DOI: 10.21564/2414–990X.162.285119

Local Working of Patents: a Comparative Study of Europe and Indonesia

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Abstract
This study analyzes the implementation mechanism of local working patents from both European and Indonesian perspectives, using normative research methods and secondary data obtained from library research. The implementation of Patent Act Number 13 of 2016 has faced criticism from various parties, including patent holders who find it complicated and difficult to comply with the local working patent provisions. The Ministry of Law and Human Rights has issued regulations to facilitate patent holders who are unable to implement Article 20 by allowing them to request patent postponement. However, the Job Creation Act No. 11 of 2022 has made it easier for patent holders to fulfill their obligations regarding local working patents. The Directorate General of Intellectual Property (DGIP) is responsible for monitoring, evaluating, and reporting on intellectual property protection. However, rules and procedures related to monitoring mechanisms, especially those related to implementing local working patents, have not been fully regulated by the DGIP Office.

Keywords: local working; patent; monitoring mechanism.

Локальна робота з патентами: порівняльно-правове дослідження патентного права Європи та Індонезії

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Анотація
У роботі проаналізовано механізм імплементації європейських місцевих робочих патентів та, з індонезійської точки зору, з використанням нормативних методів дослідження і вторинних даних, отриманих на основі аналізу наукових публікацій. Наголошено, що імплементація Патентного закону № 13 від 2016 р. зазнала критики з боку різних сторін, включаючи власників патентів, які вважають, що дотримання місцевих положень про робочі патенти є складним і важким завданням. Міністерство юстиції та прав людини видало підзаконні акти, що полегшують життя власникам патентів, які не можуть виконати статтю 20, дозволивши їм просити про відтермінування дії патенту. Однак Закон про створення робочих місць № 11 від 2022 р. спростив для власників патентів виконання їхніх зобов'язань щодо місцевих робочих патентів. Генеральний директорат інтелектуальної власності (DGIP) відповідає за моніторинг, оцінку та звітність у сфері захисту інтелектуальної власності. Однак правила і процедури, пов'язані з механізмами моніторингу, особливо ті, що стосуються впровадження місцевих робочих патентів, не були повністю врегульовані Офісом DGIP.

Ключові слова: локальна робота; патент; механізм моніторингу.

Introduction

Intellectual property is becoming more valuable in the global market. As technology and innovation continue to advance, the ability to create and protect intellectual property is crucial for businesses to stay competitive. Inventions,

patents, and other forms of intellectual property can provide a significant advantage to companies in various industries. However, it is important to ensure that intellectual property rights are respected and enforced to promote fair competition and innovation. This requires effective regulations and monitoring mechanisms, such as the ones implemented by the DGIP in Indonesia, to protect the interests of patent holders and promote the development of intellectual capital [1].

The complexity of IP protection which has legal, economic, and cultural dimensions, needs serious attention from the Indonesian government. The IP system is a private right. One is free to apply or register intellectual works or not. The exclusive rights granted by the state to individual IPR actors (inventors, creators, designers, and so on) are nothing but appreciation for their work (creativity) [2]. Any intellectual property issue should be resolved by national laws. Because intellectual property rights have one characteristic which other national rights do not have [3].

It is unavoidable impact of the Industrial Revolution 4.0 era that intellectual property (IP) law has more important and strategic role in supporting the economic development, including industry and the growth of the business sector [4]. Technology has an important role in developing the economy in a country. Therefore, there is an assumption from many countries in the world that economic development cannot be separated from industrialization. Technology as an intellectual creativity of human beings, where its creation sacrifices abundant number of thoughts, time, and funds, has valuable economic benefit. Therefore, the inventors of those technologies are given legal protections, named patents [5]. Patent regulations designed to protect intellectual property and stimulate innovation have been introduced in Indonesia. Regulations were originally introduced by decree in 1953 and the Patent Law of 1989, which complied with international standards, was the first patent law to be introduced [6]. Then, it was amended by Law No. 14 of 2014. And, amended again by Law No. 13 of 2016.

