

# **IPR (INTELLECTUAL PROPERTY RIGHTS) PROTECTION ON WORKS OF INDUSTRIAL DESIGN CREATIVITY FOR MICRO SMALL AND MEDIUM INDUSTRY AS AN EFFORT TO IMPROVE NATIONAL COMPETITIVENESS IN FREE TRADE**

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*IPR (Intellectual Property Rights) protection of industrial design is a strategic medium for improving designer's creativity of micro small and medium industry as one of the efforts of improving national competitiveness in entering free trade era. This paper is aimed at reviewing the IPR protection on works of industrial design creativity for micro small and medium industry as an effort to improve national competitiveness. Figuring out the IPR protection on creative works of industrial design through the Law of Copyright and Industrial Designs, as the implementation of TRIPs, is the effort of small medium and micro enterprises for increasing their competitiveness. It also serves as the design for formulating a legal regime on IPR that is more adequate for the protection of the IPR of the work of industrial design creativity of small micro medium enterprises in entering the era of free trade.*

*Normative juridical approach is applied on this research, which focuses on secondary data obtained from the literature research, supported by primary data from field research.*

*The result shows that proper IPR protection over industrial design creativity contributes significantly to the designer's creative ideas of micro small and medium industry. Designers' of micro small and medium industry have not used the laws of Copyright and Industrial Design, as the implementation of TRIPs, effectively. The law of Copyright does not meet the designers' expectations in the way of protecting their creative ideas as the effort for improving the national competitiveness.*

*The other existing barriers in realizing the IPR protection is the juridical aspect; the regulation of IPR protection over the creative works is not yet clear and complete, and less recognition to the fact that creative works do contribute to the designers, other than the fact that social environment is still influenced by the communal society.*

*The government needs to perform a concrete effort by completing and socializing the regulation of what to be used for protecting industrial creative works. The Forms of appropriate and legal IPR regime for the protection of creative works of industrial design, mainly to encourage the creativity of small medium micro enterprises to improve national competitiveness in the era of free trade, is the Law of Industrial Design that is "single protection".*

**Keywords:** IPR Protection, Industrial Design Creativity, Micro Small and Medium Industry, Competitiveness, Free Trade.

## 1. Background

Free trade era demands the improving competition for goods as the result of deregulation in every field, and therefore the market will only be dominated by high quality goods.

To cope with it, as a developing country, Indonesia needs to develop its industrial sectors by improving competitiveness. One of the competitiveness is by way of making use Industrial Design, which is the part of Intellectual Property Rights (IPR). The varied culture combining with the efforts to participate in free trade; by protecting the Industrial Design with law, will accelerate the development of national Industry<sup>1</sup>.

As a developing country, Indonesia is populated by more than 200 million. This means that Indonesia has the potential in Human Resources (HR) and serves as great asset for the development of particular industries. These potentials allow the development of industries, small scale, or micro small and middle industry (MSME)<sup>2</sup>.

Highlighting the development of industries in Indonesia, particularly the small and micro one, the law protection over Industrial Design is mostly needed in terms of improving society's living standards as well as supporting the nation's economy<sup>3</sup>. It may happen since the potential of MSME is significant in running the society's economy activities and at the same time becomes the income foothold for most society in improving their welfares<sup>4</sup>. Additionally it also serves as strategic facilities for national competitiveness effort in free trade era.

The existence and role of MSME in national economy, very potential in 2008, the number of MSME reached the number of 52,26 million of business units, this means that it is 99,99% of national business people. In 2007, the contribution of MSME in absorbing manpower, forming National Gross Domestic Product (GDP), national foreign exchange, and national investment played major role in the formation of national investment based on the prevailing price that was Rp 461,10 trillion or 52,99% of the total of national investment that was Rp 870,17 trillion. The contribution of Micro Businesses was recorded in the amount of Rp 71,66 trillion or 8,24 percent, Small Businesses for Rp 180,20 trillion or 20,71 percent, and Middle Businesses for Rp 209,24 trillion or 24,05 percent. In 2008, MSME contributed greater for Rp 197,27 trillion or 38,88 percent to Rp 640,38 trillion. Micro Businesses contributed for Rp 101,53 trillion or 8,3 percent, Small Businesses for Rp 250, 52 trillion or 20,69 percent, whereas Middle Businesses for Rp 288,33 trillion or 23,81 percent, and the rest was the contribution from Big Businesses<sup>5</sup>.

The role of micro small businesses in developing of national business, based on creative industries, is quite significant such as furniture, souvenirs, sculptures and so forth. Indonesia Industrial Design has achieved several international achievements, including that from the *Brit Insurance Design of the Year* 2009 for the design of branded Magno wooden radio by Singgih Susilo Kartono. With a turnover of approximately Rp 750 million a month or Rp 9 billion per year, the business 'Piranti Works' of Singgih is included in the classification of Small Business<sup>6</sup>.

