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Abstract: This work aims to re-examine the (existence of an) exclusive right in optimising the production and dissemination of information and technology under an intellectual property regime. To visualise the idea, this paper has identified and mapped some substantial issues, which are classified, into:

- symptoms
- core problem
- root causes.

This paper offers an Indonesian perspective in empowering society to appropriately access information and technology. At the end, this paper emphasises the importance of the Pancasila as the grand norm, which contains various crystallised Indonesian values that are linked to and match universal values, such as unity (keutuhan), balance (keseimbangan), harmonisation (keserasian), and sustainability (keberlanjutan), in optimising the production and dissemination of the intellectual products for the greatest benefit of the people.

Keywords: exclusive right; Information and Technology; IT; Pancasila; public interest; the greatest benefit of people.

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1 Introduction

Disparities, difficulties[1] and conflicts of interest in optimising (access to and the distribution of) Information and Technology (hereinafter IT) indicate the tragedy of the anti-commons[2] (Heller, 1998) that may threaten the sustainability of human life. From time to time, issues concerning the optimisation and utilisation of intellectual products become crucial problems, and now they are becoming one of the hottest issues in the public debates, particularly in developing countries. Recently, they have been core issues relating to discussions at WIPO meetings, which relate to the Geneva Declaration or the Development Agenda. Seemingly, they are likely to be unfinished on the world agenda. Indeed, the existence of those problems is interdependent with other related complex problems in the social, economic, political and cultural fields. In the context of the distribution of intellectual products, the weakest link may refer to the exploitation of exclusive rights in the Intellectual Property (IP) regime.

Admittedly, the exclusive right is principally aimed at protecting the interest of individual s(creator or inventor) who actualise their own existence and potential. To a certain extent, the exclusive right given to authors or inventors may stimulate the production and dissemination of creativity and productivity (literary, artistic, science and technology works) under free market conditions as well as promoting certain cultural policies (Grosheide, 2001). However, in practice, the ideal goal and rationales have been manipulated by a few gigantic corporations. They use and exploit exclusive rights as the main instrument to accumulate the interest of power holders towards capitalism. At a time when millions of people are deprived of basic rights to health, food and education and inequality is growing, this question is a challenge to the role of law – IP law – in bridging the gap. A method that can be used to bridge the gap is the reinterpretation of the exclusive right principle in the IP regime.

For this reason, it is relevant to explore an ideal alternative approach in bridging the right to profit and public interest – how to transform the exclusive right towards the greatest benefit of people. This paper will re-examine and elaborate the existence and the implication of exclusive rights in developing countries, particularly in Indonesia. In re-examining and elaborating the exclusive rights principle, I will introduce an Indonesian perspective and employ an ideological and paradigmatic view from the *Pancasila* as the grand norm in Indonesia.

2 Mapping problems in optimising information and technology

The implementation of the absolute exclusive right principle in the inventor and creator doctrine by a few gigantic corporations has raised some complex problems. The main issue concerning these problems is clustered into a tension between rights to profit and rights to life. In order to map the anatomy of the problems, this work has classified them into three layers:

- symptoms
- core problem
- root cause.

Firstly, symptom problems are usually considered as undesirable effects. These symptoms appear on the surface. They can be seen as impacts that emerged from the implementation of the IP regime that embodies the exclusive rights principle without an underlying ideal legal framework. Some problems, such as the incapability of people in many developing countries to access essential resources (such as food, medicines and basic education for sustaining their collective life), inequality in distributing the benefits of intellectual products and an accumulation of growth accrued by a few gigantic corporations and so forth illustrate this symptom. Various facts and data visualise serious threats of unbalanced policy in managing and regulating IT that bring about the disparities in optimising intellectual products. Data on these disparities indicate that most IP products and their derivatives are controlled by a few gigantic corporations in developed countries (Drahos and Braithwaite, 2003).[3] Shiva further analysed IP regimes in the context of 'free trade' and 'trade liberalisation' as instruments of piracy at three levels:

- resource piracy
- intellectual and cultural piracy
- economic piracy.

