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**IPR (INTELLECTUAL PROPERTY RIGHT) PROTECTION OVER  
THE MERCHANDISE WORKS OF CREATIVE INDUSTRY  
TO IMPROVE INDONESIA ECONOMIC DEVELOPMENT**

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**ABSTRACT**

Merchandising right is part of IPR (Intellectual Property Right), serving as the works of creative industry that can be protected legally by the copy right and industrial design right. It is a strategic media to support and improve the economic development.

This paper is aimed at studying the procedures of IPR protection, on merchandising as the creative industry works, in supporting the economic development. It also reviews the way of IPR protection over the merchandising right, through the Acts of Copyright and Industrial Design, in supporting the economic development. Additionally, this paper is also purposed to study the Copyright and Industrial Design Acts as the appropriate regime of IPR law that protects the Merchandising Right of the works of Creative Industry in supporting the economic development. Normative-juridical method is applied to this study. This method puts emphasis on the secondary data obtained from the library research. The research specifications are analyzed using descriptive-analytic approach. The research stages performed are library research and documentation study using qualitative method in analysing the data . The results show that the IPR protection over merchandising rights of the works of creative industry supports the economic development. Additionally, the IPR protection over the merchandising rights, through the Acts of Copyright and Industrial Design, does support the economic development. Finally yet importantly, the Copyright and Industrial Design Acts as an appropriate regime of IPR law that protects the Merchandising Right of the works of Creative Industry supports the economic development. The obstacles that hamper merchandising right as a strategic way in improving the economic development are the the facts that there are no specified, firm, and clear regulation to accommodate the merchandising rights. The accurate ways to overcome this is by revising the Act No 31 year 2001 regarding Industrial Design and the Act No 19 year 2001 regarding the Copyright. After the revision, the Acts then should be socialized.

*Keywords: IPR Protection, Merchandise Right, Creative Industry Works, Economic Development.*

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**A. Introduction**

Currently, creative industries all over the world contribute significantly to their host countries.<sup>1</sup> Creative industries are promising industrial sectors to support the economic growth. In the period of 1997-2000, the percentage contributed from the GDP of creative industries in several countries is around 2,8% (in Singapore) to 7,9% ( in England). Additionally, the growing numbers of the industries is around 5,7% (in Australia) and 16% (in England), and with labour absorption around 3,4% (in Singapore) to 5,9% (in US) of all workers in the mentioned countries. In Indonesia, this industry contributed the

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<sup>1</sup> *The Development of Indonesian Creative Industry 2009-2025.*

GDP of Rp 104, 73 trillion, or 6, 28%<sup>2</sup> in 2006.

Creative industries in Indonesia may solve the short and middle terms problems such: (1) the low economic growth post-crisis (in average only 4,5% per year); (2) the high numbers of unemployment (9-10%) and poverty (16-17%), and (4) the less competitive industries in Indonesia.<sup>1</sup>

The potentials of this industry as the source of foreign exchange earnings to the year of 2008 had contributed 6,3% of Indonesia's GDP. This industry is one among four pillars of national development other than agriculture, goods, and services. This industry is inseparable part of the creative economy focusing on the creation of goods and services by way of optimizing skills, talent, and creativity as the intellectual properties.<sup>3</sup>

Various subsectors of creative industries in Indonesia are potential to be developed because Indonesians have creative human resources and rich cultural heritage. The efforts taken to expose the creativity is to awaken the existing value of creativity that most Indonesians already have. Therefore, the efforts of knowing the talent and optimizing the skill and creativity are more prominent than depending on the natural resources that certainly run out gradually.

With regard to economic development, as a developing country, Indonesia needs to improve the creative industry sectors by improving the competitiveness. One of the competitiveness is by utilizing *merchandise* as one of the products of the creative industry, which must be protected by the *merchandising right* functioning as the part of Intellectual Property Right (IPR). The varied cultures competing in the free trade should have their law protections so that the products (*merchandise*) may accelerate the national development of the creative industry. This will further support the economy development.

Based on the mapping, there are 14 groups of national creative industry namely, architecture, art and antiques market, crafts, design, fashion, video, film, photography, interactive games, music, art, printing and publishing, computer service and software, television and radio, and research and development<sup>4</sup>. Thus, *merchandise/souvenirs* can be in the form of t-shirt, bags, posters, key chains, toys, household appliances, and others that are both practical and usable daily, with artistic touch as their typical. In trade, the mentioned things are known as *merchandise* whereas in law regime of intellectual property right over creative souvenirs (*merchandise*), they are given their legal protection named *merchandising rights*.

