



Intellectual Property Rights as a WAQF Asset: The Way to Change an Old Paradigm in Indonesia

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Waqf has a significant role in economic development and social welfare. The Waqf paradigm in Indonesia is limited to immovable assets such as land and buildings. In fact, Law No. 41 of 2004 concerning Waqf also regulates assets other than immovable property. One of these assets is Intellectual Property Rights. The economic potential of Intellectual Property Rights (IPR) becomes an opportunity to realize prosperity for the community. This paper identifies IPR regimes that can be used as waqf and constraints in their implementation. The results show that the regulation of entire IPR Law allows the rights transfer through waqf with several adjustments, i.e., the term of the Copyright waqf must be adjusted to the period of copyright protection in Indonesia. In addition, the transfer of rights in the copyright waqf only covers Economic Rights. This means that Moral Rights are still attached to waqif. Constraints to the implementation of IPR waqf include the absence of legal rules at the technical level as a direction to waqif and Nazhir to carry out the transfer of rights. Another obstacle found was the absence of the role of Indonesian Waqf Board (BWI) in improving Nazhir's competence regarding Intellectual Property Rights.

Key words: *IPRs Waqf, Waqf Asset, Social Welfare.*

Introduction

Waqf practices in Indonesia influence potential growth significantly and play a socio-economic role in society (Ihsan, Sulaiman, Alwi, & Adnan, 2017; Puspitasari, 2017). One of the consequent developments is the change in the use of assets from consumptive to productive waqf. (Budiman, 2014). The purpose of this change is to empower people and generate economic benefits. However, the waqf paradigm built into the community is still limited to immovable assets such as land and buildings (Fahadil Amin Al Hasan, 2017). Since 2004, the Government has attempted to expand waqf assets by initiating waqf of movable objects through Law Number 41 of 2004 concerning Waqf (Indonesian Republic, 2004) in Article 16 of the Waqf Law, one of the assets of a movable object that emerges from this expansion is Intellectual Property Rights (IPR).

There are several reasons the Indonesian Government regulates IPRs as waqf assets. So far, the Government has assessed that IPR in Indonesia has considerable economic potential (Winaya & Arief, 2018). This is evident from the Non-Tax State Revenue (PNBP) from the IPR sector in the last five years of IDR. 1,903,949,043,295,- (DGIP, 2018) with details of the IPR application in Table 1 below:

Table 1: Intellectual Property Application Statistics in Last 5 Years

Year	Copyright	Industrial Design	Geographical Indication	Trademark	Patent	Trade Secret	Total
2014	5,679	3,691	17	60,895	8,364	1	78,647
2015	5,973	3,909	20	61,790	8,880	2	80,574
2016	7,262	3,847	7	65,346	9,236	2	85,700
2017	11,791	3,641	14	68,368	9,798	1	93,613
2018	11,492	1,873	4	32,274	5,042		50,685
	42,197	16,961	62	288,673	41,320	6	389,219

In addition, the transfer of IPR assets through waqf is one of the government's strategies to reduce the nuances of IPRs that appear to be individualistic in transition to the social community.

However, these efforts are not accompanied by the establishment of comprehensive implementing regulations regarding the transfer of assets through waqf. Government Regulation Number 42 of 2006 concerning Implementation of Law Number 41 of 2004 concerning Waqf (Indonesian Republic, 2006) does not include the waqf mechanism with IPR assets. The consequence is a lack of legal rules that impact on the absence of waqf



practices with IPR assets. In addition, the characteristics of each IPR regime have significant differences, especially in the rule of law in Indonesia.

