

Protecting Micro, Small, and Medium Enterprise Products through Trade Secrets as the Intellectual Property in Indonesia

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Abstract. Competition in the globalization era requires protecting trade secrets of Micro, Small, and Medium Enterprises (MSMEs) products. MSMEs have strategies that should be kept from other people or companies. MSMEs as business actors have a very strategic role in the Indonesian economy. The products of MSMEs in Indonesia are born from valuable thoughts and ideas, have high economic value, are unique, have the potential to develop rapidly, and have competitive prices. Therefore, they need to be protected through trade secrets. This study aims to analyze the development of MSMEs in Indonesia and the urgency of trade secret protection for MSME products. This study uses the normative juridical method. The data were secondary data, including primary and secondary legal materials. The results show that MSMEs in Indonesia have experienced very significant developments in the national economy. The importance of trade secret protection for MSMEs products is to prevent fraud between business actors to healthy competition. Also, MSMEs players can exploit their products with a sense of security, creating a climate or business condition that allows people to create products or other subsequent innovations.

Keywords: Intellectual Property, Protection, Trade Secrets

1 Introduction

Economic globalization is increasingly being developed based on the principles of trade liberalization or other free trades. It has influenced the laws of every country involved in economic globalization and free trade. Economic globalization and free trade flow must be followed because of their developments through international negotiations and agreements [1]. The implications of economic globalization on law cannot be avoided because legal globalization follows economic globalization. Substantially, various laws and treaties are cross-border [2]. The view of Lawrence M. Friedman is then precise, stating that the law is not autonomous but is open at all times to outside influences [3]. Globalization is a new feature of post-industrial societies [4].

Protection of Intellectual Property Rights (IPR) is vital in the globalization era and is closely related to trading at the international level. Since the early 18th century, Europeans have started thinking about the IPR, as reflected in Vienna's international exhibition of discoveries in 1873. Furthermore, some countries were reluctant to participate in the exhibition because they were worried that their new ideas were stolen and exploited commercially in other countries. Ever since, the international community's attention to IPR protection has increased. The TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement discussed in the Uruguay

Round within the framework of the GATT (General Agreement on Tariffs and Trade) is a step taken to enforce IPR legal rules. Indonesia has agreed to the Uruguay Round of GATT and should adjust the IPR legal system as regulated in the TRIPS. Ratification by the Government of Indonesia through Law Number 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization (WTO). As a consequence, Indonesia should implement the provisions in the TRIPS, which regulate the IPR. Since implementing this policy, Indonesia has already had laws for Copyrights, Patents, Trademarks, Trade Secrets, Industrial Designs, and Layout Designs of Integrated Circuits.

TRIPS is known as the most comprehensive international agreement on the IPR, which is a unique blend of the basic principles of GATT. Various international conventions were conducted before the introduction of TRIPS which has been amended several times. The industrial concept that is considered as the most significant is the Paris Convention for the Protection of Industrial Property (Paris Convention), while for the copyright is the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

The IPR legal system at the beginning of its development was not well known and received little attention in Indonesia. This right was often ignored and there were many infringements. This is not surprising, considering that the IPR concept and legal system are not rooted in Indonesia's legal culture and national legal system. The legal system of ownership in Indonesia originates from the values of Pancasila, which mandate a populist economic system that emphasizes a concept imbued with communalism. Meanwhile, the IPR legal system originates from the western world, which fights for a liberal economic system that tends to have a concept of ownership law based on individualism. Western law values spiritualism more than materialism, while original Indonesian law is the opposite [5].

MSMEs as business actors in Indonesia have a significant role in economic development [6]. Since their business activities can expand employment opportunities and provide broad economic services to the community [7], the quality of high-value MSMEs products should be followed by a high level of awareness to protect the IPR of their products. Protection of MSMEs products through IPR will protect the product itself from imitators or thieves and have economic value. Other parties producing such products must have approval from the right holders who will get royalties from the exclusive rights given. Protecting MSMEs products by registering them in IPR will give Indonesia have substantial competitive advantages in facing the global market.

