CLAUSULA RESTRICTIONS IN TECHNOLOGY TRANSFER PATENT LICENSE AGREEMENTS THAT IMPACT ON UNFAIR COMPETITION

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ABSTRACT

Licensing practices in technology transfer that contain restriction clauses that are indirectly burdensome to the licensee and will further result in business competition. The law of unfair competition and the law of intellectual property rights are complementary because they both aim to promote competition and innovation. The granting of monopoly rights by the Intellectual Property Rights Law must not violate the provisions in the unfair competition law.

The results of the research show that the limitation clause in the technology transfer patent license agreement has not received satisfactory attention from Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition with the exclusion of the agreement in the field of Intellectual Property Rights in Article 50 letter b. This will open up opportunities for the development of technology transfer patent license agreements containing restriction clauses that can lead to monopolistic practices and/or unfair competition, to anticipate limitation clauses in technology transfer patent license agreements as contained in the provisions of Article 78 of the Law. Number 13 of 2016 concerning Patents, however, interpretation is still needed in accordance with the objectives to be achieved by Law Number 5 of 1999, so that the provisions in Law Number 13 of 2016 can effectively cancel licensing practices that inhibit competition through clauses. -the limitation clause in the technology transfer patent license agreement.

Keywords: Clause Restrictions, Patent License Agreements, Unfair Competition, Technology Transfer.

INTRODUCTION

The era of free trade with the spread of industrialization around the world (Labetubun et al., 2018), in a modern economy it determines that a fair business competition climate is necessary in the developed world, this principle is strictly adhered to and becomes an indispensable prerequisite in the economic activities of their corporate society. However, this does not mean that competition is completely unknown in our heterogeneous society. Competition is trying to achieve profit already exists instinctively in almost all business actors. This competition can be in the form of price, quantity, service, or a combination of various factors that are owned by consumers (Khemani, 1998).

The development of competition law in Indonesia with the promulgation of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition is a specific and comprehensive regulation relating to business competition. The law is expected to become a tool for government policy and law to create an equal business opportunity (level playing field) for all business actors.

So important is the antitrust law for a country that some say that the American antitrust law is like a Magna Charta for free enterprises to maintain economic freedom and the system of free enterprises or like the Bill of Rights for Human Rights to protect very fundamental personal freedoms (Sjahdeni, 2000). In terms of substance, Law Number 5 the Year 1999 still has many loopholes that may be abused by business actors and legal practitioners. One thing that is interesting to note is the exception to some things contained in Article 50. The author wants to highlight the provisions of the exemptions in letter b regarding exceptions to agreements in the field of Intellectual Property Rights.

In some developed countries such as America, Australia, Japan, and the European Union, the provisions of competition law still apply to agreements in the field of IPR, reducing the possibility of abuse of IPR to reduce or hinder fair business competition. In fact, in some developing countries, efforts to combat unfair business competition have been made by including these provisions in their technology transfer laws. One example of the Patent Law in Ukraine which led to the issuance of weak patents in medicine and pharmacy and created an opportunity to monopolize the owner of the patented object (Volik et al., 2020).

The international agreement does not yet indicate which licensing practices (except grantback) can hinder competition, but it can indicate a common opinion internationally that an agreement in the field of IPR can have negative implications for fair competition and therefore may not violate provisions in competition law. Unfortunately, this is not a serious concern in Article 50 letter b of Law Number 5 the Year 1999.

For Indonesia as a developing country, the problem of unfair business competition practices in agreements in the field of technology transfer patents is very important. This is none other than because Indonesia still expects investors to be willing to invest, in carrying out their investment activities; investors not only bring capital in the form of finance but also technology. This technology was brought in to facilitate activities and increase their profits. In practice then this technology is likely to be licensed to local partners/companies.

Technology transfer is closely related or has a high economic side, especially when viewed from the side of the relationship between technology buyers (foreigners) and technology receivers (developing countries). In every modern socio-economic activity, there is always an element of technology or knowledge (knowledge). But unfortunately, this technology or knowledge is not readily available in all parts of the world. They are usually concentrated in the developed world and are mostly protected by IPR so they cannot be transferred for free. Therefore technology transfer refers to a commercial transfer (Khairandy, 1996).

