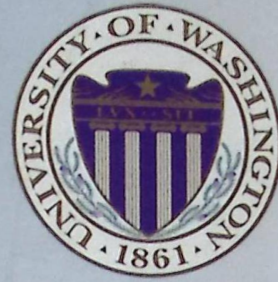




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Proceeding

International Conference

Southeast Asia Legal Education

Preparing Lawyers for Tomorrow's Society and Profession

Joint collaboration between School of Law University of Washington
and Faculty of Law Universitas Airlangga, Indonesia

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Preparing Lawyers for Tomorrow's Society and Profession

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**THE TRADITIONAL KNOWLEDGE
AS A TEACHING MATERIAL****Dr. Agung Sujatmiko¹
Ria Setyawati²****Abstract**

Intellectual Property Rights (IPR) Education Method and Its Role on IPR Enforcement in Indonesia. The aims of IPR education establish in Indonesia faculty of law are providing in depth understanding of IPR knowledge for students. The materials for IPR class are IPR protection both national and international law perspective. Its also contained the TRIPs Agreement and related international conventions. These materials are needed to improve IPR substance globally for students.

There are several reasons why IPR education is needed for law students in Indonesia. First, nowadays IPR infringement in Indonesia still on the Priority Watch List of the United States Trades Representative (USTR). Second, law enforcement on IPR in Indonesia is weak. These two condition could be the affect of the societies knowledge about IPR is not comprehensive. That is the reason why Indonesian law students as substantial part of the societies need IPR education. They are the candidates of law enforcement officer and the future lawyers. They will be on the front line of IPR protection in Indonesia. In this matter, the reconstruct of IPR education is needed. The method of IPR education not only in the form of classical class, but also discussion and case analysis. Thus the teaching materials are included substantive law and law enforcement on IPR matter.

Keywords: IPR education, law enforcement of IPR

1. Introduction

Traditional knowledge is part of the material in the Intellectual Property Law (IPR) class for undergraduate program (bachelor degree program). It is not similar to other materials in IPR matters (such as Trademark, Copyrights, Patents, Industrial Design, Right to Layout Design of Integrated Circuits, Trade Secret, and the Protection of Plant Varieties), which have been regulated in a National Law, Traditional Knowledge has not been set in the a separate regulation. Until now, Indonesia does not have a special law on the setting of Traditional Knowledge. Even so, the material on this traditional knowledge remains as an important matter. It become a subject that debatable at national and international levels as well.

In law faculty, the teaching materials for IPR subject are deliberately provided for the purpose of the knowledge of the traditional knowledge as a part of IPR. There is a reason why the traditional knowledge become important subject is because Indonesia has a lot of potential and traditional knowledge. Traditional knowledge in Indonesia is widespread in parts of Indonesia territory which consists of thousands of islands, separated from each other. Each

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area in Indonesia territory provides the potential number of traditional knowledge, so it will be of great benefit for students to study the material in traditional knowledge.

2. The Definition of Traditional Knowledge

World Intellectual Property Organization (WIPO) stated the definition for traditional knowledge as it is not limited to any specific field or technology or the arts. The entire field of human endeavor is open to inquiry by traditional methods and the full breath of human expression is available for its transmission. Traditional knowledge system in the fields of medicine and healing, biodiversity conservation, the environmental and foods and agriculture are well known. Still the definition of WIPO version, traditional knowledge is the categories of traditional knowledge include expression of folklore in the form of music, dance, song, handicraft, design, stories and artwork.

The definition of the traditional knowledge is the same with the definition which stated at the Convention of Biological Diversity (CBD). Based on the CBD, traditional knowledge is knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. According to the definition in the CBD, the scope of traditional knowledge is including traditional medicine, folklore and so on.³

At the convention, some members acknowledge the connection between the dependence of the tradition with traditional communities and biodiversity.⁴ The main purpose of this convention is there should be legal protection for traditional knowledge in all its forms, including traditional medicine (herbal medicine or concoction) in order to achieve the community welfare. Thus, the protection of traditional knowledge have to be protected.

Article 7 Trade Related Aspects of Intellectual Property (TRIPs), stated that, The Protection and enforcement of intellectual property right should contribute to the promotion of technological innovation and the transfer and dissemination of technology to the mutual advantage of producer and user of technological knowledge and in a manner conducive to social and economic welfare, and to balance of rights and obligations. Based on that Article, the aim of the protection and the enforcement of intellectual property are encouraging innovation, transferring and dissemination of technology by creating social and economic well-being and also balancing between rights and obligations.