However, Article 20 of the Patent Law has risen a debate that the Government disregarded the international trade obligations it undertook under the TRIPS Agreement which is a "hard law" in nature and subsequently binding to the WTO member States [7]. This provision requires patent holders to manufacture products and use processes in Indonesia to support technology transfer, absorption of investment, and/or provision of employment. This provision is also referred to as "local working". Essentially, the local working of a patent entails that the 'patentee must manufacture the patented product, or apply the patented process, within the patent granting country [8]. Some companies from

the United States of America have objected to this provision, saying that it will not only make things difficult for them, but also contradicts the International Agreement [9].

The Job Creation Law passed by the Indonesian Parliament in November 2020, which took effect on the same day, includes changes to the Patent Law No. 13 of 2016. Article 107 of the Job Creation Law amends certain provisions in the Patent Law, including the removal of the requirement for patent use to be limited to production in Indonesia. The changes also include an increase in clarity for simple patents and a shorter substantive examination period for trademarks. The aim of these changes is to boost economic recovery and position Indonesia competitively in ASEAN. The Job Creation GRL, a revised version of the Job Creation Law, also streamlines the process of obtaining halal certification and allows for outsourcing agreements between companies. However, the mechanism for monitoring the activities of the implementation of Article 107 has not been regulated [10–12].

Based on the brief description above, it is necessary to conduct in-depth research studies related to the following problem how is the mechanism for monitoring the implementation of local working patent if compared to the Europe perspective.

Materials and Methods

This research approach can provide valuable insights into the legal framework and regulations related to intellectual property rights in Indonesia, particularly in the context of patent regulations. By analyzing the relevant legal materials and conducting qualitative analysis, it will be possible to identify any gaps or areas for improvement in the current system, as well as potential best practices and solutions for effective implementation and enforcement of patent regulations. Additionally, comparing the mechanism for monitoring the implementation of local working patents in Indonesia and Europe could provide valuable insights into best practices for IP regulation and enforcement, which can ultimately encourage investment in research and development, leading to new and innovative products and services that benefit society.

Results and Discussion

Mechanism for Monitoring the Implementation of Local Working Patents

In the end of 2019, the Indonesian president Joko Widodo for the period 2019-2024 brought a new view of changing the concept of statutory law, namely the Job Creation Act No. 11 of 2020. The goal of this Act is to increase the investor confidence in Indonesia by reducing rules and simplifying the licensing procedure [11]. There are several points of amendments in the provisions of patent-related

regulations in the JCA compared to the currently Patent Law which have been summarized by the researcher as follows (see table).

PATENT ACT NUMBER 13 YEAR 2016	JOB CREATION ACT NUMBER 11 YEAR 2020 CHAPTER VI EASE OF DOING BUSINESS ARTICLE 107
Article 20 (1) Patent holders are required to make their product or use the process in Indonesia. (2) making the product or using the process as referred to in paragraph (1) must support technology transfer, investment absorption, and/or job creation.	**1. The provisions of Article 20 have been amended to read as follows:** (1) Patents must be worked or implemented in Indonesia. (2) Patent implementation as referred to in paragraph (1), is as follows: a. the implementation of product patents, which involve various activities such as making, importing, or licensing the patented product; b. Implementation of the patented process which involves manufacturing, licensing, or importing products resulting from a patented process; or c. Implementation of the patented methods, systems, and uses which involves manufacturing, importing, or licensing products resulting from the patented methods, systems and uses.
Article 82 (1) A compulsory license shall mean a license to implement a patent which has been granted based on decision of the Minister based on an application with the following legal grounds: a. Patent Holders do not carry out the obligation to manufacture products or to use processes in Indonesia as referred to in Article 20 paragraph (1) within 36 (thirty-six) months as of the date of grant of a patent.	**2. The provisions of Article 82 have been amended to read as follows:** (1) A compulsory license shall mean a license to implement a patent which has been granted based on decision of the Minister based on an application with the following legal grounds: a. Patents are not implemented in Indonesia as referred to in Article 20 within 36 (thirty-six) months as of the date of grant of a patent.

PATENT ACT NUMBER 13 YEAR 2016	JOB CREATION ACT NUMBER 11 YEAR 2020 CHAPTER VI EASE OF DOING BUSINESS ARTICLE 107
b. The relevant patent has been implemented by the patent holder or the licensee in a form and manner that contravenes the public interest; or c. Patents developed from previously granted patents cannot be implemented without using the patents of other parties which are still under protection. (2) A request for a compulsory license as referred to in paragraph (1) shall be subject to a fee.	b. The relevant patent has been implemented by the patent holder or the licensee in a form and manner that contravenes the public interest; or c. Patents developed from previously granted patents cannot be implemented without using the patents of other parties which are still under protection. (2) A request for a compulsory license as referred to in paragraph (1) shall be subject to a fee.