There is a relationship between the protection of trade secrets or undisclosed information and the globalization of trade [8]. Trade secrets are classified information that is considered to have economic value because it is not generally known, such as recipes, dishes, client lists, and others. MSMEs actors who hold this right can prohibit other parties from disclosing these secrets to third parties who are feared to cause economic losses. The Trade Secret Rights are regulated in Law Number 30 of 2000 concerning Trade Secrets. The term of this right is unlimited. The purpose of regulating trade secrets is to promote industries to compete in the scope of national and international trades, especially for MSMEs. It can increase added values for entrepreneurs, including the acquisition of special rights held by MSMEs. Protection of trade secrets is an absolute requirement if it is associated with the globalization of trade because trade secrets are an essential factor in fair trade competition and being a precious commodity and having high economic value.

MSMEs in Indonesia is still very traditional and have not considered protecting the intellectual property for their products. This is due to a lack of understanding and information that the products they produce have high economic values when entering foreign markets. Lack

of sensitivity and awareness to protect their products lead to thefts of ideas and designs of traditional Indonesian products by outsiders.

If MSMEs in Indonesia is not ready to defend against technological changes, many may go bankrupt. This technological change must be followed by the IPR protection of the product technology. Therefore, it can close opportunities for other business actors to survive in a business industry that depends on such technological changes. The possibility of adequate IPR protection can stimulate a creative process, resulting in a country's technical improvements and economic growth [9]. Based on the description above, it is necessary to study several things that become the problem's formulation. They are how MSMEs in Indonesia develop and how the urgency of trade secret protection for MSMEs products in Indonesia is.

2 Research Method

Legal research is a process to find legal rules, legal principles, and legal doctrines to answer the content of the law at hand [10]. The research approach used was juridical normative, namely legal research conducted by examining library materials [11]. A juridical approach was an approach that refers to the prevailing laws and regulations [12]. A normative approach was research on secondary data in the law concerning primary legal entities, namely various legal instruments and statutory regulations and other secondary legal materials in the form of scientific works by scholars. The normative juridical approach emphasized reviewing legal documents and library materials related to the principal protection of MSMEs products related to trade secrets. The legal research examines trade secret legal protection referred to Law Number 30 of 2000 concerning Trade Secrets and Law Number 20 of 2008 concerning MSMEs. This is in line with obtaining scientific truth through a statutory approach. The statutory approach looks at the statutory regulations and examines the content [10].

3 Results and Discussion

3.1 Development of MSMEs in Indonesia

Micro, Small, and Medium Enterprises (MSMEs) play an essential role in the Indonesian economy. MSMEs contribute to the expansion of employment opportunities and absorption of labor, growth of Gross Domestic Product (GDP), provision of safety nets, especially for low-income people to carry out productive economic activities. MSMEs are also influential in exports and the creations of fixed/investment capital. MSMEs have a very strategic role for economic growth in Indonesia, where they have been able to absorb as many as 116.97 or about 97% of the 120.598 million workers in Indonesia [13]. The contribution of MSMEs GDP to National GDP was 61.07%. The entrepreneurial ratio in 2018 was 3.47%. Another contribution from MSMEs in supporting the Indonesian economy is 61.07% of the formation of Gross Domestic Product (GDP) and the remaining 38.9% are contributed by large business actors, which amount to 5,550 or 0.01% of the total business actors [14].

The number of MSMEs in Indonesia has increased from 59.26 million units in 2015 to 64.1 million in 2018. It was expected to grow to 68.60 million in 2020. The productivity of the MSMEs sector per business unit has increased from Rp. 27.93 million in 2015 to Rp. 86.22 million in 2017. It was expected to grow to Rp. 182.59 million by 2020 [15].