The huge market and great fans of *merchandise* have encouraged some businesspersons to produce it, either legally or illegally. The illegal actions may be in the form of piracy for any commercial purposes without any permission from the owner<sup>5</sup>. The violations over the *merchandise* rights occur as consequences of its high economic value and less understanding over the IPR conditions in general, particularly the copyright and industry design right. This violation has caused great economic loss for the copyright owner. Therefore, IPR problem is a crucial issue needs to be addressed. Optimising legal protection over *merchandise* right as a creative creation is one effort to support the creative industry in Indonesia. The protection over the *merchandise* right will give additional value to the products and at the same time will stimulate the creative industries to make products that are creative, quality, and reliable.

Australia issued specific regulation of *Olympic Instigma Protection Act* 1987 to protect the right of *merchandise*, it is a regulation regarding the protection over the Olympics symbol. In Japan, it is regulated in Copyright Act, Trademark Rights Act, and Industrial

<sup>2</sup> Based on the Mapping of Creative Industry performed by the Departement of Trade of Republic of Indonesia in 2007.

<sup>3</sup> Collections of Article and News. *Industri Kreatif dan Masalah HKI*, 30 September 2009, <http://chahya.blogspot.com/2009/09/30/industri-kreatif-dan-masalah-hki>.

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

Designs Act<sup>6</sup>. In Indonesia, legal protection for *merchandise* right has not yet been added to the Act No 19 regarding Copyright and Act no 31 year 2001 regarding Industrial Designs Act. However, Industrial Designs Act is capable of providing protection over *merchandise* right by implementing the obligatory registration under the principle of "constitutive." In this principle, the registration is the basis of protection for the works of creative industries. The registrant will have "exclusive right," both "economic right" and "moral right" are called *merchandising* right that can prevent other parties to falsify, pirate, and other steering actions to the owner.

The Act No 19 regarding Copyright does not explicitly regulate the protection over *merchandise* products. The act contains only general terms to protect the owner of the *merchandise* through civil suit or criminal lawsuit to the copycat. Though this Copyright Act adopts "automatic principle", the protection does not apply based on the principles of official registration and requirement proposed by a country (*declarative* system), the product registration is not an obligatory requirement in order to get the copyright. However, the creator or the owner registering the products will have product registration that can be used as a proof in the court whenever disputes over the products happen.

Consequently, there needs to be a formulation regarding the appropriate form of IPR regime. It must be firm and clear so that it can provide protection over *merchandising* right as one of the works of creative industries supporting the economic development. The weak law enforcement is such circumstance a creative industry entrepreneur would not expect. Based on the background, this study is aimed at reviewing the way IPR protection over *merchandising* products supports the economic development. Other than that, it is also aimed at reviewing how IPR protection over *merchandising* right, through the Industrial Designs Act and Copyright Act, supports the economic development. Last but not least, it also reviews the Industrial Designs Act and Copyright Act as the appropriate form of IPR for protecting the *merchandising* right of the creative industry supporting the economic development.

## B. Theoretical Background

Creative industry is an inseparable part of creative economy. This economy is focused on the creation of goods and services made by exploiting the skills, talent, and creativity as the form of its intellectual property.<sup>7</sup> The term *creative industry* initially evolves in England with the following foreign definitions:

*Creative Industry: Creative Industries as those industries which have their origin in individual creativity, skill & talent, and which have a potential for wealth and job creation through the generation and exploitation of intellectual property. This includes : advertising, architecture, the art and antiques market, craft, design, designer fashion, film and video, interactive leisure software, music, the performing arts, publishing, software and computer services, television & radio*<sup>8</sup>

In addition, UK DCMS Task force 1998 defines it as :<sup>9</sup>

<sup>6</sup> See Massayasu Ishida "Character and Merchandising Right", Japan Paten Office , 2001, in *ibid*.

<sup>7</sup> Edi Irawan, *Pengertian Fondasi Dan Pilar Subsektor Seni Musik in Pengembangan Ekonomi Kreatif*, media HKI Vol. IV/No.4/Agustus 2008, page 9 in *ibid*.

<sup>8</sup> Muhamad Djumhana, "Perlindungan Hukum Hak Merchandising In Menunjang Pertumbuhan Industri Kreatif Di Indonesia Dihubungkan Dengan UU No. 19 Tahun 2009 Tentang Hak Cipta. Syiar Hukum Faculty of Law Bandung Islamic University, Vol XII, page 273.

<sup>9</sup> *Ibid*.

“Creatives Industries as those industries which have their origin in individual creativity, skill & talent, and which have a potential for wealth and job creation through the generation and exploitation of intellectual property and content”

The industry originating from individual creativity, skills, and talent exploitation may provide a well-being state and create job opportunities by producing and exploiting one's creativity<sup>10</sup>. Therefore, legal protection of the merchandising right, supporting the creative industry, should rely on the economic basic principles through the *cost* and *benefit* approach. In legal aspect, it must also apply on the concept of development.<sup>11</sup>

Mochtar Kusumaatmadja,<sup>12</sup> through his Law Development Theory, defines that the role of law is to ensure the dynamic changes occur in regular manner<sup>13</sup>.” Law is a society's renewal media; it means that it must serve as a director for society's actions to support the development.” Sunaryati Hartono states that the crucial point of law development comprises the four following concepts:<sup>14</sup> (a). to perfect; (b) to shift into a better and modern system, (c). to make something that does not exist, and (d). to exclude the existing invalid system.

