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AUTHORITY OF INTELLECTUAL PROPERTY CONSULTANTS

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Abstract

Intellectual Property Consultants appointed by the Ministry of Law and Human Rights is an office that has a limited authority to carry out their duties; The appointment of IPR consultant are intended to assist Ministry of Law and Human Rights in resolving the matter on IPR registration. Due to the reason that IPR is the scope of Ministry of Law and Human Rights authority, the one which has the authority to appoint someone as IPR Consultant is also Ministry of Law and Human Right. Appointment of IPR Consultant should be specially granted for Law School Graduate due to the reason that Consultant shall understand and able to execute the procedure of authority and regulation that limits its authority in running Consultant position. In carrying out its duties, IPR Consultant will be closely related to legal action and must strictly comply with the Law and assume responsibility given by the client. The duties and responsibilities attached to IPR Consultant have a legal consequence. In conducting its duties, IPR Consultant shall be able to read and implement the regulation enforced by the government.

Keywords: Intellectual Property Rights; IPR Consultant Authority; Counsel Transition; IPR Consultant.

Abstrak

Konsultan Hak atas Kekayaan Intelektual yang diangkat oleh Kementerian Hukum dan Ham merupakan jabatan yang memiliki sedikit wewenang untuk menjalankan tugasnya, pengangkatan jabatan tersebut menjadikan Konsultan HKI sebagai kepanjangan tangan Kemenkumham di bidang HKI. Karena yang menangani segala urusan tentang HKI adalah Kemenkumham, sehingga Kemenkumham yang mempunyai kewenangan untuk mengangkat seseorang sebagai Konsultan sekaligus perwakilan bidang HKI. Pengangkatan Konsultan HKI seharusnya diperuntukkan khusus lulusan sarjana hukum, Konsultan HKI harus mengetahui dan melaksanakan tata cara pelaksanaan dan aturan-aturan yang membatasi kewenangan dalam menjalankan jabatan, tugas Konsultan HKI tidak terlepas tindakan hukum dan wajib patuh kepada undang-undang yang berlaku dan mengemban tanggungjawab atas kuasa yang diberikan klient, karena tugas dan tanggung jawab yang melekat pada Konsultan HKI ini mempunyai akibat hukum. Hasil penelusuran seluruh produk HKI diatas hendaknya menjadi suatu produk hukum yang dikeluarkan oleh Konsultan HKI, selain penelusuran pada prakteknya pemeriksaan formalitas juga dilakukan oleh Konsultan, pemeriksaan formalitas ini meliputi syarat-syarat permohonan pendaftaran dan produk HKI yang tidak melanggar undang-undang dan ketentuan lain yang diatur oleh undang-undang.

Kata Kunci: *Konsultan Hak atas Kekayaan Intelektual; Kewenangan Konsultan HKI; Peralihan Kuasa Konsultan.*

Introduction

The development of Intellectual Property Rights (hereinafter, “IPR”) in Indonesia was started from the establishment of Law on IPR which become the milestone of legal protection for IPR holders’ in Indonesia. The improvement of technology nowadays should be complemented with the development of Law on IPR aspect which adjusted with Indonesian legal regulation, not simply with ratifying international legal instrument on IPR. Ideally, legal regulation on IPR should be adjusted with the applicable Positive Law due to the widespread and vigorous developments that occur in the era of economic, social and cultural globalization. It is necessary to adjust protection in the said areas since it is directly related to IPR. In the broader sense, IPR is divided into 2 (two) parts, namely: First, copyright; Second, industrial property right, which includes patents; industrial design; trade mark; countermeasures on the practice of unfair competition; integrated circuit layout design; and trade secret.¹

The rapid advancement in technology and easiness in accessing all forms of human works, increase the likelihood of copyright infringement that could endanger social life and destroy the creativity within society. In order to align its Law and Regulations in the field of IPR with TRIPS Agreements, on 2001, Indonesian government establishes Law No. 14 year 2001 on Patent and Law No. 15 year 2001 on Trade Mark. Following the establishment of these Laws, on the middle of 2002 Indonesian government passed Law No. 28 year 2014 on IPR that replaces the previous Law and effective one year since its enactment. Nevertheless, it only provides explanations on legal certainty for the protection of IPR objects and did not specify the procedures for IPR registration and the subject entitled to submit IPR application.

