Creating Appropriate Legal Framework in the Utilization of Intellectual Property Products

by Lalu Muhammad Hayyanul Haq

Submission date: 21-Oct-2019 09:36AM (UTC+0700)
Submission ID: 1196836208
File name: 01._JICLT_-_Creating_Appropriate_Legal....pdf (106.12K)
Word count: 7023
Character count: 40898

JCLT
Journal of International Commercial Law and Technology
Vol.9, No.2 (2014)

Creating Appropriate Legal Framework in the Utilization of Intellectual Property Products

Hayyan ul Haq

Centre for Intellectual Property Law
Molengraaff Institute for Private Law
Law Faculty - Utrecht University

Abstract. Evaluating the consequences of the existing creator and inventor doctrine on access to public goods, this paper investigates the ways of finding the most adequate legal protection that may bridge public interest and private interest in this respect. For that reason, this work will not only re-examine the status of exclusive intellectual property rights, but also its implication in Indonesia. In addition, it proposes the embodiment of humanistic rationalization and the U-Principle in order to protect public interest. This protection is meant to create an ideal legal framework for expanding broader public access to any essential product in the field of food, agriculture, health and education in order to maintain the sustainability of collective life.

1. Introduction

A deficiency in the creator and inventor doctrine is perceived as tending to provide unrestricted opportunities for capitalist potential and resources in exploiting and privatising intellectual property products, i.e. information and technology, (hereinafter, IT) resulting in a scarcity of IT, particularly essential IT products in the public domain. By promoting the importance of the incentive theory, the protection of exclusive right is empowered and entrenched and is even manipulated by a few gigantic corporations to accumulate their profit interest. It was these corporations which to a much greater extent enjoyed and employed their exclusive rights to strengthen the accumulation of profits towards intellectual capitalism. The dramatic increase in the accumulation and concentration of intellectual property products controlled by a few gigantic corporations has hampered many developing countries including Indonesian stakeholders' (universities, research and development centres, the government, public institutions, particularly in health and education, national industries, particularly small and medium-sized industries, society, NGOs) capacity to access and develop intellectual property products, i.e. essential IT, particularly through technology transfer in order to maintain the sustainability of collective life.

The spirit of unrestricted exploitation has been embodied in various international (i.e. TRIPs Agreement, UPOV, etc) and national regulations (i.e. Indonesian Copyright and Patent Acts). In the midst of the pros and cons of the implementation of the TRIPs Agreement, the developed world tries to force developing countries, including Indonesia, to accept and to introduce free trade agreements (US-FTA) that may restrict those developing countries in protecting their national or public interest in essential fields such as food, health and education. It is well known that the US-FTA introduces several stricter clauses than TRIPs clauses that may hamper developing countries in accessing IT through technology transfer, compulsory licensing, fair use, parallel imports, governmental use and so forth.

In this divide, not surprisingly, the stronger parties, i.e. capitalists, may exploit the exclusive maximum right (unrestricted exploitation) by introducing various strict intellectual property protection regimes (*Ove Granstrand, 1999:10, 278-280*). At the global level, many scholars warn us about difficulties and conflicts of interest in this respect. For example, Heller, Eisenberg, and Boyle are concerned about the tragedy of the anti-commons (*Heller, 111 HARV. L. REV. 3 [1998]*) that threaten the sustainability of collective life. Granstrand analyses that the patent-based oligopolies and cartels of the twentieth century are likely to become the intellectual property-integrated 'infogopolies' and 'biogopolies' of the twenty-first century. Clearly, the unrestricted exploitation of information and technology (IT) may fulfil only the interests of a few gigantic corporations (capitalism). (*Granstrand, 1999:10, 278-280*). The scarcity, difficulties and conflicts of interest in the utilization of IT have been extensively discussed at WIPO meetings related to the Geneva Declaration, or the Development Agenda.

At the national level, this work has been inspired by the ultimate goal of the Indonesian 1945 Constitution, Arts. 28, 31, 32, 33 and 34, which emphasises that social justice principles must be inherent in the implementation and management of public resources towards the greatest benefit for the greatest number of people. In this respect, public resources may cover not only natural resources, but also intellectual products which are pivotal components for maintaining and guaranteeing the sustainability of collective life. In addition, Indonesia has introduced a number of Acts and Government Regulations governing the utilization of intellectual products, such as UU No. 14/2001 on Patent, UU No. 18/2002 on the National System of Research and Development and the Application of Information and Technology, UU No 19/2001 on Copyright, and Government Regulation No.20/2005 on Technology Transfer and Products of Research and Development Activities by Higher Education and Other Research and Development Institutions. All of those legal resources emphasise the important role of the IT for national development. Unfortunately, they failed to provide positive law regulations that guarantee the protection of the public interest and social function, particularly in the field of food, health, and education. Consequently, Indonesia must face multiple collective threats stemming from the inability of the Indonesian government to interpret and implement the Indonesian 1945 Constitution for fulfilling of the fundamental rights enshrined in the Constitution. For that reason, Indonesia needs a strong and appropriate legal framework that may optimise the utilization of IT for the greatest benefit for the greatest number of people.