Table 1. Number of MSMEs 2009—2019

Year	Total Number of Unit	Share
2009	52,764,750 Units	99.99%
2010	54,114,821 Units	100.53%
2011	55,206,444 Units	99.99%
2012	56,534,592 Units	99.99%
2013	57,895,721 Units	99.99%
2014	57,895,721 Units	99.99%
2015	59,262,772 Units	99.99%
2016	61,651,177 Units	99.99%
2017	62,922,617 Units	99.99%
2018	64,190,000 Units	99.99%
2019	67,400,000 Units	99.99%

MSMEs are productive businesses owned and managed by individuals or business entities that have met the micro-business criteria. Meanwhile, the criteria for Micro, Small, and Medium Enterprises (MSMEs) according to Law Number 20 of 2008 are classified based on the number of assets and turnover owned by a business.

Table 2. Classification of Micro, Small, and Medium Enterprises

No.	Classification	Criterion	
		Asset	Turnover
1	Micro	Max Rp. 50 Millions	Max Rp. 300 Millions
2	Small	> Rp. 50-500 Million	> Rp. 300 Millions-2.5 Billion
3	Medium	> Rp. 500 Millions-10 Billion	> Rp. 2.5-50 Billion

The development of MSMEs in Indonesia is inseparable from the factors that encourage this progress covering technology, information and communication facilities, the ease of borrowing business capital, and reducing the final income tax rate. MSMEs in Indonesia have become an essential part of the economic system because they are business units that are more numerous than large-scale industrial businesses and have the advantage of absorbing more labor. Also, MSMEs can accelerate the process of equalization as part of development. MSMEs can support the country's economy and equalize the people's economy because they are located in various places and even reach remote areas. Based on this fact, it is appropriate for MSMEs to be protected by laws and regulations related to their operational activities and development.

According to Law Number 20 of 2008, substantial efforts in developing resilient and independent MSMEs businesses as the people's economy are to create a conducive business climate. The flow of globalization and high competition make MSMEs face global challenges, such as increasing product and service innovation, developing human and technological resources, and expanding the market size.

3.2 The Urgency of Trade Secret Protection for MSMEs Products in Indonesia

Trade secrets are parts of information that are considered confidential in the field of technology and business. Information is considered secret as long as certain parties only know it, has economic value, and is kept confidential through reasonable efforts. As long as the information criteria are maintained, trade secret protection will still apply to the information. Information is considered confidential in the form of company information known only to the

company's director. Examples are a list of clients, a list of suppliers of goods from a company, etc. Information is considered to have economic value if it can be carried out for commercial activities or businesses or increase economic benefits. The examples are recipes with secret information about the spices used and processing methods, making the product distinctive. In the *Batik* industry, some MSMEs also have secret formulas about the color mixing technique or night blocking technique with *canting* (a pen-like tool used to apply liquid hot wax). These characteristics make them different from other *Batik* MSMEs.

Detailed information can provide economic benefits for a company. Information is considered to be kept confidential if the owner has taken appropriate or proper steps. Examples are when a food formula is stored in a safe deposit box and a confidentiality agreement between the company and its employees or third parties [16].

Indonesia makes regulations on trade secrets so that business actors can carry out fair and healthy competition in the national and global markets. The business that is most vulnerable to occurring is unfair competition in trade secrets. For example, in the food sector, food recipes with economic values are stolen and then copied by other business actors. It results in losses to the owner of trade secrets and unfair profits for fraudulent business actors.

The existence of MSMEs is inseparable from their relationship with intellectual property. The benefits of intellectual property for MSMEs are: a) Products of MSMEs in Indonesia have high economic value, are unique, have the potential to develop rapidly, and have competitive prices; b) More than 90% of enterprises in all economic sectors are MSMEs which make a significant contribution to employment, trade, investment, and economic growth; c) MSMEs have been proven to be investment-driving tools and behind a large number of technological breakthroughs; d) In the economic management associated with new knowledge, intangible assets that include innovative ideas, know-how, and information have become the center of business; e) Intellectual property can be used as a company asset because it has proper economic values [17].