Some data show several resource piracy examples and misappropriation cases in the exploitation of intellectual products. For example, Japanese corporations patented several Indonesian traditional formulas, genetic resources and biological diversities, while in copyright cases, traditional designs for batik and jewellery have been registered in Europe, Japan and the USA.

Secondly, the core problem refers to the substance[4] and structure of law,[5] particularly in IP regimes. At the substantial level, the crux of the tension lies in different characteristics of the existing norms between developed and developing countries. On the one hand, IP is likely to contain individualistic, materialistic and exclusivist characteristics, which have developed over the years, and they reflect Western and developed countries' interests. On the other hand, most of the developing world tends to involve characteristics of communalism, spiritualism and inclusiveness. Anup Shah, in "the WTO and Free Trade", notes a number of TRIPS problems related to the weaknesses of its internal regulation to protect public interest in the field of health – drugs and medicines, food and the distribution of IT. Then, at a structural level, these problems have been rooted in the insertion of 'hard law' as a core characteristic of the TRIPS Agreement and its implementation, which tends to serve and protect the interest of capitalism in developed countries. This can be seen from technological knowledge, which is clustered in developed countries. Mostly, it is in the hands of Multinational Companies (MNCs), which dominate Research and Development (R&D) activities worldwide.[6] The impact of an unequal IT distribution, including the failure of technology transfer from developed to developing countries, is largely felt in developing countries, particularly in the field of public health and sanitation, food, malnutrition and education.

Thirdly, the root cause of the symptoms and the core problem can be found in the philosophical and conceptual domain, which validates the exclusive right principle, particularly in the recent market contexts. The concept of an exclusive right in the inventor and creator doctrine – the IP regime – is central to every effort to safeguard products of the mind.[7] Even though the exclusive right principle plays a significant role in accelerating industry and trade development towards economic progress, it also

contains potential threats that may widen the gap between developed and developing countries in optimising IT. In order to avoid the threats, it is necessary to link IP rights with human rights, public interest and the social function. Therefore, it is relevant to re-examine the concept and the implementation and impact of exclusivity in IP regimes. This is important to provide more equal and just access for Indonesians and other people from the developing world to information, knowledge and technology.

3 Implications of the inventor and creator doctrine: an Indonesian case

The strong pressure to implement the inventor and creator doctrine, which promotes the exclusive right through stricter rules around of the world, has complex implications, particularly in developing countries including Indonesia. This complexity is caused by the fact that each country has unique, specific and domestic problems, inter alia socio-cultural, religious, geographical, demographical, political, legal and economic aspects. The forced uniformity, on behalf of harmonisation, has had several implications at

- the dogmatic or legislative layer
- the practical layer.

At the dogmatic layer, the implication of the exclusive principle can be seen from the Indonesian IP – patent and copyright – legislative development. In order to comply with TRIPS, Indonesia has revised its patent and copyright laws on several occasions. Apparently, those revisions are dedicated to fulfilling the interests of developed countries and have been embodied in the minimum standard norms of the TRIPS. These laws were ratified without a prior study of their impact and without any proper public consultation. The objective was only to comply with WTO rules and to avoid pressures and threats from Indonesia's trading partners. The patent law was enacted without any consideration for long-term impacts. The Indonesian patent law is considered to have adverse impacts on biodiversity and traditional knowledge, as well as community innovation.[8] The revision process has sidelined differences of opinion and conflicts of interest between various sectors of the community, while both the government and the members of the House of Representatives did not try to bridge those differences.[9] The ratification process did not involve those communities that might suffer from the implementation of the patent law, namely farmers, traditional healers and traditional handcrafters. Most substantive parts of the patent law, which influence the sustainability of people, have been transplanted from model laws without considering the main characteristics and the needs of Indonesians.

