

Intellectual Property Right (IPR) as a Common Property in Perspective Compilation of Islamic Law

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ABSTRACT: This study tries to answer three important issues, which are about the judicial momentum of the Intellectual Property Right (IPR) pre-marriage before registration is accomplished, relevant and justice for all of each person (al-qisth) to the division of common property, legal certainty about the distribution of common property based on the Compilation of Islamic Law (CIL) applied through the instrument of law of Presidential Instruction No 1/1991. The result of this research indicates that IPR is the exclusive Right recognized by the State through legislation on the intellectual creativity concerned, regarded as one of property Right, a value intangible object as a moral Right and economic Right and useful for the community, and as economic life of the husband and wife inclusively. Although the laws and regulations on IPR do not provide assertiveness and explanation about the status of IPR as husband and wife, but through the theory of kind and justice and referring to the Marriage Law (ML) and Compilation of Islamic Law (CIL), unconstitutional IPR can be categorized as a common property and still relevant to the division of Right respectively husband and wife with the same parts. The provisions on the distribution of a common property based on the Compilation of Islamic Law which was enacted through Presidential Instruction No. 1/ 1991, needs to be a refinement of the material and changes in its legal instruments.

Keyword: Intellectual Property Right, Common Property, Compilation of Islamic Law

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I. INTRODUCTION

Common Property in human life, related by marital relationship between husband and wife in the household. Marriage is defined as a strong relation between a man and a woman as husband and wife in order to make a happy and eternal family (household) based on the One God. Compilation of Islamic Law (CIL) states that marriage aims to realize serenity, peace and compassion in a family. One additional factor to get domestic happiness it is to have the property during the marriage. The ownership of intellectual property Right that occurs between two persons in a marriage is referred to as common property in marriage, Article 35 of Law Number 1/1974 about Marriage Law (ML) is defined of any property acquired by a married couple during marriage. Furthermore, in Article 87 paragraph (1) Compilation of Islamic Law (CIL) mentioned exceptions with the acquisition of grants and inheritance. Special to property acquired during the marriage in classical fikih terminology categorized or classified by syirkah al-Abdan. According to the terminology of Islamic jurisprudence, al-Abdanyirkah first introduced in the battle of Badr by three companions of the Prophet, Abdullah Sa'd and 'Ammar who teamed up to get ghanimah, not in the context of al-Abdanyirkah between husband and wife in marriage. But in Indonesia then popularized by the Marriage Law with the title of common property (vide article 35 paragraph (1)) which mentions: "Property acquired during marriage are being a common property". Although in rule of Court Religion before independence and the ML not arise also been known the common property in various terminologies, such as the Gono-gini in Java, Hareutasi hareukat or hareuta reputable in Aceh, Harta Suarang in Minangkabau, guna kaya in Sunda and druwegrabo in Bali traditionally show the Indonesian people have known the substance of common property, so that M. Yahya Harahap said that apart from the common property instituted on the basis Syirkah al-Abdan also mentioned that the common property is based on the theory of 'urf.

The mention of common property as terminology property acquired during the marriage too globally and generally, so that Article 9 1 of CIL more details objects including the common property. The detail come with the emergence of science and technological developments which includes right and obligations as part of

intangibles into the common property. Further, Intellectual Property Right (IPR) are incorporated into the right as part of intangible objects derived from the work of the brain.

Intellectual Property Right (IPR) is an acronym of IPR is mentioned by Imam Syahputra as a right to property arising from human intellects in technology, or science, art and literature produced by human beings through their intellectual ability, creativity and taste. Including one of IPR is copyright, the exclusive right as creator or the assignee right to announce or reproduce the creations or grant permission to it without prejudice to restriction under applicable legislation, as in Act No.19 Year 2002 About Copyright (CL) in Chapter I Article 1, letter a.

The development of science and technology with the ratification of the General Agreement on Tariffs and Trade (GATT) and Trade-Related Aspects of Intellectual Property Right (TRIPS) as mentioned in Act No. 7 of 1994 the spread impact of all kinds of Right belonging to the IPR are protected by laws and regulations in Indonesia. The protection of IPR as material right have consequences the right holder of IPR can enjoy the creation or invention.