The registration of all IPR aspects may be exercised by an individual who owns the right or through the power of IPR Consultant. Authorization or *Lastgeving* in Dutch terminology is an *overeenkomst* (agreement) by which an individual

¹ Direktorat Jenderal HKI, *Buku Panduan HKI* (Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia 2011).[1].

authorizes or *macht* (grant power) to *Lastheber* (Recipient) that receives it; for and on behalf of *Lastgever* (the Principal). The means of granting authority may be made by *notarieel* (authentic deed), *geschrift onderhands* (written affidavit) or by written agreement or oral agreement.² As for its acceptance, it may be made expressively or *stilzwijgend* (tacit). Further, it can be inferred from its implementation that mandate by gratuitous title is *omniet* (free of charge). Pursuant to Indonesian Civil Code, there are several kinds of authorization which are crystallized in Article 1795; “a mandate can be either specific, being related to one or more matters, or general, being related to all matters of the Principal”.³

The existence of dualism in the rules of registration on IPR creates no certainty for IPR Consultant appointed by Ministry of Law and Human Rights. The IPR Consultant is not granted an absolute authority in the registration on IPR in the Directorate General of IPR, even when Law No. 2 year 2005 on IPR Consultant have asserted the procedure of appointment and rights of IPR Consultant, it still not provides any certainty on absolute authority for IPR Consultant. IPR Consultant pursuant to Law No. 2 year 2005 Article 1 paragraph 1 is defined as a person with expertise in the field of IPR and specifically provides services in the matter of processing application for IPR registration managed by the Directorate General and registered as IPR Consultant in Directorate General.

Currently, the procedure on IPR registration is in accordance with the existing Laws and Regulations. Nevertheless, such procedure did not put IPR Consultant in a special position, instead, it only consigned as an extension of the Directorate General of IPR in the authorization to manage IPR registration. The appointment of the IPR Consultant by Minister of Law and Human Rights should have granted the IPR Consultant a broader authority and the position of IPR Consultant in managing various issues related to IPR should be specifically mandated. Thence, it will allow society to take utmost benefit from IPR Consultant. The broad authority of this special position is solely intended to provide education, knowledge, and benefit to

2 Komar Adamsasmita, *Notaris II* (Sumur Bandung 1982).[453].

3 M. Yahya Harahap, *Segi-Segi Hukum Perjanjian* (Alumni 1978).[308-309].

the society as a whole and make ease the enforcement of justice in the IPR aspect.

Requirements and Qualifications of IPR Consultant's Authority Abide to the Law

Philipus M. Hadjon asserts that in Indonesian law, the term "authority" should always be noted under the concept of public law.⁴ Accordingly, the literature of Dutch Administrative Law pronounces authority as the initial part of administrative law due to the reason that the object of administrative is *bestuurbevoegheid* (governmental authority).⁵ In addition, Philipus M. Hadjon further affirms that the authority of public law is the authority to cause legal consequences which have the characteristic of public law; such as, issuing rules, making decisions, or establishing a plan with legal consequences.⁶ Likewise, authority or *bevoegheid* is defined as authorization, power, and competence.⁷

Furthermore, Kamus Besar Bahasa Indonesia (Balai Pustaka, 1989) defined authority as a matter of authorization; rights and powers to conduct something. Pursuant to Administrative Law Literature; there are two main ways to obtain government authority, which are attribution and delegation.⁸ Pursuant to the Law on Local Government, attribution is said to be a usual way of obtaining government authority.⁹ It is further stated that attribution is an authority for *besluit* (making a decision) which is directly rooted in its material sense.¹⁰ Other affirmed that attribution is the formation of a certain authority and giving it to a certain organ and those who can form the authority is the authorized organs based on the legislation; which its formation and distribution of the authority is set forth in the 1945 Constitution of the Republic of Indonesia. These formations of government authorities are based on the authority set by the Laws and Regulations.¹¹

⁴ Philipus M. Hadjon, 'Tentang Wewenang' (1997) No 5&6 Yuridika.[74].