Several studies have been conducted to examine IPRs as waqf assets, one of which is Raji, Tahir, Muhammad, & Omar, (2015) work which discusses IPR as a waqf asset in the perspective of the Shari'a. In this research it is claimed that IPR in Shari'a is permitted as a waqf asset. However, the IPR regime that can be used as a waqf asset has not been revealed. (Praja, Mulyadi, Riswandi, & Arifah, 2018) One IPR regimes of waqf assets, namely patents, has been revealed. The patent requirement as a waqf asset is (1) the patent is legally owned by the patent owner with proof of patent certificate issued by the Directorate General of Intellectual Property Rights (DGIP) (2) Patent does not contain controversy that violates Islamic Law. (3) Patent rights not in internal disputes from inventors or in dispute proceedings in court before obtaining permanent legal decisions (4) Patents have economic value and benefits. However, these four conditions cannot necessarily be applied in all IPR regimes because of the different characteristics of the IPR regime. Furthermore, every IPR regime in Indonesia also has different laws and regulations with consequent affects on the legality of waqf and legal certainty for Waqif and Nazhir.

Based on the description above, this paper tries to present a more specific identification data of each IPR regime that can be used as waqf assets and analyze the potential and constraints of IPR waqf implementation in Indonesia.

Research Methodology

This study uses normative legal research by examining various regulations in the field of Waqf and IPR. In-Depth interviews with Indonesian Waqf Board and DGIP are used to identify obstacles to the implementation of IPR waqf. The data obtained were analyzed using a qualitative approach and presented in a descriptive format.

Results and Discussion

Legal Framework for IPRs as WAQF Assets

Intellectual Property is associated with ownership of rights to movable objects, immovable objects, tangible or intangible objects. The legal perspective views IPRs as a private property that arises from natural human rights. IPRs are similar to other property rights that can be maintained from the power of anyone who is not entitled. The emergence of IPR is a new form of the development of conventional property rights or movable objects that are not intangible. In addition, the material of IPRs is emerging as a form of appreciation for intellectual activity materialized in anything new or original, both in the technology field of



literature and science and industry. In General, equation with other property rights namely the material rights can be transferred to other people in various ways or legal events including waqf.

In Islamic studies, IPRs are seen as one of the *huquq maliyyah* (property rights) that get legal protection (Putri, 2018). MUI Fatwa Number 1 / MUNAS VII / MUI / 15/2005 dated July 29, 2005, states that IPR is a property and can be used as a waqf asset (MUI, 2005). In Indonesian law, the rights inherent in IPRs provide the freedom of IPR owners to transfer rights. The law has legalized waqf as one of the mechanisms for the transfer of rights. Three IPR Laws explicitly state the transfer of rights through waqf namely

1. Article 16 Copyright Law Number 28 of 2014 (Indonesian Republic, 2014)
2. Article 74 Patent Law Number 13 of 2016 (Indonesian Republic, 2016a)
3. Article 41 Trademark and Geographical Indication Law Number 20 of 2016 (Indonesian Republic, 2016b)

In addition to the three laws above, there are several other IPR laws that regulate the transfer of rights through waqf. However, the law was not explicitly stated. These provisions are contained in

1. Article 31 of the Industrial Design Law Number 30 of 2000 (Indonesian Republic, 2000a)
2. Article 23 of the Integrated Circuit Layout Design Law Number 32 of 2000 (Indonesian Republic, 2000b)
3. Article 40 of the Plant Variety Protection Law Number 29 of 2000 (Indonesian Republic, 2000c)

The fourth law states that the right can be transferred because of (1) Inheritance (2) Grant (3) Testamentary (4) Written agreement; with provision in number (5) for other reasons justified by the legislation. From a legal perspective, Article 16 of the Waqf Law regulates the entire IPR regime can be used as a waqf asset.

The legality of transferring rights through waqf is determined by several aspects. According to the scholars, the legality of waqf is determined by the waqf property. In Article 15 of the Waqf Law, the conditions of the property represented are only assets that are legally owned and controlled by the waqif. Furthermore, the waqf implementing regulation explains that the waqf's assets are free from confiscation, cases, disputes and are not guaranteed. (Al-Kabisi, 2004) added that the requirements for waqf property include (1) Valuable property (2) Have a clear form (3) Legally owned by waqif (4) Immovable Assets, such as land or objects adapted to existing waqf habits.