The definition of local working requirements should be understood. "Local working requirements are domestic provisions which allow for the grant of a compulsory license when a patent is not 'worked' in that country" [12] considering whether Article 30 and 31 of TRIPS would make legitimate the compulsory license based on local working requirements. Part IV concludes that local working requirements and the compulsory licenses they guarantee are permitted under the TRIPS. \"Domestic legislation providing for local working requirements does not unjustifiably discriminate against other WTO members in violation of Article 27 of the TRIPS.\"","author":[{"dropping-particle":"","family":"Lee","given":"C hia-Ling","non-dropping-particle":"","parse-names":false,"suffix":""},{"dropping-particle":"","family":"Graduate","given":"J D","non-dropping-particle":"","parse-names":false,"suffix":""}],"id":"ITEM-1","issued":{"date-parts":[["2013"]]},"publisher":"NTUT J. of Intell. Prop. L. & Mgmt","title":"THE LEGALITY OF LOCAL PATENT WORKING REQUIREMENTS UNDER THE TRIPS AGR EEMENT","type":"report","volume":"2"},"uris":["http://www.mendeley.com/documents/?uuid=28fa8db1-fcb2-3b61-aab5-0c31d4e61323"]}],"mendeley":{"formattedCitation":"[12]","plainTextFormattedCitation":"[12]","previouslyFormattedCitation":"[14]"},"properties":{"noteIndex":0},"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}. It is claimed that the local production of patented inventions would decrease transport costs, cut dependence on foreign suppliers, provide local jobs, increase expertise, cause transfer of technology and lead to innovation [13].

The TRIPS Agreement in Article 27(1) stipulates that patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. A combined reading of the above interrelated provisions leads to the conclusion that Article 27(1) is to be read alongside all the other provisions and therefore "local working" is an essential precondition for the patentee to meet his obligations to the society and to the country in which the patent is granted [14]. The Job Creation Act (JCA) passed in November 2020 removed the requirement for local working patents in Indonesia, which was seen as a move to attract more foreign investment and increase competitiveness within the ASEAN region. This change has been met with mixed reactions, as some argue that it may lead to a lack of regulation and monitoring of patent use, particularly for process patents. However, proponents of the change argue that it will spur economic growth and increase innovation within the country. It remains to be seen how the implementation of these changes will play out in practice.

According to recent changes in the Patent Law through the Job Creation Law in Indonesia, the requirement for local working patents has been removed [15]. This has raised concerns about the lack of regulation and monitoring of patent use, as it may lead to the exploitation of patents without any benefit to the public interest. The concept of a "license of right" patent, which creates an obligation for patent owners to license their patents and ensure their working in the public interest, has been proposed to address this issue [16]. However, the rules on what constitutes "working" vary from country to country, with some countries requiring manufacture in that country to a level sufficient to meet local demand, while others are satisfied with manufacture in any WTO country or anywhere in the EU [17].

Provisions for a "license of right" have been introduced in several European countries and are available for the new European patent with unitary effect. This creates an obligation for patent owners to license their patents, similar to the obligation created by competition law for standard-essential patents. With a "license of right" patent, the actual working of the patent is secured regardless of whether or not someone is willing to work it, as the license constitutes the working of the patent. However, the implementation of such licenses must be regulated to prevent abuse and ensure they are used in the public interest [18]"mendeley":{"formattedCitation":"[18]","plainTextFormattedCitation":"[18]","previouslyFormattedCitation":"[20]"},"properties":{"noteIndex":0},"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}.