The position of IPR into the intangible things classified as a common property is referred to in Article 91 paragraph (1) and (3) of Compilation of Islamic Law that impact for the spouse holder on IPR are also entitled IPR owned by their partners, but because of the initial concept of common property start from concept *syirkah al-Abdan*, then direct involvement in producing a creation or invention is not a requirement for the validation of *syirkah al-abdān* which will bring up the common property.

In this regard, the concept of common property concluded in "obtained in marriage" is a vague and unclear concept, because the IPR is not arise immediately after the invention, but the right was be arise at the time of registration at the Directorate General of IPR in the Department Law and Human Right requiring the time and cost. In addition, the expiry Right of IPR that produce property does not stop with the marriage breaking up, but still continues until the expiration of the IPR certificate held by the inventor.

Standing on the obscurity concept of common property with the object of IPR, Article 96 paragraph (1) Compilation of Islamic Law (CIL) states that if a divorce dies, then half the common property becomes the right of a spouse who live longer, while in Article 97 explained further that the divorced widow or widowers shall be entitled to one half the common property as long as it is not specified in the marriage agreement. Thus it is clear that the CIL divides the two equally of the property acquired during the marriage or a divorce alive or dies. Based on the above, then there is a problem of common property with the object of IPR. To answer this issue, it is necessary to research the extent status of IPR ownership acquired before the occurrence of marriage or the owners of IPR has died in the marriage bond while the period of IPR ownership has not expired in the certificate. Similarly, in dividing the common property with object IPR when the spouse of husband and wife going divorce.

The research of sharing common property with object IPR are interesting to be examined by arguments: First, there is no clarity in the rules and regulation governing the different types of IPR as a common property. Second, there is no justification in sharing the common dispute for the disputers. Third, there is still misunderstanding in the community about IPR as a common property.

Based on the background of the problem above can be identified the issue of IPR as a common property. First, from a qualification of the common property that mentions "common property is acquired during the marriage, except acquired by inheritance and grants." The common property with the object of IPR has a different legal character from the other common objects of property. IPR has two stages, are: The first stage, completed the creation or invention. Second stage, registration of creation or invention. Royalties of creation or new invention arise after these two processes. However, it is possible that the second stage arises by buying the creation or invention of others. Likewise with the possibility of the creation or invention are sold before the certificate of IPR come out. Second, the issue of the division, in Article 96 and 97 Compilation of Islamic Law, is called for two with the equal part. The decisive jurisprudence is divided into three, two parts for the husband and one part for the wife.

II. CONCEPTUAL AND PARADIGM

Refer into various laws and regulations concerning intellectual property Right, there is no definition of what constitutes of IPR. However, in various legislation that contains IPR are always refer to addendum 1 letter c of Law Number 7 of 1994 concerning the provision of the Establishment of World Trade Organization which is a first juridical foundation of IPR, then interpreted in the Indonesian language is "Hak Kekayaan Intelektual". The absence of the terminology formulated by legislation on IPR is inseparable from the fact that the Republic has not a priority to make a codification of legislation in IPR, so that the law on IPR is dealt with ad hoc and regulated separately in a legislation, such as secrets trade, patents, trademark and so on, so the definition of jurisdiction just found only the parts belonging to the group of IPR, as contained in the Compilation of Islamic Law (CIL) of the Republic of Indonesia in the Intellectual Property Right (IPR) is a compilation of several laws on different types of IPR.

With regard to this as an example, the definition of a patent as an exclusive right granted by the State of the Republic of Indonesia to the inventor of its invention in technology for a certain period command this invention itself or give it to others to implement it, while the right marks as exclusive right granted by the state to the mark owner registered in the General Register of Marks for a specified period using the own brand or giving permission to others who use it. Regarding the copyright is one part of the IPR defined as an exclusive right of the creator or the rightful recipient to announce or reproduce the creation or grant permission to it without prejudice to restrictions in accordance with applicable legislation. The three examples of the above right constitute was existing right before arising the Law Number 7/1994 on the Agreement of the Establishment of World Trade Organization, while the Trade Secret Right formulated as unknown information to the public in technology or business, have economic value because it is useful in business activities, and kept confidential by the owner of trade secrets. This is an implementation of the inclusion of Indonesia as a member of the WTO in 1994.

