



# Trade Related Aspects of Intellectual Property Rights (TRIPs) from the Perspective of Islamic Civil Law

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**Abstract.** The development of science and technology in a country can be monitored from the number of Intellectual Property Rights (IPR) that have been registered with the Director General of Intellectual Property Rights or the Patent Cooperation Agreement. IPR protection at the international level has been agreed in the form of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement. The research used is Normative Juridical Research, namely library research. The approach used by the author is a statutory-regulatory approach. This approach can be carried out by looking at all statutory regulations and all forms of regulations relating to legal issues that will be and are being researched by the author. Researchers see a continuous relationship between one regulation and another. Islamic Civil Law, which exists as a living law in Indonesian society, stipulates that Intellectual Property Rights (IPR) are assets, therefore ownership of these assets must be protected by considering the balance of protection between moral and economic, protection of individuals and many people. TRIPs, in this case IPR, are created based on the values that live in society and will strengthen the Indonesian nation in facing the current flow of globalization.

Keywords: TRIPs, Intellectual Property Rights, Islamic Law.

## 1. Introduction

The advancement of science and technology cannot be separated from the role of the instinct of curiosity and the spirit of wanting to learn with the motivation to progress in the human thought process to know everything on Earth and its contents by conducting creative and innovative research for the development of science and technology. Countries that often conduct research activities are carried out by many Western countries, where the majority of people are non-Muslim. Islamic countries or countries with a majority Muslim population only act as users of the results of science and technology findings produced and published by European, American, and East Asian countries. In the field of legal protection, developments in science and technology were accompanied by the ratification of GATT (General Agreement on Tariffs and Trade) and

TRIPS (Trade-Related Aspects of Intellectual Property Rights). IPR protection at the international level under the administration of the World Trade Organization (WTO).

An important agreement produced in the Uruguay Final Round (The Uruguay Final Round) 1994 WTO contained in Law No. 7 of 1994 aims to protect and enforce IPR laws in order to encourage innovation, transfer, and dissemination of science, technology, art, and literature, so that it leads to the socio-economic welfare of society. Thus, TRIPs automatically bind the policies of all member countries, including Indonesia. The development of Islamic Civil Law in Indonesia cannot be separated from the history of Islam. Talking about Islamic law is similar to talking about Islam as a religion. The development of Islamic Civil Law existed in Indonesia long before the arrival of colonizers. However, the law in postcolonial Indonesia is generally the legacy of Dutch law. When Indonesia proclaimed independence, there was a transfer of power from colonizers to Indonesia, but there was no systematic transition from Dutch law to Indonesian law, except for the 1945 Constitution, which was prepared on an emergency basis.

All laws that apply after the ratification of the 1945 Constitution on August 18, 1945, whether civil, criminal, procedural, or other laws, are a continuation of the laws that apply to the Dutch administrative area. In this article, the author will discuss *Trade-related Aspects of Intellectual Property Rights* (TRIPs) from the perspective of Islamic Civil Law.

## **2. Problems**

- a. How are TRIPs from the Perspective of Islamic Civil Law?
- b. What are the rights and ownership of property under Islamic Civil Law?

## **3. Method**

The research used in this research is Normative Juridical Research, namely library research. In normative legal research, library materials are initial data, which in research science is included in secondary data. Secondary Data, including personal letters, collections of diaries, and official documents published by the government. The approach used is a statutory approach. In this approach, researchers can see the continuous relationship between where one regulation is interconnected with other regulations.

The collection of legal materials is carried out using primary legal materials obtained from *ius constitutum* or the law currently in force in a country or commonly known as positive law, then secondary legal materials which provide explanations of primary law such as books discussing civil law. Islam, and tertiary legal materials which provide guidance or guidance on primary and secondary legal materials such as

dictionaries, encyclopedias related to the object to be studied. The analysis technique used is descriptive analysis, by providing an overview or explanation of the subject and research object of how this research was carried out.

#### **4. Discussion**

Protection of IPRs resulting from research activities' creative and innovative findings of thinkers pioneered by non-Muslim majority countries then immediately arises an understanding of what they are doing just for materialistic interests that are not in line with the concept of Islam. Country Islam or countries with a majority Muslim population consider IPR to be something that is not important because it only benefits developed countries that initiated TRIPs.

