

Juridical Review on Intellectual Property Related to Corporate Intellectual Capital in Indonesia

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Abstract

Intellectual properties are not only beneficial to their creators, but also to the common public who uses the products and/or services that contains protected intellectual properties. The more intellectual properties created, the better for the subject of law or the incorporated and non-incorporated business entity since it increases intellectual capital value of the person or the business entity. The purpose of the author in analysing this matter is to qualitatively review the relation between intellectual property and the increase of intellectual property value of a corporation and whether the change of regulation in Act number 11 of 2020 on Job Creation affects a corporation's intellectual capital in Indonesia. The authors didn't find any similar research on the topic that the author chose in this study. The method of this research is normative-juridical in nature and takes references from secondary literatures including Act number 11 of 2020 on Job Creation, regulations regarding intellectual properties, books, journals, and articles related to intellectual properties and intellectual capitals. This research shows that the more a corporate owns intellectual properties that yields sales, the more intellectual capital said corporate acquire. The change of regulation regarding trademarks in Act number 11 of 2020 on Job creation may impact on the intellectual capital in terms of capital structure, while the change of regulation regarding the establishment of patent may increase intellectual capital in all categories which are human capital, structure capital, and physical/customer capital.

Keywords

intellectual property;
intellectual capitals;
corporation.



I. Introduction

Humans needs to develop for the better. Therefore, human needs may become more complex which led to them in need of making their needs simpler. Business which are used to be done conventionally at workplaces are no longer necessary since applications and media are now available to connect people from different parts of the world. Teachers can create learning materials and upload them in the school or university systems or even the internet so that the students can learn them at home. Such ever advancing technologies would not exist without research and development in various forms such as the technology to make interesting contents or to produce better computer processors for laptops and smartphones. These examples of contents made by creators and invented technologies can be protected as intellectual properties. Intellectual properties can be divided to seven categories which are copyrights, patents, trademarks, industrial designs, integrated circuit layout designs, trade secrets, and protection of plant varieties.

These intellectual properties protect various things according to their respective categories. For example, technologies previously described can be protected by patent or

trade secret. Contents, videos, music, and pictures can be protected by copyrights. The regulation of those intellectual properties is written in different acts of law:

1. Trademark rights regulated by Act No. 20 of 2016 concerning Trademarks and Geographical Indications;
2. Patent rights regulated by Act No. 13 of 2016 concerning Patents;
3. Copyrights regulated by Act No. 28 of 2014 concerning Copyrights;
4. Integrated circuit layout design regulated by Act No. 32 of 2000 concerning Integrated Circuit Layout Design;
5. Industrial design regulated by Act No. 31 of 2000 concerning Industrial Design;
6. Trade secrets regulated by Act No. 30 of 2000 concerning Trade Secrets; and
7. Protection of plant varieties regulated by Act No. 29 of 2000 concerning Protection of Plant Varieties.

The regulation of patents and trademarks experienced some changes that were regulated in the Act No. 11 of 2020 concerning Job Creation. Intellectual properties are linked to intellectual capital in terms of structure capital. Structure capital is the ability of an organization or corporation in fulfilling the routine process of its company and structure which supports the worker's effort to produce optimum intellectual performance as well as the performance of the overall business, the company's operational system, manufacturing process, the culture of the organization, management philosophy, and all forms of intellectual properties owned by the company. Intellectual capitals are information and knowledge applicable in a work which may create value in the company. Intellectual capitals are generally divided into three components which are customer capital, human capital, and structure capital. The researcher aims to review the role of intellectual property in positively influencing (increasing) a company's value through legal viewpoint, which makes this research unable to use quantitative data. Furthermore, the legal regulations regarding intellectual properties have experienced changes due to Act No. 11 of 2020 concerning Job Creation. The changes include several chapters concerning patents and trademarks. The author aims to review regarding the impact of the changes in several chapters concerning intellectual properties in the Act No. 11 of 2020 concerning Job Creation towards the intellectual capital of a company.

Based on the aforementioned elaboration, the researcher is interested to further discuss about intellectual properties related to intellectual capitals which will be presented in the research with the title "Juridical Review on Intellectual Property Related to Corporate Intellectual Capital". The statement of problem in this research are 1) What is the relation between intellectual properties and intellectual capitals in adding a company's value? and 2) What is the impact of the changes of regulations regarding intellectual properties in Act No. 11 of 2020 concerning Job Creation towards a company's intellectual capital in Indonesia?