Intellectual Property Right (IPR) are arising out of or of human intellectuals. The acquisition of IPR is different from non IPR, because IPR based on excellence intellectual, while non-IPR emphasizes the physical aspect, although it also does not exclude the intellectual aspect. Therefore, the point of this issue in this study is meant by the juridical momentum is to know at which point in the legal acquisition of common property of husband and wife whose object IPR can be determined, whether since its creation by *personnel recht* (*personlijkrecht*) or from registered according to *real recht* (*Zakenlijk recht*). And also between pre-marriage certificate, but is registered for the acquisition of a certificate after the marriage is performed.

Measuring whether it is relevant and fulfilling a sense of justice to the divide property based on article 96 and 97 of the Compilation of Islamic Law (CIL) between non-IPR and IPR objects, should refer to the relevant (suitable) and sense of justice. Whereas relevance is suitability, compatibility, relationships and relationships; So that what is meant is whether there is a suitability of the relationship with the division of common property that is a non-IPR object with collecting system of common property with IPR object. With the same division ($\frac{1}{2}$: $\frac{1}{2}$) between husband and wife.

The sense of justice is a word derived from the Arabic *fair*, Murtadha Muttahhari expressed words of fair use in 4 (four) things, First, the state of balance (*al-mizan*). Second, the equality and disclaimer of any distinction (*Musawah*). Third, doing the Right of individuals and gives the right to every person entitled to hold it, and this is called by social justice. Fourth, fair and justice are protect for existence and not existence of Right and transitional grace when a lot of possibilities to exist and perform transformations. Thus, it is meant whether they satisfy the sense of justice if the system of division of common property on Article 97 and Article 98 ILC applied to the division of common property with object of IPR.

The legal certainty concerning the concept of unequal dividing of common property in Article 37 in the LoN is a matter to be answered. According to the law of Perspective Religion, of course for Muslims must be enforced Islamic law. During this time the Compilation of Islamic Law (CIL) be the first reference of Islamic Law in Indonesia enforced through the instrument of law Presidential Instruction (INPRES) number 1/1991. The position of legal INPRES instruments in the development constitutional is now no longer included in the order of legislation. Then from the material side Compilation of Islamic Law (CIL) there is no straightforward and unclear regulating system the division of common property with IPR object, and therefore it is necessary to conceptualize the division of common property to fulfil the sense of fairness and legal certainty.

H. Taufiq as Vice Chairman of the Supreme Court of the Non-Judicial Sector on various kind of training for the Chairman, Vice Chairman and Judge in east Java in 1999, delivered that IPR has a limitation as an intellectual ability to create invention, innovation and brand which are very useful in company activities, Attaching a right that can provide economic benefits to its owner is called intellectual property. Intellectual property is a part of immaterial property which is the basis for economic gain. The common property may be in form to unmovable or moving properties, and the Right of others property, intellectual property Right, and property of accounts receivable from husband or wife or third person. The common property include: a). Results of husband's income, b) wife income and c). Proceeds and income from the personal property of the husband and wife, even if the estate is not included in the common property, provided that all of it is acquired throughout the marriage.

The National Assembly VII of the Indonesian Islamic Scholar Council resulted in a fatwa decision on the protection of intellectual property in which there is a formulation of Intellectual Property Right (IPR) which is the property arising from the brain thought that produces a product or useful process to human beings and is recognized by the State according to the laws and regulations. Applicable invitations. Later in the formulation of the second fatwa dictum about the legal provisions, contains the following information:

1. In Islamic law, Intellectual Property Right (IPR) is seen as one *huquq maliyyah* (property Right) that is protected by law (*Mashun*) as *Mal* (property);
2. Intellectual Property Right (IPR) protected by Islamic law is IPR which is suitable to Islamic law (something that is not forbidden);

3. IPR can be used as the akad object of the contract (*al-ma'qud 'alaih*), both *aqadmu'awadlah* (exchange, commercial), and *contract tabarru'at* (noncommercial) and can be represented and inherited;
4. Any form of Intellectual Property Right (IPR) violations, including the using, disclosing, making, selling, importing, exporting, distributing, supplying, announcing, reproducing, plagiarizing, counterfeiting, pirating other people's IPR unlawfully is an injustice and this is haram (forbidden).