2. Mapping Problems: The Creator and Inventor Doctrine and Its Implication

The absence of an appropriate legal framework in regulating the production, dissemination and utilization of IT creates unlimited opportunities for stronger parties (capitalism) in exploiting their potential. This is because the creator and inventor doctrines have no internal norms to control or to limit the exploitation of the exclusive right embedded in the two doctrines. This will certainly create complexity and serious impacts on the appreciation and implementation of the creator and inventor doctrines, either at a dogmatic or a practical level. At the dogmatic level, even though the main mandatory provision of the Indonesian 1945 constitution is dedicated to attaining the greatest benefit for the greatest number of people based on social justice, there are still many ambiguities in appreciating and implementing the concept of the greatest benefit for the greatest number. This can be seen from various and contradictory positions of organic laws in the interpretation of the Indonesian 1945 constitution and other related Acts.

At the practical level, disparities, difficulties and conflicts of interest in optimising IT are particularly seen in the utilization of essential IT products, such as in health, food and education. Recently, Indonesia has been forced to face a dilemma regarding bird flu (H5N1) control and management. The dilemma stemmed from a conflict of interest between private (corporations, capitalism) and public interests. Even though Indonesia has been suffering from bird flu, it has no access to IT to improve its capability to produce H5N1 vaccine independently. This is because access has been obstructed by a conflict of interest between private and public interests. Many scholars predict that if the H5N1 develops into a real pandemic, it will kill millions of people. Even if all the large pharmaceutical corporations are simultaneously forced to produce the necessary vaccine, they can never be able to use it effectively. This is because the pandemic's effect is much more rapid than the corporations' capacity to produce H5N1 vaccines. Other similar cases which visualise the conflict of interest between private (corporations) and public interests in Indonesia can be seen from various cases in education (*Microsoft and the Indonesian government vs. the Indonesian Antitrust Committee*), and in food and agriculture (*Charoen Phokpand Indonesia and PT. BISI vs. Farmer*). In the long term, this condition will impact on the accessibility of scientist and technological experts to develop intellectual products, which in turn bring about the tragedy of the anti-commons that threatens the sustainability of human life.

Those problems are based on the absence of an appropriate legal framework to guarantee the just optimization of the production, dissemination and utilization of intellectual property rights in order to protect the public interest. From time to time, the issues concerning the optimisation of IT become crucial problems, and now they are becoming some of the hottest issues in the actual public debate, particularly in developing countries, including Indonesia. All social components, not only in developing countries, but also in developed countries, need an ideal legal framework to anticipate the serious collective threats. For that reason, the exclusive rights principle in intellectual property should be re-examined in order to create an ideal and proportional legal framework for the greatest benefit of mankind. In this case, how can one

explore an ideal alternative approach in bridging the right to profit and public interest or how can the exclusive right be transformed into the greatest benefit for the people?

3. Finding Root Cause: Conceptual and Structural Fallacy

The above problems derive from conceptual and structural fallacy that not only impact on the conceptual and institutional level, but also the practical level. At the conceptual level, several authors have signified that the exclusive nature of intellectual property suffers from internal logic (Drahos, P., 1996; Moore, A., 1997:65-108). Hettinger has provided an insightful critique of the main arguments used to justify intellectual property. He begins by mentioning that intellectual products are social products. This means that an intellectual work does not exist in a social vacuum. (Hettinger, 1989:31-52). So, first, exclusivity creates self-interest. In a market context, intellectual property rights create distinctive kinds of opportunities. Then, rational self-interested actors take those opportunities. By doing so, they defeat the social interest that provided the justification for having the rights in the first place. This inconsistency is caused by what Drahos called the "danger of the inner logic" of the exclusive right (Drahos, 1996:119). Consequently, the articulation of capitalist interests without an appropriate legal framework may ignore and threaten the public interest which is one of the constitutional reasons (UUD 1945; UDHR, Art. 27; ICESCR, Art. 15. 1 [c]) to justify the existence of intellectual property rights. Several studies show that the unrestricted exploitation of intellectual property brings about injustice in the distribution and the optimization of global resources, i.e. IT. The accumulation of power by the owner of intellectual property rights is made possible by an inappropriate legal framework. This accumulation creates an unbalanced structure in the world IT order. This is because the interest and maneuver of capitalist (gigantic corporations) tends to demand and urge their states (developed countries) to drive and force other developing countries to adopt and to introduce the TRIPs Agreement, bilateral agreements on trade (BIT) or free trade agreements (i.e. US-FTA). Drahos illustrates that the use by the U.S. of its trade enforcement mechanisms (section 301 of its Trade Act of 1974 and the Generalized System of Preferences under Title V of that Act) against developing countries was triggered in many cases by petitions by U.S. companies or business organisations. By way of an example, the section 301 action initiated by the USTR against Indonesia in 1988 was in response to a petition brought by the Pharmaceutical Manufacturers Association (PMA). The PMA also filed a petition in 1987 and 1988 against Brazil and Argentina respectively, on the issue of patent protection that triggered an USTR investigation. (USTR, at *http://www.ustr.gov*.)