Industrial design, which is part of the intellectual property rights as stipulated in Law No. 31 of 2000, is a logic consequence of Indonesia's participation in the approval of TRIP "s-WTO. Since the enactment of the Act began on December 20, 2000, the designer who comes from a group of Micro, Small and Medium Enterprises, (MSME controlling nearly 99.9% of businesses people in Indonesia are expected to take advantage of the

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<sup>1</sup> Expalantion for the Law of RI No. 31 Year 2000 Regarding Industrial Design.

<sup>2</sup> Implementation of Legal Protection over Rattan and Wood Furniture Design in Cirebon, 7 Nopember 2009, [http://gudang\\_lmu\\_hukum.blogspot.com/2009/11](http://gudang_lmu_hukum.blogspot.com/2009/11)

<sup>3</sup> ibid

<sup>4</sup> Meilia Witri Budi Utami, Making Use of Industrial Design for the Development of: Between Reality and Hope Antara, page 1-2, <http://mediahki.wordpress.com/vol-viino-01februari-2010/kolom-hki>,

<sup>5</sup> Book of "Statistics of Small and Medium Enterprises -Year 2007-2008 ", The Data Bureau of Planning Ministry of Small and Medium Enterprises. [www.depkop.go.id](http://www.depkop.go.id) in ibid.

<sup>6</sup> [www.kabarnews.com/article/berita\\_indonesia/bisnis/bisnis\\_radio\\_kayu\\_asal\\_temanggung\\_tembus\\_dunia/33650](http://www.kabarnews.com/article/berita_indonesia/bisnis/bisnis_radio_kayu_asal_temanggung_tembus_dunia/33650) in ibid.

protection of Industrial Design. In practice, it turns out the group of MSMEs are not fully take advantage of the protection of Industrial Design as *an intangible asset* that actually could promote its business competitiveness in the era of free trade.

Industrial Design that is relatively easier to be developed and more accessible by the MSME to produce a product becomes more appealing and attractive to consumers is the unique selling points. Designers' creativity ideas for the sectors of industry, manufacturing, and new, original and rewarding traditional art and crafts may create a gap in domestic and export market. It then requires adequate protection for the owner. For example, Indonesian exports of rattan products, designed attractively, are able to take up International market. Protection of Industrial Design is critical part of the business strategy of an MSME in an effort to improve competitiveness in free trade.

Protection over Industrial Designers that is currently valid applies combination system of protection based on the copyright and industrial design approaches. In its implementation, it turns out the legal protection system with the two approaches has not been effectively implemented. Whereas in Article 14 of Law No. 20 of 2008 MSME set about aspects of trade promotion, among other things, facilitate the ownership of Intellectual Property Rights of MSME products and design in business activities in domestic and export<sup>7</sup>.

In addition, based on Government Regulation (PP) No. 19 Year 2007 on the tariff for Non-Tax State Revenue, there have been differences in the cost for Small Enterprises for 50% compared with non-small business. This government program is an effort for a register of IPR particularly MSME Industrial Design will be more and more. However, from industrial design registration statistics showed that during 8 (eight) years from 2002 till the year of 2009 the number of MSME who have registered Industrial Design at the DJHKI were still low at only 2% of the total number of applicants. Compared with non-SMEs<sup>8</sup>.

The low enrolment is due, among others, lack of awareness and lack of understanding about the importance signup MSME industrial design. The SME is less understood that the signup will give exclusive rights both moral and economic rights as the existence of Industrial Design that serves as a tool of competitiveness in the era of trade. This can be evidenced by a lack of appreciation given to the industrial design community. Until now, many designers have no reservations when others, and even quite the contrary feel proud, imitate their creative designs when they are imitated. In fact, there lies an assumption that the designs are really interesting and great<sup>9</sup> if others do so to their designs.

Those are barriers to MSME in its efforts to improve the competitiveness of national enterprises in free trade. The fact that emerged is the rise of unfair competition by making, using, selling, importing, exporting and/or distributing goods produced, where the goods have been given the right to industrial design. Often the Industrial Design Indonesia exports are declined in other countries because they are not registered. The designers from Japan, Germany, Britain and Malaysia in their respective countries have now registered Indonesian batik motif. Another case is the Indonesian silversmiths sued by American businesspersons because the product design had been registered in the U.S. and the registration certificate had been issued. The craftsmen was sued to pay a fine of U \$ 600,000. Ironically, the registered design elements made use an ungainly form of Borobudur<sup>10</sup> temple. These are challenges that can weaken the competitiveness in the international market. When cases of infringement of a design occur intensely, then the designer will be no longer creative<sup>11</sup>.

