

# INTELLECTUAL PROPERTY LAW BASED ON LOCAL WISDOM

*by* Kholis Roisah

---

**Submission date:** 27-Aug-2018 10:36AM (UTC+0700)

**Submission ID:** 993574396

**File name:** IJMET\_08\_09\_019.pdf (312.33K)

**Word count:** 4241

**Character count:** 23054



# INTELLECTUAL PROPERTY LAW BASED ON LOCAL WISDOM

Kholis Roisah, Joko Setiyono, Annisa Anggraini Daulay, Elfia Farida

Faculty of Law University of Diponegoro

## ABSTRACT

*This paper explores the consideration of opposite sides between the conception of intellectual rights in IPR law and in customary law, especially in Indonesian case. By using legal perspective approach, the study reveals that the majority of Indonesian people put emphasize on the spiritual and communal values in the ownership. Thus, the IPR law demanding for society to sacrifice mutual interests with individual interests is arguably not incompatible with these orientations. Spiritual and communal values also simultaneously reflect the values of Pancasila, that are the value of theism, humanism and socialism. This shows that the legal politics of IPR law development is still not consistent with the basic philosophy and ideals of the Indonesian philosophy of Pancasila. Therefore, it is necessary to reform the IPR legal system capable of accommodating the values of local wisdom of the communal and spiritual orientations as its base and also adopt global values that is honesty and respect for intellectual property so as to make the legal system of IPR more rooted of social life system.*

**Key words:** intellectual property rights, local wisdom, customary law, Indonesia.

**Cite this Article:** Kholis Roisah, Joko Setiyono, Annisa Anggraini Daulay, Elfia Farida, Intellectual Property Law Based on Local Wisdom, International Journal of Mechanical Engineering and Technology 8(9), 2017, pp. 183–190.

<http://www.iaeme.com/IJMET/issues.asp?JType=IJMET&VType=8&IType=9>

## 1. INTRODUCTION

Intellectual property is a creativity resulted from the human mindset in order to meet the needs and welfare of human life. Human creativity is emerging as one's intellectual assets has long been a significant influence on human civilization, among others, through the discoveries and inventions and results in the field of art and literary work (Roisah, 2014). The more creative one develops, the more human civilization develops. Starting from the understanding that the need for a special form of appreciation of one's intellectual work and the rights arising from the work, the concept of Intellectual Property Rights then flourishes. Basically, the concept of intellectual property rights is a form of tribute result of human creativity, both in the form of discoveries and inventions and the work of authorship and artistic aspects, especially when the result of the creativity is used for commercial purposes.

Legal protection against IPR has developed very rapidly in the international order and even become one of the issues in the current era of globalization and liberalization.

Particularly, since the signing of international agreements on Trade Related Aspects of Intellectual Property Rights-TRIPS Agreement, which is an integral part of the agreement on the establishment of the World Trade Organization (WTO), more than 180 countries ratify the provisions of the TRIPs Agreement and become members of the WTO and are burdened with the obligation to implement IPR protection in accordance with the standards in the agreement TRIPs (Lisdiono & Assalmani, 2017). Thus, there can be a global harmonization in the field of IPR protection. The number of states involved in the TRIPs agreement shows that IPR protection is a prerequisite in the structure of international relations. This has an impact on efforts to improve IPR protection at local / national level including Indonesia. Indonesia has ratified international agreements in the field of IPR and has revised and also issued new regulations in the field of IPR legislation.

However, in the local context, there are some obstacles in implementing the IPR. Most notably, indigenous peoples of Indonesia in general do not recognize the concept of an abstract, so that in the form of customary norms do not recognize the construction and interpretation of such abstract law. This paper explores the consideration of opposite sides between the conception of intellectual rights in IPR law and in customary law, especially in Indonesian case.