Regarding the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Drahos and Braithwaite (2002) signified that the TRIPs Agreement is the most controversial international intellectual property convention. They identify three lines of criticism aimed at it. First, it was the product of duress (undue influence) by powerful states against weak states rather than a bargain struck by equal sovereign parties. The second line of criticism is that TRIPs is part of a hard bargain in which developing states received very few reciprocal gains. The economic gains of the standards contained in TRIPS are most likely to be captured by companies committed to radical innovation and with large economies of scale. It was generally recognised that not many countries in the world have robust valleys of innovation like Silicon Valley in US. So the benefits of TRIPS remain something of a distant promise to most developing countries. For the impacts of TRIPS Agreement, see: Maskus, Keith, 2000; Krishna VR., 1996. A third line of criticism focuses on the adverse consequences for developing countries of implementing the TRIPs agreement. The debate over the impact of TRIPS standards on access to essential resources for the sustainability of collective life, such as access to food, health and education is one example of this type of criticism. Clearly, each of those criticisms shows how the options of certain international business are manipulating socio-economic life.

Now, under the TRIPs agreement, the strong exploitation of exclusive rights brings about disparity and inappropriate optimisation concerning IT. The TRIPS Agreement is deemed to be protectionist, a legal infrastructure to promote monopolistic practices and profits, and almost exclusively benefits developed countries. The agreement has no instrument to protect public interests, particularly for poor people or weak groups/parties. Related to public health issues, Shah mentioned several points: (i) TRIPS aims to prevent the imitation of products (which is ironic, given that this would allow further competition and better prices for drugs and other products); (ii) The effect of the 20-year period of a patent protection is to basically deny others (such as developing countries and their corporations) from developing

alternatives that would be cheaper; (iii) Technology transfer is prevented; (iv) Some provisions, such as compulsory licensing to allow the creation of alternatives in cases of emergency and parallel importing to effectively permit shopping around the international market for the cheapest price for the same product, do not go far enough as many nations have faced pressure from the likes of the United States when they have used these measures; (v) TRIPS, WTO and general international trade-related agreements do not take public health needs into account. Instead, commercial interests are promoted. (See: http://www.twnside.org.sg/title/ twr120a.htm). Recently, the US has started to impose an extremely high standard of IP protection, (Correa, C.M., 2004, GRAIN, at: http://grain.org/briefings/?id186 , retrieved on: 24 January 2005) to bring Indonesian IP laws into line with US national IP laws (Soesastro, Hadi, 2004:23).

Again, due to the absence of an appropriate legal framework in maintaining a balanced relationship between the individual or group and public interests, the spirit of capitalism allows and even strengthens individual or group readiness to put the public interest aside. The above description demonstrates the structural difficulties in appropriately utilizing intellectual property to fulfil and protect peoples' interests in optimising IT. The indicated state of affairs is interdependent with other complex problems in the fields of sociology, economics, politics, and culture. In the context of the distribution of IT, the 'weakest link' (Dettmer, W., 1997) is likely to be the unrestricted exploitation of exclusive rights in an IP regime.

Not surprisingly, the difficulty in accessing IT becomes more widespread, where right-owner groups control the optimization, i.e. production, distribution and utilization of IT, either at the policy, legislative or practice level. At the policy and legislative level, in pharmaceutical industries Graham Dutfield identified that Germany, Switzerland, France and Great Britain had designed their patent law with respect to the patenting of products and processes and were strongly influenced by the strengths of their respective chemical industries. (Graham Dutfield, in Drahos, 2005). At the practical level, patent-based cartels were most strongly present in the chemical and pharmaceutical fields. Over two or three decades, the cartels involved German companies (IG Farben, Bayer, Badische, Kalle, and Hochst), Swiss companies (Ciba, Sandoz and Geigy), the British company ICI and the American Du Pont and the National Aniline Chemical companies. These right-owner groups, i.e. corporations, experienced a period of enormous expansion based on the abnormal profits they had obtained by means of the patent system. However, the profits of each individual company tended to come from only one or two drugs. For example, in 1960 terramycin and tetracyn accounted for 33% of Pfizer's sales; chloramphenicol accounted for 45% of Parke Davis' sales and Merck saw Divril account for 39% of its sales. (Peter Temin, 1979: 429, 442). When these patents ran out, the companies would be thrown back on to the competitive markets. (Peter Drahos and John Braithwaite, 2001-2002: 462)

4. Towards an Ideal Legal Framework for the Utilization of the Intellectual Products

In this section, I will elaborate and offer some alternative solutions in optimising the utilization of IT under the Indonesian legal paradigmatic view. It refers to the Pancasila and the Indonesian Constitution of 1945 as grand norms of the Indonesian positive laws which are linked to and match with the universal values embodied in the Universal Declaration of Human Right (UDHR), the International Convention on Economic, Social and Cultural Right (ICESCR), and the European Convention on Human Right (ECHR).

