

TRANSFIGURING INDONESIAN PATENT LAW ENFORCEMENT BY CONSIDERING DEVELOPMENT OF PATENT PROTECTION SYSTEM IN THE EUROPEAN UNION AND IN THE UNITED STATES

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Contextually, patent granted by the government for inventors is an exclusive right, it can especially be considered as a freedom of inventors in order to be able to restrict others from producing, trading, and/or using their invention.¹ The rapid growth of technology and information increased the need for patent protection. The ideal patent protection will increase the competitiveness of the country,² besides, it is given with the intention of rewarding new inventions, inciting innovation³ and being a stimulus for future inventions.

In general, Indonesian Patent Law's content is based on the 'first-to-file' system just like most states in the world, except the United States (before 2013) and the Philippines (prior to 1997).⁴ From historical point of view, this law substitutes the old patent law (Patent Law No. 6 of 1989 amended by Law No 13 of 1997 mainly because of the espousal to Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – Law No. 7 of 1994 proved the true willingness of Indonesia to adopt the basic provisions of Uruguay Round Agreement: TRIPS.⁵

In response to the ratification, Indonesian Patent Law affirmed five strategic national efforts, such as: revising previous patent law systems by harmonizing standards regulated under TRIPS, reforming patent management system, improving bilateral and multilateral cooperation, spreading public awareness on economic and social benefit of patents, and providing law enforcement to protect the exclusiveness of patent right.⁶

After more than a decade of implementation, current Indonesian Patent Law still has some inefficiencies: low level of pro-activeness toward domestic modest innovations, uncertainty to grant protection for original inventors, and less spirit to

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¹ Patent is one of the intellectual property rights. It is a kind of proprietization of "creativity" or "talent". Hughes, Justin: *The Philosophy of Intellectual Property*. 77 *George Town Law Journal* 287 (1988-1989), p.291.

² Zekos, Georgios I.: *The Influence of Patents, Copyright, Trademarks, and Competition on GDP Growth, Trade and FDI*. *The IUP Journal of Management Research*, Vol.XIII, No.4 (2014), pp.7-8.

³ Boone, J: *Intensity of Competition and the Incentive to Innovate*. *International Journal of Industrial Organization*, Vol. 19, No. 5, (2001), pp. 705-709.

⁴ Dunner: *First-to-file: Should Our Interference System Be Abolished?*. 68 *Journal of the Patent and Trademark Office Society* 561 (1986), p.561.

⁵ Law No. 7 Year 1994 concerning Ratification of Agreement Establishing the World Trade Organization.

⁶ Lindsey, Tim., et.al.: *Hak Kekayaan Intelektual: Suatu Pengantar*. Asian Law Group Pty. Ltd. & PT. Alumni, Bandung, 2006. p.26.



challenge regional competition. If we compare the Indonesian Copyright Law⁷ – also enacted after the ratification of TRIPS – with this one, we can see that this law was revised in 2014, adopting a new methods to solve past and future challenges of globalization. This law was revised in 2014 under national and global development circumstances of that time in order to solve existing problems. Such copyright law development is now included in the new Indonesian Copyright law:⁸ determination of all rights enjoyed by creators,⁹ longer period of protection compared to the previous law,¹⁰ creation of Collective Management Institution,¹¹ effective dispute settlement mechanisms,¹² as well as other substantial changes.

By comparative study approach, this paper elaborates the progressive development of global patent protection, especially in the European Union and in the United States. This paper then investigates significant development to complete the gap or uncertainty regarding measures of protection based on the current Indonesian Patent Law. Furthermore, this paper also presents some recommendations to effectively enforce Indonesian Patent Law and give more favorable environment for inventors.

Recent Development of Patent's Protection System in the European Union and the United States

This paper analyzes current development of the patent protection system within the European Union and the United States. Based on further investigation, both of them introduce the latest practices on patent protection system.