## 2. IPR AND CUSTOMARY NORMS

Customary norms are not material conceptions of motion and immobile, tangible and intangible (Mahadi, 1991). Soepomo (1982), states that the concrete and visual system of customary law in the customary law implies that all the problems are as far as possible to be arranged and resolved by paying attention to the many and the real recurrences of the matter and the view that each changes and connections are only recognized in customary law where there is a visible evidence. Rato (2011) explains that the basic nature of mind in the law is the concrete means everything that is going to be pursued against certain things always arranged so that things are meant, or desirable or be undertaken transformed or given a visible manifestation of an object, either directly or in symbolic direction. However, customary law recognizes the legal construct is concrete and visual, meaning clear, real, and tangible and can be seen, open and not hidden. The nature of custom legal relationship demands for legal construct to be tangible and has clear appearance. For example, in the trading case, the time falls together between the payment of the price and the delivery of goods (Hadikusuma, 1992). To be able to be traded by custom, the traded objects must be in tangible and real (Mahadi, 1991). In addition, the sale agreement is made in cash and accompanied by the transfer of ownership of the goods traded (Hadikusuma, 1992).

The intellectual property rights conceived as a category of intangibles are not recognized under customary law construction. Thus, the indigenous peoples of Indonesia have never imagined that the ideas of intellectual creation) is worthy (Hadikusumo, 2003). Customary law only acknowledges the product produced by the creator and the creator may only claim the ownership of the product of his creation. Customary law may not allow the creator to claim intellectual ownership which is the basis of product manufacture because the the IPR is not real or concrete (Heliantoro, 2017; Roisah, 2006).

Indigenous does not recognize the concept of 'selling' intellectual goods. Thus, if the buyer or user of the goods are still required to continue to pay royalties to the creators or inventors after the goods are purchased in cash, then the treaty is not said to be buying and selling but leasing (Hadikusumo, 2003). This means that the ownership of the goods remains the creator or the inventor. According to customary norms, if the buyer has purchased intellectual goods by paying in cash, the ownership rights of the intellectual property also

move to the buyer. Thus, the buyer becomes the full owner of the goods, so that the buyer may use their own, sell, rent, copy, lend and performing in the show (Kusumadara, 2000).

Although customary law only recognizes the right of individuals to own goods, it does not justify the right of individuals to defeat public interest and succumb to the principle of 'social function goods'. Thus, the ownership of the work or inventiveness is not absolutely exclusive, not monopolistic but relative. Hence, the individual owner of IPR at all times must give up the utilization of the work or the findings of individuals for the benefit of the wider community as a form of social interest.

The moral doctrine in the intellectual property protection system takes good moral doctrine such as the value of respect for the work of others, the value of honesty and not to imitate or use the works and findings of others without prior approval and doctrine is expected to bring the trigger of society to more creative and innovative to produce his creations and findings. The moral doctrine as reflected in the legislation of IPRs in the legal context can be used as a tool for social change of the culture which is reflected in the behavior of imitative and using the work and findings of people without asking permission first be be honest behavior and respect for the work of others such as to include original creators when producing the same work (Roisah, 2012). Although such behavior is understandable because the legal culture of ownership that is intangible is not known in the Indonesian customary law.

Besides, the cosmology of society is not just released in the social community then it brings the impact of imitating culture thrives in the behavior of Indonesian society. It has become commonplace when a person produces a particular product that is the result of a copy of another person's previous work, especially in many small industry communities. For the creator himself when his work is imitated by others there is pride and happiness because of his work provides benefits for others and even become part of the charity worship of spirituality. The communal and spiritual values of life have become the community behavioral guidelines. Therefore, to accommodate communal culture, it should be introduced in terms of the concept of IPR ownership (patents, brands, copyrights, industrial designs and varieties of plants) based on collective ownership on behalf of certain intellectual property producing communities or stakeholder communities, traditional knowledge-based intellectual property and traditional cultural expressions that do not necessarily require to be incorporated. This means that communities can be subject to IPR ownership law.

In addition, it is important to understand how to place IPR ownership in the communal context means the owner of IPR with exclusive rights that are monopolistic but also accompanied by certain obligations which are part of the social function of ownership such as performing a compulsory license when the findings are needed by the wider public or a work that while in the protection of IPR may be used freely when there is wider social or public interest. The customary law does not recognize ownership of a monopoly because it is an integral part of the environment. Ter Haar (1948) defines this as 'the non-material environment, the external environment and a part of the material world.'