This opinion was refined by Budiman, 2014; Adedoyin, & Okere, (2017) who stated that waqf assets are not only tangible assets, but also intangible assets that bring benefits that can be felt by the community. The core teaching contained in the waqf is the spirit of upholding social justice through the provision of assets for the benefit of society. Although waqf is a charity that is voluntary, it has a very high impetus for the creation of equal welfare of the people.

Investigation of IPR Criteria as Waqf Assets: What are The Requirements? Copyright

Article 1 number 1 of Copyright Law states that Copyright is an exclusive right for the author or the right holder to announce or reproduce his work or give permission for it by not reducing the restrictions according to the prevailing laws and regulations (Indonesian Republic, 2014). In copyright, there are known moral rights and economic rights. Moral rights in Article 5 of the Copyright Law explain that moral rights are eternally attached to the author to keep mentioning or not putting his name on the copy in connection with (1) the use of his work for the public (2) using his alias or disguise (3) changing his work according to propriety in society (4) change the title and child of the title of the Work (5) retain his rights in the event of distortion of Creation, mutilation of Creation, modification of a Work, or things that are detrimental to his honor or reputation.

In addition, the Bern Convention affirms the Moral Rights in Article 6bis which states that :

“ ...the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.”

When described, Moral rights in the Bern Convention include: :

1. The right to claim authorship
2. The right to object any distortion, mutilation, or other modification of the work
3. The right to object other derogatory action in relation to the said work

Komen and Verkade stated that the moral rights possessed by the creator included (Hasbir Paserangi, 2011):

1. Prohibition of making changes in creation;
2. Prohibition of changing the title;
3. Prohibition of changing the determination of the creator;
4. Right to make changes;

Based on the above provisions, the moral rights of the author cannot be transferred through waqf. Moral rights are rights inherent in the author or perpetrator (art, recording, broadcast)



which cannot be eliminated for any reason even though copyright has been transferred (Soelistyo, 2011). The implementation of moral rights in the form of the inclusion of the name of the creator if the copyright waqif wishes is clear in that the name waqif must still be included even though the Copyright has been transferred through waqf.

Economic rights are regulated in Article 8 of the Copyright Law. Economic rights are the exclusive rights of the author or Copyright Holder to obtain economic benefits for the Creation. Economic rights in copyright are the exclusive rights of the creator to obtain economic benefits from creation, this economic right in the form of the right to announce a creation and the right to reproduce the work (Riswandi & Sumartiah, 2006). Economic rights inherent include (Heniyatun, 2017) :

1. *The reproduction right*
2. *The adaptation right*
3. *The public performance right*
4. *The broadcasting right*

The transfer of copyright through waqf is only limited to economic rights. This economic right is related to the use or exploitation of the work under copyright norms. For example, someone who carries out the waqf of knowledge has been written in an article in the book. The science is located as a charitable waqf and book copyrights are identified as waqf that can be utilized by recipients of waqf.

Nazhir has the right to copy, distribute or modify (change the cover of books, paper books, or change the type of letters and numbers in the book). Even Nazhir can sell or award the book to others. However, the knowledge remains free to be used by the public or society. The Indonesian Waqf Board manages the use of waqf property in the form of copyright. The heirs of an author or copyright holder who has authorized the copyright are not entitled to take advantage of the copyright. The rights possessed by the creator in the form of exclusive rights, economic rights and moral rights, which are still inherent in the creator's self-are only moral rights, namely the right to be recognized as the author (Nizar, 2015; Adewale, 2016). Copyright Waqf can be categorized as productive time waqf. This is due to the limited period of protection until the Author dies plus 70 Years.

Trademark

The definition of Trademark is regulated in Article 1 number 1 of Trademark Law. The article states that trademarks are signs that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or



more elements to distinguish goods and / or services produced by a person or legal entity in trading goods and / or services. The Law also mentions Trademarks, Service Marks and Collective Marks. Trademarks are a sign used on goods traded by a person or several people jointly or a legal entity to distinguish from other similar items (Article 1 point 2). A Service Mark is a sign that is used in services traded by a person or several persons jointly or a legal entity to distinguish it from other similar services (Article 1 number 3). A Collective Mark is a Mark that is used on goods and services with the same characteristics that are traded by several people or legal entities together to distinguish from goods and other similar services (Article 1 point 4).