Patents in technology transfer which are ownership of IPR in the Industrial sector (Labetubun, 2019), it becomes a question that how is the relationship between technology and patents. When we talk about technology, talking about patents is very relevant. Because most of the technology needed for industrial development is patented and the patents are owned by companies in industrialized countries (Lubis, 1986). As formulated in Article 1 paragraph (1) and (2) of Law Number 13 of 2016 concerning Patents, it can be seen how close the relationship between technology and patents is. The formulation of the article states that patents are aimed at inventions in the field of technology, while the invention itself is also a solution to certain problems in the field of technology. So, we will talk about patents or at least, patents as a branch of IPR is very relevant when we talk about technology. Likewise, a technology license as a means of defeating technology can be referred to or identified as a patent license. Although not all technologies can obtain patents and/or are patented by their inventors, Tatpi Amir Pamuntjak stated from experience that more than half of all technology licensing contracts involve patents and others know how without patents.

Concerning patent licensing, it is a means of being able to beat technology from developed to developing countries. Even though in reality this license cannot help the Indonesian nation in the context of transferring technology due to the many obstacles in the patent license, including the absence of supervision of the license agreement because the agreement has never been registered and because there is no time limit on the license agreement patent (Saidin, 2015).

Licensing practices that have implications for unfair business competition and barriers to technological development are certainly very dangerous for Indonesia, which is actively developing because current conditions show how large the number of foreign-owned patents is that most business transactions can be ascertained (including the license agreement) involving the patent must also involve foreign parties (as the owner of the patent technology).

METHODOLOGY

The method used in this research is normative juridical to analyse the legal problems contained in the legislation related to the problem under study with descriptive-analytical nature. The problem approach used is the statute approach and conceptual approach. According to Peter Mahmud Marzuki, the legislative approach is carried out by examining all laws and regulations relating to legal issues (Marzuki, 2007). The conceptual approach moves from the views and doctrines developed in the science of law to find ideas that give birth to legal concepts, legal understandings, and legal principles needed to complete research.

RESULTS AND DISCUSSIONS

Market Power Caused by Technology Transfer Patent Holders

Concerning competition law, it is necessary to conduct a preliminary analysis of whether granting exclusive patents requires or immediately creates market power and whether the market power that may be created can be extended or leveraged in a market that is relevant (relevant market) or in another market, through a license agreement. Market share is one of the main components used to assess the presence or absence of such market forces. This is exempted in Law number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition, but it should not be considered a monopoly at the same time as having power over the market, and all power over its market does not oblige it to carry out healthy competitive practices (Akyuwen, 2016).

Courts and competition authorities in America and Europe consider IPRs to be an economic force, but this does not automatically give rise to the ability of their holders to have market power. In general, they can give rise to exclusivity but market power arises solely from market demand for the technology. Where the demand itself depends on the availability of real or potential close substitutes and the cross elasticity of the demand or advantages of these replacement technologies, and also the cross elasticity of demand between technology and its complementary in the relevant market. So that the things mentioned above can be factors that prevent or limit the obtaining of market power.

Patents may result in the formation of market power as a consequence of superior technology or products obtained due to technological sophistication and/or excellent marketing/business strategies. It does not violate competition law unless it is misused to achieve objectives that impede or conflict with fair competition or the gain of market power is carried out in a manner prohibited by competition law.

The negative impact of market power of a patentee for the competition can also arise even though it is not intentionally aimed at it, if the patent rights owned by a patentee/company create entry barriers for similar business actors, especially for actors who are just entering the market (new entry). Competitors will not be able to enter the market without prior permission from the patent holder because if there is no permit, the competitor's entry into the market can be considered a patent infringement.

