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ESSENTIAL FACILITIES DOCTRINE AND THE LIMITATION OF EXCLUSIVE RIGHT ON PATENT

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ABSTRACT

The Patent Object includes the Patent holder who prohibits the others to control that prominent facility. Thereby, the Patent holder has violated the Act No. 5 of 1999 regarding the prohibition of monopolistic practice and unfair business competition. The aim of this study is to produce a systematic explanation whether the law on the business competition can be one of the factors limiting the exclusive patent right, and the systematic on the Essential Facilities Doctrine in the business competition is able to limit the exclusive patent right. The method conducted in this study is normative. The typology of this research is Doctrinal Research. Moreover, this studi also uses the statute approach, conceptual approach, and case study. The result of the study reveals that there is Patent object which categorized as the prominent facility or referred to as the Essential Facilities Doctrine. The correlation with the intellectual property is the Patent exclusive right and the licenses will lead to monopolistic practices. This matter in the perspective of Business Competition Law is not justified, but in the perspective of Intellectual Property Law is the contrary because of the existence of monopoly patent right. This study will benefit a group of people who have registered their ideas regarding the process or product of their invention in the technology field with a Patent will get exclusive right for a certain period of time. They will be allowed to use it by themselves or give their consent to the other parties regarding the use of that idea. That exclusive right contains a monopoly for the Patent holder, so that it will create an unfair competition if the right limit is misused.

INTRODUCTION

Intellectual Property is the result of the human intellectual activity (creativity) expressed in a particular form of creation or invention. This activity is in the fields of science, art and technology (Muhammad, 2001). The framework of intellectual property law (IP Law) is regulated in one of the WTO (Agreement on Establishing the World Trade Organization) agendas, namely the agreement on trade related aspects of intellectual Property rights including trade in the counterfeit goods (referred to as TRIPs). TRIPs increases the protection standard of intellectual property with the aim of conducting and enforcing that intellectual property in order to contribute the healthy trade promotion (Jened, Kekayaan Intelektual Penyalahgunaan Hak Eksklusif, 2007).

From the legal perspective, in a process of manufacturing drugs, the intellectual property is protected. In other words, the manufacturing drugs process itself and the product is the drugs. The reason is because the Intellectual Property Rights have characteristic in which commercial – private right which can be licensed and includes to the monopoly right in order to prevent the other using it without permission. The monopoly which adheres to the intellectual property will create certain problems if the right limitation is misused (Purwaningsih, 2005). That monopoly itself actually is not a crime or violating the law if obtained in the fair ways and does not violate the law. Thereby, the monopoly is not necessarily forbidden by the business competition law; instead the prohibited one is the actions of companies which have a monopoly to use their power in the relevant market and commonly referred to as monopolistic practices or monopolizing or monopolization (Lubis, 2009).

The purpose of Act No. 5/99 is regulated in Article 3 which states that protect the public interest and increase the efficiency of the national economy as an effort to improve the people's welfare; create a conducive business climate through the regulation of fair business competition to ensure the certainty of equal business opportunity for large, medium, and small businessmen; prevent the monopoly practice and or the unfair business competition which caused by the businessmen; and the creation of effectiveness and efficiency in the business activity. Therefore, it is expected that the equal opportunity will be created for each businessman and the elimination of anti-competitive action, especially the misuse of authority in the economic sector. The principle and objective outlined above do not have direct relevance for the businessmen, but the principles and objectives of the Act No. 5/99 becomes important when it must be interpreted and applied to every provision in that Act (Setyawati, 2013).

This theory is developed as a determination of accountability which is different from what has traditionally been known as a tool in analyzing Antitrust or anti-competition cases, especially if it is not easy to categorize the term “market” in the real sense. Essential Facilities Doctrine in relation to the intellectual property is a doctrine about the prominent facility misuse which dominated by one or several certain businessmen in the field of Intellectual Property, namely Patent

exclusive right and its licenses – which later on causes the existence of monopoly practices. It is not required in the perspective of Business Competition Law, but it is in the perspective of Intellectual Property Law due to the existence of monopoly patent right which makes the patent holder to freely regulate and dictate the market without any other good as the substitute (Fuady, 1999).

The competition law is a doctrine of essential facilities which broadly known in the European Union and America, for example, the case in the European Union is the seaport case (B&I vs. Sealink 1992 5 CMLR255) and the other one in America is US vs. Terminal Railroad Association of St. Louis, (1912) 224 U.S. 383.74 (Setyawati, 2013). The Essential Facilities Doctrine is a law doctrine which depicts the type of certain monopoly claim made under the competition and patent law (Contreras, 2017). This concept of Essential Facilities Doctrine is the businessman who masters the important facilities which have the obligation to open the opportunity for the business competitor as well as there are important competition law doctrines, such as the doctrine that discusses the excessive pricing and important facilities (Abbott, 2017).