In order to balance the development, legal certainty is required. It can be implemented through the availability of appropriate law set to meet society's development and prosperity<sup>15</sup> or to come through the international market. Similarly, this would also apply to merchandise that serves as other particular form of copyright in a work of industrial design creativity requiring an adequate protection. The regulation is firm and is clearly stated in the IPR of Copyright Act and Industrial Designs Act.

The underlying principle of IPR is that if one creates and innovates something from his intellectual skills, one must get the ownership of natural right, based by the flow of natural law.<sup>16</sup> Grotius argues that the natural law generated from one rational activity is positive that it regulates the principle of giving respects to individual rights<sup>17</sup>, the IPR<sup>18</sup>. To make this possible, government needs to get involved by providing specific protection, as suggested by the concept of modern *welfare state*. Padmo Wahyono says that in this concept, the government not only guarantees people security but also guarantess their social right, economy, and cultures<sup>19</sup>. In correlation to that, Marbun adds that the modern “*welfare state*,” government should actively participate in any society's activities, through which they can ensure the welfare for their people<sup>20</sup>.

The underlying theories for the IPR protection are proprietary theory, contract theory, and several supporting theories<sup>21</sup>. The supporting theories are (1) *Reward theory*; the creator of original design and industry is given a reward, recognition, and legal protection over the works and his achievements in designing particular products. (2) *Recovery theory*; the creator is given an exclusive rights to exploit the given IPR in order to regain what he has been worked out. (3) *Incentive theory*; incentive is given to stimulate one's creativity to create

<sup>10</sup> Unan Pribadi, *Aspek Hak kekayaan Intelektual In Perkembangan Industri Kreatif Di Indonesia*.

<sup>11</sup> ibid

<sup>12</sup> Mochtar Kusumaatmadja, *Hukum Masyarakat, dan Pembinaan Hukum Nasional*, Binacipta, Bandung, 1976, page 4.

<sup>13</sup> Mochtar Kusumatmadja, Op cit, page 4

<sup>14</sup> Sunaryati Hartono, *Sejarah Perkembangan Hukum Nasional Indonesia menuju Sistem Hukum Nasional*, paper, 1991.

<sup>15</sup> Ranti Fauza M, *Perlindungan Desain Dikaitkan dengan Pembangunan Ekonomi Indonesia In Era Perdagangan Bebas*, Dissertation, Unpad, April 2002, page 44.

<sup>16</sup> See Theo Huijbers, *Filsafat Hukum In Lintasan Sejarah*, Kanisius, Yogyakarta, 1982, page 60.

<sup>17</sup> Eddy Damian. *Hukum Hak Cipta Menurut Beberapa Konvensi Internasional, Undang-Undang Hak Cipta 1997 dan Perlindungannya Terhadap Buku serta Perjanjian Penerbitannya*, Alumni, Bandung 1999, page 17.

<sup>18</sup> Ibid, page 27-28.

<sup>19</sup> Padmo Wahyono, *Pengembangan Hukum di Indonesia*, Ind-Hill-Co, Jakarta, page 32-33.

<sup>20</sup> Marbun dan Mahfud, *Pokok-pokok Hukum Administrasi Negara*, Liberty, Jogjakarta, page 45.

<sup>21</sup> Robert M. Sherwood, *Intellectual Property and Economic Development : Wesview Special Studies in Science, Tecnology and Public Policy*. Westview Press Inc, San Fransisco, 1990, page.11-13.

unique, new, original, and useful industrial products<sup>22</sup>. The exclusive right given is the economic benefit over the products. This will encourage the creator to invest the capital and it will eventually contribute to the industrial competition in the free trade era. Robert M. Sherwood in *Public Benefit Theory*<sup>23</sup> suggests that creator must be valued and protected legally so that they can keep on creating products that become the basis of the growing industry and at the same time support the economic development.

The underlying philosophy of the exclusive right is the right of monopoly as suggested by Jeremi Philips dan Allison Firth in "*The Absolute Monopoly of The Market*". This theory suggests that the owner of IPR has the right to prevent anybody in making use the proprietary in the market, as regulated by the legal act.

### C. Research Method

The method used is Normative Juridical. It searches, investigates, and examines the object either through legal principles or through national legislation, which is Industrial Design Act No.31 of 2000 and Copyright Act No 19 year 2002. TRIPs-WTO Agreement is associated with the IPR protection of creative works of Industrial Design.