A similar stance is taken by American antitrust law through the United States Antitrust Guidelines of the Licensing of Intellectual Property Rights (guidelines). The market power created by a technological innovation so that a financial surplus is obtained for the patentee/licensor will not be considered to be illegal. This is in contrast to an attempt to create market power through restrictions in a license agreement.

So it is very important to prove that the licensor has sufficient market power and he misuses it for his business interests in the form of restrictions in the license agreement which results in obstruction of existing or potential competitors. This requirement of having sufficient market power is adhered to by American antitrust law.

Impact of Business Competition from the Limitation Clause in the Transfer of Technology Patent License Agreement

Several things need to be considered in analysing whether a technology transfer patent license agreement can create opportunities for the emergence of a monopolistic practice or unfair competition. Furthermore, it can be described some of the problems that can arise, although not all are related to the limitations in the technology transfer patent license agreement, but rather the behaviour/implementation of patents that is detrimental to competition, the authors will still describe briefly in addition to remembering that these matters are important to discuss because with the application of competition law to technology transfer patents.

Cartel

An important thing faced by competition authorities in dealing with patent license agreements is that the license agreement can be used to make price-fixing agreements, output restraint or market division/allocation. It is these kinds of provisions that are usually found in patent license agreements. Its anti-competitive effect can arise when a license agreement is made between a licensee and a licensee who is competing or has the potential to compete in the relevant market, where the relevant market is not necessarily the market that is the subject of the license agreement. Securities or facilitation of a cartel agreement can occur where it becomes a part of/included in the patent license agreement or it is separated from the patent license agreement.

To find out whether the patent license agreement is used to facilitate cartels, it is necessary to analyse how much stressing is on technology as the object being licensed. In a horizontal license agreement, it can be suspected that it contains a cartel agreement if the licensed technology is "*weak*" in the sense that the technology is not important to the licensee. So the question that arises is whether the patent license agreement is only for the guise (sham agreement), namely: where the parties imply that they are not interested in transferring the patent, but the license agreement is only to disguise their efforts to limit output or increase prices in several markets other than the patent market itself.

Although it is assumed that the patent license agreement is not a cover (sham), it is necessary to consider how much of the market is affected by the limitations contained in the patent license agreement. The risk of the cartel effect emerges is greater if these parties have the power to effectively control their respective market share.

Besides, the patent license agreement can also be used to facilitate the implementation of a cartel agreement that is separate from the license agreement itself. For example, cartelization; occurs when a large number of products are determined to be homogeneous. Likewise, a patent license agreement specifies that the technology used to produce a good is used to facilitate (separately) a collusive agreement between the licensee and the licensee to determine the price of the product. This problem usually appears in the patent pool agreement.

Vertical pricing can contribute to the continuity of the cartel agreement at the licensor level by making the retail price of the licensor more stable. This is done by employing an RPM agreement between the licensors and their distributors and prevents them from independently cutting prices and supervising them on the local price list. In general, terms limiting output, territoriality, or consumers are usually widely used licensors to facilitate collusive practices.

Exclusionary Effects

The license agreement is not intended to unfairly get rid of competitors, in the sense that the clauses in the license agreement are not aimed at or creating market forces or facilitating collusive practices. This must be distinguished from the exclusion effect in an exclusive agreement, in a tie-in agreement, for example, vertical restrictions are not intended to substantially limit the entry of other business actors. In the tie-in, the licensor will acquire a dominant position in the market of the side product (tied good), which in turn forces their competitor or potential competitor to enter the two markets simultaneously if they do not want to be knocked out/out of the competition. Whether gaining a large share of the market in a tied good market will lead to market forces depends on the presence of entry barriers and expansion in that market.

The problem of exclusionary effects also arises from the tie-out agreement, which is an agreement in which the licensee is required to only use the licensee's technology. If this license agreement involves multiple licenses, where the entry to the market at the licensee level also requires entry to the licensee level market simultaneously, and entry is also difficult, then it can be concluded that the licensee has carried out practices that reduce or inhibit competition at the licensee level. The issue of the anti-competitive effect if the licensor obtains a dominant position in the tied-good market depending on the entry barrier in the second market (the tied-good market) if the entry barrier does not exist or is relatively small, the licensor will not gain market power even though he gains a large market share.