3. The Protection of traditional medicine (Concoction) Under Patent Law

The pharmaceutical companies who produced modern medicines, have the privilege protection by Patent Law as stipulated in Law no. 14 year 2001 (hereinafter referred to as UUP).

3 Fadia Fitriyanti, *Peran Pemerintah Indonesia Dalam Melindungi Pengetahuan Tradisional (Folklor) menurut Undang-undang Hak Cipta*, Paperwork that presented at Konferensi Asosiasi Pengajar Hak Kekayaan Intelektual, Fakultas Hukum Universitas Padjajaran, Bandung, 12-13 Desember 2012, p. 1

4 Adya Paramita Prabandari, *Sistem Registrasi Sebagai Alternatif dalam Memberikan Perlindungan Atas Pengetahuan Tradisional (Studi Kasus Sengketa pengetahuan Tradisional Antara Amerika Serikat dan India)*, Thesis, Master Program at Universitas Diponegoro, Semarang, 2008, p.22

Patent is an exclusive right granted by the state for the inventor on the results of invention in the field of technology. Due to the period of the protection, an inventor has the right to deliver their consent to the other party to do so (Article 1 paragraph 1 UUP).

The medicine invention is falls under the protection of patent regime. It is because the drugs invention meet the requirements for patentability as set out in Article 2 UUP. While in the area of traditional medicine, is also could be granted the protection under patent law. There is still a question about the possibility to give protection for traditional medicine under the patent law.

The terms of the patent requirement, particularly concerning about novelty. In this point, it is not possible for the herbal medicine granted the patent protection since the nature of novelty in it does not exist. The existence of the herbal medicine is already known by the indigenous people. In addition, the granting of the patent for traditional medicine (herbal medicine) is constrained by the provisions of article 7 letter b and Article 7, paragraph d UUP. Both Articles are related to the exception for granting patents.

Beside the novelty, the traditional medicine does not meet the inventive step requirement. The inventive step requires that the invention from the standpoint of technology is a new invention, while herbs such as herbal and traditional knowledge such an inheritance that lasts from generation to generation. The last requirement for the patent protection is that the invention must be applied in the industrial field (useful / industrially applicable). It means that the invention can be produced using a variety of industries. In this matter, the claims mentioned in the patent documents can be conducted by following the instructions which described in the patent specification. The protected works must be opened for technologically invention (disclosed). In the other word that the invention must be able to implemented by anyone who has the technical knowledge in the related field. If the inventor can not explain how the invention can be applied in the production process, the invention can not be granted patent protection. The candidate of patent grants is that they should be taught how to use the invention in question. In such way, the development of technology will increase because each party was given the opportunity to study such invention, which can ultimately find a new technology through continuous research based on the existed invention. In this matter, the traditional herbal medicine can not be protected. It is because its manufacture is based on the traditional knowledge handed down through generations. In general, traditional knowledge of herbal medicine has become the property of the indigenous people. This was in accordance with the meaning of the traditional knowledge which that the knowledge gained from generation to generation, based on the tradition and supported by the community. Based on those fact of the traditional knowledge, the protection of herbal medicine is still not granted the patent. It is because the traditional herbal medicine does not meet the requirements of the patent granted. The three requirements are: the work is a new invention, it has an inventive step, and can be applied in industry. The three requirements are cumulative, in the other words, that all three requirements must be met. The protection for the traditional knowledge become the concern matter for the Proposal of the TRIPs agreement delivered by many participating countries. At the fourth meeting of the WTO Ministerial Conference in Doha (November 2001), they proposed that the TRIPs agreement and the CBD have some clauses to protect the traditional knowledge which are also include the traditional medicines and folklore.

Meanwhile WIPO is currently negotiating an international agreement (treaty) on traditional knowledge and folklore. This is a good start to provide protection to traditional knowledge in all its forms. Therefore, currently, Indonesian government construct the draft of a regulation on the Protection and Use of Intellectual Property Traditional Knowledge and Traditional Cultural Expressions (the Bill of PTEBT). The bill will discuss the protection of traditional knowledge in the form of herbal medicine in the community, in particular the Madura traditional herb which widely produced in Madura island.