II. Review of Literature

There are seven kinds of intellectual properties which can be divided into two major divisions:

1. Copyright/author right which concerns about art, literature, and science as well as related rights (showmanship, record producer, and phonogram companies); and
2. Industrial property, comprised of:
 - a. Trademark which concerns about marks to differentiate goods and services;
 - b. Patents which concern about technological inventions;

- c. Integrated Circuit Layout Design which concerns about the layout designs of integrated circuits;
- d. Industrial Design which concerns about the design of a product's appearance;
- e. Trade Secrets which concern about secret information that contain economical value; and
- f. Plant Variety Protection which concerns about plant varieties produced from plant breeding activities.

These seven branches of intellectual properties possess moral and economical rights which are called the natural right theory. This theory grants an inventor or creator the right to control the use and profit of an idea, even after said idea revealed to the public. This theory has two elements: 1) First occupancy that views the moral right of someone who invented or created an invention to have exclusive rights of said invention; and 2) A labour justification that views the economical right granted to someone whose labour creates an intellectual property as a reward for their effort. Good intellectual properties will impact the quality of the company that owns said intellectual properties.

Intellectual capital has three components:

1. Human capital. This component represents the collective ability to produce the best solution based on the knowledge possessed by the people within the company to add the company value.
2. Structure capital. Structure capital is the facilities that supports the workers to create optimum performance, comprised of organizational capability, market reach, hardware, software, organizational structure database, patent, trademark, and all organizational capabilities that supports workers productivity. Structure capital is comprised of:
 - a. Innovation capital, which are intangible assets in the form of worker's creativity in utilizing available opportunities in the company environment that produces innovations which adds value and fulfils the customer's needs;
 - b. Process capital, which are intangible assets that take part in the production process itself, from the order receiving until the product or service delivery to the consumer, so that a high-value output can be produced for the consumer; and
 - c. Relationship capital, which is the company's ability to maintain good relationship internally and externally since it can determine the assessment of the company's performance.
3. Physical capital displays the harmonious relationship between the company and its partner, whether it is the supplier, customer, the government, or the surrounding community.

III. Result and Discussion

3.1 Relation between Intellectual Properties and Intellectual Capital in Adding a Company's Value

A corporation is said to have a competitive advantage if said corporation can create higher economical value compared to other corporation in the same industry, which makes a corporation relies on intangible asset such as innovation, worker competency, and others. An intellectual capital comprises of all the process and assets which does not normally visible in the balance sheet and all intangible assets (trademarks, patents, and brands) which has the attention of modern accounting method.

The following is a further elaboration regarding the three components of intellectual capital. The first is the human capital. Human capital is the human resource that gives

positive contribution for the company seen from the process of recruitment, selection, and afterwards training given by the company to the resource. Positive contribution that comes from the worker's knowledge is very important for the company since the human resource is the force that moves the company towards its goals. The role of human resource in a company is divided into the managerial and the executor role. The company's managerial requires technical expertise, ability in communication and interaction with the society, conceptual expertise, decision making, time management, global management and technological expertise. Value adding can only be performed by the company's human capital, which are the workers who have certain skills, competence, and knowledge. There are three level of management from the perspective of organizational hierarchy:

1. Top management which has conceptual expertise such as the director, deputy-director, and general director , or those who are usually referred as the C-suite level which are the Chief Executive Officer (CEO), the Chief Operational Officer (COO), the Chief Financial Officer (CFO), the managing director, and the president ;
2. Middle management who has interpersonal expertise such as regional manager, director of products, head of division , or head of department, and branch manager ; and
3. Lower management who has technical expertise such as the supervisor, foreman , the office manager or the section manager

The executors of a company are the operatives, which are the resources who runs the activities assigned by the top management through the middle and lower management. New and innovative ideas or concept to create an intellectual property may come from the management or the executors that performs personal development.

Second, the structure capital. Structure capital is the knowledge and skills of the human capital which have been transformed and owned by the company in the forms of such as systems, procedures, methods and know-hows, technologies, and others. The company needs to build a comfortable working system for the employees, build a good system in terms of planning, designing, to the execution of a decree or a product and/or service sold to the public. Clearly all of the aforementioned need to be formulized by the management so that the market result prospect can be seen. If the prospect is good, the management will have the executor bring the concept to reality.

