

INTELLECTUAL PROPERTY RIGHTS IN THEORY OF ECONOMICS ANALYSIS OF LAW PERSPECTIVE

AL Sentot Sudarwanto¹, Adi Sulistiyono², M Hudi Asrori S³, Arief Suryono⁴,
Yudho Taruno Muryanto⁵, Diana Tantri Cahyaningsih⁶, Dona Budi Kharisma⁷

E-mail: ¹alsentotsudarwanto@staff.uns.ac.id, ²adisulistiyono@staff.uns.ac.id,
³m.hudiasrori.s@staff.uns.ac.id, ⁴ariefsuryono@staff.uns.ac.id, ⁵yudhotaruno@staff.uns.ac.id,
⁶dianatantri@staff.uns.ac.id, ⁷donabudikharisma@staff.uns.ac.id
^{1,2,3,4,5,6,7}Privat Law Department Faculty of Law Universitas Sebelas Maret

Article Information

Keywords: *Economics analysis of law; Intellectual property rights; Reward.*

Kata Kunci: *Economics analysis of law; Kekayaan intelektual; Reward.*

Abstract

This article aims to describe the relevance of the protection of intellectual property rights (IPR) in the perspective of the theory of economic analysis of law. The approach used is a historical approach (historical approach) using primary legal materials and secondary legal materials. The data collection technique used is the literature study technique. Based on the research results, it can be concluded that so far the focus of traditional economic analysts has only highlighted that inventors or holders of exclusive IPR are entitled to incentives or rewards for their findings. Apart from that, giving incentives is also to encourage people to make discoveries that are beneficial to human life. However, they did not highlight the high cost of accessing or using their findings. Even the cost of accessing IP exceeds the cost of the production margin of IP itself. In the perspective of the theory of economic analysis of law, the condition of unbalanced margins can cause injustice.

Abstrak:

Artikel ini bertujuan untuk menguraikan relevansi antara fungsi perlindungan hak kekayaan intelektual (HKI) dalam perspektif teori *economics analysis of law*. Pendekatan yang digunakan yaitu pendekatan pendekatan historis (*historical approach*) dengan menggunakan bahan hukum primer dan bahan hukum sekunder. Teknik pengumpulan data yang digunakan yaitu teknik studi pustaka. Berdasarkan hasil penelitian dapat disimpulkan bahwa selama ini focus analisis ekonomi tradisional hanya menyoroti bahwa inventor atau pemegang hak eksklusif kekayaan intelektual (KI) berhak mendapatkan insentif atau reward atas hasil temuan mereka. Selain itu, pemberian insentif juga untuk mendorong masyarakat agar melakukan temuan-temuan yang bermanfaat untuk kehidupan manusia. Namun, mereka tidak menyoroti mahalanya biaya untuk mengakses atau memanfaatkan hasil temuan mereka. Bahkan biaya untuk mengakses KI melebihi biaya margin produksi KI itu sendiri. Dalam perspektif teori *economics analysis of law*, kondisi ketidakseimbangan margin tersebut dapat menimbulkan ketidakadilan.

A. Introduction

In every discussion regarding aspects of the protection of Intellectual Property Rights (IPR) or Intellectual Property (IPR) it is always identified with the theory of economic analysis of law by Richard A Posner. The essence of the theory is to apply economic principles to analyze legal issues (Richard A Posner, 1997). However, the use of economic principles in the field of law has actually been initiated by Jeremy Betham who examines how individuals deal with legal sanctions and evaluates the results by taking into account social welfare measures (utilitarianism perspective) (Louis Kaplow & Steven Shavell, 2002).

Economic thought in the field of law was then continued by Ronald Coase and Guido Calabresi who analyzed limited resources that make a person or organization choose the most profitable decision for him (R. H. Coase, 1960; Lourdes A. Sereno, 2018). Guido Calabresi also analyzes the cost of compensation due to accidents from a legal and economic perspective in his book entitled “The Costs of Accidents-A Legal and Economic Analysis” (Guido Calabresi, 1970). These costs are primary costs (treatment and damage to goods), secondary costs (economic costs incurred when failing to compensate victims), and tertiary costs (costs of anticipating losses, primary and secondary costs) (Richard A. Posner, 1970).