Traditionally, Indonesian artists and authors do not put names and signatures on their work (Surahman, 1997). Thus, others can freely imitate and use the works and findings. For the people of Bali, the principles of *dharma* is the principle that provide a person to perform an action that is useful for others, the driving factor for someone to spread the knowledge of others to be clever (Sarjono, 2002). Impersonation is part of the learning process as one way to gain knowledge of others, the more people imitate it as a sign that the work can bring benefits to the people. Balinese artist Ida Bagus Nyana, the creator of the finger-licking sculpture, certainly feels very happy and does not feel disadvantaged while his creation is

imitated by others. For Nyana the recognition of the audience for his artwork is considered more important than the benefit for him. This sharing is seen as a charity, as having, thus giving his own inner satisfaction (Sedyawati, 2002).

The attitude of the customary people reflects the values of communality, which these values describe the relationship between individuals and society as a whole. Thus, the society perceives its citizens not as individuals, but an inseparable unity with society. Every individual in the unity of his unity moves and strives as a devotion to the whole unity. Therefore, to create or find something is a result of motion and individual efforts, in which the results of the work of inventiveness or findings can be collectively owned by all members of the community where the individual is.

### 3. CUSTOMARY LAW AND LOCAL WISDOM

Customary law is part of the incarnation of local Indonesian wisdom (Susilo, & Syato, 2016). Local wisdom can be understood as a human efforts in using his intellect or cognition to act and behave towards something, objects, or events that occur in a given space. This understanding, arranged etymologically, places wisdom as a person's ability to use common mind in the act of behave as a result of an assessment of things, objects, or events that occur (Ridwan, 2007). Local wisdom is 'living view and science as well as various life strategies that are tangible activities undertaken by local communities in answering various problems in meeting their needs.' This term is also conceived as local wisdom, local policy, local knowledge or local intelligence (Din et al., 2017).

Local wisdom can be said as a reflection of the value of custom in a particular society. Customs at basically tested by nature and undoubtedly well worth it, because the customs is a social action and experiencing repeated reinforcement. If an action is considered to be not good by society then it will not experience strengthening continuously. The movement occurs naturally because it is considered either voluntarily or containing goodness (Sartini, 2004). The inherent characteristic of traditional wisdom is its dynamic, sustainable and acceptable character by its community. In local communities, traditional wisdom takes the form of a set of rules, knowledge and skills as well as the values and ethics that govern the social order of the community that continues to live and evolve from generation to generation. According to the author's interview with I Nyoman Sirtha, local forms of wisdom in society can be values, norms, ethics, beliefs, customs, customary laws, and special rules. Local wisdom is not only in the form of cultural norms and values, but includes a vast cultural dimension, encompassing segments of ideas in the field of technology, health care, aesthetics, language and all other phrases of secrecy, various patterns of action and outcome of material culture. In a broad sense, local wisdom is encompassed in tangible and intangible cultural heritage. Jim Iffe (2002), in *Community development: Creating community alternatives-vision, analysis and practice*, states that local wisdom has six dimensions, in terms of local knowledge, local values, local skills skills, local resources, local decisions mechanism and local droups solidarity. The values that are considered good in essence a moral principles that guide behaviors deemed inappropriate in society and even become normative guidelines or the living law in the community. These principles in Indonesia are known as customary law principles.

### 4. THE VALUE OF LOCAL WISDOM IN THE UTILIZATION OF IPR

The value of local wisdom in the utilization of IPR shows that the values, basic ideas underlying the protection of ownership and utilization of intellectual property of the Indonesian nation are communal and spiritual, that is, that does not emphasize individual

ownership of each work or findings that result and produce works or invention that benefit people part of *dharma* or worship. These values of communality and spirituality are undeniably a reflection of the Pancasila (Indonesia's state of philosophy) values reflecting the balance between the obeying to God, and individual subjugation to human values, and society (Arief, 2009). According to Soediman Kartohadiprodjo (2010), the philosophy of Pancasila emphasizes that the basic basic structure and human existence is togetherness with fellow of human beings, interdependence between humans and between humans and nature, and dependence on the God.