To intensify the economic integration within the European Union, intellectual property rights were also taken into consideration for setting the common union goals. Intention to regulate intellectual property rights in the community is basically delegated from article 118 of the Treaty of the Functioning of the European Union (TFEU).¹³

⁷ Law No. 28 Year 2014 about Copyright. This law changed the previous Law No. 19 Year 2002 about Copyright.

⁸ *Ibid.*

⁹ *Ibid.* This new law is now giving more details about the rights of creators such as the moral right (article 5-7) and the economic right (article 8-19).

¹⁰ *Ibid.*, art.58. The period of copyright is protected during the live of creators and 70 years after his/her death.

¹¹ *Ibid.*, arts.87-93. Collective Management Institution (*Lembaga Manajemen Kolektif*) is profitable legal entity duly authorized by the creators, the owner of copyright, and/or the owner of related right to carry out their economic rights in the form of gathering and collecting the royalty.

¹² *Ibid.*, arts.95-105.

¹³ Article 118 of TFEU stated that "... the European Parliament and the Council, ... shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralized Union-wide authorization, coordination and supervision arrangements." Other provision of TFEU, such as article 207 on the uniform principles implemented in the commercial aspects of the intellectual property" and article 262 that affirms "the Council authority to adopt provisions to confer jurisdiction to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights."

Inspired by such provision, the European Patent Convention (EPC) set up in 1977¹⁴ has been successfully realizing the harmonization of substantive and procedural patent system, though this treaty is separate from the EU treaties. This Convention is now ratified by 38 member states in March 2015.¹⁵ Its effectiveness is proved by the growing number of patent registration every year.¹⁶

The direct regulation from the Union Law was Community Patent Convention (CPC).¹⁷ It was signed in Luxembourg on 15 December 1975 but never entered into force as the minimum number of ratifications was not completed.¹⁸ The failure of CPC resulted in that EPC was the only existing patent instrument binding for all contracting parties, including EU member states. However, the ECJ can also use CPC and EPC as sources of interpretation of Community Law, especially meaning article 36 of the TFEU.¹⁹ Both treaties also influenced the adoption of the some generally accepted provisions regarding the national patent laws of EU member states.

On 17 December 2012, both the European Commission and the European Parliament legislated the unitary effect of the European Patent. With true ambitious endeavour, this unitary system, including the creation of the Unified Patent Court, will be realized in 2015. The new concept of 'unitary effect' shall be the tool to achieve the three main community intentions:

- To fix common problems arising in the present European Patent system, such as: each patentee will only have to disburse one renewal fee and the use one additional language other than the languages recognized by the European Patent Office²⁰ but could be accessed by the EU member states except Croatia, Italy, and Spain.²¹
- To provide unitary protection and equal legal effect of patent grants for member states;
- To establish a single Unified Patent Court for the litigation of European patents. This court shall have exclusive jurisdiction over patent infringement.²²

¹⁴ Convention on the Grant of European Patents 1973 (hereinafter EPC).

¹⁵ European Patent Office: List of Contracting States Sorted According to the Date of Accession, *available at* <http://www.epo.org/about-us/organisation/member-states/date.html> (March 23rd, 2015).

¹⁶ In 2014, the number of patent fillings increased +3,1% from the year before or total number 274,174 registrations. European Patent Office: Annual Report 2014, *available at* <http://www.epo.org/about-us/annual-reports-statistics/annual-report/2014.html> (March 23rd, 2015).

¹⁷ Community Patent Convention 1975 (CPC), art.93. Furthermore, based on article 5 of this Convention, the Court of Justice has the jurisdiction in respect of the provisions of the Convention.

¹⁸ *Ibid*, art.98.

¹⁹ In *Duijnste v. Goderbauer*, the Court highlighted that although the two treaties are applicable to the case but in fact those treaties can be use as the source of interpretation of the Community Law. *Case 288/82 Duijnste v. Goderbauer – Judgment (Fourth Chamber), 15 November 1983*, p.3677.