The research specifications used is analytical-descriptive aiming at providing description regarding the facts together with the precise analysis to the valid law and regulation. It is also related to the theories of Law and its practices over the IPR of *merchandising* as the efforts to support Indonesia's economic development.

The steps taken in this study is through the library research and data collection using the study of documenting. The data analysis is the description of the conclusion and the results. Both law materials, primary and secondary data, are analyzed using qualitative method to figure out the principles and information. The data are located in Indonesia and other relating countries.

### D. IPR Protection over Merchandising Rights as the Works of Creative Industry Supporting Economic Development.

The year 2004 is the golden era of creative industry in Indonesia. At that time, the economic development reached 8, 17%, higher than the national economic development with only 5, 03%. However, the average development of the creative industries in 2002-2006 was only 0, 74%. This not only indicates a high fluctuation but also suggests that this industry is not fully well established, yet it shows its potential to grow optimally when business and environment conditions support it. However, though the average development in 2002-2006 is only 0, 74%, some subsectors of the creative industries show a fine development, they are architecture, interactive games, computer and software service, research and development, advertising, and music<sup>24</sup>.

There is a great opportunity for expanding the creative industry both in Indonesia and overseas. The promising market share is wide open and tends to improve. This industry contributes in many aspects of life, not only from the economic side. It also affects positively other aspects such as image, national identity, and society's innovation and creativity. It is the industry with renewable energy and positive social impacts.<sup>25</sup>

The following data provides evidence why the creative industry contributes significantly to the economic development. In 2006, Indonesia's creative industry contributes GDP with Rp 104, 73 trillion or 6, 28% of the total GDP of the nation. The average development of the GDP during 2003-2006 was only 0, 74% as the result of the decreasing

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<sup>22</sup> ibid

<sup>23</sup> Robert M. Sherwood, opcit, page 37.

<sup>24</sup> The development of Creative Industry. op.cit

<sup>25</sup> ibid



contribution of craft and fashion industries in 2002-2003 and 2005-2006. In 2006, this creative industry can accommodate 5,4 million employees with 5,8% of worker participation. The export value of Indonesia's creative industry in 2006 reached the point of Rp. 81, 4 trillion, contributing 9, 13% of the national export value<sup>26</sup>.

In trade context, people get more and more to like the goods that not only satisfy their functional needs but also they must meet them with the needs of self-identity and respect. The mentioned characteristic is identical for the consumers in the developing countries. Therefore, the developing countries have become the trendsetter in international trading so that the behaviour affects other countries and make this as a *global trend*. In terms of trade and industry, the products sold to developed countries should contain non-functional characteristics that meet the needs of consumer's self-identity and respect. In this way, creative industries hold an important role. They must be responsive in accumulating the happening social phenomena into good and service products; such as fashion, crafts, or other entertainment products such as music and films.

As one of the creative industry products, merchandise can be exploited to its maximum level to persuade the customers<sup>27</sup>. In the other side, less proper protection on the products will weaken its exploitation since many tricky competitors may pirate or imitate the designs. One great and crucial obstacle that holds up Indonesia's creative industries is that the creator are less familiar regarding the role of IPR for them. Therefore, it may lead to great obstacles in improving the creative industry sectors.

The IPR protection over merchandise right, as a work of creative industrial designs, is a consequence that Indonesia obtains for its participation in the agreement of TRIP's-WTO. It is meant to legally protect the rights from any forms of piracy performed by the creator/designer or other irresponsible parties, nationally or internationally.

The IPR protection over merchandise right, as a work of creative industrial designs, encourages and motivates one's creativity to create new designs. The interesting new designs will lead to improved competitiveness in the free trade and at the same time support the economic development. Therefore, the creators/designers need to have legal protection over their products.

In line with the Act No 31 year 2000 regarding the Industrial Designs focusing on the *constitutive* system, the effectiveness of legal protection for the designers will be realized when the registration principle has been implemented. This implementation relates closely to globalization and free trade. Therefore, it requires serious attention because the registration evidences are the authentic possession over the design rights and decides the starting of the protection. Registration will ease the verifying in the court because written evidence acts as primary evidence with strong legal force<sup>28</sup>.

Similarly, it is also in accordance with the theories underlying the IPR protection. They are<sup>29</sup>: (1) *Reward theory*; the creator of original design and industry is given a reward, recognition, and legal protection over the works and his achievements in designing particular products. (2) *Recovery theory*; the creator is given an exclusive rights to exploit the given IPR in order to regain what he has been worked out. (3) *Incentive theory*; incentive is given to stimulate one's creativity to create unique, new, original, and useful industrial products.