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<sup>7</sup> Refer to verse 14 of the Law No. 20 Year 2008 Regarding MSME.

<sup>8</sup> Statistical Data of Industrial Design Registration [www.dgip.go.id/statistik/desain\\_industri\\_in\\_op.cit.Buku](http://www.dgip.go.id/statistik/desain_industri_in_op.cit.Buku) Statistic.page 3

<sup>9</sup> Ranti , Protection.The Protection of Industrial Design In Regards To Indonesian Economic Development In Free Trade, Dissertation, Unpad, April 2002, page 13.

<sup>10</sup> Kontan. Ancestor Design Sued in US: Silver Design Patent Dispute, Jakarta No.4 Year IV, 18 Oktober 199, page 26 in *ibid*, page 13.

<sup>11</sup> *Ibid* , Ranti Fauzi in Protection.... page 11.

Another thing that causes the low registration for the MSME is the dualism of legal protection system for the designers, in addition to being protected by the Industrial Design Rights protection system; it can also through a system of protection of Rights Reserved. This can obscure the view of the MSME that is not design work need to be registered. This was due to copyright law adheres to the terms declarative. This means that copyright protection is automatic when a real expression is materialized without registration. Copyrighted works is a masterpiece and not mass-produced, whereas the protection of the rights was granted under the Industrial Design to design a new registration (constitutive) and Industrial Design was mass-produced.

Looking at the above problems, this research aims at examining how the IPR protection of creative works of Industrial Design MSME serves as an effort to improve the competitiveness of national enterprises in free trade. In addition to that, it also assesses how the IPR gives protection of creative works of industrial design MSME through the Law of Copyright and Industrial Design as the implementation of TRIPs in improving the competitiveness of national business. As the complementary, it also formulates a legal regime on IPR that is more adequate for IPR protection over the creative work of the Industrial Design MSME in entering the era of free trade.

## 2. Theoretical Background

The role of law in the development process by Mochtar Kusumaatmadja, through his Legal Development Theory is to ensure that the changes occur in a regular way<sup>12</sup>. "Law is a means of community renewal, in the sense of rules or laws can serve as a regulator or means of channelling the direction of human activity to the development desired by the development or renewal." Sunaryati Hartono said that the meaning of legal development includes four<sup>13</sup> following terms: (a). Complementing, (b) changing for the better and modern (c). Creating something that had not previously existed, and (d). Nullifying something contained in the old system.

In order to run the proportional development, legal certainty is necessary, realized in the form of the availability of adequate legal tools, to meet the needs of progress and welfare of the community<sup>14</sup>, as well as in penetrating international markets. Similarly, the Industrial Design creativity requires adequate protection through IPR Industrial Design.

IPR main principle is that a person who produces the creation, innovation from his intellectual ability needs to get the ownership of natural rights, based on the flow of natural law<sup>15</sup>. Grotius argued that the law of nature that are generated through his rational activity is a positive law; that is the setting about respecting human property rights<sup>16</sup> in the form of IPR with which it is an acknowledgment of one's intellectual work<sup>17</sup>.

The theories underlying IPR protection, among others, are the theory of property rights, contract theory, and several other supporting theories. They are<sup>18</sup>: (1) Reward theory is, namely, for the designer who has the benefit in his industry originality, newness and useful needs. He must be given an award, recognition, and legal protection for the success of his efforts in creating the design of certain products in tangible form. (2) Recovery theory is, namely, the efforts and works of creativity producing energy, thoughts, time and cost. It needs to be given exclusive rights to exploit the IPR in order to regain achievement of what has been produced; (3) Incentive theory is that incentive needs to be given to stimulate creativity and effort to create works of unique, exciting, new, original and useful in industrial<sup>19</sup> field. The award of the exclusive rights in the form of economic benefits of

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<sup>12</sup> Mochtar Kusumatmadja, Op cit, page 4

<sup>13</sup> Sunaryati Hartono, History of National Legal Indonesia Towards The National Legal System, paper, 1991.

<sup>14</sup> Ranti Fauza M, Op.cit page 44.

<sup>15</sup> See Theo Huijbers, Philosophy of Law in The Track of History, Kanisius, Yogyakarta, 1982, page 60.

<sup>16</sup> Eddy Damian. Copyright Law According to Some International Convention, Copyright Act 1997 and its Protection over Books and publishing agreements, Alumni, Bandung, 1999., page 17.

<sup>17</sup> Ibid, page 27-28.

<sup>18</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>19</sup> ibid

the findings will encourage creativity and stimulate the growth of a person/company to invest its capital and will contribute to the competitiveness of MSME<sup>20</sup> entering the era of free trade. Robert M. Sherwood, in the Public Benefit Theory<sup>21</sup>, states that creators should be respected and protected by law for continued creativity. This becomes the basic for the growing in industry in the era of free trade.

