Fairness in Fair Dealing on the Industrial Design Protection

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Abstract
Fair dealing is one of the important elements in the Industrial Design Legislation. Because of that, it is significant to analyze the concept of fair dealing which can be understood by the society to achieve fairness in the protection of industrial design works. Under industrial design, the concept of fair dealing means that industrial design can be used by other parties for education and research purposes as long as it does not prejudice the interests of industrial design right holders. The purpose of this study is to analyze the value of fairness in the concept of fair dealing in industrial design law, so that it can be used as guidelines for the right holders and the public so they not violate the Industrial Design Law and this Law can also be used to advance the welfare of society. This study is normative legal research by using statute and conceptual approaches. While material used for this study are primary and secondary legal materials. This study found that fairness in the fair dealing in the protection of industrial design can be achieved in the form of fulfilment of balance rights between the designer’s right and society. Fairness for both is if between the right holder and society have the opportunities to use and enjoy available industrial design. Industrial design rights holders have limited monopoly rights and the public has the opportunity to use the results of industrial design in a limited manner for their welfare. This is in line with what Aristotle said that justice is given in accordance with values or propriety that is not the same.

Keywords: Fairness; Justice; Fair Dealing; Industrial Design Protection.

Introduction
Industrial designs are part of intellectual property rights (IPR) which have moral and economic rights. According to Article 1 number 5 Law Number 31 of 2000 concerning Industrial Design (hereinafter referred to as Law No. 31/2000) that the Industrial Design Right is an exclusive right granted by the Republic of Indonesia to a designer for his creation for a certain period of time to carry out his own work, or to give his consent to another party to exercise said right. This exclusive right
gives the designer the right to carry out his work or prohibits other parties from using his work in accordance with the law. These rights include making, using, selling, importing, exporting, and/or distributing goods that are granted industrial design rights.

The exercise of exclusive rights over industrial designs created by the designer is accompanied by restrictions on rights or fair use (fair dealing)\(^1\) This ‘fair dealing’ allows the public to be able to take advantage of industrial designs for their interests without violating the rights of industrial design rights holders. ‘Fair dealing’ in Indonesia is more commonly known as ‘the limitation of rights’. The mention refers to the legal concept used in Indonesia, namely the Civil Law System, while the term ‘fair dealing’ refers to the concept of the Common Law System.\(^2\) Based on the provisions of Law no. 31/2000 mentioned in CHAPTER II Scope of Industrial Design Part Five Scope of Rights Article 9 paragraph (1) and (2) there is ownership of Industrial Design Rights which are as follows:

Article 9

(1) Holders of Industrial Design Rights have exclusive rights to exercise their Industrial Design Rights and to prohibit other people without their consent from making, using, selling, importing, exporting, and/or distributing goods granted Industrial Design Rights.

(2) Exempted from the provision as referred to in paragraph (1) is the use of Industrial Designs for research and educational purposes as long as it does not prejudice the reasonable interests of the holder of the Industrial Design rights.

Based on ‘fair dealing’ doctrine, it means that fair dealing in industrial designs is possible if it is in accordance with the objectives as stipulated in law. Therefore, educational and research activities in using industrial designs owned by designers as they do by society, even though for reasons of education and research purposes, if they are not based on the objectives referred to in law, they may constitute actions that violate industrial design rights. Industrial design disputes that occur indicate

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\(^1\) Muhamad Djumhana and R. Djubaedillah, *Hak Milik Intelektual: Sejarah, Teori, Dan Praktiknya Di Indonesia* (Citra Aditya Bakti 2014).[104].

\(^2\) Rahmi Jened, *Interface Hukum Kakayaan Intelektual Dan Hukum Persaingan (Penyalahgunaan HKI)* (RajaGrafindo Persada 2013).[145]
that there is ignorance or lack of public understanding of the limitation industrial design rights. Because indirectly, one of the causes of industrial design disputes is the ignorance/lack of public understanding of the limitations on the use of industrial design rights. The existence of an industrial design lawsuit indicates problems in law implementation.