4.1. Defending Unity and Sustainability as Meta Values

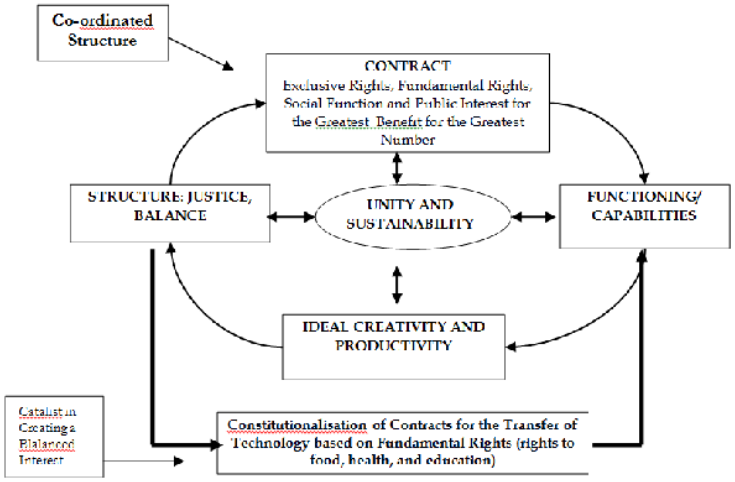
Theoretically, under the systems theory and the circularity principle, the balance of interaction (structural coupling) (Maturana and Varela's Works) between the human being and nature will produce several second-order phenomena, such as: science, knowledge, and technology, and concepts of property rights. It should be noted that the second-order products are instruments to support the sustainability of a system. As complementary instruments, their values are hierarchy lower than unity and sustainability. Thus, the values of science, technology, art, and natural resources are merely instrumental. Therefore, their legitimation cannot surpass the need to maintain unity and sustainability. Ideally, as subordinate or instrumental rights, intellectual property should serve the interest and needs that citizens can identify, through the language of human rights, as being fundamental right. (Drahos, 1998).

At the dogmatic level, all of the components of fundamental rights are embodied in the Pancasila and the Indonesian Constitution of 1945 as the grand norm of Indonesian positive laws. Thus, the management

and implementation of patent law and other laws concerning IT should be in line with the interpretation and implementation of the fundamental rights enshrined in the Pancasila and the Indonesian Constitution of 1945, Art 28). This concept contains several principles: (i) the principle of the State's authority; (ii) the principle of the utilisation of IT for the greatest benefit of the people; and (iii) the principle of social justice as contained in the Pancasila. To simplify the concept, the first principle relates to the status of IT in Indonesia, and the second and the third principles concern the utilisation and optimization of IT, which are measured by two determinant indicators: (i) for the greatest benefit of the people; and (ii) social justice. Those principles limit the state's authority to control (master) the utilization of IT.

The term mastery implies the state's authority in using and optimising INT. With regard to the concept of mastery, the State, as the sovereign organization, should be considered as the organization representing the people's power. Therefore, it is not relevant to assume the state's authority in terms of ownership theory. The state, as the organization representing sovereign people, has authority to regulate: (i) the availability, utility, and optimization of IT; (ii) the determination and regulation of the legal relationship between individuals or institutions (legal subjects) and information, knowledge and technology (legal objects). An indicator that can be used to measure the limits of the legal subjects in utilising these legal objects is the term 'the greatest benefit of the people'. Therefore, the concept of the utilization and optimization of intellectual products for the greatest benefit of the people should be embodied in a concrete statement. It requires that: (i) any grant, utilization, and optimization of IT; (ii) any determination and regulation of the legal relationship between individuals and IT; and (iii) any regulation and legal relationship between individuals and legal action concerning IT, should be dedicated to achieving the greatest degree of benefits for the people. (UU No.18/2002, Considerans: (a) and (b). For that reason, this paper elaborates and offers an ideal legal mechanism for managing the utilization of IT in order to maintain a balanced interest between private and public, which, in turn guarantees the unity and sustainability of collective life.

Maintaining A Balanced Interest towards Sustainable Justice



The above scheme shows a legal mechanism that guarantees the sustainability of a balanced interest in optimizing intellectual products, particularly post pactum. In this respect, my argument stems from the importance of unity and sustainability which characterize our living system. Unity and Sustainability contain some constitutive elements such as public interest, social function and fundamental rights, which are meta-values of any legal policy and products, including contracts for the transfer of technology. Therefore, all clauses in the contract for the transfer of technology must not contradict and threaten the unity and sustainability of the social system. In this context, the optimization of exclusive rights should consider fundamental rights, public interest and the social function so that this rule can strengthen

collective capabilities towards creativity and productivity which, in turn, create a just and balanced structure in our collective life. The failure to achieve a just and balanced structure may threaten the unity and sustainability of collective life. Therefore, this work offers not only a legal mechanism by which to maintain unity and sustainability at the pre-contract level but also at the post-contract stage. At this point, the legal mechanism at the post-contract stage can be initiated by recontrolling, and reexamining any contracts that may threaten unity and sustainability. Then, the government, by virtue the Pancasila, the 1945 Indonesian Constitution articles 28, 31, and 33, and the Universal Declaration of Human Rights, may constitutionalise those non-conforming contracts. To visualize the implementation of this idea, the Indonesian government and parliament may provide a broader authority and competencies to the Indonesian Constitutional Court in controlling and examining the private issues that may influence the public interest and the constitutional rights of the people.