⁵ *ibid.*

⁶ Philipus M.Hadjon,[*et.,al.*], *Pengantar Hukum Administrasi Indonesia* (Gadjah Mada University Press 2005).[70].

⁷ H. Van der Tan, *Kamus Hukum Belanda-Indonesia* (Timun Mas 1961).[35].

⁸ Philipus M.Hadjon,[*et.,al.*].*Loc.Cit.*

⁹ *ibid.*[51].

¹⁰ *ibid.*

¹¹ *ibid.*

Article 10:3 of Algemene Wet Bestuursrecht (hereinafter, “AWB”) define delegated authority as (the transfer of authority) from the State Administrative Officer (hereinafter, “SAO”) to another party to create besluit. Thus, it can be interpreted that delegated authority is an authority originated from a transfer of power to make decisions on behalf of the SAO and the responsibility and liability attached on the delegate.¹² In issuing delegated authority, several requirements shall be met, namely:¹³ First, delegates must be definitive; meaning that delegates can no longer use their delegated power. Second, the delegation must be based on the provisions of legislation; meaning that delegation is possible when there is a provision for it in the legislation. Third, the delegation is not to subordinates; meaning that delegated authority in the hierarchy of personnel relationship is not allowed. Fourth requirement is Principal obligation to provide an explanation; meaning that the delegate may request an explanation in exercising such authority. Fifth, *beleidsregels* (policy); it refers to the Principal obligation to provide instructions on the use of the authority. On the side note, authority based on mandate did not complemented with recognition of authority or any explicit transfer of authority. This is closely related to intern work agreement between the employer and employee. In the table below, the Author will describe the differences of mandate authority and delegated authority.¹⁴

Table 1 the Differences between Delegated Authority and Mandate Authority

Differences	Mandate	Delegated
Procedure of Transfer	In the regular relationship between Principal and subordinate: unless strictly prohibited.	From a governmental organ to another organ: inferred in Legislation
Responsibility and Liability	Attached to the Principal	Attached to the delegate
Whether the Principal may use the Authority transferred	At any time, the Principal may exercise his own authority whether it has been transferred or not	Cannot use the authority transferred anymore, unless after the revocation by adhering to the principle of “ <i>contrarius actus</i> ”

IPR Consultant specifically provides services in the field of IPR registration.

¹² *ibid.*

¹³ Emanuel Sujatmoko, ‘Pembagian Kekuasaan Secara Vertikal’ (2005) edisi II Yuridika.[7].

¹⁴ *ibid.*

In practice, it is needed to provide requirements and other procedure that required in IPR fields by Ministry of Law and Human Rights to reduce the possibility of the application to be rejected due to incomplete submission. It is excluding trade mark registration, due to the need of novelty element. In the event of the existence of same or similar brand, it is necessary to examine the above mentioned. The IPR Consultant requires such authority, as like the authority of Notary to provide legal certainty of company name from Directorate General of General Law Administration; and such authority should be granted to IPR Consultant for the sake of legal certainty and IPR Consultant may be held liable as the office holder.

The result of all IPR products' examination should be a legal product issued by the IPR Consultant, aside from the formalities investigation by the Consultant. Formalities examination includes the requirements of IPR registration and investigation on the IPR product's conformity with the Laws and Regulations. The result of formalities examination should also become a legal product issued by an IPR Consultant. Such measure is deemed necessary to provide legal certainty for IPR applicants who apply for IPR registration through IPR Consultant. The two concepts mentioned supra are the possible subject of IPR Consultant legal product. The other subject which are substantive examination, publication, certificate issuance and/or issuance of copyright letter; is not possible to be categorized as the legal product of IPR Consultant.