Then, at the practical layer, since the beginning of the 1980s, the Indonesian government has embarked upon intensive and extensive legal reform, particularly in the field of IP laws. In doing so, the government has introduced stricter IP rules to create a conducive atmosphere for improving the creativity and productivity of people and to attract foreign direct investment to Indonesia. Unfortunately, there is no hard evidence that this policy is the right one. Correa and Maskus found that there is no significant correlation between stricter IP rules and increased investment. Even this policy has been raising more complex problems and dilemmas in its implementation, when faced with the

demands of most people to have more equitable access in optimising information, science and technology for sustaining their daily lives.

The result is that Indonesian IP became more difficult to enforce. Ignorance of IP law is widespread within the country and the protection of IP rights is both practically and legally weak. Some studies show that the implementation of the absolute exclusivity principle in IP law in Indonesia may have a detrimental effect on Indonesia's technological and economic development, as the law increases the local cost of important technological products and further inhibits local technological development (ul Haq, 2000; Kusumadara, 2000). Before the IP campaign in Indonesia, many innovations were in the public domain, such as woven tie cloth, tenun ikat, batik, herbal medicine, *tempe* making, *keroncong, gamelan* music and so on; they were shared by the public. Now, the patent and copyright laws stimulate and force people to privatise public innovations into private property.

4 Exclusive rights re-examined

Several previous studies[10] show that the exploitation of the exclusive right in IP brings about injustice in the distribution of access to and the optimisation of global resources. It is caused by the accumulation of power holders' interests concerning property, as a consequence of an unbalanced legal framework. The result is that the exclusive right may surpass collective rights, such as public interest and the social function. Some writers have signified that the exclusive right in IP may contain a dangerous inner logic, which illustrates the tension between a basic reason that validates the existence of exclusive rights and the impacts of rights exploitation. This is caused by the weakness of the legal system in providing ideal protection and maintaining the balance between the individual and collective interest. Consequently, the spirit of capitalism allows and even strengthens the individual or group aggressiveness to surpass the social interest. Not surprisingly, the disparity in accessing IT becomes more widespread, where power holder groups control the distribution of IT to the rest. The above description demonstrates the structural difficulties in utilising IP to fulfil and protect peoples' interests in optimising information, knowledge and technology appropriately.

Through the incentive theory, the exclusive right is empowered and entrenched by a few gigantic corporations. It was corporations which much more enjoyed and employed the exclusive right to strengthen the accumulation of profits towards intellectual capitalism. This inconsistency was caused by what Drahos called the 'dangerous inner logic' of the exclusive right. The lack of an ideal legal framework to guarantee the just optimisation of the exclusive right results in the power holder, i.e., capitalism, exploiting the exclusive right to the maximum. (Lemley, 2004).[11] Clearly, the shift and the ultimate goal of the doctrines are caused by manipulation and forces of self-interest, or corporate interest (capitalism). Undoubtedly, IP rights are rights, which are created for and exist within market contexts. Now, under the IP regime, the spirit of the maximisation of exclusive rights brings about disparity and an inappropriate optimisation of IT. For that reason, the exclusive rights principle in IP should to be re-examined to create an ideal and proportional legal framework for the greatest benefit of the people.

5 Ideal optimisation of information and technology: an Indonesian perspective

In order to explore and find an ideal alternative legal framework in optimising IT under an IP regime, this work may use a number of theoretical concepts. This is important to lay down the ground rules for people to live together in harmony. This work elaborates a view that links and matches the system values in Indonesia. This view sees unity as the main mandatory rule to maintain the sustainability of the social system. The unity is indicated by a good or normal interaction between the components of a social system. A social system will work properly if all components can interact normally. Good-quality interaction between the components will stimulate the full participation of the components into function proportionally, which, in turn, maintains the unity of the social system. This situation requires a balance. In a legal context, the term balance can be interpreted as justice. Therefore, justice should be dedicated to maintaining the unity and sustainability of the social system. The legal consequence is that all interaction at the political, economic, social or cultural level should be devoted to creating and strengthening the unity and sustainability of collective life. Thus, all development programmes that ignore the main mandatory rule are considered to be invalid.