This exclusive right achievement can be in the form of economic benefit for the inventions so that it will encourage the creator to invest the capital and at the same time contribute to industrial competitiveness. Robert M. Sherwood in *Public Benefit Theory*<sup>30</sup>

<sup>26</sup> Based on the Mapping of Creative Industry performed by the Departement of Trade of Republic of Indonesia in 2007, in ibid

<sup>27</sup> Ibid

<sup>28</sup> In Civil Procedure, evidence is divided into two, that is written in the form of certificate

<sup>29</sup> Robert M. Sherwood, *Intellectual Property and Economic Development : Westview Special Studies in Science, Tecnology and Public Policy*. Westview Press Inc, San Fransisco, 1990, page.11-13.

<sup>30</sup> Robert M. Sherwood, opcit, page 37.

suggests that creator must be valued and protected legally so that they can keep on creating products that become the basis of the growing industry and at the same time support the economic development.

The underlying philosophy of the exclusive right is the right of monopoly as suggested by Jeremi Philips dan Allison Firth in “*The Absolute Monopoly of The Market*“. This theory suggests that the owner of merchandising right has the right to prevent anybody in making use the proprietary in the market, as regulated by the legal act.

In fact, the designers, particularly those of the MSME, do not pay serious attention regarding the registration<sup>31</sup>. The statistic shows that the number of registrants for creative industrial designs in 2007 (4.473) drastically decreases in 2008 (3.866) yet regains its numbers in 2009 (4,181). However, the last statistic shows that the number is still below the 2007 statistic<sup>32</sup>.

In order to support the economic development, the creative industrial designers’ understanding in registering its creative products is critical once it faces the international market competition. Exporting merchandise, as the products of creative industrial designs, without any legal IPR certificate will be rejected. It is even ironic if there is monopoly claim, to *batik* designs for example, that is pronounced by other parties who firstly register the design whereas the design itself originally belongs to Indonesia.

Other than providing a strong selling point for the designers through design protection, the registration of merchandising rights, as one of the creative industrial design product, will improve the value of the company. The registered designs may shift to other parties through “Licensing” so that it will expand the market share<sup>33</sup>. These will encourage a healthy competition and fair trade. Additionally, it will also lead to the production of various new, interesting, and useful products.

There are somehow critical barriers over the mentioned things, particularly regarding the improvement of the creator competitiveness. It is important since it can support economic development, studied from the aspects of “structure”, “substantial”, and “culture”<sup>34</sup>.

1. “Substantial” aspect. The IPR law and regulation does not explicitly regulate the protection over merchandising right. The regulation is implicit in both Copyright Act and Industrial Designs Act. This fact weakens the protection over the owner of merchandising right.
2. “Structure” aspect. The IPR registration process is still bureaucratic therefore it requires reformation. Several investors in some areas complaints that the IPR center in Research and Development Institution and University do not act as the way they should be<sup>35</sup>. In West Java for example, technology and research developments as one of the creative industry sub-sectors are under the process of IPR registration. In fact, many investors are interested in societies’ works and findings, yet the works have not been registered<sup>36</sup>.
3. “Culture” aspect. The surrounding societies do not fully support the creation of conducive atmosphere for the protection over designers works. Other than that, the designers do not fully understand the fundamental point of registration; they will have exclusive rights, economic and moral rights. With these rights they can monopolize domestic, regional, and global markets so that they can spare from illegal exploitation of other parties.

<sup>31</sup> Source: [www.dgip.go.id/statistik/desain](http://www.dgip.go.id/statistik/desain) industri in Meilia Witri Budi Utami, *Pemanfaatan Desain Industri Bagi Pengembangan UMKM Antara Kenyataan dan Harapan*, page 3-4.

<sup>32</sup> ibid

<sup>33</sup> ibid

<sup>34</sup> This page is in accordance with the arguments of Ranti, in *Perlindungan...* op.cit page 377

<sup>35</sup> ibid

<sup>36</sup> According to Anung Sugiharto, The Head of Research and Development of Central Java Province, *Kompas.com* 2 Juni 2009 in ibid.

The concerning state is that there is an assumption from the creative industry societies that registration is not the rights acquired but it is a burdening, wasting-time, and costly processes. Therefore, these societies need to be constantly reminded the importance of IPR in developing the creative industries. Other countries' claims over the product of Indonesian artisans must be taken into account so that it cannot harm the business of Indonesia creative industries<sup>37</sup>.

#### **E. IPR Protection over Merchandising Rights through the Act of Copyright and Creative Industrial Designs with Industry Creative Works Supporting Economic Development**

The artists (artisans) create merchandise. Their creativity is potentially strategic in the national economy state and therefore it requires an appropriate protection to the designs from any irresponsible parties' with their piracy, imitating, and other cheating actions that may kill the artists' potential creativity.

