

The Forms of Intellectual Property Rights Waqf as a Part of Productive Waqf

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Abstract

Abstract: The paradigm of productive waqf is contained in Waqf Regulation (Law Number 41 of 2004 Concerning Waqf). This regulation expands the scope of property in waqf which was previously only on fixed objects, now includes movable objects, both tangible and intangible. As an intangible movable object, IPR (Intellectual Property rights) is one of the waqf objects in this regulation. However, the forms of IPR waqf has not been explained on waqf regulations. So that, this paper will discuss the forms of IPR waqf as a part of productive waqf form. First, the absolute handover of IPR by the wakif to Nazir. In this form the nazir can manage IPR waqf by himself or licenses. Second, waqif can do his waqf of IPR for a certain period using a license or franchise

Keywords: Intellectual Property Rights Waqf; Productive; License; Franchise

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1. Introduction

Nowadays, waqf as a social worship in Islam has new paradigm called productive waqf. Before, waqf only known as a fixed object like “land”. Then, they build a worship place like Mosque, educational place like madrasa, or graves. Productive waqf paradigm try to use movable object beside fixed object to make waqf more productive.

The productive waqf paradigm in Indonesia have shown by the Law Number 41 of 2004 concerning waqf and Government Regulation Number 42 of 2006 concerning the implementation of Law Number 41 of 2004. Those regulations try to expand the scope of waqf object and their management to make waqf more beneficial for Muslim community. Based on those regulation, the term of productive waqf means as an extension of the existing conventional waqf.

By the term of “Productive waqf”, waqf which was previously known as land only (on civil law known as a fixed object) now expand into movable object. On article 16 paragraph (3) Waqf Law said that waqf object include movable and fixed object. The term of movable object in this law means an object that cannot consume completely, they are money, securities, gold, vehicle, intellectual property rights (IPR), rental rights and other movable object accordance with sharia regulations and positive law regulations.

IPR as waqf object is a new and interesting thing. In Indonesia IPR is less well known by the Islamic community. IPR only known in business world. Besides, IPR also known as systems full of western culture which is strongly influences by individualistic and capitalistic values. The existence of IPR, which is full of individualistic values, is closely related to both local and global trade.¹ In the global regulation, IPR is part of the GATT-WTO (General Agreement on Tariffs and Trade – World Trade Organization), namely the TRIPs (Trade Related Aspects of Intellectual Property Rights) Agreement.²

IPR in Indonesia is divided into two main groups, namely copyright and industrial property rights. Copyright consists of Copyright itself and Related Rights (Neighbour Rights) while for industrial Property Rights consists of: Patents, industrial designs, Trademarks and geographical indication, Layout Design of Integrated Circuits Circuit and Trade Secrets.³

¹ Etty Susilowati, *Hak Kekayaan Intelektual Dan Lisensi Pada HKI* (Semarang: Badan Penerbit UNDIP Press, n.d.). Page. 1

² Ahmad Zen Purba, *Perjanjian Trips Dan Beberapa Isu Strategis*, 1st ed. (Bandung: Kerjasama Badan Penerbit F.H Universitas Indonesia dan PT. Alumni, 2011). Page. 1

³ Saidin, *Aspek Hukum Hak Kekayaan Intelektual (Intellectual Property Right)*, Cet. 1. (Jakarta: RajaGrafindo Persada, 1995). Page. 13-15.

The reality is that IPR as waqf object is still very rarely done. IPR waqf is still less popular than cash waqf as part of the productive type of waqf. Whereas MUI has responded with the Decree of the Fatwa Commission of the Indonesian Ulema Council (Fatwa MUI) No. 1 of 2003 concerning Copyright and Fatwa of the Indonesian Ulema Council No. 1/MUNAS/MUI/15/2005 concerning the Protection of Intellectual Property Rights. The main reason is that the Muslim community in Indonesia still follow to the opinion of the Syafi'iyah scholars who emphasize the importance of maintaining the immortality of waqf objects (muabbad theory), compared to maintaining the sustainability of the benefits of waqf objects (maqasid al-syariah theory). So, land is still the popular to wakif for waqf.⁴

IPR as a waqf object in Indonesia so far only on copyrights field. It happens because only copyrights have discussed completely on MUI Fatwa Number 1 of 2003 concerning Copyrights. Meanwhile, other IPRs are only described in general terms in the 2005 MUI Fatwa concerning the Protection of Intellectual Property Rights. For the example Hanafi (Alm), a lecturer at the Sharia Faculty of UIN Gunung Jati has donated one of his books to the Bandung district branch of the HMI organization and Nasuka, a retired army also donate his book published by Prenada Media to Postgraduate Program of UIN Sunan Gunung Djati Bandung.⁵ Besides, the results of research by Syifa Habibah et al on public understanding of the concept of IPR waqf (in this case in the Jabodetabek area) stated that 62% of respondents had never heard of IPR waqf.⁶

Theoretically, IPR waqf is in line with the concept of productive waqf. Productive waqf is a transformation from conventional waqf management to professional waqf management to increase the benefits of waqf. It can also be said that the productive waqf paradigm is a process of waqf management to produce maximum goods or services with minimal capital.⁷ Meanwhile, IPR itself is closely related to the business world. In the future, IPR waqf can provide greater benefits than conventionally waqf such as land.