²⁰ European Patent Office is patent granting authority of Europe established under EPC.

²¹ These four states still not ratify the Agreement on Unified Patent Court, Brussels, 19 February 2013.

²² Agreement on Establishing Unified Patent Court was signed on 19 February 2013. This agreement established the Unified Patent Court but still not entry into force and open for ratification.

The United States, in brave effort, significantly changed the patent system from ‘first-to-invent’ to ‘first-to-file’ in 2013. During the first-to-invent regime, the first and the true person inventing a product or a process gets the patent rights.²³ The original invention could be protected by showing that no application process has been done by the inventor in the early stage of the invention.²⁴ Attempts to change the first-to-file system remained unsuccessful, even though such an attempt also came from the World Intellectual Property Organization (WIPO) in 1990, while its basic proposal required the United States to switch to first-to-file system.²⁵ The rejection of the harmonization by the United States then raised debates among scholars regarding pro and contra of the first-to-file system. One interesting debate can be read from Pravel’s (1990-1992) response to Conley’s opposition, saying that such harmonization would not increase the United States’ access to foreign markets:

“Mr. Conley misconceives the purpose of harmonization and its effect on foreign markets. Although United States’ citizens will have no greater access to foreign markets because of harmonization, obtaining patents in foreign markets would be an advantage because they would provide exclusive rights there.... More uniform procedures and substantive laws should reduce the cost for international protection of inventions... In short, harmonization would increase market potential for U.S. citizens and the rest of the world....”²⁶

Surprisingly, after the long history of defending the first-to-invent system, on 16 September 2011, President Barack Obama signed the America Invents Act (AIA) that applies the first-to-file system after 16 March 2013.²⁷ The new law works with the term “first-inventor-to-file” in order to avoid disproportionate practices on the protection of stolen ideas. The AIA has 20 provisions and strengthens the US Patent and Trademark Office (USPTO) to help setting up enforceability the issued patents.²⁸ These provisions have three main purposes: enabling a patent applicant to have greater certainty in patent rights, preventing and/or removing low quality patents on the patent system, and establishing the 21st century patent office.²⁹ The new system has some substantial changes; the following picture describes the system prior to the AIA, post AIA, and current European system well:³⁰

²³ Jackman, Peter A.: Adoption of First-to-File Patent System: A Proposal. 26 *The University of Baltimore Law Review* 67 (1997), p.71.

²⁴ Teva Pharm. Indus. Ltd. V. AstraZeneca Pharm. LP, 661 F.3d 1378 (Fed. Cir. 2011). p. 1384.

²⁵ *Ibid.* pp.79-80.

²⁶ Pravel, Bernarr R.: Why the United States Should Adopt the First-To-File System for Patents. 22 *St. Mary’s Law Journal* 797 (1990-1992), p. 813.

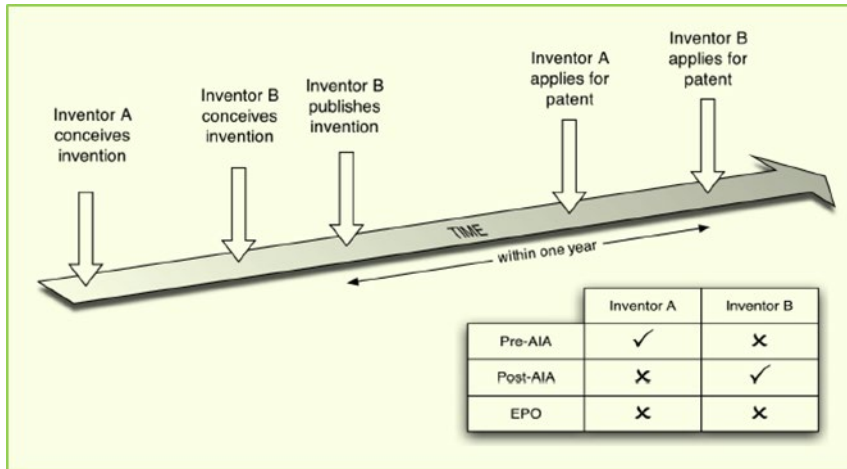
²⁷ This law is well-known as Leahy-Smith America Invents Act, H.R. 1249, 112th Cong., 1st Sess. (2011). U.S. Patent and Trademark Office: America Invents Act: Effective Dates, *available at* http://www.uspto.gov/sites/default/files/aia_implementation/aia-effective-dates.pdf (March 27th, 2015).