Concerning the owner of intellectual properties which are realized or fixed, a discussion between the company and the resource which has realized the intellectual property. If the intellectual property is made in a professional relationship, the law in the field of intellectual properties formulized that the one who has right to claim said intellectual property is the one who provide the job (in this case, the company), unless it has been agreed otherwise. The employee who realized the idea into an intellectual property has the right to write their name to the certificate and earn proper reward for the intellectual property they produced. Such arrangement is the form of legal protection to the creator or inventor or designer as fulfilment of moral and economical right of the work performed, which are:

1. The theory of intellectual ownership right. John Locke stated that a person's ownership right over the items he/she produced has existed since birth. Said item may be tangible or intangible which is the result of human intellect.
2. The theory of moral rights and the rights over intangible items (the right which are material and economical in nature). This theory is divided into 3 outlooks:
 - a. In the intellectual ownership rights, there are aspects of personality rights and the right over intangible items which is considered a unity, however between those two aspects, the personality aspect is more dominant due to the close relationship between

the creator and the creation. This theory is known as the monism where a work is the result or product of human intellect;

- b. The second thought is known as the dualism theory where the personal and economical aspects are two separated matter and copyrights solely contains economic value; and
- c. From the previous two theories the modern monism theory emerged where the personal and economical aspect of the ownership right is considered a unity and both equally earned legal protection from the positive law nationally and internationally.

Furthermore, there are reasons why the appreciation of an intellectual property is an absolute necessity:

1. Intellectual works always come from hard work that requires effort and the work of the mind which cannot be done by just anyone;
2. The awareness over the value of intellectual properties may motivate people to create more works.

Those opinions are also aligned with the increasingly competitive globalization which requires competency.

For Hegel, intellectual properties are seen as an ongoing expression of its creator not as a free, abandonable (expendable) cultural object. Intellectual properties can create an economically and socially conducive environment for creating more intellectual works which in the end will be important for the development of man.

The third is the physical or customer capital. Physical capital or customer capital is the positive relationship with every external party, not only the customer or consumer, but also the stakeholder, shareholder, the government, the community and others. A company's output, whether it is goods or services, are directed towards the society. The society is not only comprised of the costumers (whether they are the intermediate or final) who continuously use the services or by the products, but also the government as the regulator, and the shareholder or stakeholder to whom the company must take responsibility regarding their performance. The better the company's performance visible from the income statement, customer's feedback, and lack of company related dispute (against the consumer or concerning permits, etc.), the higher the company's value.

A company's value is the investor's perception regarding the company's performance, which can be related to the stock price. The company can be said to have a good value if its performance is also good. The value of a company goes public can be measured from the company's stock that is stable unless influenced by an external economic condition such as a pandemic. Aside of being important for the company's value, a company's output, especially those protected as intellectual property can be an additional value for the company. Additional value means that it has an irreplaceable role and its existence gives significant and positive impact for the company's progress. Every component is assessed about whether it has additional value based on its contribution for the organization or company. The increasing additional company value from intellectual properties can be seen from the examples of division of intellectual property for several field of industry:

1. Technology company: patent, trade secret, integrated circuit layout design, industrial design, copyright, and trademark. Example of technology company is Apply Inc. Apple produced various kinds of technological items that helps occupational and educational productivity.
2. Fast Moving Consumer Goods (FMCG): Trade secret and trademarks. An example of an FMCG company is Unilever. Unilever sells various products for daily needs of the people in Indonesia; and

3. Agribusiness companies, especially those that work in the field of agriculture: Plant variety protection, trademark, and trade secret. Example of agribusiness company is Agri Makmur Pertiwi whose work is in the field of vegetable seed cultivation.

Based on the aforementioned example, the most potential technology company may hold almost all intellectual properties and all companies have trade secret as well as names which can be the companies' trademarks. A good company name, seen from its well-known products and good sales may increase the company's value and become an additional value. If the company further increases its intellectual properties according to its field, the value of the company will increase and thus the share price and the fundamental analysis will also increase. A company can produce goods or services if its human and structure capitals in the form of company system is able to keep producing innovative technology, safely protects its trade secret, avoid causing harm to any parties both internally and externally, and effectively produce improvements for the company. The result of a company's intellectual property is like the company's own image. A company that keeps innovating in accordance to the society's needs by guarding its quality will have a good image. A company may keep its innovation by properly and effectively implementing its intellectual capital.

Intellectual capital is an intangible asset such as people's talents, management efficiency, and customer's cooperativeness. The human part (employees and managers) as the source of intellectual capital has the human capital. The company part as the channel for intellectual capital must manage the human capital gained from the employees into structure capital, and finally distributed to the final destination which is the customer so that the final result in the form of customer capital can be earned. Increasing innovations protected as intellectual properties may increase the intellectual capital since innovations are created by the employee who are the human capital and said innovation is produced or run by the company as a structure capital in order to be accessed to the society as customer capital.