In transferring trademarks through waqf, these trademarks must be legally owned by the waqif. The ownership is evidenced by a trademarks certificate in the name of the waqif registered in the Directorate General of Intellectual Property Rights (DGIP). In addition, the type of brand and the classification of the brands that will be used as waqf assets must be clearly stated. In Article 41 number 2 of the Trademark Law, trademark owners who have registered trademarks of more than 1 (one) and had similarities in principle or equality as a whole can only transfer their trademark rights with the same party. Based on the above provisions, waqif who has several registered brands that have similarities in their principal and overall equality must endow the same recipient of waqf (nazhir). These provisions are intended to realize legal certainty for waqif and Nazhir and minimize the occurrence of disputes in the ownership of the trademark rights.

The economic value of the trademark rights relates to the license, which is the permit given by the trademarks owner to another party through licensing based on the granting of the right to use the mark, either all or part of the type of goods or services within certain terms and conditions. Use of trademark rights requires the user to provide rewards or royalties to the right owner. Endowments Trademark rights are waqf of intangible, movable objects whose only temporary term is ten years from the date of receipt. Trademarks that can be represented are brands that do not conflict with Islamic law. According to Dr. Razilu, the IT division at DGIP said that trademarks that are not under Islamic law could not be transferred through waqf, i.e., liquor brands.

Patent

Patents that can be transferred through waqf are Patents with legal ownership, do not contain anything controversial and contain economic value and benefits (Praja et al., 2018). The economic value is related to the economic rights held by the patent holder because the only economic rights that can be transferred. Economic value can be measured from the patent, namely the use value, selling value, and use value that can be used for the welfare of the



people. If the patent does not have these elements, then it does not fulfill the element of waqf assets.

The nature of the patent is the same as the nature of copyright regulation. Both intend to protect someone who invents something so that their thoughts and work are not used by others. Legal protection against patented inventions is given a certain period. During this period, the patent holder can carry out his own patented invention or submit to another person to carry out his invention. The patent protection period is 20 (twenty) years and 10 (ten) years for simple patents. Both types of patents cannot be extended. Simple patents and patents are classified as *mu'abbat bi ghayrihi* waqf or waqf with a certain period of time (Hidayah, 2012).

Industrial Design

Industrial design is an exclusive right granted by the Republic of Indonesia to the designer for his creation for a certain period to implement it himself or give his consent to another party to implement the right. The Right Holder of Industrial Design has the exclusive right to carry out his Industrial Design and to prohibit other people who without his consent make, use, sell, import, export, or distribute goods given the Right to Industrial Design.

In accordance with the provisions of waqf assets that waqf assets may not conflict with the provisions of sharia, for example, is a form of beverage bottles that resemble naked women. The shape of the bottle is a composition that is not allowed in the Shari'a. Designers who are given the Right to Industrial Design are positioned as waqif and must include a document transferring rights from the DGIP in the implementation of waqf. Duration of Protection of Industrial Designs for ten years and this also affects the period of waqf. The waqf period with the object of industrial design is not allowed to exceed the period of industrial design protection stipulated in the Law.

Trade Secret

A Trade Secret is defined information that is not known by the public in the field of technology or business and that has economic value because it is useful in business activities, and kept confidential by the owner of the Trade Secret (Article 1 number 1 Trade Secret Law). The scope of protection of Trade Secrets includes production methods, processing methods, sales methods, or other information in the field of technology or businesses that have economic value and are not known by the general public (Article 2). The owner of a trade secret has the right to:

1. Use his own Trade Secret;



2. Give licenses to or prohibit other parties from using the Trade Secret to third parties for commercial purposes.

Although the Trade Secret Law does not regulate the transfer of rights through waqf, it can be ascertained that trade secrets in Article 5 point 5 of the Trade Secret Law can be transferred by other causes that are justified by legislation. This means that the Trade Secret can change with the provisions in the Waqf Law. The transfer of the Trade Secret Right along with the documents regarding the Transfer and all forms of transfer of Trade Secret Rights must be registered with the Directorate General by paying the fees as stipulated in the Law. The transfer of Trade Secret Rights that are not registered at the Directorate General does not have legal consequences for third parties. The transfer of Trade Secret Rights through the waqf is announced in the Official Trade Secret News. Waqf trade secret rights mean giving economic value in the form of prices from the use of these rights by other parties. Endowments for trade secrets can be categorized as endowments of movable objects that are not tangible (Jaih Mubarak, 2008).