²⁸ Gongola, Janet: The America Invents Act: Reforming the US Patent Law for the 21st Century, *Inventors’ Digest*, Vol. 28, No. 9 (2012), p. 26.

²⁹ *Ibid.*

³⁰ Sherman, Cherie Ann and Anderson, Philip M.: What Students and Independents Inventors Need to Know About the America Invents Act. *Southern Law Journal*, Vol. 23, No. 2 (2013), pp.215-216.

Picture 1: Patent Protection System in Pre-AIA, Post-AIA, and EPO³¹



Sherman and Anderson (2013) affirm that determining which inventor receives a patent grant depends on when and where the inventor requests.³² Prior to AIA, in order to obtain patent right, an invention is required an inventive step and its potential practical application.³³ As theoretical case regarding first-to-invent: if it was A who conceived the invention in January, but B was the first one to reduce the same invention to practice on March, though B conceived the invention after A, only A's invention is protected if A can reveal the reduction to practice's date prior to B's. Now, first-to-invent system is not used by any states in the world. Using the term 'first-inventor-to-file' under the post AIA, it can be illustrated under this example: If A invented the invention in January and later in the same month A disclosed the invention in publication then filed the patent application in April, but B conceived the same invention in February then filed the patent application in March, A's invention would be awarded the patent since A had disclosed the invention to public³⁴ before B proceeded the application.

The procedural steps in the European Patent Office (EPO) seem as a simplified first-to-file system. If A filed an invention that is patentable³⁵ in January and B a filed similar invention in January but conceived the invention prior to A, A will be awarded patent by the EPO simply based on the filling date. In contrast with the post AIA, if

³¹ *Ibid.* p.216.

³² *Ibid.*

³³ The pre-AIA regime the first person to invent a product or process gets the patent rights. Barrett, Margreth: Intellectual Property. Aspen Publishers Online, 2008, p.40. *See also* Miller, Roger and Jentz, Gaylord: *Business Law Today: The Essential*, Cengage Learning, 2007, pp. 151-154.

³⁴ 35 U.S.C. § 102 (2011).

³⁵ To be patentable, an invention must be novel and involve an inventive step. EPC, art.52.

the invention has become publicly available in any way before the patent application was filed, the application will be rejected.³⁶

Effective Enforcement of Indonesian Patent Law: A Domestic and Regional Step Ahead

Indonesian Patent Law contains 139 articles and most of them reflect the core harmonization contents found in TRIPS.³⁷ Under this law, an invention is granted patent right for novelty, inventive step, and capability to reduce it in industrial practices.³⁸ This law also affirms the usage of first-to-file system³⁹ where available publication to be made before filling the application prevents the inventor from patent protection.⁴⁰

Though Indonesian Patent Law has comprehensive patent protection regulating contents, in fact, it is still far from the main goals of this law regarding stimulation of new invention and generating citizen's prosperity. This paper recommends that there is no need to amend the law, however, gives three different argumentations in strengthening the current Indonesian Patent Law: first, building pro-new invention policy; second, legal enforcement assurance; and third, explication of patent access to and from ASEAN member states.