5.1 In search of a legal framework: insight from the Pancasila

Before stepping into any further discussion of this theoretical framework, it is important to outline the ideal state of social order in managing IT in Indonesia. The ideal state of social order can be traced through the Pancasila[12] as the grand norm of Indonesian positive law. Hierarchically, after the Pancasila, Indonesia's main positive law is the 1945 Constitution. In its preamble, the 1945 constitution sets forth the Pancasila as the embodiment of the basic principles of an independent Indonesian state. In brief, and in the order provided in the constitution, the Pancasila principles are:

- belief in one supreme God
- humanitarianism
- the unity of Indonesia
- democracy
- social justice.

Theoretically, all laws emanate from the Pancasila and the 1945 Constitution. Thus, logically and juridically, it follows that the Pancasila is the principal foundation of the value of truth, which legitimates other legal products. The Pancasila is the source of law which establishes and structures the foundation of general legal principles in Indonesia. The five basic principles of Pancasila are stipulated in the four main ideas of the Preamble to the 1945 Constitution.[13] The Pancasila and the Preamble to the 1945 Constitution are considered to be the axiom of Indonesian legal endeavours, which cover:

- the legal objective
- the legal source

- social justice
- aspect of legal protection.

First comes the legal objective, which governs society's interests (such as the emerging right and duties) that are determined by God. In this case, the law emphasises the importance of a balance between rights and duties. Thus, any action to help each other is a necessary obligation of fulfilling the need for sustainable collective life. This condition requires that every human being should act based on justice and civilised rule. As a consequence, they should maintain their existence and the existence of others; they even have the obligation to maintain other living beings. The harmonious relationship between rights and obligations is a must. Therefore, it requires legal protection. Thus, clearly, there is a strong link between moral issues and positive law. In this context, positive law must be in accordance with morality. Law should help human beings to develop their existence and potential based on their nature by conserving the dignity of human beings, maintaining justice, ensuring equality and freedom and developing public interest and welfare.

Based on the above description, the general legal principles, legal theories, legal dogma and legal practice concerning the just utilisation of IT should emanate from the grand norm of the Pancasila. Consequently, all laws and regulations relating to the utilisation of information, knowledge and technology should consider the greatest benefit of the people based on social justice as contained in the Pancasila and the 1945 Constitution. This is reflected in a series of Indonesian IP legislation with regard to research, science and technology, which refer to the Pancasila and the 1945 Constitution.

In order to optimise IT for the greatest benefit of the people, this research will also elaborate arguments of on public interest and the social functions of IT. Therefore, the discussion of legal principles, which govern the relationship between government rights, public rights and individual rights in utilising IT based on social justice, becomes important. Theoretically, all legal products in utilising IT should be in accordance with the Pancasila and the 1945 Constitution. Thus, in practice, those legal principles should provide guidance for settling various disputes emerging from conflicts of interest in controlling important and vital IT.

As a welfare state, Indonesia should prepare national development programmes to improve society's welfare. This duty is derived from two main ideas:

- the State should facilitate and accelerate the fulfilment of citizens' rights
- the State should integrate economic facts into social justice.

In terms of law, the phrase 'for the greatest benefit of the people' is the ultimate goal in utilising IT. The ultimate goal is people's interest, so the utilisation of IT should be used in an appropriate (efficient) manner. The character of this appropriateness is absolute. This concept will be significant and will have an important meaning if it is included in positive laws. Admittedly, manifestation of "the greatest benefit of the people" cannot be readily explained. Therefore, it is essential to identify constitutive elements or the main characteristics of the phrase "the greatest benefit of the people", either explicitly or implicitly. If the phrase "the greatest benefit of the people" is link to the law, it can be interpreted as fulfilling an the usefulness for all (Bentham, 1973).[14] The meaning of the phrase relates to the manifestation of appropriate policy, which is determined based on good law. It has a strong correlation with the demand for justice, such as balanced

interests, public order and legal certainty. The question that immediately arises is then whether social justice under the Pancasila can be linked to legal validity and appropriateness? The answer is to measure legal validity and appropriateness; all development programmes intended to achieve "the greatest benefit of the people" should be devoted to manifesting social justice (based on the Pancasila) through maintaining a balance of interests without ignoring public order and legal certainty.