4.2. Optimising the Utilization of Intellectual Products in Indonesia

Principally, the optimisation of information and technology (IT) can be achieved by ensuring that the common good, i.e. IT is shared. For this purpose, at a global level, some strategic interrelated steps can be established in order to create the 'common good', i.e. for the South-North flow of information: (i) the establishment of a sustainable global knowledge society (Weiser, 2002:3; Allan S. Gutterman, 1993:89-139); and (ii) determining how people from the developing world, e.g. Indonesian people, are understood and perceived by the North. It is common knowledge that the current view of the developing world is primarily based on a North-South flow of information. What is needed is a free flow of information between the South and the North that will enhance a mutual understanding. To use the notion of Habermas: a 'public sphere' must be created in the world, where people can have the opportunity freely to share ideas and understand one another. Shared information between the South and the North is the core of such a public sphere, and it is therefore an imperative that the South must have a voice to make its views clear. This can only be done when the communication channels are in place to ensure an effective South-North flow of information. (Habermas, J. 1989). To concretise these channels, all parties, particularly international and national public institutions, i.e. governments or NGO, should be involved in developing and promoting indigenous technology and technology assessment. Some workable, manageable and promising programmes that can be implemented are: (i) establishing a collaborative network of research centres; (ii) strengthening programmes of cooperation and assistance in developing technology; (iii) promoting long-term partnerships between the holders and users of technologies, and between companies in developed and developing countries, and so forth.

4.2.1. Visualising the Legal framework at Pre-Grant and Post-Grant Levels

At the national level, in creating an alternative appropriate legal framework for optimalising the utilisation of IT in Indonesia, this work offers several solutions which are classified in two stages: (i) pre-grant and (ii) post-grant. At the pre-grant level, this work suggests a tailor-made creator and inventor doctrine for Indonesia. The tailor made system could be designed and constructed by exploring the Pancasila principles as the grand norm of Indonesian positive laws. In this respect, the Indonesian government can identify and embody Indonesian laws which link and match universal values into the Indonesian legal system. As a legal consequence, the Indonesian government must integrate exclusive rights, the social function and the public interest for the greatest benefit for the greatest number of people based on the principle of social justice. In this respect, the government may integrate essential intellectual products in the Indonesian intellectual property regime. In line with the above description, this work also offers a coordinated structure for the contract for the transfer of technology that may integrate and accommodate all interests, either private or public. It can be implemented through various methods: (i) modifying the significant or essential legal icons and institutions of common law in accordance with the Indonesian legal system; (ii) enacting local laws which contain general legal principles in the existing intellectual property law systems; (iii) amending the existing intellectual property laws (legal amendments) through sui-generis and optimising contract law.

Then, at the post-grant level, for the ideal optimal utilization of intellectual products this work advocates the constitutionalisation of intellectual property and technology transfer contract by widening the role of the Indonesian Constitutional Court. At the institutional level, this substantial reformation should be followed by a structural adjustment through the creation of an equal distribution of justice in managing IT. This structural adjustment can be manifested by preparing appropriate mechanisms for

sharing the benefits, and establishing a global institution for managing and distributing sensitive and essential intellectual products to most people. (*Overwalle, G.v., 2006*). In this case, the Indonesian government must independently and creatively initiate and advocate the establishment of global, national and local institutions for optimising the utilization of essential intellectual property products to guarantee the fulfilment of public interest, particularly in the field of food, health and education.

4.2.2 Embodying Humanistic Rationalisation and the "U"niversal Principle in Longitudinal Contracts

The above ideas can be embodied in various efforts to optimise the production and dissemination of IT, for example through fair contracts in technology transfer. In optimising contracts, at the philosophical and theoretical level, this work suggests the embodiment of humanistic rationalisation in contracts, particularly in longitudinal contracts that may impact on public interest, such as contracts for the transfer of technology. Humanistic rationalisation deals with the appreciation of fundamental rights, the social function and public interest that may preserve the unity of the social system in order to guarantee the sustainability of collective life. In determining more workable and measurable humanistic rationalisations, James Boyle emphasises the important role of the WIPO and offers several principles that should be adopted: (i) balance; (ii) proportionality; (iii) developmental appropriateness; (iv) participation and transparency; (v) openness to alternatives and additions; (vi) embracing the net as a solution, rather than a problem; and (vii) neutrality. (*James Boyle, 2004*).

This can be manifested by introducing the Habermasian Universal principle in the contract for the transfer of technology. The U-Principle emphasises the validity of norms which are based on sustainable justice. It can be seen in Habermas' concept on the U-Principle: "A norm is valid when the foreseeable consequences and side-effects of its general observance for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion" (*Habermas, 1998*). The implementation of the U-Principle must be contained and formatted in the circularity principle for the sustainability of collective life. One of the core elements of the sustainability of collective life is humanistic rationalisation. It refers to fundamental rights components, such as rights to food, to health and to education, as enshrined in the UDHR, ICESCR, ECHR, and the Indonesian Constitution of 1945, as well as in other national regulations in Indonesia, such as UU.No.18/2002 on the National System of Research and Development and Application of Information and Technology, Law No.20/2003 on the National Education System, Law No. 23/1992, Law No.39/1999 on Human Rights, and the Government Regulation on Technology Transfer. Those international conventions and national regulations show that the humanistic rationalisation (fundamental right) is a universal reason. Thus, by law, the fulfilment of fundamental rights should be construed as an ultimate goal.