The works of the creative industries are legally protected by the Act No. 21 year 2000 regarding Industrial Design and Copyright Act No 12 year 2002 regarding Copy Rights. The Industrial Design Act has regulated the protection for the creative industry designers. Before legally constituted by the Act No 31 year 2000 regarding Industrial Design, the Copyright Act is an alternative for the protection of industrial designs. At his moment, Copyright Act is regulated in Act No 19 year 2002 whereas it was previously regulated in the Act No 12 year 1997.

Industrial Design Act applies the protection system comprising of shape, configuration or line/color composition or line and color or the combination of both in two or three dimension giving an aesthetic impression. It can also be used to generate particular product, commodity, or handicraft<sup>38</sup>. Yet, only the works of art that get the protection from the copyright. If the designs are to be applied outside the industrial scope, in Copyright protection, then the protection over the industrial designs will follow the conditions of copyright under the protection timeline, protection principle, and protection requirements. There lies difference between the two forms of IPR regime, they are<sup>39</sup>:

The protection principles based on the Industrial Design Act is given on the registration of the new designs (*constitutive*). In addition, the protection based on Copyright Act is "automatic principle", this means that the protection applies not based on the registration principle and the legal requirements proposed by particular Country (*declarative system*). Product registration is not mandatory for getting the copyright. However, the creator and the owner registering the products will get registration confirmation that can be used as initial evidence in the court whenever disputes occur over the products. Products are masterpiece and are not produced massively, whereas industrial designs are produced massively.

Other differences occur in terms of violation. In industrial designs, violation is offence whereas in copyright it is said as complaint. The registration conditions of the industrial design must also be new, whereas the conditions for copyright must be original and specified.

Other than that, the period of protection is also different; Industrial Designs Act is valid for only 10 years whereas in Copyright Acts over new creations (fine arts, sculpture, batik, and other creations) is valid for as long as the life of the designers and continues until

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<sup>37</sup> Creative Industry and IPR problems

<sup>38</sup> Article 1 Verse 1 Act No. 31 year 2000 Regarding Industrial Design

<sup>39</sup> Nina Nurani, IPR Protection of Industrial Design Creativity For Micro Small And Medium Industry As An Effort To improve National Competitiveness In Free Trade. Second International Conference on Bussines and Economic Research ( 2 nd ICBER 2011, Holiday Villa Beach Resort and Spa, Langkawi Kedah, Malaysia. 14-16 March 2011.



50 years after the death. With this protection requirement, the merchandising owners will have longer protection period than that applies for Industrial Design. The example of the protection is over the design motives, picture, or paintings, which can be qualified as works of art worth of protection in term of copyright.

The crucial requirement is regarding the copyright over the creations under the government responsibility, the copyright of folklore<sup>40</sup> and culture, crafts, and other works of art. Relying on the Copyright Act, in order to declare and produce the products, foreigners must get their permission from the affiliated institutions.

#### **F. Industrial Designs Act and Copyright Act as the Law Regime of Appropriate IPR over Merchandising Right Protection of the Creative Industry supporting the Economic Development.**

Indonesia creative industries have become one of the most successful and promising. Since 2002<sup>41</sup>, during 2009-2015, the annual contribution of this industry to the export industry reaches 12% and at the same time provides job opportunities for 7% of the productive human resources. The subsectors of this industry contributing to Gross Domestic Product (GDP) are: fashion 44%, craft 28%, advertising and design each with 7%, architecture 3,2%, printing and publishing 3,5%, music 3%, radio and television 2%, research and development 1%, and computer and software services 1%<sup>42</sup>.

The main reasons limiting the development of creative industry in supporting the economic development are; there is no incentive in obtaining the copyright as well as no effective law enforcement over the piracy<sup>43</sup>. Based on the *incentive theory*, the *incentive* needs to be given to stimulate designers' creativity in creating new, original, and useful products so that it will add the value over the merchandise products to be more interesting, attractive, and unique. As a developing country, Indonesia must certainly have attempted to improve the creative industry sector through *merchandise* products equipped with appropriate IPR protection. This protection will encourage designers to create new designs through which the national, regional, and international competitiveness<sup>44</sup> of the national executives will be exposed. From this exploitation, the potential designers can create modern designs supporting the economic development. The support is indicated from the fact that until 2008, it has contributed 6,3% to Indonesia's GDP

With regard to the support mentioned, IPR protection over merchandise products of the creative industry has been constituted in the Act No 31 year 200 regarding Industrial Design, though the regulation is not yet stated explicitly regarding the Merchandising Rights of the creative industry. Industrial Design Act puts its emphasis on the implementation of "constitutive" principles in which registration serves as the basic protection over particular design. The registrants will have the "exclusive right"; both the "economic right" and "moral right" are considered as *merchandising* rights that can prevent other parties to pirate, imitate, and perform any disadvantages actions over the owner of the right.