These local values can be explored in establishing the National Law, including the development of IPR law. It is necessary to base the values and ideas as a guide that can lead the people of Indonesia towards the intended society. These basic values and ideas must necessarily stem from the values that have been believed and have been used as life views have even been made as Indonesian ideology. This means that the Indonesian people have agreed that the Pancasila contained in the Preamble of the 1945 Constitution is the basic and ideals of the Indonesian. Thus, the basic values and ideas contained in Pancasila should be the basis for establishing the National Law system. According to Tamanaha (in Satjipto Rahardjo, 2009, p. 22) based on the Vago's theory states that every legal system in a close of a relationship to the social ideas, aims and purpose reflects the intellectual, social, economic and political climates in its time.'

It is inevitable that the development of the legal system of intellectual property in Indonesia places the legal system of IPR as not an original concept or not developed within Indonesian context and not rooted peculiar from of social life (Rahardjo, 2009). But, it is imported from outside or in Tamanaha's term, it is 'imposed from out side' or built by the outsider. The term was later often used by Satjipto Rahardjo in his many books to explain the phenomenon of incompatibility between modern culture introduced by the West with the indigenous legal culture. Intellectual property law in Indonesia was not since the beginning developed by the Indonesian nation itself (Antons, 1997). Prior to independence the Dutch East Indies government enacted IPR law which was not applied to indigenous people because of segregation politics for European class which is equal with Dutch law and for indigenous law applied customary law. The legal system of intellectual property in Indonesia is the adoption through the Dutch colonial concordation politics. And now, the IPR implementation is the effect of insistence of the globalization.

It can also be stated that the compilation of IPR legislation in Indonesia is an act of transplanting foreign law into the national legal system. The adoption of IPR legal system is arguably not incompatible with the legal system applicable in Indonesia (Soekanto, 1975). The possibility of such inappropriate adoption would lead to a criminalizing factor in community behavior that was previously an ordinary behavior of unlawful behavior, such as the behavior of people who make products based on pre-existing designs. The possibility is like the statement of the UN Congress "... the importation of foreign cultural patterns which did not harmonize with the indigenous culture had a criminogenic effect." (Arief, 2010).

The legal culture of Indonesian society that shows the interaction of society with the intellectual property law system can be described through the behavior of society in obtaining IPR. Data at the Office of the Directorate General of Intellectual Property Rights show that until November 2009, the number of patent applicants were 67,149, with a composition of 64,025 for foreign owners and only 3,134 local owners. The number of applicants of trademarks were about 600,000 ([http // www.dgip.go.id](http://www.dgip.go.id)). The amount is very small compared to the business actors in Indonesia amounting to 49.8 million. In addition, the increasing cases

of IPR disputes in courts and the subpoena number of advertisements and copyright infringement in the newspapers reveals a society's legal culture related to the legal system of intellectual property. These figures show that the integration of the Indonesian people against the IPR system is still very weak because of the IPR system that is individualistic and monopolistic in nature is not rooted in the social system of Indonesia that are communal and spiritual character.

National law politics is the effort to make the law as the process of achieving the goals and goals of the state, that is to create a just and prosperous society (Ghofur & Susilo 2017). Then the IPR system also should also aim in that direction. The purpose of IPR system in addition to stimulate the creativity of society aims to increase the volume of investment in Indonesia. With the increasing volume of investment, economic growth and employment are available so that the welfare of society can be expected. However, these objectives have not yet materialized, especially the purpose of increasing investment due to unclear regulations on the obligation to invest in the territory of Indonesia for foreign IPR owners who want their protection by registering their intellectual rights in Indonesia (Roisah, 2001).

Thus, if the national legal system should always stem from Pancasila and the 1945 Constitution, then the IPR legal system part of the national legal system that does not accommodate part of Pancasila values of spiritual and communal can be regarded as an imperfect. According to Barda Nawawi Arief, the legal system that does not contain any of the values of Pancasila of theism, humanism and socialism is not the Indonesian national legal system (Arief, 2009). Based on the thought, therefore it is necessary to conduct political reconstruction of IPR protection in the framework of renewal of the national legal system which is more consistent with Pancasila and the 1945 Constitution by accommodating the values of local wisdom which is a reflection of the values of Pancasila as its base and at the same time, not ignore the global values (Roisah, 2013).