From the views of these experts, an economic approach theory emerges which can be interpreted by the application of economic theory (especially microeconomics and the basic concept of welfare economics) to study the formation structure, process and economic impact of laws and legal institutions. Nicolas Mercuro and Steven G. Medema (1999) stated the following:

Law and economic can be defined as the application of economic theory (primarily micro economics and their basic concept of welfare economics) to the examine the formation structure, processes, and economic impact of law and legal institution (Nicolas Mercuro & Steven G. Medema, 1999).

However, the economic approach to legal issues is still being debated. One of the basic things that is the difference is whether efficiency is a legal issue and not contrary to justice. The conflict between justice as efficiency and justice as fairness (justice as efficiency and justice as fairness) is a contemporary debate between the political views of law and moral theory (fairness) (Harold J. Berman, 2005).

On the one hand, one of the current contemporary legal issues is regarding the protection of IPR. IPR as a creativity-based asset becomes a legal object that must be protected, but in practice problems arise as well as legal issues because there is no balance between the production costs of IPR assets and the costs of enjoying IPR assets. For example, the cost of producing a vaccine issued by an inventor is not balanced with the economic value obtained. A vaccine inventor gets too much economic value from a patient who buys the vaccine because he needs the drug. In this context, the principles of efficiency and justice as fairness contradict each other. In this regard, this article attempts to describe the relevance of the protection of intellectual property rights in the perspective of the theory of economic analysis of law using a historical approach.

B. Methods

The research approach used in this study is a historical approach. In a historical approach, it is carried out by examining the background of what was learned and the development of arrangements regarding the issues at hand (Peter Mahmud Marzuki, 2010). To describe the relevance of the IPR protection function and the theory of economics analysis of law, research is needed on the background of the principle of efficiency in IPR protection, the meaning and function of IPR protection from an economic and legal perspective.

The data collection technique was carried out by means of library research or known as document study. Document study is a data collection tool that is carried out through written data (secondary data) using content analysis. This library research was conducted in order to collect secondary data on theories that support the proposed problematic analysis, as well as positive law in the form of laws and regulations related to the utilization of trademark law.

In this study the author collects data by reading, understanding and collecting legal materials to be studied, namely by making document sheets that function to record information or data from legal materials studied which are related to research problems that have been formulated in the literature. about the theory of economic analysis of law and IPR, as well as various laws and regulations related to IP.

C. Research Result and Discussion

One of the fundamental questions in the field of law today is whether justice can be found in efficiency? To answer this question, of course, starting from what legal theory is used because each has a different rationale. The view that answers that efficiency cannot create justice departs from natural law theory, while efficiency can create justice is rooted in legal positivism, especially utilitarian theory which assumes that law and social policy are instruments or tools and have consequences (Michael I, Swygert & Katherin Earle Yanes, 1998). In general, people think that efficiency and justice are diverging or always different, but in fact these two things can be unified and integrated between the concepts of fairness and efficiency.

Posner stated that:

A second meaning of justice, perhaps the most common, is-- efficiency. There is more to notions of justice than a concern for efficiency. The Economics of Justice, he wrote: V have tried to develop a moral theory that... holds that the criterion for judging whether acts and institutions are just or good is whether they maximize the wealth of society (Richard A. Posner, 1981).

The economic approach to law does not only talk about efficiency, but also predicts the effect of policies on an important value, namely "distribution". Even economists claim to be a profession that best understands how law has an impact on the distribution of income and prosperity between classes and groups in society. Combining individual welfare and social welfare is the economist's way of explaining his task of reconciling the conflicting interests of class and interest groups.

Social welfare theories are viewed by philosophers as a family among competing traditions which propose a solution to the problem of distributive justice (Robert Cooter & Herman Selvin, 2003).

1. Wealth Maximization

In connection with the theory of economic analysis in law, Richard A Posner emphasizes the Principle of Efficiency – Wealth Maximization. Posner defines efficiency as a condition in which resources are allocated so that their value is maximized. In economic analysis, efficiency in this case is focused on ethical criteria in the context of making social decisions (social decision making) concerning the regulation of community welfare (Richard A. Posner, 1994).