5.2 Exclusive right, the social function and public interest for the greatest benefit

One of the main challenges in visualising the concept of the greatest benefit of the people is how to interpret, elaborate and embody it into positive law. It is important to provide for legal certainty and to avoid inconsistency between the ultimate goal and the utilisation of information and technology. This is important because the utilisation of IT is frequently inconsistent in that ultimate goal. In practice, certain people, corporations or institutions that control IT, through state grants, technology trading or other valid methods, do not use or optimise it properly. In this context, several important provisions related to the social function, national interest and public interest in regulating IT under the IP regime become more relevant.

In Indonesia, the social function is meant to restate the fact that the exclusive right has a social function, just like Notonagoro's concept illustrates the concept of the social function on the land. He started from the state's authority. Because the state is a personification of the people, the state has the authority and power to guarantee the social function. The authority of the state means the state's authority to regulate and maintain collective life. So, if we focus on IT, it means that we develop and make efforts to regulate anything concerning IT. From the above description, it follows that apparently the state has a certain authority to emphasise the characteristic of the social function concerning IT that should be manifested based on the public interest principle.

Normatively, Indonesian IP legislation regulates those issues. For example, the Indonesian Patent Act contains the concept of the social function, which is used to restrict the Exercise of patent law. The concept of the social function in patent law is derived from the concept of a harmony and balance between rights and obligations. It means that the social function must ensure personal rights, but if it involves the public or national interest, the public or national interest must be given priority but without ignoring personal rights. The restriction relates to the provisions concerning the exercise of patent law in Indonesia, such as compulsory licenses, the implementation of a patent by the government, defence and state security and the national interest. Unfortunately, those provisions do not work properly, because they do not yet have an implementation regulation. Consequently, they become 'catch all' provisions and leave decision makers and judges with a wide discretion to expand policy regarding the social function, public interest and national interest. This leads to legal uncertainty concerning IP.

Actually, this weakness can be dealt with by applying Indonesian competition law, which also provides strong protection to the public interest, the social function and national interest.[15] Principally, Indonesian competition laws are most likely to be useful in meeting their goals as long as

- the legal rules and frameworks for analysis are clear
- the derogations from market-based rules are clear
- decision making is transparent and governmental institution or agency and court discretion is limited.

Unfortunately, in the implementation of Indonesian competition law, the government tends to face serious challenges due to large-scale ambiguities and wide discretion. Therefore, the Pancasila and the 1945 Constitution that provide guidance to Indonesian laws and regulations on how to think and to act for the utilisation of information, sciences and technology should be differentiated in clear legal rules and framework analysis.

Thus, the management and implementation of patent and copyright law and other laws concerning information, science and technology should be based on the Pancasila. This concept contains several principles:

- the principle of state authority
- the principle of the utilisation of IT for the greatest benefit of the people
- 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 concern the utilisation and optimisation of IT measured by two determinant indicators:

- for the greatest benefit of the people
- social justice.