Pro-new invention policy;

- There is no doubt that Indonesia is also a source of industrial creativity.⁴¹ The majority of inventions, let them be simple or higher quality, are created by creative, young Indonesian inventors. The vast majority of natural resources, the increasing number of population, the high level of poverty, and unequal job opportunities are key factors in influencing the rise of stringent competition. It is true that this kind of competition could not be positioned parallel with the stride competition in developed countries. However, the factual situation of competition raised in the society stimulates creative invention with local character i.e. some inventions are patented in the agricultural area.⁴²
- Even though competition dominantly exists in the modern Indonesian society, the number of patent applications still inconsiderable. There were only 7.032 patents granted in 2012, however, it increased by 14,71% from 6.130 patents in

³⁶ *Ibid.*, art.54.

³⁷ Indonesia is also party to international treaties relating patent beside TRIPS, such as: Paris Convention for the Protection of Industrial Property (1883) succeeded from Netherland, and Patent Cooperation Treaty (1970) in 1997.

³⁸ Indonesian Patent Act, art. 2 (1).

³⁹ *Ibid.*, art. 20.

⁴⁰ There is no grace period for available publication under Indonesian Patent Law. *Ibid.*, art.3.

⁴¹ Sumotarto, Untung: Industri Kreatif Berbasis Sumber Daya Alam. *Paper Proceeding*, Simposium Nasional 2010: Menuju Purworejo Dinamis dan Kreatif (2010), pp.2-9.

⁴² For example: Agricultural cutting machine (mesin potong pertanian) registered under Patent No.877 (2007), Bioorganic fertilizer formula from latex waste and specific microbe (formula pupuk bioorganik dari limbah lateks dan microba pengaya) registered under No. 1350 (2014), and etc.

2011.⁴³ From those numbers of patents, only few were patented under WIPO: less than 20 in 2010.⁴⁴ Starting from this factual basis, it shows that the Indonesian government needs to evaluate their work and shall focus on boosting the number of patent applications. The government must revise the policy of pro-patent environment in order to create public awareness on how important to protect their invention is. Not only altering citizen mindset, the government should also modify their current policy and should be friendlier with new inventions, such as: decrease or even erase the annual cost of patent's safeguard,⁴⁵ support new inventions with potential commercial benefit,⁴⁶ and synergize work between government institutions to support new invention that contributes more benefits for the country.

Legal enforcement assurance;

- There is no need to change the patent system as it currently exists in the USA. The first-inventor-to-file solution is suitable for U.S. conditions where vast commercial competition occurred at any time with different level of complexities. By using the simple system of first-to-file, the Indonesian patent system is perfectly suited with the country's situation.

Again, there is no need to amend the Indonesian Patent Law because this law is not broken and still fits to establish the patent mechanism. However, to affirm the enforcement of the law, there are some Government Regulations (*Peraturan Pemerintah*) that need to be enacted to bring certainty, to provide examples: specific law regulating guideline for license agreement⁴⁷ and application of simple patent or petty patent.⁴⁸

To be effective, Indonesian Patent Law shall not discriminate inventions, either. The *Tukirin v PT. BISI*⁴⁹ case shows that patent awareness and the protection of simple invention has not been in the government's centre of attention. Tukirin, being a farmer who found the cross planting technique and lacking IPR's understanding, filed a criminal complaint against the company getting monetary loss from his experience. As we learned from the United States' practice, even though there are some limited

⁴³ Directorate General of IPR, Indonesian Ministry of Law and Human Rights: Statistik Paten 2012, available at <http://www.dgip.go.id/statistik-paten> (April 1st, 2015).

⁴⁴ Yuliyanto, Iwan: Prestasi Indonesia dalam Jumlah Paten Internasional, available at <http://iwanyuliyanto.co/2012/02/12/dalam-jumlah-paten-internasional-indonesia-pun-sangat-jauh-tertinggal/> (April 1st, 2015).

⁴⁵ The annual cost imposed for safeguarding the patent protection but failing this obligation will result the null and void of the patent's approval. This regulation is not supporting the simple patent. In 2013, around 2.800 patents threaten by its cancelation from government approval because of their failure to meet the annual cost obligation. Indonesian Patent Law, art. 115 (1). See also Paten Indonesia: Ribuan Paten Terancam Dibatalkan, available at <http://www.patenindonesia.com/?p=685> (April 1st, 2015).

