

# JUDICIAL OVERVIEW ON CRIMINAL LIABILITY AGAINST A PERSON WHO DELIBERATELY USE, SELL OR EXPORT AN INDUSTRIAL DESIGN WITHOUT GETTING APPROVAL FROM THE EXCLUSIVE RIGHTHOLDERS OF INDUSTRIAL DESIGN BASED ON INDUSTRIAL DESIGN LAW

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## Abstract

Industrial design is a part of the intellectual property created by tasteful and corrosive thought and imagination. Protection against industrial design was indispensable to the certainty of laws to designers. This research issue to find out how the protection of industrial design that has conforms to industry design is listed in the general list under the 31st year 2000 act. This method of research USES the *yuridis normatif* and empirical approaches. The type of data used is secondary and primary data. The study concluded that a designer who lists industrial design products in the registry, has the exclusive rights granted to him by the republic of Indonesia. It can forbid anyone without his consent to use, sell, manufacture, export, import. When using bad faith, as holders of exclusive rights may file a civil suit and/or criminal charges. The conclusion is that the industrial design that industrial design could provide with the design of science-based on the design of science-based, should fill with novelty of that industry's design and yet no public announcement was made.

**Keywords:** Criminal Liability, Intellectual Property Rights, Industrial Design, Exclusive Right.

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## INTRODUCTION

The protection of intellectual property rights is very important to Indonesia people and the world. Intellectual Property Rights are a form of creativity of a person resulting from the thought and intention of humans, not all humans can create copyrighted works produced by their thinking power to create a work of creativity must have a very high imagination. As a property right, the existence of Intellectual Property Rights is very important for economic progress that has benefits and is useful in supporting human life, also having the results of the work formulated as intellectuality, so that when something is created based on the work of the mind it is formulated as intellectual property rights.

Design itself is designing a visual plan of an object or structure to be implemented as intellectual property rights. Features of the form, configuration, pattern or ornament applied to an industrial manufacturing article, including parts of the article if it will be made separately that can be judged by the eye in the finished article.

The challenge of growing globalization on local cultural products must be anticipated by strengthening norms from customary norms (local wisdom), this is done as a legal protection from irresponsible behavior (Erlina, 2013). New technologies that emerge from globalization without pushing the boundaries of local cultural renewal are efforts to be imitated, bartered, used in new ways or improved, then get rid of the values that exist in local products (Adimihardja, 2004).

Meanwhile the novelty requirement must be specified in all laws, the nature of the required novelty as a condition of protection differs between laws in different countries. The novelty required is sometimes absolute or universal, meaning that the design for the registration sought must be compared with all other designs that have been produced in all other parts of the world in the past and expressed through tangible or verbal means.

For example, an industrial design that is already owned by one party and has been registered with the Directorate General of Intellectual Property Rights (Directorate General of Intellectual Property Rights / *Ditjen HKI* in Indonesia), then at a different time another party registered an industrial design with the same shape/configuration and both of them are the same, the registration is accepted in the general register, or the industrial design which is registered in bad faith. Industrial design and painting have similarities, but there are differences, namely the object, industrial design is not only an image but also a combination of colors that have different artistic values and meanings from other colors.

In Article 9 paragraph (1) of Laws Number 31 of 2000 concerning Industrial Designs, it is explained that "the holder of the industrial design right has the exclusive right to exercise his industrial design rights and to prohibit other people without his consent from making, using, selling, import, export, and/or distribute goods that are granted industrial design rights". Excepted in this case, the use of industrial designs for research or educational purposes as long as it does not harm the reasonable interests of the rights holder. If this provision is violated, it can be qualified as a criminal act as stated in Article 54 paragraph (1) of Law Number 31 of 2000 concerning Industrial Design which stated whoever intentionally and without rights commits the act as referred to in Article 9 shall be punished with a maximum sentence of imprisonment for 4 (four) years and/or a maximum fine of Rp. 300,000,000 (three hundred million rupiah).

The attitude of the people who still regard Intellectual Property Rights as a public right has resulted in the implementation of legal protection for industrial designs that are often not running properly. So that disputes over the ownership of rights to industrial designs often occur because many designs are not properly registered. The public's lack of understanding with the existence and benefits of industrial designs indirectly provides opportunities for parties with bad intentions to register industrial designs that are not their rights. This can be seen from the various industrial design cases that have reached to the court, most of which occur because many industrial designs do not have an element of novelty but can be registered and obtain industrial design rights (Kusumaningrum, 2016).

From the description above, the Authors is interested in raising the research problem in this writing: What are the criminal sanctions for the act of abusing industrial designs belonging to other parties without permission based on Law Number 31 of 2000 concerning Industrial Designs and whats is the process of proving the novelty element in a registered industrial design based on Laws Number 31 of 2000 concerning Industrial Design?