Trade secrets as a waqf asset are still being debated, related to ownership of trade secrets. When the waqf is implemented, the secrecy of the trade secrets is to become an endowment object, meaning that confidentiality in the trade secrets is also given to the recipient of the waqf or only the economic value of the trade secret. In addition, endowments with trade secret assets are difficult to administrate; the main obstacle is that the Trade Secret is normatively not required to register so that it does not have authentic evidence for the basis of ownership rights. When examined from a legal perspective, trade secrets cannot be categorized as IPRs. Because there is no material element that is used as a basis for providing legal protection.

According to an interview with Dr. Razilu, a resource person from DGIP, trade secrets could not be used as waqf assets, because during this time when registering applications for trade secrets, DGIP only registers without knowing the confidentiality information of the trade secrets. So if implemented, it will create new problems, namely the sustainability of trade secret protection. However, if considered under Article 3 the Trade Secret Law which states that information is considered confidential if the information is only known by certain parties or is not publicly known then as a whole these provisions make it clear that if the information is only known by Nazhir, the Trade Secret can be a waqf asset with a note, and the Trade Secret Waqif can be appropriately enacted while maintaining its confidentiality. On the other hand, Nazhir as the manager of waqf property also participates in efforts to maintain its confidentiality. One of the steps in maintaining confidentiality in trade secrets is to include a clause "Obligation to maintain confidentiality" listed in the Deed of Endowments (AIW).



Integrated Circuit Layout Design (DTLST)

In the provisions of Article 1 number (1) of the DTLST Law, Integrated Circuits are products in their finished or semi-finished form, in which there are various elements, and at least one of these elements is an active element, which is partially or wholly interrelated and formed in an integrated in a semiconductor material intended to produce electronic functions (Article 1 number 1). Layout Design is the creation of a three-dimensional laying design from various elements, at least one of these elements is an active element, and some or all of the interconnections in an Integrated Circuit and three-dimensional laying are intended to prepare for the creation of Integrated Circuits (Article 1 number 2).

The economic right of DTSLT is the exclusive right to exercise rights and prohibit others without their consent to make use of selling and importing or exporting in which there is all or part of the design that has been given DTSLT. DTSLT Waqif is the right holder who first registers the application so that he can transfer his rights through waqf. DTSLT Waqf only for a given period of 10 years. Thus, DTLST waqf is temporary because there are time restrictions by the Law. Economic rights of DTSLT rights can be applied to activities or production processes. (Jaih Mubarak, 2008).

Plant Variety Protection

Plant variety protection waqf are included in the mu'qqat waqf or waqf with a certain period. According to Article 4 of the Plant Variety Protection Law, the period of protection of season plant is 20 years, while the annual plant is 25 years. Plant Varieties are possible as a waqf asset because there are economic values for holders of Plant Variety Protection rights. The economic value is obtained through royalties if the rights are permitted to be carried out by another party to produce or multiply seeds, prepare for propaganda purposes, advertise, offer, sell or trade, export, import, and store as reserves (Article 8 paragraph 1 Variety Protection Law Plant). However, based on the provisions of Article 41, the transfer of rights in plant varieties does not abolish the rights of breeders to remain included with other names and identities in the variety protection certificate and the right to obtain compensation.