In order to continually manifest the ultimate goal, it will be relevant if this work introduces the Habermasian U-Principle as a method or procedure to challenge and to re-examine any contract or agreement which is no longer in coherence with social justice or the public interest (i.e. fundamental rights). Therefore, in order to guarantee the fulfilment of fundamental rights, all contracts that concern and impact on public interest must be disclosed in order to invite and to involve public participation in creating ideal collective norms to guarantee their sustainability. In this respect, any contract should be construed as a tool to maintain a balance and justice not only for contracting parties but also for other third parties or the public. For that reason, in order to nurture, to defend and to protect fundamental rights, all steps in the process of entering into a contract, such as: (i) the pre-contract stage; (ii) the contract itself; and (iii) the post-contract stage could be subject to interventions not only by contracting parties, but also by other third parties or the public. At the practical level, the Indonesian government and parliament must give the Indonesian Constitutional Court a greater power in controlling and re-examining any contracts that may contradict the public interest and the social function, particularly any contract depriving Indonesians of their right to access essential intellectual products (fundamental rights issues).

Relevant to the above idea, it is necessary to ascertain that fundamental rights must be included as the core elements in formulating IP norms. For example, for essential medicines the government can provide a kind of prize model for inventors and innovators instead of patents. In addition, the government can list and regulate various essential medicines that cannot be patented. This model could be functioned to incentivise inventions in essential medicines. In this respect, the government may consider the application of the prize model to change or to complement the existing monopoly system in patent law, especially for

incentivizing and guaranteeing the availability of essential medicines. Additionally, the government could also use the license and royalty system as an instrument to reduce drug prices and to develop its own domestic pharmaceutical industries. This prize model could be an alternative and appropriate solution for not only protecting public interests but also inventor's interest.

a. Technical Level

At the technical level, in order to employ humanistic rationalisation for guaranteeing fair and just transactions for contracting parties and public interest, those fundamental rights components can be manifested in an integrated and planned law reform, either at the level of substance, structure or the culture of law. Again, at the substance level, the reform of the copyright and patent system and other related legislation should integrate humanistic rationalisations (fundamental rights, the social function and public interest) that have been embodied and nurtured in Indonesian traditions and values. Hence, any legislation or organic regulation must consider the local socio-economic context because, historically, intellectual property rights –copyright and patent- have developed as a response to local needs. Thus, it is wise to formulate the copyright and patent provisions by considering local values.

This should be compared with other countries, -the UK, the EU, the US- that have introduced, embodied and integrated exclusivity, individualism, materialism, efficiency, and rationalism into various pieces of legislation to protect technology such as confidentiality obligations in respect of know-how, data exclusivity for medical products, Orphan Drug Status in the USA, Contractual rights, trademark and passing off. Those regulations protect not only patented technology products, but also the market system of technology and consumers who use that technology (*Anderson, Mark, 1996:153-154*). Even though most provisions of the Indonesian laws are abstract and stem from the ethical domain, theoretically they can be embodied in positive laws. For embodying the concept of wisdom, it is interesting to note the importance of ethics in the law, like Radbruch's illustration in his *Social Theory of Ownership* emphasising the importance of ethical reasons which place the social function within positive law (*Radbruch, Gustav, 1950*).

In this case, the core values of Indonesian laws, such as those on sustainability (*keberlanjutan*), unity (*keutuhan*), harmony (*kehamonisan, keserasian, keselarasan*), equality (*keseimbangan*), equity (*kepatutan*), may be embodied in related legislation and their implementation regulations, such as the Patent Act, Antitrust Act, Consumer Protection Act, Confidentiality Obligations in Respect of Know-How, Contract Law, Civil Code, and Investment Law. Undoubtedly, those Indonesian values require the embodiment of humanistic rationalisation (fundamental rights) as a core reason to formulate certain provisions in protecting the public interest, the social function, the national interest and in maintaining a balanced position among contracting parties in optimising the production and dissemination of IT, especially through the transfer of technology.

b. Structural and Institutional Level

At the structural level, humanistic rationalisation must be nurtured and developed by reforming the institutional role and function of the intellectual property (IP) regime. The IP regime must be able to accelerate the progress of science and technology by stimulating public creativity and productivity, but also to bridge humanistic transformations. For that reason, as noted in the section 3.2.1., the Indonesian government needs to establish supporting institutions (a collecting society for essential IT) to optimise the production and dissemination of IT. In this case, it can build a kind of global, national or local institution which will distribute essential intellectual products to maintain the sustainability of collective life. The institutions might be in the form of a patent pool, clearing house or combination between patent pool and clearing house model (*Geertrui, 2006, Hayyan ul Haq, 2007*). The establishment of this institution requires public policy (public participation) to determine the category of and the criterion for essential intellectual products for people's survival. At this point, the institution can find a new and innovative role as a humanistic transformation agency which holds and manages intellectual property products for the greatest benefit of mankind.