⁴ Mukhlisin Muzarie, *Sukses Memberdayakan Wakaf Di Pesantren Modern Gontor* (Cirebon: STAIC Press, 2011). Page 7-8.

⁵ Jaih Mubarak, *Wakaf Produktif*, Cet. 1 (Bandung: Simbiosis Rekatama Media, 2008). Page 105.

⁶ Syifa Habibah, Muhammad Lutfi Zuhdi, and Nurul Huda, "Survei Wakaf Hak Kekayaan Intelektual," *Al-Awqaf: Jurnal Wakaf Dan Ekonomi Islam* 12, no. 2 (2019): 177-88, <https://doi.org/10.47411/al-awqaf.v12i2.68>.

⁷ Mubarak, *Wakaf Produktif*. Page. 15-16.

However, the Waqf Law and the Government Regulation on the implementation of Waqf do not provide further information regarding IPR as waqf objects. There is no explanation regarding the forms of waqf of each IPR. Considering that each IPR has different characteristics. So that the author is interested in analysing how the forms of IPR waqf based on the characteristics of each IPR (Copyright and Industrial Property Rights).

2. Discussion

Intellectual Property Rights

Intellectual property rights (IPR) have been enshrined in the United Nations charter (Universal Declaration of Human Rights/UDHR) on 10 December 1948. Article 27 UDHR states: "Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author". However, for developing countries, IPR protection system has not been a serious topic of discussion for a long time.⁸ They discuss seriously about IPR protection after they become a member of the World Trade Organization (WTO). Within this organization, IPR is a part of the General Agreement on Tariffs and Trade (GATT) in the form of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).

The development of IPR in Indonesia began with the Dutch term *Intellectuele Eigendomsrecht*. Then in the 1993 GBHN and 1998 GBHN translating the term Intellectual Property Rights which is known in the common law / Anglo Saxon legal literature with "*Hak Milik Intelektual*". In the next stage, the term "*Hak Milik Intelektual*" was changed to "*Hak Kekayaan Intelektual*" (Intellectual Property Rights/IPR) based on the Decree of the Minister of Law and Regulations of the Republic of Indonesia no. M.03.PR.07.10 of 2000 and the approval of the Minister of State for the Empowerment of the Republic of Indonesia State Apparatus by letter Number 24/M/PAN/1/2000.⁹

Adrian Sutedi defines IPR from three (3) key words: Rights, wealth, and intellectual property. Wealth is an abstraction that can be owned,

⁸ Purba, *Perjanjian Trips Dan Beberapa Isu Strategis*. Page. 1.

⁹ Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia: Kritik Terhadap WTO/TRIPs Agreement Dan Upaya Membangun Hukum Kekayaan Intelektual Demi Kepentingan Nasional*, Cet. 1 (Bandung: Mandar Maju, 2011). Page. 44.

transferred, bought, or sold. Intellectual property is defined as the wealth of all the results of the production of intellectual power, such as technology, knowledge, art, literature, song compositions, written works, and so on. Then rights, which can be interpreted: *first*, basic rights (human rights) which are absolute rights that cannot be contested, such as the right to life, the right to get justice and so on, *secondly*: mandated rights in rules/laws, namely rights because they are given/regulated by the community through regulations/laws. Intellectual property rights are defined as the rights (authority/power) to do something on the intellectual property which is regulated by norms or applicable laws. So, if it is related to the definition of rights, IPR is a mandated right of the rules, the community has the rights to determine how much IPR is given to individuals and groups.¹⁰

1. The Classification of IPR

Intellectual Property Rights (IPR) are classified into copyrights and industrial property rights. Copyright is divided on the copyright itself and related rights. In the other hand, industrial property rights consist of patents, trademarks and geographical indications, industrial designs, integrated circuit layout designs and trade secrets.

Copyright in Law no. 28 of 2014 concerning Copyright Article 1 point 1 is defined as: the exclusive right of the creator that arises automatically based on declarative principles after a work is manifested in a tangible form without reducing restrictions in accordance with the provisions of laws and regulations. Copyright consists of three fields: science, art, and literature. In detail, what is included in copyright protection is stated in article 40 paragraph.

Saidin explains for item (a) to (m), then (r) and (s) are qualified as an original creation. In the other hand, for item (n) to (q) is management from original creations that has been mentioned earlier.¹¹ The validity period of economic rights from items (a) to (j) are as old as creator lifetime plus 70 (seventy) years after the creator died, and then for item (k) to (s) the validity period is 50 (fifty) years old since first announcement

The neighbouring rights on copy rights is rights which have connection or side by side to copy rights. Neighbouring rights consist of

¹⁰ Adrian Sutedi, *Hak Atas Kekayaan Intelektual*, Cet. 1 (Jakarta: Sinar Grafika, 2009). Page. 38.