3.2 The Impact of Changes in Regulations of Intellectual Properties in Act No. 11 of 2020 Concerning Job Creation towards a Company Capital

The regulation of intellectual properties experienced some change in Act No. 11 of 2020 concerning Job Creation. The change is regulated in the third and fourth part of Chapter IV concerning Ease of Doing Business, which are:

1. Article 107 which regulates several amendments of Act No. 13 of 2016 concerning Patent
 - a. Article 3 which regulates requirements of simple patents with addition of the requirement of "having practical use" as well as addition of verse which regulates the criteria of the development of existing product or process that includes simple products, simple process, or simple methods;
 - b. Article 20 which regulates the implementation of patent was changed from "patent owner must manufacture the product or use the process in Indonesia by supporting transfer of technology, absorption of investment, and/or provision of work space" into "patent must be implemented in Indonesia by sharing the implementation based on the type of patent which are:
 - 1) Implementation of product patent which encompasses manufacturing, importing, or licensing patented product;
 - 2) Implementation of process patent which encompasses manufacturing, licensing, or importing products of a patented process; or

- 3) Implementation of method, system, and usage patent which encompasses manufacturing, importin, and licensing product of a patented method, system, and usage;
- c. Article 82 which regulates obligatory licensing earns an emphasis that obligatory licensing is for patents not established in Indonesia as regulated in Article 20;
- d. Article 122 which regulates substantive checking of simple patent. Option to perform substantive checking of simple patent is 6 (six) months at the latest since the date of erasing of simple patent request acceptance;
- e. Article 123 which regulates the time frame of simple patent request announcement process got 3 (three) amendments:
 - 1) Simple patent request announcement is quickened from 7 (seven) days after 3 (three months) since the simple patent request acceptance into 14 (fourteen) days since the simple patent request acceptance;
 - 2) Patent request announcement is quickened from 2 (two) months since the simple patent request announcement into 14 (fourteen) days since the simple patent request acceptance;
 - 3) Addition of verse which regulates those exceptions of Article 49 verse (3) and (4) concerning objection during announcement period which states “objections toward simple patent request is directly used as additional consideration in substantive assessment; and
- f. Article 124 which regulates the verdict of patent request is quickened from 12 (twelve) months at the latest since the acceptance of simple patent request into 6 (six) months at the latest since the acceptance of simple patent request.
2. Article 108 which regulates regarding several amendments in Act No. 20 of 2016 concerning Trademarks and Geographical Indications
 - a. Article 20 which given additional trademarks that cannot be listed which are those that contains functional forms;
 - b. Article 23 which regulates substantive assessment of trademarks which comprises of:
 - 1) Period of substantive assessment is quickened if there are no objections from 30 (thirty) days since the end of announcement into directly at the end of announcement;
 - 2) Period of substantive assessment is quickened and divided into 2 (two) conditions, which are whether there are objections or not. Substantive assessment regulated in Article 25 verse (5) for trademark request with and without objections has a period of 150 (one hundred and fifty) days, but it is amended into 30 (thirty) days if the trademark request has no objections and 90 (ninety) days if there are objections in the trademark request process;
 - 3) Deletion of Article 23 verse (8) which regulates further regulation in Ministerial Regulation concerning trademark assessment expert outside the assessors; and
 - c. Article 25 which regulates trademark certificate has a deleted verse. The deleted verse is Article 25 verse (3) which regulates deletion and/or what is considered withdrawal of trademark request which has already listed if the issued trademark certificate is not taken by the trademark owner or its representative in 18 (eighteen) months since the issuing of the certificate.

The amendment of intellectual property regulation in Act No. 11 of 2020 concerning Job Creation is only for the issue of patents and trademarks. The trademark regulation amendment leans toward the addition of category of trademarks that cannot be listed, substantive assessment of trademark, and deletion of trademark certificate retrieval regulation, while the patent regulation amendment lends towards simple patents and patent implementations. Based on this research’s first statement of problem, intellectual property

is a part of a company's capital, which lies in the structure capital category. However, for a value addition, the intellectual property impacts the intellectual capital as a whole which comprises of human capital, structure capital, and physical/customer capital. The amendment of patent and trademark regulation in Act No 11 of 2020 concerning Job Creation does not entirely influential towards the structure capital.