For MSMEs, using or exploiting their products with a sense of security will create a climate or business that allows people to create products or innovations. Many products of MSMEs in Indonesia have high economic value and are unique, especially when they enter the free market. The characteristics of a business become a precious asset. Its confidentiality must be maintained because that is where the profits grow. Trade secrets include the right to use the trade secret and the right to license or prohibit other parties from using or disclosing trade secrets to third parties for commercial purposes [18].

The high quality of MSMEs' superior products should be followed by high awareness to protect the intellectual property contained in these products. Several principles of protection in the law regarding MSMEs activities [19], are: 1) the economic principles in the 1945 Constitution as stipulated in Article 33, which is the direction of national goals for the creation of a just and prosperous society; 2) the principle of protecting the national interest which implies that the public interest must not be contradictory to the principle of freedom of contract—meaning that in the public and national interest the freedom of contract for business actors is not getting narrower in their business activities; 3) the principle of protection in international law and civil law in the framework of trade among countries through various means of transportation and communication with mutual respect based on international agreements and the principles of the *pacta sunt servanda* (agreements must be kept); and 4) the principle of protection for the economically weak group through Law Number 9 of 1995 as a protection and guidance effort provided by the government to small businesses.

Protection of intellectual property rights (IPR) plays an essential role in technological change and economic growth. In Indonesia, a trade secret is a branch of IPR whose protection

is recognized. Through this IPR protection, right owners can exploit their intellectual property, namely the rights to create, use, distribute, sell, and import. They can also take legal actions if someone violates these rights [20]. Micro, small, and medium enterprises (MSMEs) have the same opportunity to take advantage of IPR protection in their business processes. One of the opportunities to increase the value of the MSMEs GDP contribution can be taken through IPR protection.

Protection of IPR by MSMEs in Indonesia cannot be underestimated because it can be one factor in doing business in the industrial world. New technologies can change the face of existing industries, cause some industries to go bankrupt, and open up opportunities for new industries [21]. If MSMEs in Indonesia is not ready to defend against technological changes, many MSMEs may go bankrupt. This technological change must be followed by IPR protection of the technology to close opportunities for other business actors to survive in a business industry dependent on these technological changes.

The trade secret owner thoroughly pursues the trade secret protection mechanism to prevent the secret from being exposed to the public. The period of trade secret protection is as long as it is not disclosed. Also, a trade secret has no registration as it is not required. The owners themselves only keep trade secrets. Intellectual property rights are unique because they do not need to be registered and announced to get legal protection [18].

Protection of trade secrets in intellectual property rights is unique. It is based on the characteristics of trade secrets that are very different from other intellectual property rights such as trademarks, patents, industrial designs, and integrated circuit layout designs. Confidential information used in trade can be said to be ideas originating from human intellectuals that also need to be protected due to justice and respect for the trade secret owner. Not every confidential information in trade will always be protected with an intellectual property right. It is also not easy to categorize information in the trade as trade secrets. Several factors are used to determine whether a secret qualifies as a trade secret. This factor is the extent to which the secret owner maintains the confidentiality of the information. This action regulates all the ease and difficulty of information to be known by others.

Based on these considerations, the general rule is that such information can be protected as a trade secret. If the information has been widely disseminated to the public, it is no longer a trade secret. If adequate precautions are taken to keep the information confidential from being made public, the information is still considered a trade secret. A person is deemed to have violated the Trade Secret of another party if he obtained or controlled the Trade Secret by violating the prevailing laws and regulations.

Concerning MSMEs products, it is also necessary to make defensive efforts from the government and to have a definite guarantee. Therefore, the competitiveness and ability of MSMEs need to be further improved to take advantage of the current free trade system. This system can be used to introduce and even practically involve superior products in the global market. While the condition for market opportunities is increasingly open, trade liberalism is not automatically able to help. It even becomes a threat to MSMEs. To anticipate this threat, MSMEs are required to be creative and innovative to take steps by creating products better than those of large companies [6].