¹¹ Saidin, *Aspek Hukum Hak Kekayaan Intelektual (Intellectual Property Right)*. Page. 79.

three rights; *first, the rights of artist in their performances. Second, the right producer of phonograms. Third, the rights of broadcasting organizations in their radio and television broadcast.*¹² In Copyrights Law, neighbouring rights is an exclusive right for performer, producer Phonograms, or Broadcaster.

The first industrial property right is a patent. Patents on Law number 13 of 2016 concerning Patens is an exclusive right granted by the state to inventors for his inventions result on the field of technology for period time which can be done by themselves or give an agreement to the other party. The period of patens protection are 20 years then becomes a public domain. Besides, there is also a simple patent. Simple patent is an invention as a new product or tool which has practice utility. The Period of simple patents protection only 10 (ten) years.

Second, is Trademark and Geographical Indication? In Law Number 20 of 2016 concerning Trademark and Geographical Indication, Trademarks is a sign that can be shown by graphic in the form of image, logo, name ,word, letter , number, colour arrangement, in 2 (two) dimensional and/ or 3 (three) dimensional form , sound , hologram, or combination of 2 (two) or more element to differentiate goods and/ or services produced by persons or legal entities on trading goods and/ or service activity . The geographical indication is a sign to show a place of origin from the good or product which geographical environment including nature factor, human factor, or both to give reputation, quality, or certain characteristic of good or product. The period of trademark is 10 (ten) years and can be extended. It is different from geographical indication which is protected as long as they can keep the reputation, quality and characteristic of good.

Third, is Trade Secret. Law number 30 of 2000 concerning Trade secret mention that; trade secret is an information which keep from public on technology and/or business because has an economic value on economic activity and the owner always keep this in secret. In other words, trade secret is confidential information and personally. So that, the information can be show to other party except by officer or authority to keep that information in secret.¹³ The information on

¹² Saidin. Page. 133.

¹³ Susilowati, *Hak Kekayaan Intelektual Dan Lisensi Pada HKI*. Page. 120.

trade secret which can be protect is business information of technology information such as *chemicals formula, industrial processes, 'know-how', pricing information, goods or products), customer list and information, source of supplies and merchandising methods and business information.*¹⁴

Trade secret have specific characteristic if compared with other industrial property rights. Trade secret not only has automatic protection as copy right but also no need to register. Because, if they register their trade secret, the confidential of the information will be open and has no secret anymore. So that, for trade secret just write it down to get the certificate of ownership.¹⁵

Fourth, is industrial design. On chapter 1 Law Number 31 Year 2000 mentioned that: "Industrial design is a creation about shape, configuration, or line or colour composition, or line and colour, or combined of both on three dimensions or two dimensions who gives aesthetic impression and can be realized on three dimensions or two dimensions pattern to produce products, goods, industrial commodity, or handcraft."

The protection of industrial design is combination on copyrights and design rights. The difference between them is the copyrights idea is to protect the art, but for industrial design is more practical, commercial and can be produce as a mass product. For example, *household product like kitchenware, bathroom accessories, furniture, toys, spare parts, computers, keyboards, phones, light fittings* and so on. The main Purpose of industrial design is to improve and to protect the IPR on shape, configuration, or ornamentation from goods which has important contribution on industrial and handy craft development.¹⁶

The last category of industrial property rights is integrated circuit layout design. According to Law Number 32 Year 2000, integrated circuit layout design is: first, integrated circuit is a complete product or half-finished which has various elements inside, at least one of them is an active element, which has connection and integrated on semiconductor element to produce electronic function. Second, lay out design is a three-dimension creation design from various elements,

¹⁴ Rahmi Jened, *Hak kekayaan intelektual: penyalahgunaan hak eksklusif*, Cetakan kedua (Surabaya: Pusat Penerbitan dan percetakan Unair, 2010). Page. 217-218

¹⁵ Susilowati, *Hak Kekayaan Intelektual Dan Lisensi Pada HKI*. Page. 121.

¹⁶ Jened, *Hak kekayaan intelektual*. Page. 198-199.

minimum have one active elements, which has connection on layout design and placing the three-dimension to prepare an integrated circuit.

Wakaf

Waqf is Arabic language from word “*wakafa*” which has meaning stop, stay, or hold. The word al-waqf is a *masdar* (gerund) from expression *waqfu al-sya’I* which means holding something.¹⁷ Juhaya S Praja said that “waqf” with verb *waqafa-yaqifu* means stand up, stop, doubtful, hold and prevent. Wakafu means I stand up, I stop, I doubt, I prevent, or I hold. Furthermore, the word *waqf* is more popular than *mauquf*, which means to be hold, to be stop, or to be doubt then means of transaction.¹⁸

Waqf in terminology means a gift that can be done by holding the origin ownership (*tabbisul asli*), then get the public benefit. *Tabbisul as li* means holding the waqf property for inherited, for sale, for grant, for pawn, for rent and so on. The way to utilize waqf property is using them by the wakif ‘s wants without reward.¹⁹ The principles of waqf are *wakif* (people who give waqf), *mauquf bih* (waqf property), *mauquf ‘alaih* (purpose of waqf), *sighat* (pledge of waqf) and *nazir* (waqf manager).