The trademark regulation which was amended in Act No 11 of 2020 concerning Job Creation may increase a company's structure capital value since the shortened period for substantive trademark assessment and the early assuring that the trademark offered is not similar or does not have basic similarities with an existing trademark may lead to a quicker request process for a trademark to be protected. The system of a trademark protection is the first-to-file (constitutive) system. The first-to-file system means that whoever list or earn the trademark certificate will earn the right of said trademark. If the company is quicker in earning approval regarding the trademark and issued to the General Directorate of Intellectual Property with a quicker process, the legal assurance regarding said request will be quicker to be earned. The regulation concerning the possibility of a trademark request to be deleted or considered withdrawn due to the trademark certificate unclaimed for 18 (eighteen) months is considered beneficial because with the use of online system in requesting or issuing a trademark certificate, the process of trademark request becomes more effective.

The amendment of the patent regulation in Act No 11 of 2020 concerning Job Creation increases the flexibility of management regarding patents, redefining simple patents and shortened the time to assess simple patents. In Article 20, the new regulation regarding patent implementation provides flexibility. The regulation in Article 20 of Act No. 13 of 2016 concerning Patents obligates a product patent to be produced in Indonesia and a process patent to be implemented in Indonesia. There are several points of positive amendment concerning the change in said patent regulation:

1. Amendment of patent regulation provides more room to implement patents in Indonesia. The patent holder does not need to establish a factory to manufacture a product or use the process that was patented. The change of patent regulation is to make a win-win solution. If the patent-protected product is marketable, the holder of the patent does not need to build factories in countries where the product will be sold in order to be considered as patent implementation. The patent owner simply needs to import or license the patented product in order to be considered as patent implementation. Of course, if the patent-protected product is to be protected in other countries, it needs to be listed in the targeted countries as well;
2. The TRIPS Regulation forbids discrimination, in the sense of whether the patent is local or import. As long as the patented product available in Indonesia, regardless of whether it is made in Indonesia or imported or licensed, it is considered a patent implementation. What is to be avoided is the misuse of patent such as listing a number of patents while the products themselves do not exist in Indonesia, worse still if such products are needed in Indonesia;
3. The regulation of simple patents is redefined and the period until the decision of simple patent request is shortened from 12 (twelve) months to 6 (six) months at the latest; and
4. Regarding transfer of technology, there exist there is a regulation regarding transfer of technology which first issued in 1898 with some flexibility. The fact, however is that there has not been any transfer of technology taken place. It is better to utilize licensing since it prompts the occurrence of transfer of technology. Forcing transfer of technology will instead prevent it and even hinders investment.

The changed regulation in Act No. 11 of 2020 concerning Job Creation related to simple patents may also increase a company's structure capital value more commonly found in Micro, Small, and Middle Business companies since the shortening of the time for substantive assessment of simple patent may lead to the simple patents protected earlier and, in the end, makes earning legal assurance regarding the simple patent request faster. The change in patent implementation regulation in Act No. 11 of 2020 concerning Job Creation may influence intellectual capital as a whole:

1. Human capital. Human resource in the company can be more creative in designing technologies needed by the society and protected by patents through transfer of technology that can be done by licensing and easier patent implementations.
2. Structure capital. The company can be considered implementing the patent by importing without the need to build a factory (to manufacture the patent product).
3. Physical/customer capital. The broadening of patent implementation scope may lead to society having less difficulty to purchase or gain access to the patent-protected product or process.

IV. Conclusion

Intellectual properties are connected to intellectual capital which in the end will increase a company's value. Adding innovations in various aspects which are protected as intellectual properties may increase the intellectual capital since innovations come from the employee who are the human capital and said innovations is produced or implemented by the company as structure capital that will be transferred to the society as customer capital. A company can produce goods or services if it has a good human and structure capitals in the form of company system which ensures the company can keep producing innovative technology, safely protects its trade secret, avoid causing harm to any parties both internally and externally, and effectively produce improvements for the company. The result of a company's intellectual property is like the image of the company. A company that keeps innovating according to the society's needs will surely have a good company image. Intellectual properties and intellectual capital are an intangible yet highly valuable company asset.

The shortened period of substantive assessment and intellectual property request listing system, especially in terms of trademarks which are regulated in Act No. 11 of 2020 concerning Job Creation into becoming simpler, more effective and efficient may inspire companies to enlist intellectual properties and increase structure capital. The amendment of regulation concerning patent implementation may increase intellectual capital in all categories which are the human capital, structure capital, and physical/customer capital.

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