The existence of the Intellectual Property conception with the Business Competition Law at a glance might look as if it is in conflict with each other. However, the fact is both of them are complementary to the harmony of the legal system itself in which to improve the efficiency and advance the economic system. The harmony between the Intellectual Property and Business Competition Law has been recognized in the Indonesian legal system. It can be seen from the several provisions in the legislation related to the Intellectual Property, which prioritizes the national economy and fair competition as a limit to the exploitation of exclusive right owned by the Intellectual Property holders listed as follows, Article 47 section (1) of Act no. 19 of 2002 regarding Copyright as well as Article 71 section (1) of Act No. 14 of 2001 regarding Patent (Nugroho, 2012). From this provision, it seems that the risk of monopoly or anti-competition is secondary by the consideration of the economic benefit which might be contributed by the Intellectual Property in the development. Actually, the Competition Act is not applicable to all the agreements on the Intellectual Property, but the effect of the licensing agreement can be anticompetitive so that forces the Competition Act to limit it.

RESEARCH METHODOLOGY

This research study is normative considering that the discussion is based on the legislation and the applicable legal principle. The research typology is the Doctrinal Research. Basically, Hutchinson distinguishes the legal research into 4 (four) types, namely Doctrinal Research, Reform-Oriented Research, Theoretical Research, and Fundamental Research (Hutchinson, 2002). The legal materials used are the primary and secondary legal materials. The primary legal materials are authoritarian, whereas the secondary ones are the official documents (Marzuki, 2005). The procedure of the legal materials collection is literature review. The finding method used is analysis descriptive which explains the

theories related to the discussion of the problem, and then analyzes the collected legal materials to be associated with the existing legal science theories in order to find a solution to the problem. Thereby, it can be used to help in writing the conclusion as well as suggestion.

DATA ANALYSIS

The perspective of the business competition in Indonesia

The law competition is applicable when that promise creates a monopoly, monopsony, market domination or conspiracy. To be able to prove whether the implementation of the license exceeds the limits of its monopoly, only then can it can be qualified as a violation or not against the competition law and the unfair competition methods (Rothman, 2018). Likewise, the aforementioned influence must be substantial and relevant in the market or not because basically the Intellectual Property is an exclusive right with the limited monopoly. Thereby in this case, it needs the Competition Law (Act No. 5/99) – a set of regulations which seeks to prevent the trade monopolies or trade practices that hinder or prevent the market competition (Purwaningsih, 2005).

The sample case of the Article 25 section (1) of Act No. 5/99 violation is the case of PT. ABC which conducts the competitors sliding program (PGK). PT. Arta Boga Cemerlang (PT. ABC) is determined to have a dominant position by controlling 88.73% of the national manganese AA battery market share (Putusan KPPU Perkara No. 06/KPPU-L/2004). The control of dominant positions in the business competition law is not prohibited as long as the businessman attains his dominant position or becomes a superior businessman (market leader) in the relevant market on his own ability in a fair manner (Lubis, 2009).

In order to achieve a fair competition, there are 3 (three) legal instruments that need to be enforced to avoid the potential activities mentioned on the above by the investor who has the Patent exclusive right. That right is the competition law or antitrust law which aims to ensure that the market exists as a place for the fair competition. For example, the prohibition of monopolistic practices and the misuse of a dominant position in the market. The unfair competition prevention law aims to ensure the businessmen do not act contrary to the honest practices in the industrial and commercial fields of the market competition. For example, the prohibition of consument misdirection and providing the false allegation to describe the competitiors. Finally, the Intellectual Property Law aims to provide a protection of the intellectual creation towards the piracy and counterfeiting actions (Jened, Kekayaan Intelektual Penyalahgunaan Hak Eksklusif, 2007).

The exception in article 50 letter b of Act No. 5/99

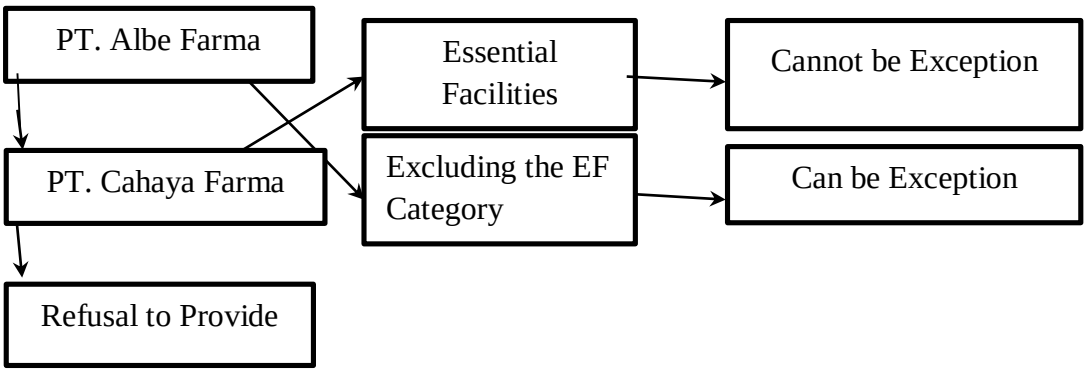
In the Act No. 5/99, this exception is only available limited. It is because all the rules about monopoly and fair competition can be violated by the businessmen