The property of waqf consist of valid requirements: *mutaqawwam*, means everything that can be stored and is lawfully (halal) used in normal circumstances / not in an emergency. Second, the waqf property must be known with certainty (*‘ainun ma’lumun*), so there no dispute. Third, it belongs to the wakif. Fourth, separate property, not common property (*musya*).²⁰

1. Productive Waqf

Waqf is one of the welfare pillars in Muslim community. Waqf also has a function to develop Islamic economy. For the future, waqf will be able to create a healthy national economy. However, in Muslim community,

¹⁷ Abdul Ghofur Anshori, *Hukum & Praktik Perwakafan Di Indonesia: Dilengkapi Peraturan Pemerintah Nomor 28 Tahun 1977 Tentang Perwakafan Tanah Milik, Instruksi Presiden Nomor 1 Tahun 1991 Tentang Kompilasi Hukum Islam, Fatwa Majelis Ulama Indonesia Tentang Wakaf Uang, Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf*, Cet. 1 (Papingan, Yogyakarta: Pilar Media, 2005). Page. 7.

¹⁸ Juhaya S dan Muclisin Muzarie Praja, *Pranata Ekonomi Islam – Wakaf* (Cirebon: STAIC Press dan Pustaka DINAMIKA Yogyakarta, 2009). Page. 26.

¹⁹ Tim Penyusun, *Paradigma Baru Wakaf: Di Indonesia / Direktorat Pemberdayaan Wakaf* (Jakarta: Direktorat Jenderal Bimbingan Masyarakat Islam, 2006). Page. 1

²⁰ Muhammad Abid Abdullah Al-Kabisi, *Hukum Wakaf: Kajian Kontemporer Pertama Dan Terlengkap Tentang Fungsi Dan Pengelolaan Wakaf Serta Penyelesaian Atas Sengketa Wakaf* (Jakarta: Dompot Dhuafa Republika dan IIMaN, 2004). Page. 219-234.

the most waqf property are used for places of worship, such as mosques and prayer rooms.

The Law No. 41 of 2004 concerning Waqf, has the spirit to make waqf, not only to become a worship tool but also to make welfare economic on Muslim community called productive waqf paradigm. By the productive waqf paradigm can make prosperity not only for Muslim community but also for everyone gradually.

Productive waqf according to Jaih Mubarak is a professional transformation of waqf property management to increase the benefits of the waqf property. In other words, productive waqf also can be interpreted as the process of managing waqf objects to produce maximum goods or services with minimal capital.²¹

Syafii Antonio in the introduction of the Management of Productive Waqf book said that the productive waqf is an effort to empower waqf which is marked by three characteristics, namely: *first*, waqf management must be patterned and integrated with each other, so that waqf funds can be allocated to the empowerment programs. *Second*, the principle of nazir's welfare. The nazir is not only considered as a social worker but also becomes a professional job which can live properly with the profession as a professional nazir. *Third*, the principles of transparency and accountability. In the future, waqf institutions must provide the reports on the process of managing funds to public every year.²²

2. The Regulation of Intellectual Property Rights Waqf in Indonesia

Intellectual Property Rights as waqf objects are explained in Law no. 41 of 2004 concerning Waqf. Intellectual Property Rights as waqf objects are contained in Article 16 paragraph (3) of the Waqf Law along with other movable objects. Movable objects in this law are defined as objects that are not consumed completely, which include: a) Money, b) Precious metals (Gold), c) Securities, d) Vehicles, e) Intellectual Property Rights, f) Lease rights, and g) another movable objects base on sharia provision and state regulation.

IPR as a waqf property also stated in Article 21 Government

²¹ Mubarak, *Wakaf Produktif*. Page. 15-16.

²² Achmad Djunaidi and Thobieb Al-Asyhar, *Menuju Era Wakaf Produktif: Sebuah Upaya Progresif Untuk Kesejahteraan Umat*, Cet. 3 (Pancoran, Jakarta: Mitra Abadi Press, 2006). Page. Viii.

Regulation (PP/Peraturan Pemerintah) No. 42 of 2006. In this Government Regulation, IPR is categorized as a movable asset together with money. In this section, IPR is more detailed, on b point including the category of Intellectual Property Rights in the form of; Copyright, Trademark Rights, Patent Rights, Industrial Design Rights, Trade Secret Rights, Integrated Circuit Rights, Plant Variety Protection Rights; and/or Other Rights.

Furthermore, when referring to the IPR legislation, waqf is included in one of the transitional categories of IPR. In Law no. 28 concerning Copyright on article 3 explains the Transfer of Copyright Economic Rights, where Copyright can be transferred or transferred, either in whole or in part because; a) inheritance, b) grant, c) waqf; d) testament, e) written agreement or f) other reasons justified in accordance with the provisions of the legislation. It also happens in Law no. 20 of 2006 concerning Trademarks and Geographical Indications and Law No. 13 of 2016 concerning Patents.

However, in Law No. 30 Concerning Trade Secrets, Law no. 31 of 2000 concerning Industrial Design, and Law no. 32 Regarding Industrial Design, there is no clause regarding the transfer of rights by means of waqf. This is understandable, because the three laws were born before Law no. 41 of 2004 concerning Waqf.