As the philosophical foundation of exclusive rights in the form of monopoly, and in accordance with what was raised by Jeremy Allison Phillips and Firth, in the theory of "The Absolute Monopoly of The Market", the IPR owner is entitled to prevent any person to use the property on the market; that law protects them in regulating the use.

### 3. The Method

The method used is Normative Juridical, searches, investigates, and examines the object either through legal principles or through national legislation, which is Industrial Design Law No.31 of 2000, Law no. 20 of 2008 on Small Micro Medium Enterprises, and Government Regulation No. 19 of 2007 on the tariff for Non-Tax State Revenue. TRIPs-WTO Agreement is associated with the IPR protection of creative works of Industrial Design MSME as an effort to improve the competitiveness of national enterprises in relation to free trade.

### 4. IPR Protection over Industrial Design Creativity MSME as an Effort to Improve Competitiveness of The National Business in Free Trade Era

Identity awareness in the process of creating a creative design is the main requirement for being able to produce works of quality<sup>22</sup>. Indonesia's cultural diversity embodied in tangible form of intellectual works is the capital for Indonesian and serves as a tool of competitiveness. A product that is designed to attract will have a value greater than selling a product with a common design.

In facing free trade, Industrial Design is not only performed by major industries, but also by MSME<sup>23</sup> industries such as handicraft industry, furniture, souvenirs, statues, and others. The fact shows that in Indonesia the economic crisis that lasted since 1997, the field of MSME industrial crafts was particularly more defensive than other major industries.

Currently, MSME has significant potential in running society's economy and at the same time becomes income foothold for most society in improving their welfares<sup>24</sup>. In 2008, the number of MSME reached the number of 52,26 million of business units, this means that it is 99,99% of national business people. In 2007, the contribution of MSME in absorbing manpower, forming National Gross Domestic Product (GDP), national foreign exchange, and national investment played major role in the formation of national investment based on the prevailing price that was Rp 461,10 trillion or 52,99% of the total of national investment that was Rp 870,17 trillion. The contribution of Micro Businesses was recorded in the amount of Rp 71,66 trillion or 8,24 percent,

<sup>20</sup> Achmad Baihaki IPR, Efforts to Encourage And Creating Conducive Environment for Industrial Growth Germination, op.cit.

<sup>21</sup> Robert M. Sherwood, opcit, page 37.

<sup>22</sup> Abdul Sobur. Capabilities and limitations of SMEs in utilizing Invention, Innovation and IPR System as Part of Business Strategy. Paper presented in national seminars Intellectual Strategies for improving utilization of Invention and Innovation Activities. Organized by the ITB, Bandung, February 14, 2001, page 4.

<sup>23</sup> Law No Nomor 20 Year 2008 regarding MSME criteria differences for Micro Enterprises, MSME are based on the nett property and annual selling point. Micro Enterprises criteria: a. having nett property at most Rp50.000.000, excluded land and building; or b. having annual selling point at most Rp300.000.000, 00. Small Enterprises Criteria: a. having nett property more than Rp50.000.000, 00 to Rp500.000.000, 00, excluded land and building; or b. having annual selling point more than Rp300.000.000, 00 to Rp2.500.000.000, 00. Middle Enterprises Criteria: a. having nett property more than Rp500.000.000,00 to Rp10.000.000.000,00 excluded land and building; or b -having annual selling point more than Rp2.500.000.000,00 to Rp50.000.000.000,00

<sup>24</sup> Book of "Statistics of Small and Medium Enterprises -Year 2007-2008 ", The Data Bureau of Planning Ministry of Small and Medium Enterprises. www.depkop.go.id

Small Businesses for Rp 180,20 trillion or 20,71 percent, and Middle Businesses for Rp 209,24 trillion or 24,05 percent. In 2008, MSME contributed greater for Rp 197,27 trillion or 38,88 percent to Rp 640,38 trillion. Micro Businesses contributed for Rp 101,53 trillion or 8,3 percent, Small Businesses for Rp 250, 52 trillion or 20,69 percent, whereas Middle Businesses for Rp 288,33 trillion or 23,81 percent, and the rest was the contribution from Big Businesses.

One of the major constraints and crucial to the advancement of industrial sector in Indonesia, mainly performed by the Pen Industrial Design, is the lack of understanding about the existence of IPR as the protection over new and original works. It can be useful to support industry progress, providing a big break in the progress of the industrial sector.

IPR Protection of Industrial Design is a logic consequence of Indonesia participation in the approval of TRIP"s-WTO, intended to provide a legal basis for protection against all forms of plagiarism, whether made between the designer or by other parties who are not responsible, either national or international scope.