## 5. CONCLUSIONS

Communal and spiritual values are the value of local wisdom as well as a moral principle of customary law that is used as guidelines for the behavior of Indonesian society in utilizing IPR. The perspective that reflects the majority of Indonesian people value the spiritual and communal values in the ownership and use of IPR law as living law. Spiritual and communal values also simultaneously reflect the values of Pancasila, that are the value of theism, humanism and socialism. This shows that the legal politics of IPR law development is still not consistent with the basic philosophy and ideals of the Indonesian philosophy of Pancasila. Therefore, it is necessary to reform the IPR legal system capable of accommodating the values of local wisdom of the communal and spiritual orientations as its base and also adopt global values that is honesty and respect for intellectual property so as to make the legal system of IPR more rooted of social life system.

## REFERENCES

- [1] Antons, C. (1997). Indonesian intellectual property law in context. *Veronica Taylor, (ed)*.
- [2] Arief, B., N. (2009). *Bahan Kuliah Pembaharuan Hukum Nasional*. Semarang: Program PDIH UNDIP.
- [3] Arief, B., N. (2009). Pembangunan Sistem Hukum Nasional Indonesia. *Paper presented at Kuliah Umum Pascasarjana UBH Padang* (May 16, 2009).

- [4] Edy Lisdiyono and M. N. B. Asyhar Assalmani , Community Right to Health on Pharmaceutical Patents . International Journal of Civil Engineering and Technology, 8(7), 2017, pp. 9 20–924.
- [5] Ghofur A., & Susilo S. (2017). Maslaha as the Philosophical, Political, and Legal Basis on the Islamic Banking Legislation in Indonesia. *Global Journal Al Thaqafah* 7(1), 7-17
- [6] Hadikusuma, H. (2003). *Pengantar ilmu hukum adat Indonesia*. Mandar Maju.
- [7] Heliantoro, H. (2017). UU Paten Berwawasan Nasional dan Internasional. *Jurnal Hukum & Pembangunan*, 17(4), 372-379.
- [8] Ife, J. W. (1995). *Community development: Creating community alternatives-vision, analysis and practice*. Longman Australia.
- [9] Kartohadiprodjo, S. (2010). *Pancasila Sebagai Pandangan Hidup Bangsa Indonesia*. Jakarta: Gatra Pustaka.
- [10] Kusumadra, A. (2000). *HKI Dalam Sistem Hukum Adat Di Indoensia*. Jurnal Arena Hukum, 12.
- [11] Mahadi. (1991). *Uraian Singkat tentang Hukum Adat Sejak RR 1854*. Bandung: Alumni.
- [12] Muhammad Din, Selmita Paranoan, Rahma Masdar, Hamonangan Siallagan and Tarmizi Achmad, Public Accountability Based On The Value of Local Wisdom. International Journal of Civil Engineering and Technology, 8(8), 2017, pp. 1046–1053.
- [13] Rahardjo S. (2009). *Bahan Mata Kuliah Teori Hukum*. Semarang: Program PDIH UNDIP,.
- [14] Rahardjo S. (2009). *Negara Hukum Yang Membahagiakan Rakyatnya*. Yogyakarta: Genta Publishing.
- [15] Rato, D. (2011). *Hukum Adat (Suatu Pengantar Singkat Memahami Hukum Adat di Indonesia*. Yogyakarta: Laksbang.
- [16] Roisah, K. (2001). *Implementasi Perjanjian TRIPs Tentang Perlindungan Hukum Terhadap Hak Atas Merek Terkenal (Asing) Di Indonesia*. Unpublished thesis, Universitas Diponegoro.
- [17] Roisah, K. (2006). Perlindungan Hukum Terhadap Kekayaan Intelektual Tradisional. *Majalah Masalah-Masalah Hukum*, 35(3), 354-364.
- [18] Roisah, K. (2012). Prisma Hukum Sebagai Dasar Pembangunan Hukum Di Indonesia Berdasarkan Pancasila (Kajian terhadap Hukum Kekayaan Intelektual). *Masalah-Masalah Hukum*, 41(4), 622-630.
- [19] Roisah, K. (2013). *Dinamika Perlindungan HKI Indonesia dalam Tata Global*. Semarang: Pustaka Magister.
- [20] Roisah, K. (2014). Perlindungan Ekspresi Budaya Tradisional Dalam Sistem Hukum Kekayaan Intelektual. *Masalah-Masalah Hukum*, 43(3), 372-379.
- [21] Sartini, N. W. (2004). Menggali kearifan lokal nusantara sebuah kajian filsafati. *Jurnal Filsafat*, 37(2), 111-120.
- [22] Soekanto, S. (1975). *Beberapa permasalahan hukum dalam kerangka pembangunan di Indonesia: (suatu tinjauan secara sosiologis)*. Yayasan Penerbit Universitas Indonesia.
- [23] Soepomo, R. (1982) *Bab-bab tentang Hukum Adat*. Pradnya Paramita.
- [24] Sulastriyono. (2012). *Bahan Kuliah Mata Kuliah Terbuka PDIH UNDIP: Konsep Hak Milik dan Kearifan Lokal HKI*. FH UGM tanggal 13-14 Maret 2012
- [25] Surahman. (1997). Retrieved from <http://www.suarapembaharuan.com/new/199711/21119/opED/opini02/opini02html>.