The common property is an acquiredduring marriage. In the Compilation of Islamic Law (CIL) this common property is mentioned with the term property in marriage or *shirkah* is a property obtained either alone or with husband and wife during the marriage bond takes place without questioning registered on behalf of anyone. The terminology of the common property mentioned in the Compilation of Islamic Law above reveals a little of the way to acquire the property, ie the property acquired during the marriage, either by obtaining it individually or together with the husband and wife.

III. INTELLECTUAL PROPERTY RIGHT (IPR) AS A COMMON PROPERTY IN THE CONTEXT OF COMPILATION OF ISLAMIC LAW (CIL)

The Compilation of Islamic Law (CIL) enforced under the legal instrument of INPRES no. 1 of 1991, in Article 91 paragraph 3 explains that intangible common property can be either Right or obligations. Based on the properties as an *illat* (cause) for adoption of IPR as an inherited property, then based on these reasons, fulfill the criteria for being IPR as a common property.

Abdullahsyah, who is currently the Chairman of the Indonesian Ulama of North Sumatra, he is a historical ulama who helped formulate and legalize the Compilation of Islamic Law (CIL) at the Workshop Ulama in Jakarta in 1991. He explained that at the time of formulating the Compilation of Islamic Law (CIL) relating to common property is not Discusses the status of Intellectual Property Right (IPR) as a common property. Furthermore, he argued, although textually did not mention the position of Intellectual Property Right (IPR) as a common property, but with the understanding of Article 91 paragraph (3) Compilation of Islamic Law (CIL) then intellectual property Right (IPR) can be categorized as a common property of husband and wife in household, because it has economic value that provides benefits and enjoyed in the life of husband and wife in the household. As Taufiq's statement above, the main point of common property can include of IPR. The observer of IPR Dedy Kurniadi said that the copyright obtained by one couple during the marriage can indeed be categorized as a common property. The position of the copyrighted work is the same as any other moving object such as a car. In copyright it is inherent material Right, he said.

The legal procedure formulated by the participants of the Religious Courts Group of the National Working Meeting (*Rakernas*) of the Supreme Court in Makassar, early September 2015. At that time, the Religious Judiciary Group formulated that the royalties of a person's work to be his right based Right under intellectual property, as long as the property is acquired in the ongoing marriage bond, so the right of royalty become income in marriage and therefore become a common property.

In addition, the management/cultivation of luggage which generate profit and loss in marriage is also categorized as common property. But Dedy reminds that not all copyright royalties can be considered a common property, because copyright is inherent in material Right, copyright may change to inheritance, grants, wills, written agreements or other causes. If the copyright holder dies, then the right is transferred to the heirs. This is in accordance with the principle adopted by the Copyright Act no. 28 of 2014. Article 16 paragraph (1) asserted: copyright is considered an intangible moving object.

The Fatwa Association of the Indonesian Council of Ulama has issued Fatwa no. 1 of 2003 dated 14 Zulhijjah 1423 H/January 18 2003 and decided to establish legal provisions: a) In Islamic Law, Copyright regarded as one of *huquq maliyyah* (property) and protected by law (*Mashun*) as the *mall* (property); b) Copyright protection of Islamic law referred to in item 1 above is not contradict in Islamic law; c) As the *mall*, Copyright can be object of the contract (*al-ma'qud 'alaih*), whether *mu'awadlah* agreement (exchange, commercial), or *tabarru'at* contract (non-commercial), represented and inherited; d) Any form of violation of copyright, especially piracy, this is being a criminality and forbidden.