IPR Protection of Industrial Design encourages creative activity to create new designs, particularly encourages MSME to produce products in the form of interesting creative works. This will improve the competitiveness in free trade. Therefore, legal protection to designers is significantly necessary.

In line with Law No. 31 of 2000 emphasizing in the constitutive system, the effectiveness of legal protection for the designer will be realized when it is implemented the principle of registration. The application of these principles is associated with globalization and free trade requiring serious attention, because the evidence is such an authentic proof of the ownership registration of particular design rights and determine the starting point of the protection. The registration will ease the process of evidencing in the court, for written evidence shall be conclusive one, and therefore the certificate of the design will be a perfect evidence that has legal force for the Court<sup>25</sup>.

In line with the theory underlying the IPR protection, they are<sup>26</sup>: (1) Reward theory is, namely, for the designer who has the benefit in his industry originality, newness and useful needs. He must be given an award, recognition, and legal protection for the success of his efforts in creating the design of certain products in tangible form. (2) Recovery theory is, namely, the efforts and works of creativity producing energy, thoughts, time and cost. It needs to be given exclusive rights to exploit the IPR in order to regain achievement of what has been produced; (3) Incentive theory is that incentive needs to be given to stimulate creativity and effort to create works of unique, exciting, new, original and useful in industrial<sup>27</sup> field.

The award of the exclusive rights in the form of economic benefits of the findings will encourage creativity and stimulate the growth of a person/company to invest its capital and will contribute to the competitiveness of MSME entering the era of free trade. Robert M. Sherwood, in the Public Benefit Theory<sup>28</sup>, states that creators should be respected and protected by law for continued creativity. This becomes the basic for the growing in industry in the era of free trade.

As the philosophical foundation of exclusive rights in the form of monopoly, and in accordance with what was raised by Jeremy Allison Phillips and Firth, in the theory of "The Absolute Monopoly of The Market", the IPR owner is entitled to prevent any person to use the property on the market; that law protects them in regulating the use.

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<sup>25</sup> In Civil Procedure Code is divided into two items of evidence that is written evidence in the form of certificate

<sup>26</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>27</sup> *ibid*

<sup>28</sup> Robert M. Sherwood, *opcit*, page 37.

In practice, designers, particularly that of the MSME industry, does not really care with the so-called registration. The number of MSME registering their Industrial Design in DJHKI is less significant compared with that of the Non-MSME. The following table illustrates it<sup>29</sup>:

YEAR	MSME	Non-MSME	Total
2002	13	2.868	2.881
2003	54	3.100	3.154
2004	15	4.379	4.394
2005	57	5.057	5.114
2006	27	4.899	4.926
2007	229	4.244	4.473
2008	46	3.820	3.866
2009	224	3.957	4.181
TOTAL	665	33.234	33.899

Source: [www.dgip.go.id/statistik/desain\\_industri](http://www.dgip.go.id/statistik/desain_industri)

From the table/graph above, it can be seen that for 8 years, Industrial Design registration number of applicants who registered from MSME only 2% of the total number of applicants. Looking at the numbers from year to year, it cannot be presumed to be a constant improvement. From the chart, we can see the rise and fall of the number of registration for Industrial Design particularly that of the MSME. The highest number of applicants occurred in 2007 (229) and fell sharply in 2008 (46), then increased again in 2009 (224). The numbers in 2009 is even still below that of the 2007. Regarding the Recipients of MSME "Certificate of Industrial Design" is 253 (with a registration year beginning in 2007), this is still a very small amount<sup>30</sup>.

The understanding of MSME industrial designers to sign up their creative works is crucial once they are dealing with the competition in international markets. Export of Industrial Design product without having a certificate of IPR documents will be rejected. More ironically, the fact that may arise in the future when such a monopoly claim, for example, over Indonesian batik designs by foreign parties who had previously registered the designs that turned out to be the original designs of Indonesian culture.

Additionally, the registration of Industrial Design by the MSME besides giving stronger selling position to the owner for it can prevent competitors produce goods with similar design, it also becomes a registered product that improves the value of the company. The design protected can be transferred to other parties through "License", so it can expand market share<sup>31</sup>. These will encourage the practice of fair competition and honest trade and will further drive the manufacturing of various products, which are aesthetically more attractive, new and useful.

The above barriers need to be criticized, particularly in regards with improving the competitiveness of MSME designer in the era of free trade. This can be studied from the aspect of "structure", "substance" and "culture", among others are the following<sup>32</sup>:

1. Aspects of "substance" and "structure" are the less unfamiliarity of designers, particularly among the MSME designers regarding the importance of registration. Registration would lead to exclusive rights, benefiting the right applicants economic right or moral right. The right to monopolize domestic markets, region, and global, so they can avoid the exploitation performed by any unauthorized parties. The most

<sup>29</sup> Source: [www.dgip.go.id/statistik/desainindustri](http://www.dgip.go.id/statistik/desainindustri) in Meilia Witri Budi Utami, Making Use the Industrial Design for the Development of MSME between Reality and Hope, page 3-4.