In addition, in economic growth in Islamic countries, foreign capital is a very influential instrument in playing its role in providing investments in terms of economic development in developing countries, such as Indonesia, which ultimately has a dependency effect. The IPR system plays an important role in attracting foreign investors to foster trust and invest capital in Indonesia. Its role is to create a conducive climate and a sense of security for the exploitation and commercialization of IPR by foreigners, including providing adequate protection for patents, trademarks, industrial designs, trade secrets, copyrights, and other IPR owned by foreign investors.

The development of IPR is manifested in the need for legal protection that rests on the recognition of IPR and the right to or within a certain time to exploit commercialization or enjoy the wealth itself. During a certain period, other people can only enjoy, use, or exploit these rights with permission from the right owner. Therefore, the protection and recognition of IPR are only given specifically to the person who owns the IPR, so it is often said that such rights are exclusive in nature.

IPR licensing is a form of business development that involves granting permission or the right to utilize, use, or implement IPR owned by the licensor, including licenses of copyright, patents, trademarks, industrial design, trade secrets, integrated circuit layout design, and plant variety protection. The licensor, as the owner or holder of IPR, grants permission or rights to other parties to make, produce, sell, market, duplicate, and distribute products in the form of goods or services produced by using the licensed IPR. In its simplest form, a license is granted in the form of the right to sell goods or services using protected IPR. Therefore, IPR holders must monitor their rights so that they are not infringed by other parties. [1]

In return for making the product or, usually, including the right to sell the market and distribute the resulting product, the entrepreneur who grants the license obtains a payment called a royalty. The amount of royalty is always related to the number of products produced or sold within a certain period of time. The granting of a license is typically set forth in the form of a contract or license agreement. Even the state plays a

role in the implementation of license agreements that do not conflict with the threat of state administration and conflict with statutory provisions.

The role of the state needs to be in synergy with all aspects so that the parties involved in the agreement can be protected, especially in development programs in developing countries, Indonesia.

#### **4.1. TRIPs in the Perspective of Islamic Civil Law**

Humans were sent by Allah to the earth with the aim of prospering or developing it (Based on QS. al-Ahzab: 72) For this purpose, and humans were appointed as caliphs. (Based on QS. QS al-Dharyat: 7) Apart from that, reason also has an important role that is useful as a means to manage the universe in meeting the needs of life physically, spiritually, desires, and interests among fellow living things.

In essence, humans act to maintain and stabilize the common good. The values of life obtained will show the magnitude of the burden of responsibility that must be carried out as well as possible, and all the dreams of life that will be achieved. Abdul Manan, in his explanation of the Concept of Private Property Rights expressed his opinion that the concept of private property rights in Islam is unique, in the sense that the absolute owner of everything on earth and in the sky is Allah. (Based on QS. Ali Imran: 189)

The Shariah provisions govern private property rights: continuous utilization of the property The payment for zakaah is proportional to the assets owned. Beneficial use of properties The use of property without harming others owns legitimate property; The use of property is neither extravagant nor greedy. The use of property to obtain profit for its rights proper application of inheritance law in Islam.[2]

#### **4.2. Property rights and ownership in Islamic Civil Law**

Etymologically, the right refers to belonging, certainty, and determination. Meanwhile, based on terminology, there are several definitions of rights based on opinions from scholars. Some muta'akhhirin (later generation) scholars define right as a law that has been determined by Shara. Sheikh al-Khafifi (Egyptian jurist) defines it as a benefit that is obtained by shara'. Mustafa Ahmad al- Zarqa, a Jordanian jurist of Syrian origin, defines al-haq as a specific thing to which power is determined by shara'.

Ibn Nujaim, the Hanafi school of jurisprudence, defines it as a specificity that is protected.[3] Teungku Muhammad Hasbi ash-Shiddieqy argues for dividing the definition of rights into 2 (two specifically and in general). Rights, in particular, are a set of rules and texts that regulate the basics that must be obeyed and implemented into the relationship of human interaction, both regarding people and property. Meanwhile, another version states that rights are the power to control something or something that is obligatory for someone over others.