who have the intellectual property right. There are several things that need to be criticized from that provision of Article 50 letter b. Firstly, the legislator of No. 5/99 makes the definition of the word agreement contained in Article 1 number 7. Secondly, the legislator makes the exception not to enact the Act No. 5/99 to the agreements related to the Intellectual Property because it highly glorifies the protection of that Intellectual Property. Thirdly, the legislator of No. 5/99 considers that the Intellectual Property as the property protection can be seen as a direct derivative from the norm of fair competition. The Intellectual Property Protection as a private property is intended to overcome the problem of market failure due to the perception of the product as public goods (Jened, Kekayaan Intelektual Penyalahgunaan Hak Eksklusif, 2007).

However if analyzed further, in fact the holder of Intellectual Property, as a party who has the exclusive right to the rare intellectual creation, has a very strong position because his exclusive rights are a barrier to entry for his competitors in the market. Although within the framework of the agreement, the holder of Intellectual Property has a stronger bargaining position. The holder of intellectual in that position has many huge potentials to misuse the rights. The exception in the Article 50 letter b of Act No. 5/99 seems to provide excessive protection (over protection or over bodig) which actually damages the principle of fairness and justice itself. The provision of exception will certainly hamper the acceleration from effort to achieve the business competition (Mahmud, 2002).

ESSENTIAL FACILITIES DOCTRINE IN THE BUSINESS COMPETITION LAW

Sample case: Refusing to provide a license (Refuse to License)



In this case, a refusal to provide license can be analyzed because PT. Albe Farma and PT. Cahaya Farma have not agreed on anything yet. Thereofe, there is no chance of exception can be provided as regulated in Article 50 letter b of Act No. 5/99. Nonetheless, regarding that it is still B2B (Business to Business), hence, the

civil context becomes thick in it. The next thing that needs to be analyzed is about the kind of refusal in providing that license.

PT. Albe Farma refuses to provide license regarding the vaccine towards the natural potential of human brain cancer and drugs to whiten the skin. For the license regarding the drugs to whiten the skin, it should be resolved civilly considering that it cannot be categorized as the essential facilities. However, for the refusal of licensing related to the vaccines of the natural potential of human brain cancer, there is a possibility to be categorized as the essential facilities. Thereby, it needs to be delved more if the result of KPPU delving states that the concerned vaccine license is categorized as the essential facilities. The case investigation is still continued regarding the possibility of the agreement which leads to the monopolistic practice and / or unfair business competition.

This is where the duty of law to create a harmony (Bodenheimer, 1962). Thereby, the competition policy rules must be made not quite strict. On the one hand, it is intended to protect the fair and effective competition in the society. On the other hand, based on the justice consideration, the protection of Intellectual Property has limitation and one the criteria to measure the right misuse is the competition rule itself. Thereby, it is necessary to review and reformulate the provisions of Article 50 letter b of Law No. 5/99.

CONCLUSION

The granting of exclusive patent right to the inventors who have monopolistic right if being misused can potentially conduct the prohibited activities in the Act No. 5/99. In correlation with the application of Article 50 letter b of Act No. 5/99, if the problem is the refusal to grant a license (Refuse to License) and not the license itself, then it needs to be analyzed. The Intellectual Property, in which its license is requested, can be categorized as the essential facilities. If it is not into the category of essential facilities, hence, that exception cannot be given. On the contrary, if it is into the essential facilities category, then the exception cannot be provided. Thereby, the possibility of the Act No. 5/99 violation needs to be followed up.

LIMITATION AND SUGGESTIONS

Limitations of this study are about business competition law can be a factor supporting the exclusive rights of patents and the essential facilities doctrine in business competition which is able to limit the exclusive rights of patents. KPPU should study more deeply by including the criteria for essential facilities in detail in the implementation of Article 19 of Law No. 5/99 in order to avoid the occurrence of anti-competition actions carried out by business actors controlling important facilities so that there are no opportunities for other business actors to enter the market, let alone related to essential facilities doctrine faced with Intellectual Property.

THE IMPLICATIONS OF THIS STUDY AND FINDINGS

The result of the study reveals that there is Patent object which categorized as the prominent facility or referred to as the Essential Facilities Doctrine. The correlation with the intellectual property is the Patent exclusive right and the licenses will lead to monopolistic practices. This matter in the perspective of Business Competition Law is not justified, but in the perspective of Intellectual Property Law is the contrary because of the existence of monopoly patent right. The Patent Object includes the Patent holder who prohibits the others to control that prominent facility. Thereby, the Patent holder has violated the Act No. 5 of 1999 regarding the prohibition of monopolistic practice and unfair business competition

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