<sup>30</sup> ibid

<sup>31</sup> ibid

<sup>32</sup> In line with Ranti, in Protection... op.cit page 377

concerning is the society's assumption, particularly MSME designers, that the registration of Industrial Design is not a granting of rights, but is considered as additional burdensome, time consuming and expensive. Infact, the government has endeavored to provide relief for MSME registration fee that is equal to 50% compared to non-MSME business. It was stated in Government Regulation No. 19 of 2007 on "Tariffs on Non-Tax State Revenue." This government program is an effort for a register of IPR particularly MSME Industrial Design to increase. This was due to a lack of socialization on crucial matters mentioned above from the government and society (eg NGOs) on the main designer in the designers among MSME.

2. An aspect of "culture" is the lack of adequate support from the atmosphere of the local MSME community in creating a conducive climate to the protection of designers' creative works. The cultural and social environment atmosphere that is still influenced by the communal society causes this; designers will be able to be harmed. Until now, many designers who have no reservations when their creative designs creativity are imitated by others and even quite the contrary feel proud they are being imitated. There are assumptions that if the design is really interesting and great if others imitate them.

## **5. IPR Protection over SMEs Industrial Designs Creativity through Industrial Design Law and Copyright Law Implementation of the TRIPs for Improving Competitiveness of SMEs of the National Business**

The improvement of competitiveness of national enterprises is contributed by designers' motivation to continue work in various types of new and original designs. Similarly, creative designs of SMEs designers are strategically potential in the national economy as a tool of national competitiveness. Global and regional designers also needs adequate protection for their designs from the party that is not responsible, such acts of piracy, impersonation and other fraudulent acts that could turn off potential work of designer creations.

The Act No. 21 of 2000 on Industrial Designs and Copyright Act No.12 of 2002 on Copyright may cover the industrial design work. The Industrial Design Act has provided a detailed regulation on industrial design as the implementation of TRIPs. Before the enactment of Law No.31 of 2000 on Industrial Designs, Copyright law is an alternative to setting the protection of industrial designs. Current copyright law as stipulated in Law No. 19 of 2002 previously provided for in Copyright Law No 12 of 1997.

Industrial Design Act adopts system of protection which includes shape, configuration or lines composition or colors lines, or a combination thereof in the form of three-dimensional or two-dimensions. This gives aesthetic impression, can be realized in the form of two or three dimensions, and can be used to produce a product, industrial commodities or handcrafts<sup>33</sup>. The copyright protects only the artworks. If the industrial design will be applied outside the field, in the Industrial Copyright protection, the protection of industrial designs shall follow the copyright provisions in both the protection period, the principle of protection, and protection requirements. There are differences in regulation of the two forms of IPR regime as follows:

Protection principles according to the Law of industrial design are granted based on the registration of the new designs (constitutive), whereas the principle of protection under the copyright law is "automatic principle", it means that protection does not apply based on the principle of registration and official requirements proposed by a State (declarative system). Registration creation does not constitute an obligation to obtain copyright. However, the creator and copyright holder who registers will get a letter of registration creations that can be used as initial evidence in court when disputes arise in the future against these creations. Copyrighted works is a masterpiece and not mass-produced, while the industrial designs are mass-produced.

Other differences are in terms of offense. In industrial design, violation is a complaint of copyright violations, while in copyright violation is an ordinary offense. There are also differences in registration

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<sup>33</sup> Verse 1 Act 1 Law No. 31 Year 2000 regarding Industrail Design

requirements. Conditions for registration of industrial designs must be new, while the requirement for copyright registration must be original and unique.

Setting the period of protection was indeed different; using the Industrial Design Act is valid for only 10 years. Meanwhile, according to the copyright for the new creation; sculpture art, sculpture, batik art and other creations is valid for life of the designer and continues until 50 years after designer's death. With the above provisions, the designers, as well as the designer of SMEs, will have a longer protection than the protection of industrial designs. One example of SME Industrial design protection in the framework of copyright is the form of textile design motives, paintings or drawings which in principle can be qualified as works of art that are entitled to protection within the framework of copyright.

The most important provision concerns with the copyright in the creation in which the creator is held by the State; the copyright of folklore<sup>34</sup> and the folk culture, crafts, songs, legends, fairy tales, and other artistic works. According to the terms of Copyright, multiplying and announcing the creation, for the people who are not Indonesian, must first get permission from agency attached thereto.