- [26] Susilo, S., & Syato, I. (2016). Common identity framework of cultural knowledge and practices of Javanese Islam. *Indonesian Journal of Islam and Muslim Societies*, 6(2), 161-184.
- [27] Ter Haar, B. (1948). *Adat law in Indonesia*. International Secretariat, Institute of Pacific Relations.
- [28] A.Ramaraju, Initiative For Strengthening Technology Commercialization And The Intellectual Property Rights Systems In Southeast Asia And India. *International Journal of Advanced Research in Management (IJARM)*, 6(1), 2015, pp. 82-96.
- [29] Salvin Paul, Political Construct Of Intellectual Property Rights: A Critique From Indigenous Knowledge Perspective. *International Journal of Intellectual Property Rights (IJIPR)*, 6(1), 2015, pp. 32-51.

# INTELLECTUAL PROPERTY LAW BASED ON LOCAL WISDOM

## ORIGINALITY REPORT

7%

SIMILARITY INDEX

2%

INTERNET SOURCES

2%

PUBLICATIONS

3%

STUDENT PAPERS

## PRIMARY SOURCES

1	Wiwik Widyo Widjajanti, Antariksa, Amin Setyo Leksono, A. Tutut Subadyo. "Socio-cultural studies to open space in fisherman settlement in Prigi, Trenggalek, East Java", AIP Publishing, 2018 Publication	1%
2	<a href="http://media.neliti.com">media.neliti.com</a> Internet Source	1%
3	<a href="http://es.scribd.com">es.scribd.com</a> Internet Source	1%
4	Submitted to Institute of Technology, Nirma University Student Paper	1%
5	Submitted to Escuela Politecnica Nacional Student Paper	1%
6	Submitted to School of Oriental & African Studies Student Paper	1%
7	Submitted to Universitas Islam Indonesia Student Paper	1%

8

[www.iprcommission.org](http://www.iprcommission.org)

Internet Source

1%

9

Tity Wahyu Setiawati, Marjo, Tutut Ferdiana Mahita Paksi. "Reformation on Local Tourism Permit Practice in Indonesia: A Case in Semarang Regency", IOP Conference Series: Earth and Environmental Science, 2018

Publication

<1%

10

Linda Novitasari, Puput Astya Agustina, Ria Sukesti, Muhammad Faizal Nazri, Jeffry Handhika. "'Alms of the Sea' at Teleng Ria Beach Pacitan: Alternative Literacy Ethnoscience for Junior High School", Journal of Physics: Conference Series, 2017

Publication

<1%

11

[www.urbanseed.org](http://www.urbanseed.org)

Internet Source

<1%

Exclude quotes On

Exclude matches Off

Exclude bibliography On

# INTELLECTUAL PROPERTY LAW BASED ON LOCAL WISDOM

---

## GRADEMARK REPORT

---

FINAL GRADE

**/0**

GENERAL COMMENTS

**Instructor**

---

PAGE 1

---

PAGE 2

---

PAGE 3

---

PAGE 4

---

PAGE 5

---

PAGE 6

---

PAGE 7

---

PAGE 8

---