Many MSMEs in Indonesia are reluctant to take advantage of the IPR system, especially concerning trade secrets. There is an assumption that law enforcement for IPR violations is feeble. This can be understood because MSMEs do not understand that all criminal offenses in the IPR Law are complaint offenses. As a result, when a violation occurs and the IPR holder does not make a complaint, the case cannot be processed further.

Trade secret protection can also be done through agreements. The owner of a Trade Secret is obliged to maintain the confidentiality of the information in his possession. This can be done through various steps, such as creating a contract that explicitly obliges the other party not to divulge the secret in writing. This kind of written contract will be especially helpful in avoiding misunderstanding the scope that should be kept secret. The obligation to maintain confidentiality can also be accomplished through the making of implicit contract terms and conditions.

Protecting trade secrets is automatic if confidential information with economic value is kept secret through reasonable efforts. Trade secret owners must be active and repressive in maintaining the confidentiality of their trade secret information. The owner must keep and maintain the confidentiality of his/her trade secret information.

Maintaining confidentiality is one of the fundamental elements in getting the rights. Trade secret rights are included in property rights that can be transferred and altered to other parties. Unlike other intellectual property, trade secrets are not registered so that the public cannot access and get the secret substance or formula. To protect Trade Secret rights, it is unnecessary to register to the Directorate General of Intellectual Property Rights because the law directly protects the trade secret if the information is confidential, has economic value, and is kept as secret. So, trade secret rights do not require a registration procedure. Although there is no regulation regarding the registration, the transfer of trade secret rights and licenses must be registered at the Directorate General of Intellectual Property to have legal consequences for the third parties (Articles 5 and 6 of Trade Secrets Law), as shown in the Figure 1.

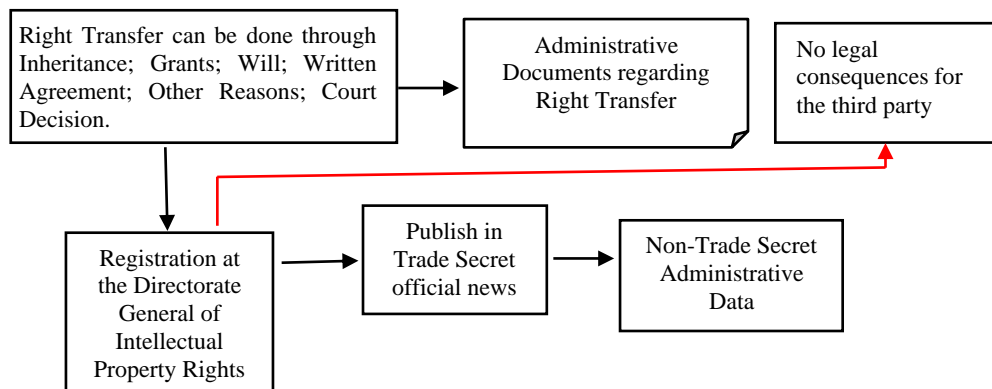


Fig. 1. Mechanism of Transferring Trade Secrets.

4 Conclusion

MSMEs play significant roles in the Indonesian economy at a macro level. The development of MSMEs in Indonesia has increased from year to year. The government supports them by issuing policies to protect their existence. The urgency of trade secret protection for MSME products to prevent fraud among business actors is meant to create healthy competition. Furthermore, MSMEs players can exploit their products with a sense of security to create a climate or business that allows people to create products or subsequent innovations. For MSMEs, it is essential to protect innovation and creativity for the sustainability of their business

to continue to improve their competitiveness because the strength of MSMEs is not from their capital but the protected innovation and creativity. MSMEs, as owners of trade secrets, are required to maintain the confidentiality of their information. This can be done through various steps, such as creating a contract that explicitly obliges the other party not to divulge the secret in writing.