It is possible for the public or other parties to use designs that have obtained industrial design rights in a study. The result of this research may also be the development of a design, so that the result is a design that may have similarities or similarities in several creations regarding the shape, configuration, or composition of lines or colors, or lines and colors, or a combination thereof which is three-dimensional or two-dimensional. If this happens, is the research conducted by the community prohibited/violates the rights of industrial design rights holders? Can the research results in the form of design development from designs that have obtained Industrial Design Rights be registered by the party conducting the research and obtaining Industrial Design Rights? And who should do the research in order not to violate the rights of industrial design rights holders? That means in producing a design, others inspired by the design or conduct creations on a pre-existing design. Isn’t it stated in the law that fair dealing can be carried out by other parties (other than industrial design rights holders) and the research referred to in Law no. 31/2000 does not limit the purpose of research on industrial designs for which industrial design rights have been granted. For this reason, it is necessary to have an in-depth study of fair dealing or restrictions on the rights of industrial designs so that there are no violations or illegal acts by other parties against rights holders, where these restrictions can be used by other parties (who are also designers) with the aim of stimulating creative activities of designers to continuously create new designs to increase the competitiveness of the national industrial sector in the globalization of trade in order to accelerate the development of national industries. This study will look at fair dealing from the point of view of its use and industrial design users.

Based on the explanation of the background, it can be concerns about this study: first, how the concept of ‘fair dealing’ of industrial design? Second,
how justice in ‘fair dealing’ for the Industrial Design Rights holders and other parties? This study of the concept of ‘fair dealing’ is limited to the scope of Law no. 31/2000. This is very important as a basis in order to measure the use of industrial designs by right holders or other parties fairly and in accordance with applicable regulations, as well as to provide limits on the use of industrial designs by right holders or the community so that there is no abuse of rights or illegal acts in Indonesia.

This research is normative legal research, considering that the discussion is based on the prevailing laws and legal principles. This study uses a statute approach and a conceptual approach. The collection of legal materials is carried out by literature study.

The Concept of Justice

Justice comes from the root word “just”. According to Indonesian Dictionary, the word ‘just’ means (1) equal weight, impartiality, not taking sides; (2) side with the right, hold on to the truth; and (3) properly, not arbitrarily. While the word ‘justice’ itself has the meaning of a just nature (action, treatment, etc.). According to M. Agus Santoso, the word fair mainly means that a decision and action is based on objective norms; so it’s not subjective or arbitrary. That way, justice for everyone is not the same, justice is given according to the merit that should be obtained for everyone through objective norms of measurement. Furthermore, M. Agus Santoso stated that the scale of justice varies greatly from place to place, each scale is defined and fully determined by the community in accordance with the public order of the community. Thus, the measure of objective norms in a justice is determined by the public order of the local community. In the context of the

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3 ibid.[15].
5 Agus Santoso, Hukum, Moral Dan Keadilan: Sebuah Kajian Filsafat Hukum (Kencana Prenada Media Group 2012).[85].
6 ibid.
Indonesian nation, the measure of objective norms in a justice is determined by the noble values in the view of life of the Indonesian people.

Discussing about justice Jimly Asshiddiqie stated that justice is closely related to all notions of equal and equality, balanced and equilibrium, fair and fairness and comparable and comparability. The many definitions related to justice indicate that justice has a close relationship with various areas of life. It was also expressed by Muhammad Dhiaduddin Rais that justice has a general meaning and has a special meaning, including justice in “muamalah”, justice in law, justice in finance, and justice in human rights.

According to Jimly Asshiddiqie, justice is seen as a supreme virtue. Therefore, if realizing a justice for every dimension of life, then it has manifested the highest virtue which will provide a balance for every dimension of life itself. So, it is very important to realize justice in all dimensions of human life in everyday life, which in the end what will emerge is virtue continuously, especially in various human relationships with others.