In general, rights can be interpreted as a provision by which Shara' establishes a power or a legal burden.[4] The sources of rights themselves according to the scholars of fiqh are 5 (five), namely: Shara', for example the various acts of worship that are commanded; Akad, for example, sale and purchase contracts, grants, and waqf in the transfer of property rights Personal will, such as promises and vows beneficial actions, such as paying off debt; Actions that cause harm to others, such as requiring someone to pay compensation for negligently using someone else's property.[3]

Property in Islam is defined as everything that pleases humans and that they maintain, both in material form and in IPR. The Hanafi School of Thought defines property as anything that people like and are pleased with and can be presented when needed, or anything that can be owned, stored, and used. Meanwhile, the majority of scholars define property as everything that has value and is subject to compensation for those who damage and lose it.[3]

The opinion of the majority of scholars is that property is not only material, but also includes the benefits of an object. This is different from the Hanafi school of thought, which argues that the definition of property is only material, while benefits are included in the definition of property. According to Hanafiah scholars, the definition of ownership is something that the owner can bertasaruf specifically and is not interfered with by others. Meanwhile, according to Ahmad Azhar Basyir, ownership is control over something, which the owner can carry out his own actions against something he controls and can enjoy the benefits if there is no Shara' obstacle.[5]

Therefore, the Hanafis are of the opinion that rights and benefits cannot be inherited because the right of inheritance applies only to material matters. According to them, the rights and benefits are not property. Meanwhile, according to the majority of scholars, the right to inheritance is not only related to the material, but also to the rights and benefits, because all of them contain the meaning of treasure,[3] in accordance with the words of the Prophet Muhammad SAW:

*"Whoever dies leaving behind property and rights, then (the property and rights) belong to his heirs "* (HR. Bukhari, Muslim and Ahmad bin Hanbal)."

The majority of scholars are of the opinion that the person who damages property must bear the cost, which indicates their view of the value of things. This means that anything that has value has benefits because anything that has value must have a benefit. Therefore, something that has no value or benefit is not liable to be borne is seen as a treasure. Thus, it can be understood that value is the basis of something that is seen as a treasure. In addition, the value itself is beneficially benefit.

It can be concluded that benefit is the origin in giving value and looking at something. Ibn 'Arafah argues that property outwardly includes objects ('ain) that can be sensed (benefits) and objects ('arad) that cannot be sensed. He defines al-'arad as a benefit that it is not possible for intellect to point to (physically). This includes IPR, which is

actually the fruit of human thought that cannot possibly be utilized unless permitted by the creator and the source who is rewarded in the form of royalties, such as books, and so on. If the benefit is included in the class as property that applies to the nature of property to an object, then the benefits of property rights apply as to objects, as long as their use is permitted according to Shara.

The theory of property ownership related to IPR is emphasized in the Fatwas of Ulama, such as the Decision of Majma' al-Fiqhi al-Islami No. 43 (5/5) Mu'tamar V Year 1409 H/1988M About al-Huquq al-Ma'nawiyah and the Decision of the Indonesian Ulema Council Fatwa No. 1/Munas VII/MUI/15/2005 for IPR protection. The decision is based on the views of Dr. Fathi al-Duraini in his book Haq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran, which statesch says:

*"The majority of scholars from the schools of Maliki, Shafi'i and Hanbali are of the opinion that IPRs on original and useful creations are valuable property, like objects, which can be utilized according to Shara' or Islamic law."*

Even the assertion of IPR in the form of authors (Haq al-Ta'lif) is clarified by Wahbah al-Zuhaili, as copyright. Muslim scholars say that the authors' rights are protected by Islamic law. Therefore, duplicating a book without the author's or printer's permission is a crime and violation of the author's rights, as mentioned:

*"Based on the fact that the right of authorship is a right that is protected by Shara', then on the basis of this rule, reprinting or duplicating a book without valid permission is considered a crime and violation of the rights of the author. In other words, in Islam, it will be considered an act of disobedience that causes sin in the view of shara' and It is theft that requires compensation for the author's right to the manuscript that was printed in an infringing and unjust manner, and causes moral harm to him."*

Compilation of Islamic Law (KHI)[6] which applies based on INPRES No. 1 of 1991, In Article 91, Paragraph 3 explains that intangible joint property can be in the form of rights or obligations. Property in the form of rights as the illat of the enactment of IPR as a property that can be inherited by heirs. Therefore, the fulfillment of criteria to make IPR a joint property. IPR has an exclusive nature, meaning that the work is produced from a creative and innovative mind, which is how to create the process of obtaining it in a way that is different from non-IPR assets; therefore, it should be placed in an honorable place, and the creator receives royalties for it.

The performance of thinking power with scientific knowledge is higher than that of non-IPR creations. Appreciation should be given from the results of the activity of obtaining the creation as usual; it is appropriate to obtain a reward in the form of royalties. To achieve legal certainty, improvements should be made to the KHI to make it a legal instrument.