## **MATERIALS AND METHODS**

This study uses 2 (two) problem approaches, namely the normative juridical approach and the empirical approach, with the following details: The approach is carried out by means of library research by reviewing, studying and analyzing theories and laws and regulations

related to this research problem. While the empirical approach is an approach that is carried out by conducting research in the field as an object of research by means of observation and interviews in order to obtain an overview and data related to the problem.

Data analysis is an attempt to determine answers to questions regarding the subject in the formulation of the problem and the things that are processed. In the process of analyzing this data, a series of data has been compiled in a qualitative juridical manner, namely by providing an understanding of the data in question according to the activities obtained in the field and compiled and described in the form of sentences. Then, from the results of data analysis, it is interpreted to form a deductive conclusion in the form of answers to problems based on research. In this problem the analysis begins with research activities and a description of the background of industrial design, industrial design objectives and protection of industrial designs that have similarities in form/configuration on the industrial design, based on existing library materials. This activity can facilitate research to analyze a proposed problem, interpret and then giving conclusions.

## **RESULTS AND DISCUSSION**

1. Criminal sanctions for misuse of industrial designs belonging to other parties without permission based on Law Number 31 of 2000 concerning Industrial Designs

This statement is based on the results of an interview with Mr. Ignatius Mangantar Tua Silalahi, as the Head of Legal Services Division of the Regional Office of the Ministry of Law and Human Rights Lampung. Basically, the holder of the industrial design has the exclusive right to exercise his industrial design right and to prohibit other people without his consent from making, using, selling, importing, exporting, and/or distributing the goods that are granted the industrial design right as mentioned in Article 9 Law number 31 of 2000 concerning Industrial Design.

Furthermore, Mr. Ignatius Mangantar Tua Silalahi, said before entering into the subject of the discussion regarding the Criminal Code for misuse of Industrial Designs owned by other parties without permission that basically industrial designs are protected by the fulfillment of the principle of novelty on industrial designs whose applications are submitted to the Directorate General Intellectual Property. What is meant by novelty, there has been no previous disclosure is disclosure.

This is strengthened by examining the TRIPs Agreement and the Paris Convention, the main points can be drawn, namely:

- a. Industrial designs that can be protected are “new” and “original” industrial designs that are significantly different from previous industrial designs;
- b. Industrial design rights owned by industrial design rights holders include “making, selling and importing” and also preventing other parties from doing so without the permission of the industrial design rights holders;
- c. The member state of the paris convention provide protection to the holder of industrial design rights for a minimum of ten years (Maulana, 2010).

The nature of the novelty required is sometimes absolute or universal, which means that the industrial design for the registration sought must be compared with all other industrial designs which have been produced in all other parts of the country in the past and disclosed through tangible means.

Sometimes in practice many companies have industrial designs where there is a novelty to industrial design, but first sell or promote their products to the market. Thus, during an inspection at the Intellectual Property Office, it was found that the design was not new because it had been sold to the market before being registered. The novelty of industrial design is the fundamental reason for awarding the state to the originators of industrial design through the protection of industrial design.

As mentioned in Article 2 Paragraph (3) of Law Number 31 Year 2000 concerning Industrial Designs, the previous disclosure as referred to in paragraph (2) is the previous disclosure of industrial designs:

- a. Receipt date ; or
- b. Priority date if the application is filed with priority rights;
- c. Has been announced or used in Indonesia or outside Indonesia.

The principle of novelty in this industrial design is different from the original principle, the meaning of new or novelty is determined by the registration that was first submitted and at the time of submission there was no other party who proved that the registration was not new or that there had been previous disclosures or publications either written or unwritten. .

Lack of public understanding of the existence and benefits of industrial designs indirectly provides opportunities for parties with bad intentions to register industrial designs that are not their rights. This can be seen from the various industrial design cases that have reached to the court, most of which occur because many industrial designs do not have an element of novelty but can be registered and obtain industrial design rights.

The attitude of the people who still regard Intellectual Property Rights as a public right has resulted in the implementation of legal protection for industrial designs that are often not running properly. So that disputes over the ownership of rights to industrial designs often occur because many designs are not properly registered.

As the holder of the exclusive right to industrial design, he/she can file criminal charges against anyone who intentionally or in bad faith and without the rights to use, sell, import, export, and/or distribute goods that are granted industrial rights.