The Forms of Intellectual Property Rights Waqf

The forms of IPR management by Nazir could be done through the transfer of IPR directly to Nazir, or through licensing and franchising mechanisms. In the following, will be explained or any form of IPR waqf. So that, it will be known which form of HKI waqf will provide the most benefit to the people. Therefore, it also relates to the characteristic of each IPR and the types of Nazir who can manage the IPR waqf.

1. Absolute Transfer of IPR by Nazir

The absolute transfer of IPR to Nazir means that the wakif gives all his economic rights to Nazir. The relationship between wakif and His IPR was completely cut off. However, Wakif still has the Moral Rights of his creation.

Based on Article 11 of Law No. 41 of 2004 concerning Waqf said that Nazir has the following duties: administering waqf objects, managing and developing waqf assets according to their purpose, supervising and protecting waqf assets, and reporting on the implementation of waqf management to the Indonesian Waqf Board (Badan Wakaf Indonesia). Then, according to Article 3 Government Regulation (PP) No. 42 of 2006 which said that waqf property must be registered in the name of Nazir in the waqf pledge, but the registration of waqf property in the name of Nazir does not prove Nazir's ownership of the waqf property.

To manage the IPR waqf Nazir has two choices. First, to carry out the management of the IPR waqf by himself and then distribute it according to the designation of the waqf property. Second, Nazir give a licence to another party and only manage the royalties on the IPR waqf.

Self-Managed by Nazir

IPR has its value while managed on business-oriented activity. So, that, IPR management depend on the quality of nazir. All types of Intellectual Property Rights (Copyrights, Patents, Trademark Rights, Industrial Design Rights, Integrated Circuit Layout Design Rights and Trade Secret Rights) can be managed by an individual nazir.

All creations which protected by Law no. 28 of 2014 concerning Copyrights can be waqf, including creations in the fields of science, art, and literature. This type of waqf has a very long period. The creation form, such as: a) books, pamphlets, and all other written works; b) lectures, lectures, speeches, and other similar creations; c) teaching aids made for the benefit of education and science; d) songs or music with or without subtitles; e) drama, musical drama, dance, choreography, wayang, and pantomime; f) works of art in all forms such as painting, drawing, carving, calligraphy, sculpture, sculpture or collage; g) architectural works; h) maps; and i) batik art or other motif art whose protection period is valid for the life of the creator (wakif) and continues for 70 years after the creator (wakif) dies. The creation form, such as: a) photographic works; b) portraits; c) cinematographic works; d) video games; e) computer programs; f) the appearance of the written work; g) translation, interpretation, adaptation, anthology, database, adaptation,

arrangement, modification and other works resulting from the transformation; h) translation, adaptation, arrangement, transformation or modification of traditional cultural expressions; i) compilation of works or data, whether in a format readable by Computer Programs or other media; and j) compilation of traditional cultural expressions as long as the compilation is an original work, the protection period is 50 years from the first announcement.

Thus, during that period of time, individual Nazir can commercialize the copyrights which profits given to people as mentioned on Article 22 of Law no. 41 of 2004 which is intended for: a) worship facilities and activities; b) educational and health facilities and activities; c) assistance to the poor, abandoned children, orphans, scholarships; d) progress and improvement of the people's economy, and/or e) progress of other general welfare that does not conflict with sharia and law regulations. In addition, individual nazir are also entitled to get 10% of the net profits from the commercialization of copyrights which mentioned in Article 12 of Law no. 41 of 2004 concerning Waqf.

Trademark waqf from wakif to nazir including trademarks and service mark. Trademark Waqf is followed by the business/or service behind the brand. This means that the individual Nazir who holds the trademark rights and manages the goods/services that previously belonged to the wakif. But, according to Article 3 PP No. 42 of 2006 concerning the Implementation of waqf on paragraph (2) said that the registration of waqf assets in the name of Nazir does not prove Nazir's ownership of waqf assets, in this case the right of Trademark. The results of commercialization have accordance with the provisions of Article 22 and the Nazir section in accordance with Article 12 of Law no. 41 of 2006.

The protection period of registered Trademark is 10 years from the date of receipt and can be extended (Article 35 of the Law on Marks and Geographical Indications). Therefore, Nazir has responsibility to extend the protection of the trademark again after ten years, so that the commercialization of the trademark waqf can continue for unlimited period.

Waqf of trade secrets has an unlimited time. Trade secrets that can be represented by wakif to nazir include management methods, sales methods, or other information in the field of technology and/or business

that has economic value and is not known by public (Article 2 of Law No. 30 of 2000 concerning Trade Secrets). Nazir can commercialize the trade secret as right holder of trade secret to distribute 90% of the net profit in accordance with the waqf purpose in the Waqf Law.

The Patent waqf to individual Nazirs is aimed to the inventions in the field of technology that contain novelty elements. According to Law no. 13 of 2016 the term of the Patent protection is 20 years, for simple patents 10 years and cannot to be extended. After the period expires, the patent becomes a domain public. If the patent is managed by Nazir on a commercial basis, after that period, the end of the waqf period does not necessarily mean. It all depends on Nazir, if the patent can still be managed commercially even though it has become a public domain, then the waqf can still run until the patent can no longer be managed commercially.