The theory or concept of justice has been proposed by many philosophers and jurists. However, in this study, the discussion of ‘fair dealing’ in industrial design protection will use the concept of justice proposed by Aristotle and several concepts of justice which are in accordance with Aristotle’s thought. So that this discussion will be limited to a view of justice in accordance with the concept of justice that has been put forward by Aristotle and other appropriate justice theory with him. So that this discussion will be limited to a view of justice in accordance with the concept of justice that has been put forward by Aristotle and other appropriate justice theory with him.

Anton-Hermann Chrous and David L. Osborn has expressed his opinion about the concept of justice put forward Aristotle. In principle, the term “just” used by Aristotle has two separate meanings, in its first meaning it is principally used to

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7 Jimly Asshiddiqie, *Konstitusi Keadilan Sosial* (PT Kompas Media Nusantara 2018).[43]
9 Jimly Asshiddiqie (n 7).[45].
describe a conduct in agreement with the “law”\textsuperscript{10} and In its second meaning Justice signifies Equality, or, to be exact, a “fair mean”.\textsuperscript{11}

Justice or the “just” according to the first meaning in the sense of moral virtue is determined by authoritative rules or rules of human behavior, while justice or fair according to the second meaning is justice in the sense of proportional justice based on the principle of equality.\textsuperscript{12} Moral justice is justice in a broader sense, while equality is justice in a narrower sense. Moral justice is commonly referred to as legal justice, while justice in the sense of proportional justice based on the principle of equality has two forms, namely distributive justice (\textit{justitia distributiva}) and commutative justice (\textit{justitia commutativa}). The views regarding \textit{justitia distributiva} and \textit{justitia commutativa} that have been put forward by Thomas Aquinas have followed the views of justice put forward by Aristotle.\textsuperscript{13}

Legal justice (\textit{Iustitia Legalis}) is justice according to legislation where the object is a society that is protected by legislation for the common good or “\textit{banum commune}”.\textsuperscript{14} Regarding this legal justice, Aristotle in his book wrote that “\textit{the just, then, is the lawful and the fair, the unjust the unlawful and the unfair}”.\textsuperscript{15} Furthermore Aristotle wrote the following.

“Since the lawless man was seen to be unjust and the law-abiding man just, evidently all lawful acts are in a sense just acts; for the acts laid down by the legislative art are lawful, and each of these, we say, is just. Now the laws in their enactments on all subjects aim at the common advantage either of all or of the best or of those who hold power, or something of the sort; so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society”.\textsuperscript{16}

In relation to legal justice, as quoted by Otong Rosadi, Thomas Aquinas mentioned legal justice (\textit{justitia legalis}), which concerns the whole law. Thus

\begin{itemize}
\item \textsuperscript{10} Anton-Hermann Chroust and David L. Osborn, ‘Aristotle’s Conception of Justice’ (1942) 17 Notre Dame Law Review.[129-143].
\item \textsuperscript{11} \textit{Ibid.}[130].
\item \textsuperscript{12} \textit{Ibid.}[131].
\item \textsuperscript{13} Otong Rosadi, \textit{Hukum, Ekologi Dan Keadilan Sosial Dalam Perenungan Pemikiran (Fil-safat) Hukum} (Thafa Media 2012).[86].
\item \textsuperscript{14} Jimly Ashshiddiqie (n 7).[57].
\item \textsuperscript{15} Aristotle, \textit{Nicomachean Ethics}, (translate : William David. Ross) (Batoche Books 1999).[72].
\item \textsuperscript{16} \textit{Ibid.}[72-73].
\end{itemize}
it can be said that *distributiva justitia* and *justitia commutativa* are contained in legal justice.\(^{17}\) Otong Rosadi stating what is expressed by Meuwissen, that legal justice demands that people are subject to all laws, since the law was declared in the public interest. Because obeying the law is the same as being nice in everything, legal justice is also called general justice.\(^{18}\) It confirms what is conveyed by Anton-Hermann Chrous and David L. Osborn in his article suggests that “Justice is a virtue - the most difficult of all virtues - which differs from all other virtues in that it is displayed towards others and not towards oneself. It is the most perfect virtue because it is the practice of perfect virtue; it is a social virtue, for it involves a relationship with others, and embodies the good of others, because it does what is to the advantage of another”.\(^{19}\)

Furthermore, regarding the second meaning of justice put forward by Aristotle, the principle of equality is the basis of distributive justice and commutative justice, both of which are justice in the sense of proportional justice. As has been explained by Anton-Hermann Chrous and David L. Osborn as follows.