Substantive examination, publication, and certificate issuance and/or issuance of copyright letter are the authority of the State which delegated to Directorate General of IPR. The concept of legal products in the form of checking and formalities examination for IPR applications will help Directorate General of IPR officers to reduce the number of incorrect submission on IPR registration; which becomes the reason why the current IPR application is prolonged. Recalling this concept and affirmed by Government Regulation No. 2 of 2005, IPR Consultant is a sworn official which appointed by Minister of Law and Human Rights, thence, IPR Consultant should have a legal product.

In addition, the character that should exist in IPR Consultant is a graduate

from Law School. This consideration is taken for the reason that in IPR registration, it exist a lot of legal issues. For instance, providing assistance in IPR registration through procedures set forth in government regulation and assisting an applicant in the event of objection and/or appeal in the process of trademark registration. The purpose of hiring Law School Graduate to undertake the position of IPR Consultant is solely to provide a Consultant which has expertise in Legal IPR consulting.

Principles and Legal Bases of IPR Consultant Appointment by Ministry of Law and Human Rights

The appointment of IPR Consultant as a sworn official by Minister of Law and Human Rights is based on the ratification of international agreement on IPR by Indonesia. The policies in IPR sector are taken from The Agreement Establishing the World Trade Organization which includes TRIPs Agreement ratification through Law No. 7 year 1994. Later on 1997, Indonesia ratified other supporting international agreements that complement policies in IPR, which includes Paris Convention for the Protection of Industrial Property that ratified through Presidential Decree No. 15 year 1997, Patent Corporation Treaty (PCT) and Regulation under the PCT through Presidential Decree No. 17 year 1997, Berne Convention for the Protection of Literary Artistic Work through Presidential Decree No. 18 year 997, WIPO Copyright Treaty (WCT) through Presidential Decree No. 19 year 1997 and on 2004, WIPO Performance and Phonograms Treaty is being ratified through Presidential Decree No. 74 year 2004.

In the Indonesian Language, there exist term *Penjabat* (using the word “n”) and *Pejabat* (without the word “n”). The term *Penjabat* and *Pejabat* has a different meaning. *Penjabat* defined as holder of someone position temporarily,¹⁵ meanwhile, *Pejabat* defined as government employee holding the position (in the term of commander) or person holding a position.¹⁶ Recognizing these terms, Indonesian government implements this in the appointment of IPR Consultant. Aside from

¹⁵ Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia* (Balai Pustaka 1994).[392].

¹⁶ Badudu-Zain, *Kamus Umum Bahasa Indonesia* (Pustaka Sinar Harapan 1994).[543].

the appointment based on positive law of Indonesia, an IPR Consultant shall be appointed by the Government. In Developed Countries like Japan and German, IPR registration from its citizen shall be made through IPR Consultant. Even in the Asian countries like Philippines and Vietnam, publication of IPR conducted solely by IPR Consultant through mass media and/or electronic media.

The appointment of IPR Consultant is intended to assist matter on IPR registration to Directorate General of IPR. With this regard, Indonesian government established the Government Regulation on IPR Consultant. This Government Regulation has mainly regulated the requirement, appointment, rights and obligation, evaluation and dismissal of IPR Consultant. Another legal basis for the appointment of IPR Consultant is Government Regulation No. 2 year 2005, which inferred in Article 5 that applicant which fulfilled the requirements as referred in Article 2 and 3 shall be appointed as IPR Consultant through Minister Decree. Under Article 6 paragraph 1 in Government Regulation No. 2 year 2005, it is also stated that prior to running his position, IPR Consultant shall take an oath according to his religion before the Minister. These bases of appointment made the IPR Consultant as the extension of Ministry of Law and Human Rights on IPR matter. On the side note, since IPR is under the scope of Ministry of Law and Human Rights authority, the one who has the authority to appoint someone as IPR Consultant is also Ministry of Law and Human Rights.