4. The Protection of Traditional Knowledge

Based on some literatures, a traditional herbal medicine as one of the category of traditional knowledge that should be protected under IPR regime. The traditional knowledge is a knowledge that is developed by an indigenous people (indigenous community). It is also named as an intellectual work based on tradition. The knowledge or the work is used by a generation and passed on by the next generation and developed based on to the needs of a particular region. M. Hawin argued that traditional knowledge includes methods of cultivation and processing of crops (agriculture), treatment, medications, food and drink recipes, art and so forth.⁵ It is also includes drugs that fall into this category of traditional herbal medicines, potions and so on.⁶ M. Hawin stated that, the protection of traditional medicines and traditional herbal medicines is needed to protect the traditional knowledge. The wrong do of the commercialization of the traditional knowledge i the form of genetic resources, is estimated that the value around U.S. \$ 800 billion per year.⁷ Besides that, there are many research use the traditional knowledge as the starting point to pursuit their own patent products.⁸ Traditional knowledge, as one of the material of the Convention on Biological Diversity (CBD), has been ratified by 170 countries, including Indonesia through Law no. 5/1994. Eventhough it has been ratified under Indonesian Law, the government do not have much effort to protect the traditional knowledge within Indonesian territory.⁹ Article 8 (j) of the CBD states "States Parties shall respect , preserve and maintain traditional knowledge; in use it must seek approval from and involve the holder, and to support the distribution of benefits (benefits) of its fair manner". But until now there has been no single international agreement that stated about about how the implementation of these provisions, both in the TRIPS agreement and other agreements.¹⁰ According to Agus Sardjono, the government is more focused on the formation of IPR laws as a consequence of ratification of conventional TRIPs agreement (WT) such as; Law.30/2000 on Trade Secrets; Law. 31/2000 on Industrial Designs; Law. 32/2000 on Layout Designs of Integrated Circuits; Law. 14/2001 on Patents; Law. 15/2001 regarding Mark; Law. 19/2002 on Copyright; Presidential Decree. 15/1997 on the ratification of the Paris Convention, Presidential Decree. 16/1997 on the ratification of the PCT, Presidential Decree. 17/1997 on the Ratification of the Trademark Law Treaty; Presidential

5 M. Hawin, Op. Cit., p. 2

6 Ibid.

7 Ibid.

8 Ibid.

9 Agus Sarjono, Upaya perlindungan HKI yang terkait dengan Genetic Resources, Traditional Knowledge and Folklore (GRTKF), di Tingkat nasional dan Internasional : Upaya yang belum Sebanding , a paper that presented at a Seminar conducted by JICA incorporation program with Ditjen HKI at Hotel Santika, Jakarta, 11-12 Juli 2005, h. 8

10 M. Hawin., Op.Cit., p. 3

Decree. 18/1997 of the Berne Convention and the Presidential Decree. 19/1997 of the WIPO Copyright Treaty.¹¹

Now, whether the existing legal instruments in the field of conventional IPRs can be used as a protector for traditional medicine and falls under the category of traditional IPR regime?¹² M. Hawin answer the above problems with three models approach:¹³ First, the position the public domain. This model suggests that traditional knowledge should be public property that should be enjoyed by all people in the world. Hence its adherents against businesses who want to make a traditional knowledge as komodite goods of a commercial nature and can be traded. In general, they support traditional social structures to maintain and control the use of traditional knowledge. Therefore, they do not agree to the creation of intellectual property rights for traditional knowledge. It is because, as intellectual property rights protection is more concerned with the individual, so it is a tool that will destroy traditional institutions and structures in traditional knowledge. Second, the model approach appropriation position. This approach fully supports the rights of exclusive ownership of traditional knowledge by an authority or body to be able to determine their use for commercial purposes and other uses. Principled adherents that because traditional knowledge is part of the IPRs, traditional knowledge can then be used as a commodity and can be traded commercially in the market. Therefor, its adherents have principles that IPR regime is very important to determine how and who is entitled to use the traditional knowledge. With such an approach, it will leads to ownership of traditional knowledge by multinational firms which are generally claimed in developed countries. Third, the model approaches the moral rights position. This model states that traditional knowledge should be protected and given the full rights of ownership, so as to prevent or oppose the claims of the beneficiaries or users of traditional knowledge, including multinational companies though. Further traditional knowledge can be commercialized, but only by the party entitled to the traditional knowledge alone. According to M. Hawin, in this case the IPR laws can be used to determine who is entitled to possession of and utilize the traditional knowledge.¹⁴

From the four of some models that the existing IPR laws, then there is some possibility of protection of traditional knowledge in the form of traditional medicine. The possibilities are :

First, the protection of the Law Number 15 Year 2001 about the protection of Geographical Indications. Article 56 paragraph 1 and 2 of the Act allows the protection of traditional herbal medicine. The existed systems in this geographical indications use the first to file system. It means, the registration is needed for the protection of traditional medicine. Registration system is seems the right system, as an alternative to the protections for traditional communities who own the traditional knowledge. The Registration for traditional knowledge requires an official documentation that describes the traditional knowledge. There are two ways to implement the registration for the traditional knowledge. First, with local recording system (within the community) or secondly, by an external recording system (outside the community itself).¹⁵