Furthermore, if Nazir could add novelty to the patent and re-register it in the Directorate General of Intellectual Property Rights on Nazir's behalf, then the waqf could continue to run. This also applies to the Industrial Design and Layout Design Integrated Circuit waqf has protection for 10 years.

Beside an individual nazir, an organization nazir can manage its own waqf of intellectual property rights if it regulated in the organization's Articles of Association, whether on copyright waqf, trademark rights, trade secret rights, patent rights, industrial design rights, and integrated circuit layout design rights. Meanwhile, in the case of legal entities, not all intellectual property rights can be managed.

Foundation cannot manage the waqf by themselves. This is due to the provisions in Law no. 16 of 2001 and Law no. 28 of 2004, where there are several prohibitions for the foundations. Foundations cannot be used as a business forum and Foundations cannot carry out business activities directly but must go through a business entity where the foundation includes its assets (Explanation of Article 3 paragraph (1)).

Then, the Foundation also cannot share the profit result of its business activities with the Trustees, Management and Supervisors. (Article 3 paragraph (2)). Meanwhile, the provisions of the Waqf Law which allow sharing of net profits of 10% for nazir. So that Nazir from legal entities as a foundation cannot manage HKI waqf directly.

Licensed

The term license comes from the Latin word “*licere*” which means to allow or permit. License can be interpreted as an agreement when the licensor give the licensee for creating for using or for selling the licence’s object with some freedom.²³ According to Tim Lindsey, there are several consequences of having a license, they are: *first*, IPR owners can use these rights to create an additional income. It means that IPR asset becomes more valuable because they get income from royalties. *Second*, IPR users can license the rights of their products and processes. It more efficient than using by themselves. So that, it leads to increase the innovation and economic growth. *Third*, nowadays licensing is a significant activity in many domestic economic activities. IPR become more valuable as a business asset and become an important component in production and service industry. The IPR access often become the most important part in business transaction.²⁴

According to Endang Purwaningsih, there are four forms of licence. *First*, the exclusive license. In this license agreement licensee has exclusive rights to create, to use, to sell the licence product. In this license agreement, the licensee has the sole right to make, use or sell products from these rights and excludes the licensor from doing these things. So that if there is an imitation, for example on a patent license (Patent Infringement), the licensor and licensee can sue the imitation. *Second*, non-exclusive licenses. It gives the licensee the right to make, to use and to sell but, the licensor still has the rights to use the invention and give the licence to another licensee. So that, the licensor will not burden the licensee when imitation/infringement happen. *Third*, cross-licensing. It happens when the licensor gives a licence to another licensee as a return for receiving the IPR from the licensee. *Fourth*, the licensing package, that is, several IPR holders make an IPR license agreements in one package that can mutually benefit the IPR holders so that the license package can cover several IPRs.²⁵

²³ Suteki, *Hukum Dan Alih Teknologi: Sebuah Pergulatan Sosiologis* (Yogyakarta: Thafa Media, 2013). Page. 47.

²⁴ Timothy Lindsey, Asian Law Group Pty. Ltd, and Alumni, P.T, eds., *Hak Kekayaan Intelektual: Suatu Pengantar*, Cet. 1 (Bandung: Asian Law Group Pty. Ltd. bekerjasama dengan penerbit P.T. Alumni, 2002). Page. 332-333.

²⁵ Endang Purwaningsih, *Hak Kekayaan Intelektual (HKI) Dan Lisensi*, Cetakan ke-I (Bandung: Mandar Maju, 2012). Page. 117-118.

In the making a license contract, there are eight things must be considered, namely: 1) determining which law governs licensing, 2) identifying the owner and IPR's user and their rights and obligations, 3) determining who is responsible for registering and protecting the IPR, (usually the owner has the responsible), 4) determines the term of the license, 5) determines whether the license can be renewed and what conditions must be fulfilled, 6) describes what to do and what not to do, and when it is said there is a violation agreement, 7) describes when the license contract expires, as well as the terms after the contract ends, and 8) how to resolve disputes.²⁶

By licensing the IPR, Nazir as IPR holder does not carry out the IPR waqf by himself as described in the previous explanation, but IPR waqf is licensed to another party (licensee) to be managed. Nazir become a licensor who gets IPR royalties. Then, using the royalties to the people base on the regulation. This opinion is in line with Asrizal saiin et al opinion, which conclude that in the implementation of IPR waqf in Indonesia using the Royalties. However, in that article, the IPR that gives royalties only on copyrights, not for another IPRs.²⁷ This IPR waqf form can be used by all Nazir, whether individual Nazirs, organizations or legal entities. Foundations as a legal entity which in the previous section could not manage IPR directly, in this form they can be a nazir. So that, the Foundation only manages the royalties that came from the licensee.

By licensing to licensee, Nazir as licensor must be smart in making licensing agreements. Nazir must fully understand the form of the IPR that he holds. So that there is no use by the licensee. This is important because the licensee must be a profit-oriented business entity. This is where the role of Nazir is needed.