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<sup>40</sup> *Fokloer* is a collection of traditional creations made by groups and individuals in the community who demonstrate social and cultural identity based on the standard of value that followed from generation to generation, including among others: paintings, drawings, engravings, handcraft, sculpture, musical instruments, traditional weaving, etc, in *ibid*.

<sup>41</sup> Ministry of Trade of republic of Indonesia approves the existence of this industry and therefore maps the contribution to the economic since 2002. *Industri Kreatif*, 20 Juli 2011, <http://www.indonesia.kreatif.net/index.php/id/page/read/technical>, 16 Januari 2012

<sup>42</sup> Department of Trade. *Fasilitas Pendaftaran Merk UMKM Kreatif* : Daily News. File:///C:/Dokumen and Settings/Utama/My Documents/UMKM INDONESIA.

<sup>43</sup> *Idem*, Research Findings of the Ministry of Trade over the main stakeholders in creative industry identifies 4 (four) main problems limiting the development of creative industry: no incentive for the copyright, no effective law enforcement over piracy, high import duties and older technology, difficult in making capital and concentrated distributional channel.

<sup>44</sup> The Statistics of Micro Small and Middle Enterprise year 2007-2008. The Data from Planning Bureau of Minister of of Micro Small and Middle Enterprise. [www.depkop.go.id](http://www.depkop.go.id). year 2008 MSME reaches 51,26 million business units in Nina Nurani, IPR ( Intellectual Property Rights ) Protection on Works of Industrial Design Creativity For MSMS As An Effort To Improve National Competitiveness In Free Trade )

The importance of registration relates to easiness in proofing in the court. This is because written evidence acts as primary evidence with strong legal force<sup>45</sup>.

In addition to that, designer's neglect regarding registration weakens the product competitiveness in foreign market because without any legal IPR protection documents, the national products of Indonesia are not allowed to the export destination countries. In contrary to that, registration can increase and add incomes in the following ways:<sup>46</sup>

1. The selling point of the owner becomes stronger because it can prevent competitors in producing the products with similar designs.
2. The registered and successful products may increase the value of the company.
3. The protected designs can be licensed (sold) to other parties that can reach the widest possible markets.
4. Registering industrial designs will encourage a healthy competition practices and fair development that will further encourage the productions of various aesthetically interesting products.

In terms of the implementation of merchandise registration, the gap between jurisdictional regulation and society practical needs have become the obstacles that obstruct the effectiveness of Industrial Design Act to support the development of the creative industries in Indonesia. To protect the designs, the act regulates that the legal of an industrial design must be registered because creative industry relates closely to the *trend* of the market changing rapidly on consumers' demand (the market). In practices, the registration takes quite a long time (1 to 1,5 year) whereas the market changing in just months (6-12 months). This has caused the ineffectiveness of the industrial design right since during the registration, the products are sustainable to piracy and when the certificate has been issued, the designs are no longer up to date. It will eventually affect the economic value of the products. This is why designers are less willing to register the products and designs<sup>47</sup>.

Merchandise products regulated in the Copyright Act No 19 year 2002 are not obliged to register (declarative principle). Therefore, revisions should apply to the regulation of the designers' works. It is constituted in the Act No 19 year 2002 regarding Copyright that obliges registration in order to legalize the merchandise rights in terms of verifying. It is indeed a crucial thing in facing national, regional, and international competitiveness in the free trade era, that it will support the economic development.

Other thing to be revised from the Acts of Industrial Design and Copyright is that both do not accommodate the interests of designers of traditional merchandising, that the designers have never registered it. The Acts do not provide protection over the traditional designers whereas traditional properties (folklore and other society's culture, crafts, arts) have high economic value for the designers yet they are imitated and registered by alien designers<sup>48</sup>. Therefore, there needs to be a regulation that specifies the protection over traditional designs through easy-access in registering the products.

The revision applied for the Industrial Design and Copyright Acts is in accordance with the "The Theory of Law Development" of Mochtar Kusumaatmadja stating that in order the Law is to be used as "Society's Renewal Media," law should comply the society using it. In this way, the law is the enforcer of society order supporting the development and at the same time regulates the changing<sup>49</sup>. To be effective, the law should be *responsive* and *accomodative*<sup>50</sup>. Sunaryati Hartono states that the crucial point of law development comprises

<sup>45</sup> Evidence in HIR is divided into written in the form of certificate and non-certificate in the form of oath. In ibid

<sup>46</sup> Meillia Witri Budi Utami, *Pemanfaatan Desain Industri Bagi Pengembangan UMKM Antara Kenyataan dan Harapan*, *Buletin Infoemasi dan Keragaman Hak Kekayaan intelektual*. Home, Reader Column. Vol VII/No.02/APRIL 2010. <http://mediahki.wordpress.com/vol-viino-01-Februari-2010/kolom-hki>.