The enactment of Law Number 31 of 2000 concerning Industrial Design in Indonesia is motivated by two reasons. The first reason is related to the issue of Indonesia's obligations as a member of the World Trade Organization (WTO) which must provide better regulations regarding the protection of industrial designs. Second, relates to the government's determination to provide effective protection against various forms of violations of industrial designs such as plagiarism, piracy or imitation. This more comprehensive protection effort is expected to be a driving factor for increasing the creativity of designers and as a vehicle for producing productive designers.

Mr. Ignatius Mangantar Tua Silalahi continued, explained that if someone deliberately copy or imitate an industrial design that has been registered in the public register and has industrial design rights, the product is traded in the market by parties with bad intentions for the sake of their business, causing losses and unfair business competition, deceive or mislead the public, then the act can be said to have violated the provisions of Article 54 paragraph 1 and paragraph 2 of Law Number 31 Year 2000 concerning Industrial Design.

In Article 54 paragraphs 1 and 2 of Law 31 of 2000 concerning Industrial Design, it is very clear that anyone who intentionally and without rights commits an act as referred to in Article 9 shall be sentenced to a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 300,000,000 (three hundred million rupiah). In paragraph 2 whoever deliberately violates the provisions as referred to in Article 8, Article 23 or Article 32 shall be punished with imprisonment for a maximum of 1 (one) year and/or a fine of a maximum of Rp. 45,000,000 (forty five million).

Industrial design rights holders have exclusive rights to industrial designs that are owned and registered with the Directorate General Of Intellectual Property, regarding criminal responsibility for someone who makes plagiarism by using, selling, importing, exporting, and/or distributing goods that are granted industrial design rights without permission or approval from the holder of the exclusive right to the industrial design goods.

In Article 54 paragraphs 1 and 2 of Law number 31 of 2000 concerning Industrial Design that whoever intentionally and without rights commits an act as referred to in Article 9 shall be sentenced to a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 300,000,000 (three hundred million rupiah). In paragraph 2 whoever deliberately violates the provisions as referred to in Article 8, Article 23 or Article 32 shall be punished with imprisonment for a maximum of 1 (one) year and/or a fine of a maximum of Rp. 45,000,000 (forty five million).

From the description above, the Author can analyze that criminal sanctions for acts of abusing industrial designs belonging to other parties without permission are based on Law Number 31 of 2000 concerning Industrial Designs. Industrial designs that get protection are industrial designs that are new or have no previous disclosures, such as:

- a. Receipt date; or
- b. Priority date if the application is filed with priority rights;
- c. Has been announced or used in Indonesia or outside Indonesia.
- d. Does not conflict with applicable laws, public order, religion and decency.

In his protection as the creator, the designer has industrial design rights or exclusive rights granted by the state. He/she can prohibit anyone without his permission and consent from the following actions:

- a. Make;
- b. Use;
- c. Sell;
- d. Importing;
- e. Exporting; and/or
- f. Circulate goods that are granted industrial design rights.

For parties who intentionally commit acts that are not permitted by applicable law, they can be punished, such as:

- a. Maximum imprisonment of 4 (four) years and/or;
- b. The maximum fine is 300,000,000 (three hundred million rupiah).

As an employee of the Directorate General Of Intellectual Property or a person who because of his duties works on behalf of the Directorate General, he is obliged to maintain the confidentiality of the application. If this is violated, there are sanctions for parties who do not maintain the confidentiality of the designer's application until the announcement of the application, such as:

- a. Maximum imprisonment of 1 (one) year; and/or
- b. The maximum fine is 45,000,000 (forty five million rupiah).

## 2. The Process of Proving Novelty Elements in an Industrial Design Registered Based on Law Number 31 Year 2000

Basically, industrial design includes three or two dimensions Industrial design is a creation of the shape, configuration, or composition of lines or colors, or lines and colors, or a combination of them in the form of three-dimensional or two-dimensional patterns and is used to produce a product, goods, industrial commodity, or handicraft.

This statement is based on the results of an interview with Mr. Ignatius Mangantar Tua Silalahi, as the Head of Legal Services Division of the Regional Office of the Ministry of Law and Human Rights Lampung. He said that the cancellation of the industrial design should be based on the official news or in the public to find out whether there has been previous disclosure by other parties, the industrial design right can be canceled if it is contrary to the applicable laws and regulations, public order, religion, or decency.

Furthermore, Mr. Ignatius Mangantar Tua Silalahi explained that his party also checked the database by referring to all previously submitted industrial design applications to declare whether or not there was an element of novelty in the industrial design to be registered. Besides that, his party also checks the website data if it turns out that aesthetically it has the same impression, the application will be rejected.