Countries that belong to IP5 (The five largest patent offices: the Japan Patent Office, the European Patent Office, the Korean Intellectual Property Office, the China National Intellectual Property Administration, and the United States Patent and Trademark Office), have relatively minimal standards for working requirements. For example, some European countries (for example, Great Britain, Italy, Czech Republic, among others) and Korea share similar requirements in which a patented invention should be sufficiently worked within 3 (three) years (or sometimes four years) from filing the application or the patent may become subject to the risk of compulsory licensing. In these countries, no annual statement of working is required to prove working of a patent. Similarly, Brazil requires a patent be worked by three years from grant, with no annual statement of working required. In Brazil, a non-worked patent could theoretically also be at risk for compulsory licensing [19]"6","16"]]},"author":[{"dropping-particle":"","family":"Bergman","given":"Osha","non-dropping-particle":"","parse-names":false,"suffix":""},{"dropping-particle":"","family":"Burton","given":"Watanabase","non-dropping-particle":"","parse-names":false,"suffix":""}],"id":"ITEM-1","issued":{"date-parts":[["2022","11","30"]]},"title":"Working on It: An Overview of Patent Working Requirements, Part 2","type":"webpage"},"uris":["http://www.mendeley.com/documents/?uuid=5d515e53-fcac-3f30-b1bf-6f6bb990f649"]}],"mendeley":{"formattedCitation":"[19]","plainTextFormattedCitation":"[19]","previouslyFormattedCitation":"[21]"},"properties":{"noteIndex":0},"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}.

With the enactment of the new local working patent provisions in JCA, it is now easier for foreign applicants to implement the local working patent provisions by carrying out importation activities of patent-protected products/process. However, the mechanism related to the monitoring of the implementation of these importation activities has not been regulated in the Patent Act or other related regulations. And this will have an impact on the emergence of problems such as for example the importation activities cannot stand alone and be supervised by the Directorate General of IP but there are other institutions, namely the Directorate General of Customs and Excise who are authorized to handle it.

In addition, the rapid pace of free trade and the increasing number of trade agreements that Indonesia is participating in, brings the issue of intellectual property rights (IPR) protection to the government's main concern. In connection with the above, Directorate General of Customs and Excise based on Law Number 17 Year 2006 on Customs, is also tasked with carry out law enforcement in the field of IP. Customs and Excise Institution together with the Directorate General of Intellectual Property (DGIP) of the Ministry of Law and

Human Rights signed a cooperation agreement related to law enforcement in the field of intellectual property in a press conference in 2021 [20].

The Minister of Finance Regulation (PMK) number 40 of 2018 is an important step towards protecting intellectual property rights (IPR) in Indonesia. With this regulation, the Customs Institution has the authority to prevent the import or export of goods suspected of infringing IP, provided that the goods are recorded in the Customs record system. This regulation empowers Customs officers to conduct surveillance and supervision of imported or exported goods suspected of infringing IP, using a database of IP recordation by owners or rights holders. This surveillance can be conducted through intelligence data collection, physical inspection of goods, or document research, with the aim of preventing the import or export of infringing goods and promoting IPR protection in Indonesia [21].

Further, the Minister of Law and Human Rights has issued the following 3 (three) newest Regulations as the implementing regulations to the Act Number 11 Year 2020 on Job Creation related to Patent and Trademark.

Type of Regulation	Regulation Number	Date		Concerning
		Date of Ratification	Date of Promulgation	
Ministerial Regulation	Number 12 of 2021	29 January 2021	3 February 2021	Amendment to Ministerial Regulation Number 67 Year 2016 concerning Trademark Registration
Ministerial Regulation	Number 13 of 2021	29 January 2021	3 February 2021	Amendment to Ministerial Regulation Number 38 Year 2018 concerning Patent Application
Ministerial Regulation	Number 14 of 2021	29 January 2021	3 February 2021	Amendment to Ministerial Regulation Number 30 Year 2019 concerning Procedures for Granting of Patent Compulsory License

The Indonesian Patent Act No. 13 of 2016 stipulates that a Compulsory License can be granted if the Patent Holder fails to fulfill its obligation to make the product or use the process in Indonesia within 36 months after the patent is granted. However, a ministerial regulation Number 30 of 2019 allowed the applicant to file a postponement of the implementation of local working patents.