In The local recording system, the community can jointly decide which traditional

11 Agus Sardjono, Op.Cit., p. 8

12 Ibid

13 M.Hawin, Op.Cit., p. 4

14 M. Hawin, Ibid, p. 5

15 Adya Paramita Prabandari, Op.Cit., p. 29

knowledge will be listed into the system. Besides put a Traditional knowledge into the list, the system also consider which one will be distributed and/or disclosed to people outside the community. As for the external recording system performed outside the community, which is often on a national or international level. In this external recording system, can be done by government, non-government organizations, museums or libraries.¹⁶ Such records will collecting the list of specific traditional knowledge which owned by the indigenous people or traditional communities.¹⁷ Secondly, the protection of the Law Number 19 year 2002 regarding Copyrights. In this Act, there is a protection for folklore. Article 10 paragraph (2) of the Copyright Act, states that the state holds the copyright for folklore and folk culture and it is owned by Indonesian citizen. For example, urban legend, tales, fairy tales, legends, Chronicle, songs, crafts, dance, calligraphy, and other traditional art works. According to M. Hawin, the provisions grants the State as the copyright holder of the state traditional works, and the state has an obligation to protect it from the harmful use of another paties.¹⁸

Since the Traditional Knowledge does not met the requirements for the patent protection (the invention is new, it involves an inventive step, and it can be applied in industry), nor give protection under the Copyright Act, there are another possibilities to give protection for traditional knowledge with create a regime of IPR. In this matter, the best way is put the traditional knowledge into seperate Law.

5. The Law Enforcement to Protect Traditional Herbal

There are two mechanism of law enforcement for any violation that hamper traditional knowledge. There are the protection by the law throught some sort of legislation and non-law protection. Protection in the form of legislation is the protection of traditional knowledge by embedding the form of law, such as IPR laws, rules and regulations governing the issue of genetic resources, and traditional knowledge in particular. Protection in the form of non-law can be done with traditional knowledge protection mechanisms against the non- binding nature, which includes the code of conduct adopted by international organizations, governments, and non- governmental organizations, professional societies, and the private sector. Moreover, it can also compile through discovery, registration and database of traditional knowledge. The combination of the protection mechanism will provide a positive and effective benefits to prevent and to give solutions for any violations that hamper traditional knowledge.¹⁹

Through the complete and acurate database in every area/region will present the detail of the traditional knowledge in an area. This database only can be done by creating a separate task force that is credible and profesinal. The task force will have some sort of tasks to gather all of information of traditional knowledge. Another alternative is to provide an additional duty on departments/agencies in the field of traditional knowledge, for example, Forums, archaeological, and so on.

Recently, at the global level, it is undeniable that there is resistance or refusal of some

16 Ibid., p. 30

17 Ibid.

18 M. Hawin, Op.Cit., p. 13

19 Tommi Ricky Rosandy, Perlindungan Terhadap Pengetahuan Tradisional, a paperwork, 8 September 2011, p.2

developed countries such as UK, USA, France, Japan to provide consent to the proposal and the signing of the Draft of United Nations Declaration on the Rights of Indigenous Peoples. The rejection indicates that the developed countries do not want to (reluctantly) admit collective rights of communities over their traditional knowledge, which includes traditional medicines (herbal medicine).²⁰

Meanwhile, Philippine has legal protection for traditional traditional knowledge, as outlined in the Section 17, article 14 of the Constitution which stated as follows:²¹ "The state shall recognize, repect and protect the rights of the indigenous cultural communities to preserve and develop their cukltures, traditions and institutions. It shall consider these rights in the formulation of nationaln plans and policies Furthermore the provisions in the Indigenous Peoples Rights Act 1997 contains a provision as follows: "indigenous cultural communities/indigenous peoples have the right to practice and revitalize their own cultural traditions and customs. The state shall preserve, protect and develop the pass, present and future manifestation of their culture as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and prior in formed consent or in violation of their laws, tradition and customs."

The provisions use declarative principls. There also set up the reward for the people who own the traditional knowledge whenever the works are being taken without permission by another parties. Desides the rewards, there is also punishment for any act that breach those articles. Indonesia also has a similar arrangement in the Copyright Act which governs Folklore. The provisions contained in Article 10 of Law no. 19 of 2002 on Copyright which provide protection to the works of traditional knowledge in Indonesia.