5. Closing Remarks

This work shows the importance of the embodiment of humanistic rationalisations (fundamental rights) in the utilization of IT to guarantee public interest and the social function as well as to anticipate the tragedy of the anti-commons, which, in turn preserve the unity and sustainability of collective life. This concept requires a strong political commitment by the Indonesian government to integrate and accommodate exclusive rights, the social function and public interest by (i) creating a tailor-made creator and inventor doctrine for Indonesia which matches universal values; (ii) developing a coordinated structure for contracts for the transfer of technology; (iii) constitutionalising any contract that may deprive Indonesians of the right to access essential intellectual products. The successful integration between private and public interests can strengthen Indonesian stakeholders' (industries, universities, research and development centres, the government, public institutions, soci3, NGOs) capacity to access information and technology, particularly through technology transfer in order to maintain the sustainability of collective life for the greatest benefit for the greatest number of people.

Bibliography

Anderson, Mark, 1996, Technology: The Law of Exploitation and Transfer, Butterworths.

Boyle, James, 2004, A Manifesto on WIPO and The Future of Intellectual Property, Duke Law and Technology Review. 0009,

Cherednychenko, Olha, 2004, "The Constitutionalisation of Contract Law: Something New under the Sun?" Electronic Journal of Comparative Law, Vol. 8.1. (March 2004),

Cherednychenko, Olha, 2006, EU Fundamental Rights, EC Fundamental Freedoms and Private Law, European Review of Private Law 1-2006 [23–61], Kluwer Law International the Netherlands, at 31-32;

Correa, C.M., (2004) '*Bilateral Investment Agreements: Agents of New Global Standards for the Protection of Intellectual Property Rights?*', *GRAIN*, available at: http://grain.org/briefings/?id186 , retrieved on: 24 January 2005.

Dettmer, William H., Goldratt's Theory of Constraints: A Systems Approach to Continuous Improvement, ASQ Quality Press, 1997;

Drahos, Peter, 1995, "Global Property Rights in Information: The Story of TRIPS at the GATT", *13 PROMETHEUS 6 (1995)*

Drahos, Peter, 1996, *A Philosophy of Intellectual Property*, Dartmouth.

Drahos, Peter, 1998, "The Universality of IPR" paper in Panel discussion on Intellectual property Right and Human Rights", Geneva November 9, 1998 in http://www.wipo.int/tk/en/hr/paneldiscussion/biographies/drahos.html.

Drahos, Peter, and John Braithwaite, 2002, "Intellectual Property, Corporate Strategy, Globalisation: Trips in Context", 20 Wis. Int'l L.J. 462, 2001-2002

Dutfield, Graham, 2005, "Is the World Ready for Substantive Patent Law Harmonisation?" in Drahos, Peter Drahos, *Death of Patents*, *Perspectives on Intellectual Property Law and Policy*, Queen Marry Intellectual Property Institute and Lawtext Publishing Limited, London.

Friedman, L. M. *American Law: An Introduction* (New York: W.W. Norton & Co., 1984)

Gervais, Daniel, 1998, The TRIPs Agreement: Drafting History and Analysis.

Gorlin, Jacques J., 1999, *An Analysis of the Pharmaceutical-Related Provisions of The WTO*, TRIPs, Intellectual Property Institute, 1999;

GRAIN, at: http://grain.org/briefings/?id186 , retrieved on: 24 January 2005

Granstrand, Ove, 1999, *The Economics and Management of Intellectual Property: Towards Intellectual Capitalism*, Edward Elgar, Cheltenham, UK, 1999;

Grosheide, F.W., 1994, "Paradigm in Copyrights Law", in Sherman, B., and Strowel, A., 1994, Of Authors and Origins: Essays on Copyright Law, Clarendon Press, Oxford.

Habermas, Jurgen, 1989, *The structural transformation of the public sphere: An inquiry into a category of the bourgeois society*, translated by Thomas Burger with the assistance of Frederick Lawrence. Cambridge: Polity

Hayyan ul Haq, 2005, "Requestioning The Existence of the Indonesian Copyright Regime in Protecting Cultural Property", in Grosheide, F.W., 2005, Intellectual Property: Articles on Crossing Borders between Traditional and Actual, MOLENGRAFICA SERIES Vol.15, Intersentia, Oxford, Antwerpent.

Hayyan ul Haq, 2006, Re-examining the Exclusive Rights Principle in Optimising Information and Technology under Intellectual Property Regime. In Kierkeegard, S.M., (ed) 2006, Legal, Privacy and Security Issues in Information and Technology. Computer Lex Series, Vol. 1, No.3, 2006, Institutt for Rettsinformatikk, Oslo University Press, Norwegia, pp. 327-342.

Hayyan ul Haq, 2007, 'Constructing A Coordinated Structure in the Contract for the Transfer of Technology', *International Journal of Technology Transfer and Commercialisation, Vol.6, No.1., 2007, at 24-39.*

Hettinger, Edwin C. Winter, 1989, "Justifying Intellectual Property," *Philosophy and Public Affairs* 18(1):31-52.