Appointment of IPR Consultant should be specially granted for Law School Graduate due to the reason that Consultant shall understand and able to execute the procedure of authority and regulation that limits its authority in running Consultant position. In carrying out its duties, IPR Consultant will be closely related to legal action and must strictly comply with the Law and assume responsibility given by the client. In conducting its duties, IPR Consultant shall be able to read and implement the regulation enforced by the government. Aside, IPR Consultant shall be aware of legal consequences that may arise from its legal action. Legal action is made from a legal decision, so it shall be differentiated between ordinary event and legal event.

Legal action is an action which regulated by law.¹⁷ Aside from that, IPR Consultant position is closely related to administrative decision that issued by Ministry of Law and Human Rights which is a legal product in the form of certificate in IPR matter.

Administrative decision is a very general and abstract notion, which in practice appears in the different forms. Nevertheless, administrative decision also contains the same characteristic, because in the theory aspect, there only one definition of 'administrative decision'. It is important to have an in-depth understanding of the meaning of administrative decisions since it is necessary to be familiar with the practice of particular decisions or actions as administrative decision. Such measure is deemed to be necessary since, in the positive law, it attaches certain legal consequences to those decisions, for instance, a dispute settlement from a judge. The nature of legal decision is individual-concrete.¹⁸ Thus, in performing its duties, IPR Consultant shall comply with the applicable Law and assume responsibility from the authority given by the client, rules stipulated by the government and duty to provide benefit for its client and society. This benefit is related to providing an overall understanding of the IPR registration and legal protection that will be obtained after the release of a certificate or proof of IPR registration.

Scope of IPR Consultant as an Official and Validity of Online Registration Application Sheet

The rapid development of information and technology resulted in massive information flow that can be obtained easily by the society, aside from allowing people to communicate with each other across the boundaries of space and time. Globalization in the economic world, especially trade, is increasingly facilitated by interconnected networking (the internet) as a medium of fast communication.¹⁹ Internet is a global computer network formed from local and regional computer networks that enable data communication between computers connected to the

¹⁷ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Prenada Media 2009).[244]

¹⁸ Philipus M.Hadjon,[*et.,al*].*Op.Cit.*[124].

¹⁹ Andi Julia Cakrawala, *Penerapan Konsep Hukum Arbitrase Online Di Indonesia* (Rangkang Education dan Republik Institute 2015).[2-3].

network. Internet presence brings benefits, such as, First, efficiency: accommodate thousands of pages on this medium and enjoy unlimited visitors. Second, unlimited: no national boundaries and time limit and emerging global virtual society (global community). Third, 24 hours online service made available and able to receive the information right away. Fourth, hyperlink: information on the internet intertwined in an instant.²⁰

In general, the internet has weakness due to the nature of global information, meaning that everyone from all over the world can access and download information from this virtual world. The nature of global information resulted in the lack of control and monitoring in the cyberspace; creating the needs of Law and Regulations in this space. Cyber Law according to Black's Law Dictionary is "*the field of law dealing with the Internet, encompassing cases, statutes, regulation and disputes that affect people and businesses interacting through computer. Cyberlaw addresses issues of online speech and business because of the nature of the medium, including intellectual property right, free speech, privacy, e-commerce, and safety, as well as questions of jurisdiction-also termed cyberspace law*".²¹ This cyber space law is intended to protect online activity, in the sense of transaction that made instantly and used to update parent data file. Data input which directly entered from terminal will be checked directly whether or not it results failure on its display.²² This online activity, or commonly referred as online processing, is having the function to:²³ First, processing mega data. Two, time sharing: processing multiple data from multiple users simultaneously. Third, Multitasking: to process data simultaneously. Online IPR registration is provided by Ministry of Law and Human Rights through its official website at <http://www.dgip.go.id/>, the access of the services provided by Ministry of Law and Human Rights is limited and currently only for listing copyright registration, product listing and related product rights (E-copyright). It will be processed on working days and hours. E-copyright may only be accessed

²⁰ Budi A.R., *Hukum Dan Internet Di Indonesia* (UII Press 2003).[15].