## **6. Industrial Design Law as Appropriate Legal Regime for the Intellectual Property in terms of Improving Competitiveness of SMEs of the National Business in Free Trade Era**

As a developing country, Indonesia should attempt to advance the industrial sector through increasing the power of national business of SMEs, including with the use of adequate IPR protection. However, this time in Indonesia, aspects of IPR protection are rarely put into consideration in determining the trade industry strategy<sup>35</sup>.

Adequate protection of intellectual property rights over creative works of SMEs industry encourages creative activity of the designer of SMEs to create new designs that may have implications for the competitiveness of national, regional and international levels. It relates to the fact that SMEs in Indonesia reach 51.26 million units occupying 99.99%<sup>36</sup> of the national economic actors. This means that it has great potential in the creation of modern designs.

To deal with the competitiveness in the era of free trade, protection of intellectual property rights over the creative works of SMEs as stated in Law no. 31 of 2000 on Industrial Design is more adequate. This law covers comprehensive scope and content of the provisions compared with the Law No.19 of 2002 on Copyright. Industrial Design Law emphasizes the application of the constitutive principles. In this principle, registration is the basis for the protection of a design. Copyright law does not require registration (declarative principle). Registration is very important in the era of free trade. By completing the registration, the designer has the evidence of registration in the office design as an authentic proof of the ownership of industrial design rights, showing that the design deadline is protected. Related to the registration provisions of the TRIPs-WTO, registration becomes more and more important, although TRIPs-WTO allows protection through Copyright.

The reason for the importance of registration relates to ease the process of evidencing in court, for the written evidence remains the primary evidence, so that the certificate of the design will be perfect evidence having strong legal force to facilitate proofing in court<sup>37</sup>.

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<sup>34</sup> Foklore is intended as 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 other things: paintings, drawings, engravings, kerajina hand, sculpture, nstrumen music, traditional weaving, etc. , in ibid.

<sup>35</sup> Ranti fauzia, Protection, opcit, page 366

<sup>36</sup> Small And Medium Business Statistics Year 2007-2008 Data Planning Bureau Ministry of Small Medium Enterprises. [www.depkip.go.id](http://www.depkip.go.id). In 2008 SMEs reached 51.26 million units

<sup>37</sup> Evidence in HIR divided into evidence in written form of notarial deed and memorandum and evidence oath.

Being unaware and neglect for signing up industrial design by SMEs generate weak competitiveness in foreign markets, because without adequate IPR documents, the Indonesian national products are prohibited to enter into destination countries.

Thus, the Law on Industrial Design is a form of intellectual property rights regime that is more adequate as an independent system ("Single Protection"). The dualism of the legal protection system; that is under the Law of Industrial Designs and Copyright Act, according to its designers can obscure the view of society, as well as SMEs. The assumption is that the design did not need to be registered.

Thus, it is necessary to improve designer's creative work settings so there will only exist one provision of legislation that protects the designer so as to create legal certainty in facing national competitiveness, regional, and international free trade era.

Some of the weaknesses that need to be improved in Industrial Designs Act are: first, the Law of Industrial Design does not accommodate the interests of traditional SMEs designer who have never performed any registration before. This law does not provide protection for the designer of traditional SMEs. Infact, traditional property has a high-economy value for the designer in question, but foreign designers imitated much of them and they registered them<sup>38</sup>. Therefore, separate special settings need to be made; providing protection over traditional design through simplicity in the registration process.

The second weakness; the Act No.31 of 2000 on Industrial Design does not explicitly regulate the provisions on the protection requirements, that it must be original as stated in the TRIPS-WTO. It would be more appropriate if the requirements contained in the Act on protection of industrial designs are not only "new" but also be "native/original" as had been noted significantly in the copyright, originality. This is intended to prevent violations by irresponsible parties, to gain popularity<sup>39</sup>, which may create a design that is purely based on a design or a combination of several designs that have been popular.

The third weakness; Industrial Design Act provides protection period for 10 years for all types of design. This protection is very short when it is given to a specific design in which the making is time consuming and costly, textile design for example. It would be sufficient if there is grouping in protection period by the type of design. It is important to encourage the designer, mainly those from SMEs, to enhance their creative ideas<sup>40</sup>.

The completions of the weaknesses are in line with Mochtar Kusumatmadja's legal theory stating that the law is to be used as "a means of community development". The law should be determined in accordance with the existence of people who will use it, so that the law is used as a means of order in business development for the change in orderly manner<sup>41</sup>. The law must be responsive<sup>42</sup>. The law is a means of community renewal in the direction desired by the development. According Sunaryati Hartono, the meaning of the law development includes: (a). complementing, (b) changing for the better and modern (c). Creating something that had not previously existed, and (d) excluding anything contained in the old system.