Efficiency in Posner's point of view is related to increasing one's wealth without causing harm to other parties. In this regard, economic analysis in law like this is known as the idea of wealth maximization or in Posner's terms "Kaldor-Hics" where changes in the rule of law can increase efficiency if the profits of the winning party exceed the losses of the losing party and the winning party can provide compensation. loss for the losing party so that the losing party still gets better. In this context, Posner observes one aspect of justice which includes not only distributive and corrective justice. Posner emphasizes "pareto improvement" where the goal of legal arrangements can provide valuable input for social justice and welfare (Nicholas Mercuro & Steven G. Medumo, 1999).

2. Future Consideration

Posner also pays great attention to aspects of the future (future consideration) in his theory of law, Todd J. Zywicki and Anthony B. Sanders, in their writing entitled "Posner, Hayek, and the Economic Analysis of Law" emphasizes the very aspect of the future. considered by Posner. Posner believes that through economic systems, the consideration for a future of social welfare will be enormous. That way, legal rules including legal theories must be able to be understood by judges for the sake of a good legal system (Todd J. Zywicki & Anthony B. Sanders, 2008).

The judge in his very large portion determines the decision to be handed down based on the considerations of the cases he handles. The aspect of social welfare that is addressed by various economic systems that support it directly or indirectly requires the skills of legal rules and legal theory that are interconnected and require IP to be able to read and understand them comprehensively. In the dialogue at Duke Law Class, he explained that a judge must diligently read and update information about the law. Answering a student's question about unprofessional judges, in the interview he said: "I don't think that judges do much reading—at least, not much secondary reading. The ordinary judicial job itself requires a great amount of reading. Most judges probably figure that that is enough" (Richard A Posner, 2009). So, Posner basically sees an optimistic future and believes that judges can create good laws or liberal laws, if they are diligent in absorbing social change and external changes. The aim is clear, namely the efficiency of the judge's decision.

3. Behavioral Law and Economy

Posner's economic view of law also gave birth to behavioral law or behavioral economy. Posner emphasized that: This (judges as future-looking rule makers) includes assessing what would be the most efficient outcome in circumstances where, because of transaction costs, a transaction would not occur without judicial intervention (Todd J. Zywicki & Anthony B. Sanders, 2008).

As with the economic conception, the existence of transaction costs must be accommodated in laws and regulations. Transaction costs which were originally economic principles were then made into legal rules so as not to harm one of the parties in the implementation of statutory products.

This behavioral principle seems clearly applied in a pluralistic society, which cannot avoid transaction costs. As a result, the rule of law is a necessity that is able to provide legal certainty and maintain a sense of social justice in society. These rules can be in the form of contracts or arrangements regarding the boundaries of ownership and property rights. Of course, this is all aimed at achieving social welfare.

4. Intellectual Property in the Perspective of Richard A. Posner

One of the figures of the Utilitarian school, Jeremy Bentham (1748-1832), in relation to the purpose of law enforcement stated that:

"The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil" (J Bentham, 2000).

Therefore, supporters of the Utilitarian school argue that: "...intellectual property right was created by society for the purpose of serving the economic interests of its members at large". That is, intellectual property is not a person's natural rights, but is granted by the Government to guarantee the wider economic interests of society. According to this school, IP protection is not the main goal, but "...only tools to another greater end: progress". That is why a work will one day become a public domain to encourage everyone to create new works (O Granstrand, 1999). It is this second stream – which is experiencing rapid development in the United States (US) – which until now has more colored the concept and regime of IP, because it is more suited to the needs of the development of industrialization.

Associated with this concept, William Landes and Richard Posner argued that if IP was not created, then everyone would not be motivated to make intellectual creativity-based products that have high social value. In relation to KI, both of them are of the view that this protection provides benefits for consumers because it reduces the "cost of searching/selection" of a product. For example, consumers will find it easier and faster to choose a product in a store simply by

looking at the brand “Chitato” or “Silverqueen”. compared to having to choose products that are not named because they have to take the time to look at the contents of the product in question. In addition, HKI also provides incentives to producers to produce something of high quality consistently. Even more interesting is that it also “improves the language” used between members of the community because communication patterns become more “efficient and attractive”. For example, of course, people will be more efficient in communicating when mentioning the brand of a product rather than having to define it at length (W Fisher, 2001).