Wealths in the legal system can be divided into 3 (three) categories. First, most people recognize the existence of private property in their personal wealth, known as *intangible things*. The second is in terms of real properties, such as land and buildings. Third, property has been recognized as intellectual property. This concept can be used as the rationale for IPR protection. IPR requires the creativity and innovation of inventors, creators, or creators.

Therefore, actions taken in terms of not compensating creators, inventors, or creators are actions that cannot be justified because they violate moral ethics in IPR. Moral teaching is the doctrine of not taking anything that does not belong to you without the owner's permission. This action upholds the values of honesty, justice, and sportsmanship in respecting and appreciating the work of others. It is unethical to take and Recognizing the work of others without the consent of the owner to seek personal gain that can harm the creator.

Because ownership of IPRs is included in human rights as individuals who can process work with the mind, the value of communalism must be ignored to respect and appreciate the appreciation of the creator. When looking at the provisions of Article 27 Paragraph 2 of the *Universal Declaration of Human Rights* states that "*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he (sic) is the author.*" The IPR regime adopts the IPR regime in order to seek legal protection and protection of the creator in this case as an IPR licensee so that his rights are not stolen, recognized, and violated by other parties.

However, the doctrine of natural law[7] above is actually more universal and widespread than just protecting individual IPR owners, because the doctrine can also be used to protect other parties, such as local or traditional communities for their traditional knowledge such as Traditional Cultural Expressions (EBT). More broadly, the philosophical basis of the IPR regime is *economic oriented*. This is acceptable because the creator has sacrificed thoughts, time, money, energy and time in order to produce a masterpiece of an invention that has an impact on the order of human life. Realistically, in order to provide protection to the IPR investment, it must be in line with the granting of exclusive rights to the creator concerned in order to exclusively enjoy the fruits of his labor in the form of royalties.

Therefore, for reasons of providing protection to the creator as well as *economic oriented* reasons like that. IPR is claimed to be something egalitarian, because the period of ownership has a limit and can be obtained by anyone for individuals who have creative and innovative power. IPR can be seen as an award and a whip of motivation to continue to create works that have a positive impact on human civilization. IPR is the result of talent and creative spirit. However, although IPR is something egalitarian, the reality is that most IPRs can only be created and generated after spending considerable financial investment, through research conducted in the laboratory by scientists.

For this reason, it is not surprising that most IPR licensees come from developed countries such as Europe, America and East Asia. The moral doctrine contained in IPR with its exclusive ownership provides protection to every individual who has an IPR license so that his ownership is not recognized and stolen by irresponsible parties or in other words, the protection of IPR recognizes the existence of individualism. This understanding explains that each individual has an absolute individual price. Based on this, this individualist understanding motivates a person's strength in thinking and acting, as a result, the exclusivity of self as an individual (*individual privacy*) gets its place.

An individual feels truly autonomous because they are released from specific relationships with other individuals. The goal to be achieved is centered on his or her own development.[8] The philosophy that emphasizes the rights of individual exclusivity is very different from the philosophy in Indonesian society, which is predominantly Muslim. As a country with a communal background and strong Islamic teachings, in Indonesian society there are still many IPR findings that were discovered together with the spirit of gotong royong and eventually became common property without anyone commercializing it. In addition, there are also many individual works that are eventually shared and taught freely to other people or communities without asking for compensation, because the culture and teachings of Islam teach that it is considered as amal jariyah or charity whose rewards will continue to flow even when the person has died. This is very contrary to the intention of TRIPs which came into force in Indonesia on January 1, 2000, created with the intention and hope that it can benefit inventors and creators or IPR licensees.

Currently, the principle of IPR protection based on TRIPs is more dominant in its economic foundation than its moral foundation. This can be seen from the existing IPR provisions that are more rights-oriented without being balanced with meaningful obligations by IPR licensees.[9] The principle of legal protection of IPR provides increasingly universal protection with a long period of time. The protection is no longer focused on the inventor or creator, but on the work or findings. The next development of IPR license holders is more widely held by the licensors. [10]

### **4.3. International Corporations**

Currently, TRIPs has been ratified by Indonesia, so that every provision is part of national law and must be carried out and implemented and must be obeyed by parties in Indonesia. The purpose of the government to implement the enactment of TRIPs is to provide protection and protection to intellectual products from all efforts to infringe on the rights of products created or discovered either by individuals or a corporation in the field of industry and trade in an effort to maintain infringement of rights to the authenticity of copyrighted works[11] concerning: 1) Copyright (Law No. 28 Year 2014 on Copyright): The exclusive rights of the creator that arise automatically based on the declarative principle after a work is realized in a tangible form without reducing the restrictions in accordance with the laws and regulations. 2) Industrial Property Rights, consisting of: Patents (Law No. 14 of 2001 on Patents) Patents are special rights granted by the state to



inventors for their inventions in the field of technology, to carry out their own inventions for a certain period of time or to give their consent to others to carry them out.