Another type of exclusionary effect relates to practices that prevent the development of new, competitive technologies. This can occur in grant back clauses that remove the incentive for the licensee to develop alternative technology. This problem can be caused by individual licensors in the patent license agreement limitation clauses or in agreements that involve multiple licensors in the patent pool. The bottleneck of new technology as a competitor can also be caused by the provisions in the tie-out; if it covers a sufficiently large number of licenses it can effectively close the market to other potential innovators.

The anti-competitive risk from exclusionary effects depends very much on the structure of the relevant market and also depends on 3 ha1: First, the market is very concentrated by only a few companies. Where the leading companies carry out obstacles (restraint) or obstacles by the companies that have the same effect. The two restrictions must cover all market capacities so that they are much closed to other competitors. The three barriers to entry to the market are very difficult. If one of these conditions is not met, licensors will not be able to collaborate to gain market power. For example, if the effort to enter at the license level is easy, then the attempt by a group of licensors to cartel at the licensor level by using an exclusive license agreement to get rid of other licensors will fail. The point is that if there are too many licensors in the market, their efforts to agree and implement the cartel agreement will fail.

Acquiring Market Power

Patents can be used to gain market power without having to do the exclusionary effects as discussed above. This market control can be obtained in the technology market or the product market if the technology is an important factor in the manufacture of the product. Problems will arise when licensors buy exclusive rights from other competing technologies. A license agreement containing such rights will be treated as a horizontal merger, by considering the extent to which the competitor's technology market shares in the relevant market.

Non-Price Predation/Raise Rival Cost

Another patent may be used as a non-price predation tool by a business actor by taking legal action with bad faith to get rid of his competitor. Business actors that are developing new technology do not have the financial power to enter into a prolonged litigation process against a business actor that is relatively stronger and the weak business actor may likely be eliminated from the competition. Eventually, entry into the market will be delayed and this will require a high cost.

Misuse of litigation strategies such as the above must be differentiated from enforcing IPR in good faith. One of the rights recognized by IPRs is the ability of the right holder to prevent other parties from imitating their innovations so that access to courts or other bodies authorized to resolve disputes is a must in an effective IPR regime. Attempts to carry out a litigation process in good faith, even if it loses, are very different when a litigation process is carried out only as a cover for the sole purpose of "disrupting" its competitors.

Litigation abuse is a representation of the most commonly known form of non-price predation. Non-price predation can also be interpreted broadly to include all actions designed to get rid of competitors or to cause "drain" of costs from competitors, so the act of non-price predation or raising rival costs is a kind of action that undermines the efficiency of its competitors.

Leverage of Market Power

Technical knowledge is one of the assets of the industry because it allows competitive division of competitors as well as quality in production. Therefore, knowledge is relevant to business success. The majority of such knowledge is expressed in the form of technical knowledge or abilities, not specifically protected as patents or all other forms of industrial property (Dias et al., 2016).

Business actors that already have market power can expand or boost their market power. In the United States, it is known as the Doctrine of Monopoly Leveraging, where business actors exercise their monopoly power in a market that they have controlled to get monopoly power in another market. This is where the restrictive practice in the license agreement is considered an instrument to expand or increase the power of the licensor market in other markets, for example in the tied-good market. For example, in a tie-in licensing agreement that has market power in the market related to tying well, it can obtain a favourable position in another market, namely the tied good market that is linked/required to be purchased, ha! This causes licensors to force independent suppliers out of the market.

Abuse of Dominant Position

A patent/licensor holder does not necessarily acquire a dominant position or the patent regime does not necessarily grant such rights to the holder. Through the sophistication of technology that he controls, supported by a sophisticated marketing system and business strategy, a technology owner can have a dominant position in the relevant market or the technology itself can become dominant because it is an efficient thing. Consumers will choose which technology is the most sophisticated on the market so that technology becomes a superior product that can dominate the market, Microsoft Corp. the Windows program can be an example of this. There is nothing wrong with the dominant position a business actor has. The dominant position only becomes a problem in the context of competition law if the dominant position is misused to achieve objectives prohibited by competition law.