<sup>47</sup> Unan Pribadi, "Aspek Hak Kekayaan Intelektual In Perkembangan Industri Kreatif di Indonesia", <http://...>

<sup>48</sup> Ranti, *Perlindungan*, op.cit page 294.

<sup>49</sup> Mochtar Kusumatmadja, op cit, page 4

<sup>50</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transaction* In Ranti, op.cit page 23.

the four following concepts: <sup>51</sup> (a). to perfect; (b) to shift into a better and modern system, (c). to make something that does not exist, and (d). to exclude the existing invalid system.

As a responsive and accommodative law, Industrial Designs and Copyright Acts must consider the society, particularly the merchandise designers. As the protector of creative industry products, the law must take into accounts the following factors: *philosophical, juridical, sosiological, and international*<sup>52</sup>.

*Philosophical* factor that must be accommodated in the act is the basic value, the ideal expected by the owner of the merchandising right in Indonesia. The value itself is stated in *Pancasila*; the balance, democratic characters, justice, and orderliness.

*Juridical* factor. It is industrial design regulation that binds; it is also government initiative to realize the *welfare state* so the government needs to make positive changes. The regulation must be appropriate, clear, and firm so that it meets the designers' expectation, considering *merchandise* is the product of creative insutry with strategic potential in supporting the national economic development.

*Sociological* factor. The regulation of industrial design should accommodate the value that most Indonesians believe, in this terms *merchandise* as the product of creative industries. The works comprise the traditional creative, folklore and other society's culture, crafts, and arts that serve as society's peculiar value with strategic potential in supporting the national economic development.

*International* factor must be taken into account in Industrial Design Act as the national law, that is by implementing the principles of TRIPs and WTO constituted in GATT. The point of ratifying the international TRIPs and WTO requirements is that it wil bring a wide jurisdiction over the real action. It will threaten the aspects of national culture creativity, particularly the creative works of the designers. Any disadvantaging actions performed by irresponsible parties, both nationally, regionally, and internationally, will certainly harm the designers and governments. This disadvantage is the logical consequences for ratifying international law and therefore the principles and sentences of international law apply<sup>53</sup>.

## G. Conclusions and Suggestions

### 1. Conclusions

- a) Merchandising right of the works of creative industry contributes significantly to the development of industries, that it eventually supports the economic development. IPR protection of Merchandising Right over any forms of violation causing any disadvantage to the right's owner is still weak. The high numbers of the violation and the minimum amount of registrants indicate this. This affects motivation, that the products will be less interesting. The obstacles of IPR protection for the merchandising rights can be seen from the aspects of "structure", "substantial", and "culture".
- b) Act No. 21 Year 2000 regarding Industrial Designs and Act No 12 Year 2002 regarding the Copyright only implicitly regulates the protection over the owner of merchandising rights. Yet, there is no appropriately explicit, firm, and clear regulations regarding IPR protection over the owner of merchandising right. This weakens the development of product creations as the industry's powerful elements. Similarly, it weakens the protection over the owner of the

<sup>51</sup> Sunaryati Hartono, *Sejarah Perkembangan Hukum Nasional Indonesia menuju Sistem Hukum Nasional*, makalah, 1991.

<sup>52</sup> Nina, *Protection of Industrisl Design Creativity For Micro Small And Medium Industry* op.cit

<sup>53</sup> *Ibid.*

merchandising right in relations to registration system, as one form, over the owner. Copyright Act relies upon the “automatic principle”, this means that the registration is not mandatory so that the creator will be motivated. It is different from that of the Industrial Design Act applying the constitutive protection system that is based on the registration principle.

- c) In principle, Act No. 21 Year 2000 regarding Industrial Designs and Act No 12 Year 2002 regarding the Copyright are a form of appropriate IPR regime in providing effective legal protection to designs and creations of the products, the merchandising rights. Since there are some regulations that are not clear and firm, revision is required to make the system *responsive* and *accommodative* law. In doing it, factors of *philosophical*, *philosophical*, *juridical*, *sociological*, and *international* to support economic development should be taken into account.

## 2. Suggestions

1. Government needs to be more proactive in the effort of socializing any arrangements related with the protection over creative works of merchandise products, including the traditional one. There needs to be a changing paradigm for the merchandise designers, that the IPR are monopoly in nature when registered. This may result in conducive atmosphere and motivated creator passion in making new, original, exciting, unique and usefull merchandise.
2. The government needs to revise the Act no 31 year 2000 regarding the Industrial Designs and Act no 12 year 2002 regarding the Copyright since various weaknesses inherent in them. The revisions needs to firmly and clearly accommodate the regulation regarding *merchandising* right over the the *merchandise* products, it is one form of creative industry work. Additionally, the revision must also accommodate the protection over traditional creative industry produced in local region.

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