The meaning is, waqf with the assets of Plant Variety Protection is still required to include the identity of the breeder even though the transfer of rights has been done. This provision is similar to Moral Rights in Copyright. The problem is, the right to get the reward is not in accordance with the provisions in the waqf. The transfer of rights through waqf brings the legal consequences of the transfer of ownership and benefit from waqif to the recipient of waqf (Mauquf 'alaih) with the purpose of worship or welfare of the people (Ministry of



Religion of the Republic of Indonesia, 2006). Provisions on the right to obtain compensation in Article 41 should be abolished if the transfer of rights is carried out through waqf.

Potential and Constraints to the Implementation of IPRs Waqf

Based on the seven IPR regimes as explained above, IPRs that have the most potential to be waqf asset involve Copyright. The creation in the Copyright field is a variety of works and the broadest development in both Indonesia and other countries (Henry, 2016). Copyright Waqf with the purpose of worship can be carried out by scholars who write books, then transfer through waqf to the people so that anyone is free to publish and distribute it. The writers' scholars do not expect rewards (royalties). This can be seen in the phenomenon of Islamic book publishing whose copyrights have shifted through endowments, mainly carried out by Middle Eastern scholars (Ministry of Religion of the Republic of Indonesia, 2006). In addition, waqf with the aim of improving the community's economy (Productive Waqf) can be carried out by a book author who transfers his rights through waqf. Royalty earned from the sale of the book is used productively by Nazhir who has competence. That is, Nazhir was given the freedom to distribute and sell the book and the results obtained were aimed at the welfare of the community.

In addition to creations in the form of books, songs also have the potential to be transferred through waqf instruments. Utilization of these songs provides the potential for good and productive management considering the song will be reproduced and screened annually. Royalties generated from these songs can certainly have a large share in the general welfare which is the goal of waqf.

Although IPR has the potential as a waqf asset, there are several obstacles related to its implementation. Research conducted found that nazhir, especially at the regional level, do not understand the concept of waqf with IPR assets and that this is due to the lack of education from the Indonesian Waqf Board to the nazhir at the regional level. In addition, the obstacles experienced by BWI are the lack of Nazhir mastery to determine the economic value (value quantification) of IPR. Guidelines for assessing IPRs can be seen in the Indonesian Assessment Practices Guide 4 (PPPI-4) Assessment of Intangible Assets issued by the Ministry of Finance of the Republic of Indonesia (Affandi, 2016).

Interviews conducted with the President Director of the Indonesian Waqf Board, Achmad Djunaedi, indicate that all this time there had been a legal vacuum on the IPR's waqf in the Rules for Implementing Waqf. The implementing regulation has not explicitly explained IPR waqf procedures. He added that the lack of clarity in this regulation severely hampered the registration process of IPR endowments. So far there has been no clear coordination with



DGIP so that there is no bright spot in the IPR endowment. Meanwhile, he stated that there were already several waqf applications with IPR assets.

In another place, researchers conducted interviews with DGIP that the obstacles experienced were related to DGIP's authority. In the transfer of rights, the authority of DGIP only records the transfer of rights, not the provision of education to applicants for IPR registration. To solve the obstacles experienced, BWI proposes a draft Waqf Law along with its implementing regulations, so that the IPR waqf can be implemented in the future for the benefit of the social community.

Conclusions and Recommendation

Based on the description above, it can be concluded that all IPR regimes can be used as waqf assets with several adjustments. The required adjustment includes the ownership and status of IPR, economic value and the period of protection of IPR. Copyright is an IPR regime that has the most potential to be used as a waqf asset considering that copyright is a variety of works and the broadest development both in Indonesia and in other countries. Constraints found in the implementation of IPRs as waqf assets include the absence of IPR rules as waqf assets. In addition, another significant finding is the disharmony between BWI and DGIP in the implementation of IPRs as waqf assets. So that the potential of IPRs as waqf assets does not seem useless, the following recommendations are made:

- The Indonesian Government immediately realize the BWI Proposal regarding the revision of the Waqf Law
- The government through the Ministry of Religion of the Republic of Indonesia must immediately make regulations on the implementation of IPR transfers as waqf assets
- The Indonesian Waqf Board as a related institution must participate in improving Nazhir's competence through massive education, especially with respect to guidance in the field of IPR and IPR Quantification Value.

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