As a responsive law, Industrial Design Law should pay attention to people, particularly SMSE, who use humum. The factors of Philosophical, sociological, and juridical international must be taken into account. Philosophical factors that need to be accommodated in the legislation are the basic ideals expected by the community as well as by the designer of Indonesian SMEs as set out in the Five Principles of equilibrium values, the character of justice to realize the democratic order.

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<sup>38</sup> Ranti, Protection, op.cit page 294.

<sup>39</sup> ibid, page 272

<sup>40</sup> ibid, page 264

<sup>41</sup> Mochtar Kusumatmadja, Op cit,page 4

<sup>42</sup> Philippe Nonet and Philip Selznick, Law and Society in Transaction, op.cit page 23.

Juridical factors, the binding industrial design settings, are a government initiative as an effort to realize the welfare state. In this term, the government needs to change to meet the expectations of its main industrial designer community, particularly those from SMEs that have strategic potential for the development of national economy in an effort to increase competitiveness to enter free trade.

Sociological factors; industrial design settings should be able to accommodate the values embraced by Indonesia's society, in this case the designer of SMEs occupying the largest number of national business people in Indonesia. The work includes, among others, traditional creative, folklore and the folk culture, crafts, songs, legends, fairy tales, as well as works of art that represents typical values of local communities. They all have a strategic potential in improving the competitiveness to enter the free trade.

International factors worth of consideration in the Industrial Design Act as national law, that is by applying the principles of TRIPs and the WTO rules as stipulated in the GATT. The meaning that Indonesia has ratified the International TRIPs and WTO provisions in terms of international market share will bring extensive legal consequences of action. The consequence is the endangering impact to the assets; works of national culture creativity, especially the creative works of industrial design of SMEs. The act of piracy and other actions undertaken by both regional and international environment will be detrimental for the designer as well as for the government as the result of Indonesia's ratification in the International provision. The provision applies the principles of international law and international legal sanctions in the form of "embargo" or "cross retaliation" and other sanctions.

## 7. Conclusions and Suggestions

### 7.1 Conclusions

- a. IPR Protection over the creative works of industriri greatly contributes to the increasing creativity of the designer of SMES, this serves as an effort to improve national competitiveness. The designers, particularly those of MSMEs, have not effectively implemented industrial design protection. It can be indicated from the fact that the amount of registered and the certificate recipients that are minimum in number. This affects the healthy competition and fair trading, and paralyzing the motivation and potential of various aesthetic designs that are attractive, new and original. The barriers emanate from the aspect of "structure", "substance" and "culture"; that is the unfamiliarity of the SMEs designers regarding the importance of registration as an exclusive right. Additionally, the barriers may emerge from cultural and social atmospheres that are still influenced communal society.
- b. There is a dualism for the protection of the works of industrial design namely Law no. 21 of 2000 on Industrial Designs and Law No.12 of 2002 on Copyright. The different arrangements of the two forms of IPR regime include the Law of industrial design adopting the constitutive protections; it means that the protection is based on the principle of registration. Differently, the Law of copyright adopts "automatic principle"; it means that protection does not apply based on the principle of registration. The violations in the industrial design are the complaint whereas that of copyright is a normal offense. The registration conditions for industrial designs must be new, while for the copyright must be original and unique. According to the Law of Industrial Design, the protection period is 10 years, while according to the copyright, it as 50 years after creator's death.
- c. Law no. 21 of 2000 is a form of intellectual property rights regime that is more adequate when compared to the Copyright Law. The arrangement of the industrial design should be revised to "Single Protection". The dualism of legal protection system may obscure the view of the registration importance for SMEs. Necessary revisions need to be taken to the Law of industrial design in order to become responsive law by taking into account the factors of Philosophical, Judicial sosiologis, and international one. This serves

as a means of competitiveness of SMEs in entering the free market. The complementary actions include: (1) the need for special arrangements to protect the work of the designer of traditional SMEs (2) there needs to be additional requirements for protecting the works that are new and original (3) the need for protection period clustering based on the type of design.

## 7.2 Suggestions

- a. Governments need to be more proactive in the effort of socializing any arrangements related with the protection over creative works of industrial design mainly on SMEs. There needs to be a changing paradigm for the SMEs designers, from traditional communal culture toward modern culture, that the IPR are monopoly in nature when registered. This may result in conducive atmosphere and motivated creator passion in making new creations, original, exciting, and usefull for the industry's competitiveness in the free trade.
- b. The government needs to revise the various weaknesses inherent in Industrial Design Law. The revisions may be made in the forms; (1) Special arrangements on the protection of the work of creative traditional design. (2) Make additional requirements for design protections that are not only "new" but also "original". (3) Set the protection period based on the kind of design. (4) There needs to exist a legal regime that is the Law of Industrial Design as a "Single Protection" that can protect the creative works of designers to create legal certainty.

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