These principles limit the state's authority to control (master) the utilisation of IT. The term mastery implies the state's authority in using and optimising IT. With regard to the term mastery, the state, as the sovereign organisation, should be considered as the power organisation of the people. Therefore, it is not relevant to assume that the state has absolute ownership like the traditional notion of ownership theory. The state, as the organisation of the sovereign people, has authority to regulate:

- the availability, utility and optimisation of IT
- 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 to utilise the legal objects is the term the greatest benefit of the people. Therefore, the concept of the utilisation and optimisation of intellectual products for the greatest benefit of the people should be embodied in a concrete statement. It requires that

- any grant, utilisation, and optimisation of IT
- any determination and regulation of the legal relationship between individual and IT
- any regulation of the legal relationship between individuals and legal action concerning IT
- should be dedicated to increasing people's prosperity.[16]

Various works in the literature (legal, political and economic) show that there are several influential factors in governing IT, such as

- general legal principles (existing at the philosophical level)
- legal theory
- legal dogma
- law in practice
- politics of law
- power, authority and coercion and other non-legal elements, such as economic, social and cultural.

Every influential factor contains an interest in constructing the existing IP regime and its implementation, because law emerges from interaction between the legal elements. In this case, each factor has a strong substantial and interrelated link to producing existing laws. For that reason, every legal element at every stage of legal endeavour, at the philosophical, theoretical or practical level, should be devoted to creating justice for the greatest benefit of the people. Those factors regulating the granting and utilisation of IT can be framed as follows.

The approach proposed here is that any granting of rights concerning IT obliges the rights holder to use and optimise them based on the rights and obligations determined by the previously indicated factors. Regulation is determined by purely legal factors and the influence of non-legal factors, such as economic, social and cultural factors. Political factors, in a legal context, also influence the regulation of granting rights and the utilisation and optimisation of IT. Accordingly, law in practice should not contradict legal dogma, legal theories and general legal principles. All stages in appreciating and endeavouring the law should be devoted to creating social justice for the greatest benefit of the people.

In this case, the determination of rights, *inter alia*, rights in IT, falls within the state's authority. Through this authority, based on law, the government can create an appropriate model for using and optimising IT for the greatest benefit of the people. One of the most important government obligations is to provide legal protection to the public interest and the social function in utilising IT. To interpret and elaborate the obligation, the government should consider the main thoughts of the preamble to the 1945 Constitution, which provides a fundamental foundation to determine the public interest and social function. This is because, theoretically, the term (values of) public interest and the social function are considered as general legal principles, which stem from the main thoughts of the Preamble to the 1945 Constitution. Indeed, the concepts of the social function and public interest are universal values, which match Indonesian values, for example, sustainability (*keberlanjutan*), unity (*keutuhan*), harmony (*keserasian, keselarasan*), equality, justice (*keseimbangan, keadilan*) and equity (*kepatutan*). Principally, regarding ideal values, there is no significant difference between the Pancasila values (crystallised Indonesian values) and universal values that have been recognised internationally, such as the public interest and the social function. Thus, the ideal values should be positioned as a basic consideration to implement the national development programmes, including the exploitation of IT.

5.3 Towards the optimisation of information and technology

The optimisation of IT can be achieved through the implementation of a shared common good, such as IT. For this purpose, at the global level, some strategic interrelated steps should be taken:

- the establishment of a sustainable global knowledge society
- striving for a better understanding and perception of Indonesian people.

At the national level, in order to create an ideal legal framework for managing and optimising IT, the Indonesian government should identify and adopt Indonesian legal data which link to and match with the universal values. It can be implemented through various methods. Several alternative strategies to attain this ideal legal framework for utilising IT for the Indonesian people can be realised by

- modifying significant or essential legal icons and institutions of common law in accordance with the Indonesian legal system
- embodying local laws which contain general legal principles into the existing IP law systems
- amending the existing IP laws through sui generis and contract law.