As an agreement, licencing agreement has the principle of agreement. They are six principles: freedom of contract, consensual, binding, trust, openness, balance, and good faith. Therefore, in the making of licence agreement, nazir as a licensor must understand what

²⁶ Susilowati, *Hak Kekayaan Intelektual Dan Lisensi Pada HKI*. Page. 166.

²⁷ Asrizal Saiin et al., "Wakaf Atas Royalti Sebagai Hak Ekonomi Dalam Intellectual Property Rights," *Al-Awqaf: Jurnal Wakaf Dan Ekonomi Islam* 12, no. 2 (2019): 165–76, <https://doi.org/10.47411/al-awqaf.v12i2.65>. Page. 174.

will be written on the license agreement.²⁸ Therefore, nazir not only get the royalty, but also has an active role in the making of licence agreement. So that, the IPR waqf become a productive waqf.

2. Licencing and Franchising

In Article 1 paragraph (1) of Law no. 41 of 2004 concerning Waqf said that “Waqf is a legal act of wakif to separate and/or to give his property to be used forever or for a certain period of time in accordance with its interests for the purposes of worship and/or general welfare according to sharia”.

This term explains that waqf is: a) the legal act of the wakif, b) the separation and/or delivery of the wakif property, c) the waqf property is used forever or in certain period of time, d) the utilization of waqf property is for worship and/or public welfare, e) base on the sharia. In point c said that the waqf property can be used forever or a certain period base on the wakif wants. In IPR waqf, the wakif is the owner and holder of the IPR. Wakif can waqf their IPR either permanently or for a certain period. Give a permanent IPR waqf means wakif has no rights anymore for his IPR. In the other hand, give a certain period waqf means wakif still have a right when the period of waqf has been completed. The waqf of IPR for a certain period can be made by the wakif in the form of a license and a franchise. Here’s the explanation:

Licence

In the license form, wakif is licensor, while Nazir acts as a licensee. It means wakif gives Nazir a period to manage his IPR. The IPR rights is still in *Wakif*. The handover of this right is the same as a licence agreement in general. The difference is a nazir as a licensee has no obligation to pay the royalties to licensor (wakif). Then, nazir as a licensee when managing the wakif IPR must give 90% of profit for waqf purpose base on the waqf regulation. Nazir as a licensee can only take 10% of the net profit.

The forms of IPR waqf licenses are basically the same as IPR licenses in general. The IPR Law only regulates voluntary licenses and mandatory licenses, not the types of licenses. Although the law does not regulate the

²⁸ Etty Susilowati, *Kontrak Alih Teknologi Pada Industri Manufaktur*, Cet. 1 (Yogyakarta, Indonesia: Genta Press, 2007). Page. 154.

types of voluntary licenses or other forms of licenses, the IPR Legal Studies has developed licensing forms into 2 general forms.

First, the exclusive license. In this license agreement, Nazir has the exclusive right to make, to use or to sell products from these rights and set aside the wakif. So that, the wakif may not manage his IPR during the license agreement. If there is an imitation, for example on a patent license (Patent Infringement), the licensor and licensee can sue the imitation.²⁹

Second, non-exclusive license. Wakif gave nazir the right to make, to use or to sell but the wakif still has the right to use the invention and gave licenses to other parties. So that, wakif will not burden the licensee in case of imitation of IPR/infringement.³⁰

The most important thing is not all types of Nazir can be a licensee and manage the IPR waqf. This regulation is the same as the previous explanation on the part of Nazir who can manage IPR directly. This means that the foundation as a legal entity cannot be a licensee (Nazir) for this IPR waqf.

Franchise

The word franchise comes from the Latin "*francorum rex*" which means free from bondage, in this case it refers to the freedom to have business rights. Besides, the word franchise also comes from medieval French taken from the word "*franc*" (free) or "*francher*" (free), which is generally defined as the granting of privileges. Therefore, the definition of franchise is interpreted as an exemption from certain restrictions, or the possibility to carry out certain actions, which are prohibited for others. In English, franchise is translated in terms of privilege. In the United States, franchise is defined as a concession.³¹

Fero Sinambea, as quoted by Adrian Sutedi, defines franchise as all property rights related to business or intellectual property rights, such as trademarks, company names, company labels, models of inventions, copyrights, know-how or Patents used for the purpose of selling goods or services to consumers.³²

Businesses with a franchise format generally get a business guarantee. This happens because the franchisor has tested his business system and

²⁹ Purwaningsih, *Hak Kekayaan Intelektual (HKI) Dan Lisensi*. Page. 117.

³⁰ Purwaningsih.

³¹ Adrian Sutedi, *Hukum Waralaba*, Cet. 1 (Ciawi, Bogor: Ghalia Indonesia, 2008). Page. 6.