Patent rights are intended for:

- a. Trademark (Law No. 15/2001 on Trademark) Trademark is a sign in the form of a picture, name, word, letters, numbers, arrangement of colors or a combination of these elements that have distinguishing power and are used in trading activities of goods and services; and
- b. Design (Industrial Design) (Law No. 31 Year 2000 on Industrial Design) Design can be in the form of industrial product design, industrial design. Industrial design is a creation.

Currently, 97% of patent holders come from developed countries such as Europe, America and East Asia. In other words, TRIPs will actually increase the movement of funds from developing countries to developed countries through royalty payments. Until now, there has been no indication that developed countries will try to transfer technology for free or free assistance to developing countries if IPR protection is held, considering that there are so many multi-national companies from developed countries that expand in developing countries which are actually the subjects of IPR protection. So according to the author, the rules on IPR in the TRIPs concept do not always provide benefits for everyone, especially for developing countries such as Indonesia. Thus the concept of economic globalization and free trade requires protection in each country.[12]

Given that globalization is not a movement that must be blocked or blocked. However, with the presence of the era of globalization, logical reasoning is needed in order to keeping it away from having a negative effect on universal justice. There must be various humanist ways to deal with it, not just with narrow nationalism, radicalism and eventually lead to terrorism. As a dynamic entity material, law enforcement should not stop at a certain point, but should continue to accommodate and improve with certain social conditions and circumstances.[13]

After discussing TRIPs, related problems were mapped, including an agreement or agreement that was created because the negotiation process was not in accordance with applicable rules, there was a lack of openness and balance where the negotiations or agreements were controlled by developed countries, this resulted in TRIPs results being worse. side with these developed countries; There are indications that TRIPs will increase the flow of funds from developing countries to developed countries by using royalties. This is because several developed countries are the largest IPR holders in the world, especially now that developed countries are the holders of patents and copyrights for software and computer programming in the world. Until now, developed countries have not taken the initiative to transfer technology to developing countries for free if protection

is carried out in the field of IPR. This clearly shows indirectly that TRIPs, which is based on IPR protection, has oppressed developing countries regarding differences in views.

TRIPs is considered to be an obstacle and a stumbling block in the development of science and technology. Not to mention the high implementation costs. In fact, TRIPs gives the impression of encouraging and making coercive efforts to enforce IPR protection in each WTO member country, even though there are differences in perspectives in interpreting and using IPR between developing and developed countries in the world. In developing countries, there are still people who still think traditionally who consider that giving creative works and scientific and technological methods to other people is worship and inner satisfaction so that it can benefit many people, especially in indigenous and Islamic communities who prioritize alms in the form of charity. money, goods and knowledge. Meanwhile, in developed countries, the application of IPR has become increasingly visionary and modern, which can result in special privileges for every inventor for the science and technology they create.

## 5. Conclusion

Legal protection efforts for IPR owners in Indonesia have been contained in various laws and regulations that refer strictly to TRIPs. The IPR regime with the rules of TRIPs has 2 (two) sides in the legal protection of IPR, one side protects the interests of individuals from IPR violations and crimes, but on the other hand empirically this legal protection greatly benefits developed countries. This is because many multinational companies from developed countries benefit from being the subject of IPR law.

Islamic law, in this case the Islamic Civil Code which lives as a *living law* in Indonesian society, makes arrangements that IPR is as property, therefore ownership of the property must be protected. In terms of ownership, there is an obligation for property owners to be able to use their property for the benefit of the people or many people. All IPRs that exist in Islamic Law, especially in Islamic Civil Law, take into account the balance of protection between morals and economics, protection of individuals and the public. TRIPs in this case IPR, created based on the values that live in the midst of society will strengthen the Indonesian nation in the face of globalization as it is today.

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