Iyer, VR Krishna, et al., *Peoples' Commission On GATT,* Centre for Study of Global Trade System and Development (New Delhi, 1996).

Julie. Cross & Jessica A. Wasserman, Trade-Related Aspects of Intellectual Property Rights, in Terence P. Stewart (ed.), 2 THE GATT URUGUAY ROUND: A Negotiating History (1986-1992) 2241 (1993);

Kamperman, Anselm. S., 2005, "The Development Agenda for Intellectual property: Rational Humane Policy or "Modern-day Communism", Inaugural Lecture, Delivered on the Occasion of the Acceptance of the Chair of European and International Intellectual Property Law, University of Maastricht, at 5.

Lemley, Mark A., 2004, 'Property, Intellectual Property, and Free Riding', *John M. Olin Program in Law and Economics, Working Paper No. 291, August 2004*, Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=582602. Retrieved: 18 December 2005

Maskus, Keith E., 2000, *Intellectual Property Rights and Economic Development,* 32 CASE W. RES. J.1NTL L. 471, 503 (2000).

Maskus, Keith, E., and Reichman, Jerome H., eds., *International Public Goods and Transfer of Technology under a Globalised Intellectual property*, Cambridge Univ. Press, 2005.

Maturana and Varela's works (1975, pp.322-326; 1981, pp. 23-29); Maturana & Varela (1980, pp. 78-82; pp. 98-99); 1987, pp. 75-80); and Varela (1979, pp. 32-33); p. 48ff.).

Maturana, HR, *Autopoiesis, Structural Coupling and Cognition*, at http://www.isss.org/maturana.htm,

Maturana, Humberto, and Francisco Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding*, Boston: Shambhala / New Science Press, 1987. Revised paperback edition released in 1992.

Moore, Adam, D. "A Lockean Theory of Intellectual Property." *Hamline Law Review,* (Fall 1997) 21: 65-108.

Noff, M. (2001), *TRIPs , PCT and Global Patent Procurement*, The Netherlands: Kluwer Law International.

Oorganization of Economic Cooperation Development (OECD) Report (1970, 1984)

Overwalle, Geertrui van, et.al., *Model for Facilitating Accessto Patents on Genetic Inventions,* NATURE REVIEWS, Vol. 7, February 2006, at 143-148; presented and discussed in an Internal Discussion, Centre for Intellectual Property Rights (CIER), Molengraaff Institute for Private Law, Utrecht University, February 2006.

Pugatch, Meir Perez, 2004, *The International Political Economy of Intellectual Property Rights*, Edward Elgar.

Radbruch, Gustav, 1950, *Grundzuge der Rechsphilosophie, Outlines of Legal Philosophy*, translated by Kurt Wilk, in The Legal Philosophy of Lask, Radbruch and Dabin, 20th Century Legal Philosophy Series, Vol. IV, Harvard University Press, Cambridge –Massachusetts.

Ricketson, Sam., 1992, "New Wine into Old Bottles: Technological Change and Intellectual Property Rights. *Prometheus* 10(1):53-82;

Ryan, Michael, 1988, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, the Brookings Institution, Washington.

Sherwood, Robert M., *Intellectual Property and Economic Development, Westview Special Studies in Science, Technology and Public Policy*, Westview Press, 1990, at 28.

Soesastro, H., *Toward a U.S. Indonesia Free Trade Agreement*, CSIS Working Paper Series No. WPE 085, CSIS, Jakarta, 2004, at 23

Stiglitz, Joseph E., 2006, "Towards A Pro-Development and Balanced Intellectual Property Regime,";

Temin, Peter, 1979, *Technology, Regulation, and Market Structure,* 10, ECON. 429, 442

The TRIPS Agreement and Developing Countries, UNCTAD, United Nations, New York and Geneva, 1996.

United Nation Development Program Report (UNDP, 1999)

Watal, Jay Ashree, 2001, Intellectual Property Rights in The WTO and Developing Countries, Qup, New Delhi, 2001.

World Bank (1999) *Knowledge for Development*, World Development Report 1998/99, Oxford University Press.

* * * *

Cite as: Hayyan ul Haq. Creating Appropriate Legal Framework in the Utilization of Intellectual Property Products . *Journal of International Commercial Law and Technology,* **Vol.9 Issue 2 (April, 2014)**

Creating Appropriate Legal Framework in the Utilization of Intellectual Property Products

ORIGINALITY REPORT

17%	8%	11%	3%
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS

PRIMARY SOURCES

1	Hayyan Ul Haq. "Constructing a 'coordinated structure' in the contract for the transfer of technology", International Journal of Technology Transfer and Commercialisation, 2007 Publication	9%
2	cgkd.anu.edu.au Internet Source	2%
3	dspace.library.uu.nl Internet Source	2%
4	www.globalissues.org Internet Source	2%
5	Razeen Sappideen. "Property rights, human rights, and the new international trade regime", The International Journal of Human Rights, 2010 Publication	1%
6	Submitted to Rheinische Friedrich-Wilhelms-Universitat Bonn Student Paper	1%

Exclude quotes	On	Exclude matches	< 1%
Exclude bibliography	On		