²¹ Bryan A. Garner, *Black's Law Dictionary* (eight edit, Thomson West 2003).[414].

²² Aji Supriyanto, *Pengantar Teknologi Informasi* (Salemba Infotek 2005).[187].

²³ *ibid.*[187].

and used by ministries and Agencies; Local Government; Educational Institutions, Institute for Research and Development; Regional Offices of the Ministry of Justice and Human Rights; IPR Centers; Consultant of IPR; Small and Medium Enterprises; and other Institutions. IPR Consultant in conducting online registration has the authority which regulated by Directorate General of IPR disclaimer policy or in the information system warning in the IPR registration website. In this sense, the website issued by Ministry of Law and Human Rights is defined as a collection of interface from documents and file that processed through computer and line to ease communication and business activity with customer and business partners 24 hours.²⁴

The transition of registration from conventional way to online that can be done by IPR Consultant can touch other parts of IPR registration, which includes trademark, Industrial Design, Patent, Integrated Circuit Layout Design. Thus, it is no longer doubted that copyright registration is valid and can be applied in another Government aspect in general and IPR in particular. The scope of IPR Consultant in this sense is as the authorized officer appointed by a client to submit copyright registration and stores paperwork and digital data to be processed in the Ministry of Law and Human Rights through Internet Media, while the matter of validity will be under the scope of Ministry of Law and Human Rights.

Transfer of authority from foreign IPR Consultant to Indonesian IPR Consultant

The regulation of Power of Attorney can be found in Article 1792 of Indonesian Civil Code which states *“A mandate is an agreement, by which an individual assigns authority to another, who accepts it, to perform an act on behalf of such mandator”*. Furthermore, Article 1793 of Indonesian Civil Code asserts that *“Authority may be granted and accepted pursuant to a public deed, or privately, in a letter, and may also be granted verbally. The acceptance of authority may also be implied, and shall be deduced from the implementation of the authority by the individual authorized”*. On the other hand, legislation does not specifically regulate term letter of duty.

²⁴D.L. Hoffman & T.H. Novak, *‘A New Marketing Paradigm for Electronic Commerce’* (1997) 13 The Information Society.[43].

Even when the term 'letter of duty' can be found in Law No. 23 year 2007 on Train Services, the term 'letter of duty' inferred as ID card (*see Article 181 paragraph 2 Law No.23 year 2007 and its elucidation*).

Meanwhile, the term of letter of duty is generally known as a letter that is given by Principal to subordinates to perform a particular task or duty. Legislation does not regulate such term, instead, such regulation exists internally in the institution or the organization. Related to the Power of Attorney given from foreign client with IPR Consultant in Indonesia, there occur two possibilities: First, the Power of Attorney granted directly from the inventor or owner from the IPR abroad. Second, the Power of Attorney originated from foreign IPR Consultant which transferred to Indonesian IPR Consultant through substitution right. These two models of application for IPR registration from overseas, granted for Indonesian IPR Consultant, can be conducted through e-mail for the sake of efficiency and cost.

Conclusion

The appointment of IPR Consultant as an official should be granted for Law School Graduate due to the close relation of IPR Consultant with legal product issued. The legal products issued are checking and formalities examination for IPR products prior to its registration. Additionally, since IPR Consultant is appointed by oath before Ministry of Law and Human Rights, Consultant shall be granted additional rights aside from becoming the representative from IPR applicant. Such additional rights are access to IPR information and grant authority to IPR Consultant to issue legal products. IPR Consultant in handling the IPR registration shall not only act on the basis of applicant attorney, but also provided legal bases for conducting necessary action related to applicable Laws and Regulations and specifically regulate the submission of IPR application can only be made through IPR Consultant. Submissions of copyright registration made from internet are valid and can be done online by IPR Consultant by providing paperwork and digital data as proof of registration application to Ministry of Law and Human Rights. Then, in the event of registration made by foreign client to Consultant, it can be made through

e-mail with attaching supporting evidence of IPR registration from the client origin country.

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