Then, the substantial reform should be followed by the creation of an equal distribution in managing IT. This goal can be achieved by structural reform, for example, preparing an appropriate mechanism for sharing benefits and establishing a global moratorium to manage and distribute sensitive and essential intellectual products.[17]

The above ideas can lead to various efforts to optimise the production and dissemination of IT, for example, through fair dealing in the transfer of technology. On a technical level, for example, the strong legal framework should accommodate and integrate all interests, in order to guarantee fair and just transactions for contracting parties. This can be manifested by an integrated and planned law reform, at the level of the substance, structure or culture of law. At the substance level, the reform of patent and copyright law and other related legislation should encompass any relevant socio-economic context, because historically IP rights developed as a response to local needs (Ida Madieha et al., 1997). Thus, it is wise to formulate patent and copyright provisions by considering local values. Accordingly, these values can be used to formulate certain provisions in protecting the public interest, the social function and the national interest and in maintaining a balanced position between contracting parties in optimising the production and dissemination of IT, for example through the transfer of technology (Yelpalaa, 1988). In this case, the Indonesian legal concepts, such as sustainability (*keberlanjutan*), unity (*keutuhan*), harmony (*kehamonisan, keserasian, keselarasan*), equality (*keseimbangan*) and 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. Even though most Indonesian legal concepts are abstract and stem from the ethical domain, theoretically they can be embodied in positive laws. For embodying wisdom, it is interesting to note the importance of ethics in the laws, like Radbruch's illustration in his *Social Theory of Ownership* (Radbruch, 1914 in Wilk, 1950).[18]

Then, at a structure level, the law reform can be directed towards promulgating provisions to develop skilled professional staff and a user society in an industrial and commercial world. In this case, the Indonesian Patent Act, the Indonesian Copyright Act and other related legislation could be empowered to stimulate the improvement of the quality of human resources in Indonesia. Certainly, this effort should be followed by reforming the institutional role and function of the IP regime establishing supporting institutions (collecting societies in essential IT) to optimise the production and dissemination of IT. In this case, we can build a kind of global moratorium, which distributes essential intellectual products so as to maintain the sustainability of collective life.

6 Concluding remarks

The absolute exclusive right in IP has the potential danger of creating the tragedy of the anti-commons, which may threaten and be detrimental to the sustainability of our collective life. Therefore, the exploitation of exclusive rights should be controlled by an ideal legal framework, in order to nurture justice as a basic requirement for creating unity. Consequently, all development programs, including the optimisation of IT, either at the national or international level, should be dedicated to maintaining justice.

For resolving the dilemma between economic and public interests, either at the national or international level, it is relevant to adopt Professor Grosheide's idea of the creation of tailor-made copyright law (Grosheide, 1992, 1994).[19] To manifest the idea, it is necessary to consider the above alternative strategies to create a tailor-made IP law, particularly in Indonesia. This can commence with a re-examination and re-evaluation of the exclusive principle under the IP regime by considering the social function, the public interest and the greatest benefit for mankind.

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Notes

[1]This 'disparity and difficulty' refer to the problem of economic justice, which is defined as the problem of a derivation from a rule for evaluating the distribution of desired objects in society.

[2]Heller defines anticommons as multiple owners who are endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to under-use –a *tragedy of the anti-commons*. For further information on 'tragedy of the anti-commons', (Heller, 1998).

[3]Drahos and Braithwaite maintain that the expansion of intellectual property systems has enabled a relatively small number of corporate players to amass huge intellectual property portfolios (Drahos and Braithwaite, 2003).

[4]The substance relates to the norms covering regulations, international conventions or agreements (TRIPS), case law and policies at a practical level, which may create the gap or disparity and the difficulty in accessing IT. Those norms (copyright and patent) provided maximum opportunities for a few gigantic corporations to exploit information, technology, genetic resources, traditional knowledge and folklore.

[5]The structure of law relates to institutions which implement its substance, such as the WTO, and governmental or non-governmental institutions, including corporations.

[6]According to *The Economist*, the US pharmaceutical industry claims to lose $500 million a year in India due to the country's bad IPR protection. On the other hand, in 1998, the USA received royalty payments of $36 billion. In view of this, stronger patent protection is mainly in the interest of industrialised countries. In 1990, only 4% of world's R&D expenditure came from developing countries, which makes it clear who will benefit most from strengthened IPR regimes.