⁴⁶ There are a lot of new invention competition holds by the government and once the committee selected the winner then no specific support to register those invention.

⁴⁷ Indonesian Patent Law, art.73.

⁴⁸ *Ibid*, art.87.

⁴⁹ Walhi: Paten Benih Menyeret Petani Jagung ke Meja Hijau, available at http://www.walhi.or.id/kampanye/psda/050928_benihjagung_cu/ (April 2nd, 2015).

exceptions, the AIA does not intend to discriminate among categories of inventions or certain industries for the purpose of providing incentive for the innovation across various industries.

Regional enforcement access to ASEAN member states

Most importantly, as an influential member of the Association of South East Asian Nations (ASEAN), Indonesia had the opportunity to propose the unitary ASEAN patent agreement in order to build the ASEAN Patent Office and the ASEAN Patent Court to carry out post ASEAN Economic Community 2015 implementation. These regional efforts have been initiated since the signing the ASEAN Framework Agreement on Intellectual Property Rights Cooperation in 1995.⁵⁰ This Agreement has not entered into force yet, however, member states have already begun to build the ASEAN Patent Examination Co-operation (ASPEC) launched in 2009 as the first regional patent work-sharing programme among nine participating ASEAN Member States.⁵¹

With the implementation of AEC 2015, the unitary system of ASEAN patent law is necessary to make a balance based on the increase in the borderless movement of people, goods, services, and capitals among member states. All member states signed and ratified the TRIPS and changed the patent protection system (especially for Philippine prior the Republic Law No. 8293)⁵² to the first-to-file system. Existing national laws in each member state are currently moving forward to face global challenges. Cultural and political considerations were not barriers to build comprehensive regional patent system proven from the community intention to implement the AEC 2015. The establishment of the ASEAN Patent Office and ASEAN Patent Court will enhance its regional patent application and protection. Particularly, the Patent Office will systematically improve the quality of granting authorities, remaining efficiency, overcoming dynamical regional problems and strengthening regional cooperation to support more regional inventions and new inventors as well. Granted patents under the ASEAN Patent Office are having unitary effect providing unitary protection in all member states.⁵³ Furthermore, in light of the establishment of Unified Patent Court, future ASEAN Patent Court will ensure the enforcement of patents granted under unitary ASEAN patent law.

⁵⁰ ASEAN Framework Agreement on Intellectual Property Cooperation signed in Bangkok, Thailand, December 15th, 1995.

⁵¹ All ASEAN Member States joint the work-sharing programme except Myanmar. ASEAN Intellectual Property Portal: ASEAN Patent Examination Cooperation, *available at* <https://www.aseanip.org/Services/ASEAN-Patent-Examination-Co-operation-ASPEC> (April 2nd, 2015).

⁵² In 1997, Philippine switched the system from first-to-invent to first-to-file system. Philippine Republic Act No. 8293, Chapter III, section 29.

⁵³ Bently, Lionel and Sherman, Brad: *Intellectual Property Law*, Oxford University Press, 2014. p. 295.

Conclusion

Indonesian Patent Law is a comprehensive national patent law tailored to the general situation of the country. However, the implementation is out far from the expectations: only a small number of patents is granted in the international patent office such as WIPO. Considering the current development of patent protection concept in the United States and in the European Union, this study affirmed that there is no stumble in the Indonesian Patent Law. However, to come up with the goals of this law, there should be three main efforts: first, the Indonesian government must ensure their policy with domestic inventions by giving true assistance to get patent recognition and support the reduction of their invention for commercial benefits. Second, assuring legal certainty by providing the needed regulation the most important consideration is to present non-discrimination undertakings. Third, proposing the unitary ASEAN patent law system by building the ASEAN Patent office and ASEAN Patent Court to develop regional inventions and to enhance regional protection.

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