Refusal to license (Refusal to license) is one example of abuse of dominant position according to European competition law, whereas according to the antitrust law of the United States it is an attempt to monopolize (the act of monopolization). Refusal to license itself gets justification in patent law through the inherency doctrine where patent law does give patent holders the right to refuse other parties to get these patents. However, this is not absolute, several facts can cause the refusal to license to be considered an abuse of the dominant position which is prohibited by competition law (United Nations Conference on Trade and Development, 2000).

This fact is for example, where the patent holder does not apply for the patent and/or gives permission to other parties to obtain the license (so that it can hinder the expansion of this technology in society), or take actions such as refusing to supply spare parts of the technology/production. To the other party, determine the price at a level that is not. Reasonable or no longer produces spare parts for a certain type of product while the product is still widely used in the market.

In Europe and America, for these kinds of cases, doctrine essential facilities are applied (United Nations Conference on Trade and Development, 2000), that is, a facility becomes essential if it becomes a necessity for market access, imitation of the facility by potential entrants is practically impossible and the owner of the facility refuses to consent to access to the facility without reasonable business reasons, mandatory access is possible where feasible and its use does not substantially affect the use by the owner of the facility, in the case of refusal to license it is the granting of a compulsory license.

In the United States, a refusal to license can only be said to violate or become the authority of the antitrust law if (Pitofsky, 2000):

1. Patents were obtained from the patent office by fraud;
2. A lawsuit to enforce/defend a patent in court is only sham litigation;
3. Patents are used as part of a tie-in strategy for expand or increase market power (patent misuse).

Acquisition of Patents Which Has Similar Effects to Mergers

Mergers are closely related to potential monopolistic practices and/or unreasonable unfair competition because basically, the essence of the merger is the added value of the company conducting the merger. The act of merger must be prohibited and regulated in-laws and regulations because it can hurt fair market competition relating to minority shareholders, employees, and creditors (Matuankotta, 2012).

Actions of mergers, consolidations, or acquisitions of business entities involving patents and licensing agreements therein must also be watched out for because they can also have an impact on business competition. The patent license agreement is deemed to form part of or support the combination agreement if it is a non-exclusive license agreement.

Acquisition of a company's patent by another company can also be considered as appropriate to take over the assets of a company, and therefore may give rise to control, either directly or indirectly, over the company whose patent assets have been taken over, so that such a situation can lead to the concentration of power in one company.

In examining how merger provisions apply to patent takeover, competition law, in addition to focusing its attention on the emergence of entry barriers in the relevant market, also looks at the possibility of abuse of dominant position (United Nations Conference on Trade and Development, 2000). According to European competition law, the obligation to license a patent that is part of a merger of the company to another party can be a remedy or it becomes a condition for the merger to be carried out or it may eliminate the anti-competitive aspect of the merger, as in the case of the merger. handled by the EU Commission, namely the merger of Boeing with McDone/Douglas or Ciba-Geigy with Sandoz who are burdened with the obligation to provide opportunities for other parties/third parties to obtain licenses from them which are non-exclusive or in the case of the Glaxo merger with Wellcome and Dupont with ICI where they are required to provide an exclusive license to other/third parties (United Nations Conference on Trade and Development, 2000).

CONCLUSIONS

The limitation clause in the technology transfer patent license agreement in trying to support and maintain the motive profile of the patent technology owner/licensee often includes a restriction clause which is nothing but terms and conditions that are burdensome to the technology recipient/licensee which can have an impact on business competition. This means that the licensor tries to obtain an unfair advantage (according to competition law) by using the restrictions in the license agreement.

Limitations in technology transfer patent license agreements can have anti-competitive potential. It must first be analysed whether the licensor has sufficient market power and whether the parties to the license agreement are in a horizontal or vertical relationship. Horizontal relationships tend to have an anti-competitive impact.

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