Posner’s view regarding IP that is no less important is that the characteristics of IP are not only that there is an exchange between incentives and access (IP creates exclusive rights for the holder and can be transferred to other people) but also involves an exchange between benefits and costs (M. William Landes & Richard A. Posner, 2003). Advantages in the nomenclature of property rights can be divided into two, namely static advantages and dynamic advantages. If the first relates to the concept of traditional property rights because objects that can be used as rights are silent. An example is land. Whereas IP is included in dynamic profits because there is an investment in the invention and development of existing resources in the future. These two characteristics give rise to different transaction costs (M. William Landes & Richard A. Posner, 2003).

Posner added, IP is a form of dynamic advantage because it relates to the work of human intellectuals where the process of invention or creation requires a fairly high cost. Because there is a high cost in IP, it is very reasonable to protect it because otherwise there will be rent-seeking who will take advantage of the findings or creations without incurring high costs but with big profits. The further impact is that the process of invention and innovation will be difficult to develop. However, protection of IP also creates externalities. The external form of IP protection is that it can hinder the invention process itself because of the monopoly characteristics of IP. Individuals or industries will incur large costs if they will conduct research to find or create new products (M. William Landes & Richard A. Posner, 2003).

Posner in several of his studies also presented the issue of an imbalance between the costs of producing intellectual property and the costs of accessing the goods or intellectual property produced. This is due to the high cost for the community to access IP, which on the one hand, the cost of producing IP is lower than the price for accessing it. So far, the focus of traditional economic analysts has only highlighted that inventors or exclusive intellectual property rights holders are entitled to incentives or rewards for their findings. Apart from that, giving incentives is also to encourage people to make discoveries that are beneficial to human life. However, they did not highlight the high cost of accessing or using their findings. Even the cost of accessing IP exceeds the cost of the production margin of IP itself. As stated by Posner:

“The traditional focus of economic analysis of intellectual property has been on reconciling incentives for producing such property with concerns about restricting access to it by granting exclusive rights in intellectual goods—that is, by “propertizing” them—thus enabling the owner to charge a price for access that exceeds marginal cost. For example, patentability provides an additional incentive to produce inventions, but requiring that the

information in patents be published and that patents expire after a certain time limit the ability of the patentee to restrict access to the invention—and so a balance is struck. Is it an optimal balance? This question, and the broader issue of trading off incentive and access considerations, has proved intractable at the level of abstract analysis (M. William Landes & Richard A. Posner, 2003).

In Posner's perspective, the condition of unbalanced margins can lead to injustice. With the rise of the legal and economic movement, the focus of economic analysis on IP has begun to shift to more concrete and manageable issues according to the structure and texture of the intricate patterns of common law and legal doctrine, legal institutions and business practices related to intellectual property. Some of Posner's concepts of intellectual property problems include:

The length of protection for intellectual property, the rules that allow considerable copying of intellectual property without permission of the originator, the rules governing derivative works, and alternative methods of providing incentives for the creation of intellectual property (M. William Landes & Richard A. Posner, 2003).

Posner emphasized that the regulation regarding IP focuses on law as a complex legal structure and has been relatively ignored by economists in conventional economic analysis of intellectual property. Posner also addresses issues of trademarks and trade secrets, and explores some of the parallels and differences between the legal treatment of physical and intellectual property.

D. Conclusion

In the context of IP, the theory of economic analysis of law does not only see from one side that inventors or exclusive rights holders of intellectual property are entitled to incentives or rewards for their findings but also outlines that legal protection of IP can also lead to injustice due to conditions margin imbalance. In fact, the cost of accessing IP exceeds the cost of the production margin of IP itself. This condition can cause injustice.

E. Suggestion

Further research is needed to formulate a balance between production cost margins and costs for accessing IP using an economic and legal approach. It aims to create justice for all parties (inventors and the general public).

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