Observing the provisions of the fatwa above that copyright is property, so as long as the property acquired in marriage then the property become a common property legally. The National Assembly VII of the Indonesian Coun Compilation of Islamic Law of Ulama in 2005 resulted a fatwa decision on the protection of intellectual property right with intellectual property Right formulation, namely the property arising from the brain thought or useful process to human beings and recognized by the State based on the rules current regulation. Later in the formulation of the second fatwa dictum about the legal provisions, in point 1 to 3, contains the following:

1. In Islamic law, IPR is seen as one *huquq maliyyah* (property Right) and protected by law (*Mashun*) as the *mall* (property).
2. The protection of IPR in Islamic law is not something forbidden.

3. IPR can be object of aqad (al-ma'qud 'alaih), wetheraqad mu'awadlah (commercial exchange) and aqad tabarru'at (noncommercial) and can be represented and inherited. Based on the legal status of intellectual property Right as huquq maliyyah (property), then what is stipulated in the Compilation of Islamic law on "Property In Marriage" in Chapter XIII affirmed in Article 91 paragraph (3), that the property that intangibles can be Right and obligations, it can be understood that intellectual property Right (IPR) can be used as common property.

IV. CONCLUSION

Based on the description and discussion on Intellectual Property Right (IPR) in terms of the provisions and principles of intellectual property Right under the following legislation and Islamic jurisprudence of the common property according to Act No. 1 of 1974 and Compilation of Islamic Law. And legal construction in Islamic jurisprudence, some conclusions can be formulated as follows: First, the momentum of Intellectual Property Right (IPR) acquired or created before the marriage, while registered to obtain a certificate after marriage, then the jurisdiction of the intellectual property is categorized as a common property of husband and wife. Therefore, as regulated in Law Number 1/1974 and Compilation of Islamic Law (President Instruction Number 1/1991), so the economic value in royalty benefit become a common property of husband and wife. The intellectual property Right (IPR) obtained or created and registered to obtain a certificate before the marriage, become a personal Right. But if the economic value of royalties on the intellectual property is received or obtained after the marriage, it is become a common property in the household. Similarly, the development of intellectual property Right which having economic value in royalties become property in the household, then the result of its development becomes a common property of husband and wife. While the moral right over the intellectual property is still attached to the IPR holder or Creator. The main factor of common property is the husband and wife still in marriage bond with exception the property derived from "inheritance" or "grant" become a personal property and be personal responsibility, which becomes pride treasure whose satisfaction on their respective responsibilities and not specified in the marriage agreement.

Second, the intellectual property Right are intellectual creativity with the acquisition process through a different procedure with the non-intellectual property, then it should be placed in the proportion. Working the brain through the level of science that exceeds the work of non-IPR, deserves a worthy appreciation of the work acquisition activities as usual, like people trying to earn income and increase the income. Therefore, the division of common property in article 96 and article 97 of Compilation of Islamic Law with division by two equally still relevant and fulfill the sense of justice, because the textually juridical declared the division of common property, ie ½ for husband and ½ for wife. Although the possibility may change casuistically based on the sense of justice, fairness and fulfill the benefit as meant in article 229 Compilation of Islamic Law. Third, the provision of common property according to Compilation of Islamic Law has not explained about the status of CIL as a common property firmly, and the implementation of CIL based on the legal instrument of Presidential Instruction No. 1 of 1991 is irrelevant to follow the development of law and life requiring the change of sciences and technology. This is with the issuance of MPR RI decree no. III/MPR/2000 on the source of law and order of legislation, the instrument of Presidential Instruction law is not included anymore as in Article 2 emphasized: The order of legislation is the guideline for the making of the rule of law. The order of the laws and regulations of the Republic of Indonesia are: 1. The 1945 Constitution; 2. Stipulation of MPR RI; 3. Laws; 4. Government regulation in lieu of Law (Perpu); 5. Government Unity; 6. Presidential Decision; 7. Local Regulations. Similarly, a set of laws relating to intellectual property Right does not adopt intellectual property Right in married and spouse households, only as transitional as inheritance, grants and wills. So to achieve legal certainty it is necessary to improve the Compilation of Islamic Law and raise the Compilation of Islamic Law into Law become an applied law in the judiciary and legal needs of the society.

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