References

- [1] J. Braithwaite and P. Drahos, *Global business regulation*. Cambridge university press, 2000.
- [2] E. Rajagukguk, *Globalisasi Hukum dan Kemajuan Teknologi: Implikasinya Bagi Pendidikan Hukum dan Pembangunan Hukum Indonesia*. Universitas Sumatera Utara (USU), 2001.
- [3] L. M. Friedman, "Legal Culture and the Welfare State: Law and Society-An Introduction." Cambridge, Massachusetts, London: Harvard University Press, 1990.
- [4] W. Menski, "Perbandingan hukum dalam konteks global sistem Eropa, Asia dan Afrika." Bandung: Nusa Media, 2016.
- [5] S. A. Brenner, *The domestication of desire*. Princeton University Press, 2012.
- [6] C. Purnama, "Perlindungan Hukum Produk UMKM melalui HKI (Hak Kekayaan Intelektual)," *Dinkop UMKM, Propinsi Jawa Tengah*, 2010. .
- [7] Legal Era, "Ini Kontribusi Koperasi dan UMKM Terhadap PDB Nasional 2017," *Legal Era*, 2018. [Online]. Available: <https://legaleraindonesia.com/ini-kontribusi-koperasi-dan-umkm-terhadap-pdb-nasional-2017/>.
- [8] A. M. Ramli, *HAKI, hak atas kepemilikan intelektual: teori dasar perlindungan rahasia dagang*. Mandar Maju, 2000.
- [9] Z. Mingaleva and I. Mirskikh, "Psychological aspects of Intellectual property protection," *Procedia-Social Behav. Sci.*, vol. 190, pp. 220–226, 2015.
- [10] P. Mahmud Marzuki, "Penelitian hukum," *Jakarta: Kencana Prenada Media*, vol. 55, 2005.
- [11] R. Sudaryanto and R. R. Wijayanti, "Strategi pemberdayaan UMKM menghadapi pasar bebas Asean," *Pus. Kebijak. Ekon. Makro. Badan Kebijak. Fiskal. Kementerian. Keuangan, Jakarta*, 2013.
- [12] R. H. Soemitro, "Metodologi penelitian hukum dan jurimetri," *Ghalia Indones. Jakarta*, vol. 167, 1990.
- [13] Databoks Katadata, "UMKM Serap 97% Pekerja Indonesia," *Databoks Katadata*, 2016. .
- [14] Lestari Moerdijat, "Perkembangan Koperasi Dan UMKM 2014-2019," *Lestari Moerdijat*, 2020. .
- [15] E. U. Nainggolan, "UMKM Bangkit, Ekonomi Indonesia Terungkit," *Kementerian Keuangan*, 2020. [Online]. Available: <https://www.djkn.kemenkeu.go.id/artikel/baca/13317/UMKM-Bangkit-Ekonomi-Indonesia-Terungkit.html>.
- [16] R. G. Bone, "A new look at trade secret law: doctrine in search of justification," *Calif. L. Rev.*, vol. 86, p. 241, 1998.
- [17] M. F. N. Dewata, *UMKM di Indonesia: perspektif hukum ekonomi*. Pustaka Pelajar, 2016.
- [18] J. Hull, "Trade secret licensing: the art of the possible," *J. Intellect. Prop. Law Pract.*, vol. 4, no. 3, pp. 203–212, 2009.
- [19] A. Komarudin, "Politik Hukum Integratif UMKM," *PT. Wahana Semesta Intermedia. Jakarta*, 2014.
- [20] S.-S. Sukarmijan and O. D. V. Sapong, "The importance of intellectual property for SMEs; Challenges and moving forward," *UMK Procedia*, vol. 1, pp. 74–81, 2014.
- [21] World Intellectual Property Organization, "World Intellectual Property Report 2015," 2015.