³² Sutedi. Page. 10-12.

can provide guarantees to the franchisee. This kind of franchise business format has generally been patented in some countries. The franchisor doing very strict control over the franchisee. Thus, the franchisee must follow the existing system and produce goods and services that are identical to the goods or services of the franchisor's product. In addition, the franchisor protects his intellectual property rights carefully. This is regulated in the franchise contract, which has very detailed terms to make franchisor can make a lawsuit when it breaks. Basically, Franchisors can operate their own products, but they may not really entrust the distribution of their products/services to franchisees. The franchisor can control the elements of the transaction such as where the franchisee is set up, what kind of outlets or promotional materials the franchisee can use, what kinds of recipes (e.g. ingredients and packaging) the franchisee can use and so on.³³

From the point of view of the franchisee, the franchisee has access to the products and services of the business and becomes a part of the franchisor's marketing network. Generally, the franchisor also provides training to franchisees and their employees in the business. Although the franchisor and franchisee relationship often like a boss and subordinate, the franchise agreement clearly states that the franchisee is an independent contractor (legally separate from the franchisor, except for their contractual relationship).

Financially, franchisees pay royalties on a regular basis to the franchisor, like licensees in general. In relation to the franchise system, the franchisee also pays a franchise fee to the franchisor which is non-refundable to the franchisee. Although the franchisee starts and works using the franchise system for several years, at the end of the validity of the franchise agreement, the franchisee has no longer the right to the franchise business or its IPR. Franchise agreements generally contain strict non-competitive business articles to prevent the franchisee from starting a rival business or business in a similar industry within a predetermined.³⁴

Basically, a franchise is a form of license consisting of several packages of IPR at once. In addition, the difference between a franchise and a license in general is that a franchise emphasizes the obligation to use systems, methods, procedures, procedures, marketing, and sales methods, as well as

³³ Lindsey, Asian Law Group Pty. Ltd, and Alumni, P.T, *Hak Kekayaan Intelektual*. Page. 342-343.

³⁴ Lindsey, Asian Law Group Pty. Ltd, and Alumni, P.T. Page. 344.

other matters that have been determined by the franchisor exclusively and must not be violated or ignored by the franchisee.

Based on this regulation, wakif become a franchisor while the nazir becomes the franchisee. The regulation of IPR waqf franchise are the same as the regulation for the IPR waqf license. Nazir as a franchisee does not pay royalties regularly to the franchisor, like franchises and licenses in general. Nazir also does not pay a franchise fee to the wakif/franchisor which is generally required to be paid by the franchisee and cannot be returned (franchise fee is non-refundable) to the franchisee.

Besides, Nazir as a licensee, when managing the IPR must give 90% of the net profit for waqf purpose base on waqf regulation. Nazir as a licensee can only take 10% of the net profit. The advantages of waqf with a franchise system, including:

- a) Businesses with a franchise format by wakif generally has business guarantees. This happened because the wakif/franchisor had already tested their business system and could provide assurance to the nazir/franchisee that the system would work. This kind of franchise business format has generally been registered in some countries
- b) Wakif/Franchisor still has control to Nazir. Thus, Nazir must follow the existing system and produce goods and services that are identical to the goods or services of wakif products.
- c) Wakif/Franchisor can control transaction elements such as the place where the franchise business is established, what kind of outlets or promotional materials can be used by Nazir/franchisee, what kinds of recipes (eg ingredients and packaging) that Nazir can use and so on. so.
- d) Nazir/Franchisee have access to the products and services of the business and become part of the wakif/franchisor marketing network. Wakif/franchisor also provides training to nazir/franchisor.

Besides, waqf which use a franchise system can be carried out by any nazir (individuals, organizations, or legal entities). It different from licencing system, which does not allow foundations to license or run wakif's IPR businesses. Article 3 paragraph (1) of the Foundation Law said that: Foundations can carry out business activities to support the achievement of its goals and objectives by establishing a business entity and/or participating in a business entity. The explanation of this regulation is to emphasize that the foundation cannot use as a business forum. Foundation cannot carry out

the business activities directly but must use another business entity which the foundation has enclosed its assets.

Based on this regulation, the foundation can carry out franchised waqf, because franchising is a business system, so that the franchise can be run under the foundation as a separate business entity. So, the management in the franchise system is separated from the management of the Foundation. The obligation of the foundation is only to receive 90% of the net profits from the franchise business to be distributed in accordance with the purpose of the foundation.

3. Conclusion

From the discussion on the forms of IPR waqf as one of the productive waqf in Indonesia has two conclusions. *First*, the absolute handover of IPR by the wakif to Nazir. In this form, if the nazir managed by himself, The IPR waqf only can be done by individual nazir and organizational nazir. However, if the nazir license the IPR waqf to another party, all type of nazir can manage the royalty from the IPR waqf, such as individual nazir, organizational nazir and legal entity nazir including organization with legal entity and foundation. *Second*, waqif handover their IPR for a certain period of time either through a license or franchise. In this IPR waqf form, if the wakif only licenses their IPR then only individual and organizational nazirs can manage IPR, while if it is in the form of a franchise system, all types of nazir can manage the IPR waqf. Based on these conclusions, The government must make regulations more detailed on IPR waqf as well as the regulation of cash waqf. After that, it can be socialized to the community massively. Cause, IPR waqf itself has a high economic value.

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