As stated in Article 2 paragraph (3) of Law Number 31 of 2000 concerning Industrial Design which states that, the previous disclosure as referred to in paragraph (2) is the disclosure of the previous industrial design:

- a. Receipt date; or
- b. Priority deadline if the application is submitted with priority rights; or
- c. Has been announced or used in Indonesia or outside Indonesia.

Legal Principles for the Protection of Industrial Designs:

- a) The principle of publicity;
- b) The principle of oneness (unity);
- c) The principle of novelty.

The principle of novelty in this industrial design is different from the original principle, the meaning of new or novelty is determined by the registration that was first submitted and at the time of submission there was no other party who proved that the registration was not new or that there had been previous disclosures or publications either written or unwritten.

Trade Related Aspects of Intellectual Property Rights (TRIPs) also regulates industrial protection requirements. Member states regulate the protection of "independently created industrial design" on new or original criteria. So it's up to each member to choose one of the two criteria. Just a reminder that the protection should not include a design dictated basically by technical or functional considerations. That is, essentially the consideration of protection against is not on a technical or functional basis.

The state provides protection against industrial design for a particular product design \ after testing the real form of the industrial design. Industrial design is a form of one's creativity resulting from the thought and initiative possessed by humans, in creating a creative work has a very high power of thought and imagination.

Thus, the Republic of Indonesia gives exclusive rights to the designer as the holder of the industrial design right. As a designer, he or she can prohibit other people from using the industrial design without their consent. As stated in Article 9 paragraph (1) of Law Number 31 of 2000 concerning Industrial Designs, the holder of industrial design rights has the exclusive right to exercise their industrial design rights and to prohibit others without their consent from making, using, selling, import, export, and/or distribute goods that are granted industrial design rights. In paragraph (2), it is said to be excluded in this case, the use of industrial designs for research or educational purposes as long as it does not harm the reasonable interests of the holders of industrial design rights.

By examining the TRIPs Agreement and the Paris Convention, it can be concluded that: Industrial designs that can be protected are "new" and "original" industrial designs that are significantly different from previous industrial designs (Significantly differ from Known Design) (Maulana, 2010). The element of novelty in industrial design that someone want to register is very important to note, that the element of novelty in industrial design is the main requirement to get protection against industrial designs and get industrial design rights, as designers get exclusive rights to works that have been registered.

Someone can prohibit anyone without his permission or approval to use, sell, import, trade for personal or group gain that has an adverse effect on one party. Sometimes in practice many companies have industrial designs where there is a novelty to industrial design, but first sell or promote their products to the market. Thus, during an inspection at the

Intellectual Property Office, it was found that the design was not new because it had been sold to the market before being registered. The novelty of industrial design is the fundamental reason for awarding the state to the originators of industrial design through the protection of industrial design.

Based on the description or statements above, the Authors analyzes that the process of Proving Novelty Elements in an Industrial Design Registered based on Law Number 31 Year 2000. Basically, disclosures on industrial designs that contain elements of novelty are as follows:

- a. Never marketed;
- b. Never been traded; or
- c. It has never been announced or used in Indonesia or outside Indonesia.

There are several ornaments in industrial design so as to create a product or item that can be registered, namely:

- a. Form;
- b. Configuration;
- c. Line composition;
- d. Color;
- e. Lines and colors; or
- f. A combination of him.

In its form, there are three or two dimensions that give an aesthetic impression and can be realized in three-dimensional or two-dimensional patterns and can be used to produce a:

- a. Product;
- b. Goods;
- c. Industrial commodities; or
- d. Handycrafts.

## **CONCLUSION**

Criminal sanctions for misuse of Industrial Designs owned by other parties without permission based on Law Number 31 of 2000 concerning Industrial Designs, as the holder of exclusive rights has the right to prohibit anyone and has the right to file a lawsuit or ask for compensation if there are parties who without their permission or approval trade, import, export and distribute goods that have been granted industrial design rights registered in the Directorate General Of Intellectual Property. The Unitary State of the Republic of Indonesia totally concern about the protection of industrial designs which contain elements of novelty and have never been traded or marketed before. For parties who without their attorneys plagiarize the creations of someone who has been registered and can harm the design rights holder, there is a criminal sanction with a maximum sentence of 4 (four) years imprisonment.

Then, proof of the novelty element in an industrial design registered under Law Number 31 of 2000, the novelty element is to be able to see from the date of receipt, the priority date if the application is submitted with priority rights and has been announced or used in Indonesia or outside Indonesia. Whereas apart from that, the Directorate General of Intellectual Property also looks at the data base by referring to all previously submitted industrial design applications to declare whether or not there is an element of novelty in the industrial design to be registered. Besides that, his party also checks the website data if it turns out that aesthetically it has the same impression, the application will be rejected.

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