[7]In law, an exclusive right is the power or right to perform an action in relation to an object or other thing, which others cannot perform. Therefore, exclusive rights may be granted in property law and intellectual property law, as well as in relation to public utilities. Many scholars argue that such rights form the basis of the concepts of property and ownership.

[8]Jhamtani and Setiawan identified that, up to November 2000, some 20–30 patent applications had been filed for transgenic plants and the DNA of plants, mostly by private companies. Many patents on Indonesian innovation have been granted abroad.

[9]Jhamtani and Setiawan reported the struggling efforts of NGO's to become involved in the revision process, either by asking for a hearing with the House or by attending meetings held by the government.

[10]From time to time, the disparity between the industrialised and developing countries is marked by scientific and technological development. Over 90% of scientists and researchers work in industrialised countries. Over 90% of their activities are concentrated on research for the rich world and on converting their findings into protected technical processes, for the disparity phenomenon.

[11]It is interesting to note Lemley's analysis of economic theory, which demonstrates that too much protection is just as bad as not enough protection and, therefore, why intellectual property law must search for balance, not free riders. He also re-questions the misused notion of intellectual property as a form of tangible property (Lemley, 2004).

[12]The Pancasila is the philosophical basis of the Indonesian State. The Pancasila consists of two Sanskrit words, *Panca* meaning five and *Sila* meaning principle. It comprises five inseparable and interrelated principles. Every Indonesian citizen should

- believe in the one and only God the Almighty
- strive to achieve a just and civilised humanity
- maintain Indonesian unity
- adhere to democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives
- strive to achieve social justice for the whole of the people of Indonesia.

These principles are sacred values of the Pancasila. It is a cultural principle, which should be respected by every Indonesian because it is the ideology of the state and the life philosophy of Indonesian society.

[13]The four main ideas are:

- The state is based on God the Almighty according to civilised society in the framework of the Indonesian union state.
- The state has sovereignty based on representative society.
- The state manifests social justice for all Indonesians.
- The state provides protection for all Indonesians and territory based on unity.

See The Preamble to the 1945 Constitution.

[14]The usefulness refers to the utilitarian concept (Bentham, 1973).

[15]The Indonesian competition law itself invokes the philosophy of the Pancasila. In the body of the statute as adopted, 'monopoly practice' is defined as the centralisation of economic power resulting in the control of production or marketing, "thus resulting in unfair business competition and potentially harmful to the interest of the public". It further states that: "Democracy in the field of economy calls for equal opportunity for every citizen to participate in the process of production and marketing of goods and/or services, in a fair, effective and efficient business environment …" Notwithstanding Indonesia's commitments to international conventions, it asserts that "there shall be no concentration of economic power in the hands of certain business enactors …". See The Indonesian Competition Law, Para. 1, Section (b) and (c). Chapter 1, Article 1, para 2.

[16]UU No.18/2002 concerning the National System of Research, Development, and the Application of Science and Technology stated that:

- God Almighty created nature and all internal treasures for the welfare of human being. Those creations should be responsibly managed and optimised through mastering, utilising and developing science and technology.
- Mastering, utilising, optimising and developing information, science and technology should be consistent with the ultimate goal of the 1945 Constitution:
- protecting all Indonesians and its territory
- improving public welfare
- promoting the nation's intelligence
- harmonising society's life and its environment based on the Pancasila.

[17]For this purpose, the global moratorium may consider a kind of collecting society model, patent pool a model or a clearing house model.

[18]Radbruch proposed the social theory of ownership. This theory emphasises the importance of ethical reasoning, which inserts the social function into positive law (Radbruch, 1914).

[18]In this context, Professor Grosheide offers two options. One of them is to replace the static uniformity that characterises the current national and international copyright law with a dynamic pluriformity, creating the possibility of tailor-made copyright law (Grosheide, 1986, 1992).

Re-examining the exclusive rights principle in optimising information and technology under the intellectual property regime: an Indonesian perspective

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