Conclusions

The lack of uniformity in working requirements for patents has been a topic of discussion in international patent law forums. However, the Indonesian government has taken steps to protect intellectual property rights (IPR) through regulations and cooperation agreements between the Customs and Excise Institution and the Directorate General of Intellectual Property (DGIP) [22]. The Compulsory License provision in the Indonesian Patent Act No. 13 of 2016 can be granted if the Patent Holder fails to fulfill its obligation to make the product or use the process in Indonesia within 36 months after the patent is granted. The newest Act Number 11 of 2020 on Job Creation and the Ministerial Regulation Number 14 of 2021 have revoked the regulation that allowed applicants to file a postponement of the implementation of local working patents. This means that the Indonesian government is taking a stronger stance on enforcing patent laws and encouraging the local production of patented products.

The implementation of local working patents in the newest Job Creation Act includes manufacturing, importing, or licensing the patented products, process, methods, systems, and uses. This means that patent holders are required to produce or use their patented products, processes, methods, systems, and uses in Indonesia within 36 months after the patent is granted. The Compulsory License provision in the Indonesian Patent Act No. 13 of 2016 can be granted if the Patent Holder fails to fulfill its obligation to make the product or use the process in Indonesia within the given time frame. These steps taken by the Indonesian government show their commitment towards protecting intellectual property rights (IPR) in the country [23].

In view of the above, the Patent Holder has the option to manufacture, import, or license their patented products or products resulting from a patented process in Indonesia. In our opinion, more clarification is needed regarding the "standard measurement" for determining whether the Patent Holder has implemented the patented product by manufacturing, importing, or licensing the patented products in accordance with the provision of Article 107 of Law No. 11 of 2020 on Job Creation Act. However, it is not explicitly stated in the law whether the Patent Holder is required to report or submit proof of importation documents to the Ministry of Law and Human Rights. It is important for the Indonesian Government to establish clear and effective measurement, reporting, and verification procedures to ensure that the Patent Holder has fulfilled their obligation to make or use the product in Indonesia within 36 months after the patent is granted. This will not only protect the interests of the Patent Holder but also promote innovation and development in Indonesia.

The lack of clarity in this matter may cause confusion and uncertainty for the Patent Holder, as well as for the Ministry of Law and Human Rights. Therefore, it is important for the DGIP Office to provide further clarification on this matter and establish effective and transparent reporting and verification measures to ensure that the Patent Holder has fulfilled their obligation to implement their patented product in Indonesia.

Recommendations

In view of the above, it is advisable for patent holders exporting their products to Indonesia to keep detailed records of their importation activities. This is because there is currently no clear requirement for patent holders to submit proof of importation documents to the Ministry of Law and Human Rights in Indonesia as a proof of implementing local working of patent. However, in case the DGIP Office issues a policy requiring patent holders to submit an annual report as proof of compliance with Article 20 of the Indonesian Patent Law, it would be beneficial for patent holders to have these records to avoid any potential legal issues. It is also important for the Indonesian government to consider the provisions of the TRIPs Agreement Article 27, which states that patents should be available and patent rights should be enjoyed without discrimination, regardless of the place of invention, field of technology, or whether products are imported or locally produced. However, there is also a national constitutional mandate as regulated in Law Number 7 of 1994 concerning the ratification of the World Trade Organization agreement.

Recording patent data with Customs Institution can help prevent intellectual property crimes such as counterfeiting and piracy. This is particularly important for patent holders exporting their products to Indonesia, as the lack of clarity in the Indonesian Patent Law can make it difficult to ensure compliance. By working closely with Customs, patent holders can help ensure that their products are protected and that they are in compliance with all relevant laws and regulations. It is important for governments to take a comprehensive approach to intellectual property protection, and working with Customs is an important part of this effort.

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Suggested Citation: Dewi, I.C., Nu'man, A.H., Ruhaeni, N., & Heniarti, D.D. (2023). Local Working of Patents: a Comparative Study of Europe and Indonesia. *Problems of Legality,* 162, 345-358. https://doi.org/10.21564/2414-990X.162.285119.

Рекомендоване цитування: Dewi I. C., Nu'man A. H., Ruhaeni N., Heniarti D. D. Local Working of Patents: a Comparative Study of Europe and Indonesia. *Problems of Legality*. 2023. Issue 162. P. 345–358. https://doi.org/10.21564/2414-990X.162.285119.

Статтю подано / Submitted: 25.07.2023
Доопрацьовано / Revised: 24.08.2023
Схвалено до друку / Accepted: 29.08.2023
Опубліковано / Published: 28.09.2023