Article 10 of Law Number 19 Year 2002 is not successful implemented. This is due to several factors that discourage it, namely, the lack of regulations observance. Some traditional knowledge from Indonesia are claimed and owned by neighboring country, Malaysia. For example, traditional songs, dances, and one of the famous folklore from Ponorogo called Reog. On the Draft Law on Traditional Knowledge and Traditional Cultural Expressions (RUUPTEBT), in Article 1 (3) explained that the use of traditional knowledge by foreign individuals or foreign legal entity or legal entity Indonesian foreign investment , must be through the mechanism of utilization and access permissions utilization agreement. Utilization of Traditional Cultural Expressions, does not require access permits utilization and utilization agreement . Traditional knowledge in these RUUPTEBT is intellectual work in the field of science and technology will contain elements of traditional heritage characteristics of the generated, developed, and maintained by its custodian. The drafts of the custodian for traditional cultural expressions as the intellectual work in the arts, including literary expressions that contain elements characteristic traditional legacy generated, developed by its custodian. The Custodians of traditional knowledge and/or traditional cultural expressions are local communities or indigenous peoples who live in a particular territory, which have similar values and social cohesion, and, maintaining and developing Traditional Knowledge and Traditional Cultural Expressions traditional. The term of protection for traditional knowledge is still maintained by its custodian. This means that, since the term of protection does not set yet, the utilization of traditional knowledge and traditional cultural expressions will aprotected by the

20 Ibid.

21 Ibid.

state. So that the other party is not allowed to have it. While in principle form of protection covers the prevention and prohibition of :

Utilization of traditional knowledge held by foreigners or foreign legal entity or legal entity of Indonesian foreign investment, without the use of access permissions and agreements;

The Utilization of traditional knowledge and traditional cultural expressions made by any person or entity, both foreign and Indonesian which did not mention clearly the origin area of traditional knowledge and/or traditional cultural expressions and its custodian, which also contain the source and the owner of traditional knowledge and expressions the traditional culture;

The utilization of traditional knowledge and traditional cultural expressions made by any person or entity, whether foreign or Indonesian, which is done improperly, distorted and incorrect impression of the peoples concerned, or that makes the community feel offended , insulted , blamed and / or polluted.

6. The Protection for Traditional Herbal Medicine from Madura

Madura is an island in Indonesia territory. There are many traditional herbal medicine originated from this island. Since the existed legislation for the traditional knowledge is not available yet, one alternative protection of traditional medicine in the form of herbal medicine, namely the documentation system. The local governments of Madura required to perform their duties as protector of traditional knowledge in the form of Traditional herbal medicine from Madura. They have the Local Government Act Number 32 year 2004. Based on the Local Government there are some action perform by local government, namely:²²

1. Make a documentation of the traditional herbal medicine from Madura as deensive protection;
2. There should be a cooperation among the local government in Madura to have a trong commitment for the protection of the traditional herbal medicine;
3. Generating the new innovation and invention of the traditional medicine through Research and Development program;
4. Alocating the local budget for the related program;
5. Provide the establishment of representative institutions of industrial society among all over districts in Madura.

Some of these efforts need to be made with respect to the existence and the rights of indigenous peoples who have not yet received the full attention of the government. That's because even though the local communities and the state can be custodians of traditional knowledge and traditional cultural expressions, indigenous people still have the biggest role in its development. All of the traditional knowledge are developed by indigenous people through their local knowledge, ceremonies, arts, culinary, medicine, and folklore. As long as the indigenous people acnknowledge their traditional knowledge, the protection for the works are possible to be protected. Darell Posey stated that if an extinct indigenous peoples, then the world will lose

22 Saleh, *Perlindungan Obat Tradisional Melalui Sistem Paten*, a paperwork 2010, p.2

thousands of years of accumulated knowledge about life and how to adapt in tropical ecosystems, resulting in the loss of information that is invaluable.²³

Thus, the bill of PTEBT should be regulated soon. It is also important to put Adat Law to decaome a part of this regulation. Adat law will reveal the dispute among some indigenous people on the area of traditional knowledge.²⁴

7. Conclusion

Teaching materials of traditional knowledge in the subject of Intellectual Property Rights at the Faculty of Law should be tailored to the potential spread of traditional knowledge in the country. It is important to emphasis on regional specialties in certain areas and the local integrated with local knowledge. Meanwhile, the legal form on traditional knowledge that not yet available, should be one of the topic for the traditional knowledge issues. It is also important to give global aspects perspective of related issues. The students need to make research from the reports, papers, discussion forum in seminars or conferences in Indonesia and overseas country.

²³ Afifah, Kusumadara, *Pemeliharaan dan Pelestarian Pengetahuan Tradisional dan Ekspresi Budaya Tradisional Indonesia: Perlindungan HKI dan Non HKI*, Jurnal Hukum, No.1, Vol. 1, 18 Januari 2011. p.33

²⁴ Ibid., p. 35

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