Equality, also called “Justice in the narrow (or special) sense,” consists of two main phases, the first of which is exhibited in the act of “distributing” certain matters between two or more persons, or in adjusting “them to their proper ratios. Every form of proportional adjustment in the sense of Equality or “equitable fairness” has to deal not only with the reciprocal claims of two or more persons, but also with the persons making the claims. The principle of Justice and Equality, which for the purpose of comparison always presupposes a duality, requires, therefore, at least four different factors: namely, two conflicting claims and two claiming persons.\(^6\) should these two persons be of unequal rank they cannot be treated alike, for the principle of Equality demands that only equals be treated equally. In this sense Equality is always proportionate equality – that is to say, it is a form of Justice which allots burdens according to the individual’s ability to carry them and accords support in amounts which vary with the needs of the individuals - and is called “distributive Justice”.

On the other hand, “commutative Justice,” which constitutes the second phase of the principle of Equality or “equitable fairness,” is distinguished from “distributive Justice” in so far as it ignores the rank of the persons involved. Thus “commutative Justice” requires only two factors, since its particular task is limited to the proportionate ratio between two “goods” - labor and wage, damage and recovery, and the like.\(^{20}\)

\(^{17}\) Otong Rosadi (n 13).[86-87].

\(^{18}\) *ibid.*[87].

\(^{19}\) Anton-Hermann Chroup and David L. Osborn (n 10).[134].

\(^{20}\) *ibid.*[135-136].
According to the explanation of Anton-Hermann Chrous and David L. Osborn above, equality in Aristotle’s concept of justice is also called justice in a narrow or special sense consisting of two main phases which are first shown in the act of distributing certain things between two or more people with a ratio right. This is called distributive justice (*justitia distributiva*), which is a form of justice that divides the burden according to the individual’s ability to carry it and provides support in varying amounts according to individual needs (proportional equality). So, according to Aristotle, the unjust is what violates the proportion. Hence one term becomes too great, the other too small, as indeed happens in practice; for the man who acts unjustly has too much, and the man who is unjustly treated too little, of what is good.

Distributive justice (*Iustitia Distributiva*) is the treatment of a person according to the services he has done. Previously, Aristotle had suggested that “this is plain from the fact that awards should be ‘according to merit’; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit…”

Meanwhile, the second phase differs from distributive justice insofar as it ignores the rank of the people involved or in other words they do not see their achievements or services. This justice is called commutative justice. Commutative justice requires only two factors, since duties in particular are limited to the proportional ratio between two goods for example labor and wages, damage and recovery and the like. Commutative justice is the treatment of someone without commutative by seeing his services.

Furthermore Otong Rosadi stated that:

“Iustitia distributiva (distributive justice) stipulates that a proportional equation between human must be realized. This means that goods must be distributed to people (for example by the authorities) based on a certain

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21 Aristotle (n 15).[76].  
22 Jimly Asshiddiqie (n 7).[57].  
23 Aristotle (n 15).[76].  
24 Jimly Asshiddiqie (n 7).[57].
criterion (work, achievement, need, or function). Meanwhile, *Iustitia commutativa* is exchange fairness, namely a balance in achievement and counter-achievement that must be manifested in civil relations (for example buying and selling, exchange, etc.)".25

Regarding justice in the distribution of intellectual property rights (IPR), in the current free market era, the theory of justice proposed by John Rawls is in accordance with current conditions. The theory of justice put forward by John Rawls can support the concept of justice put forward by Aristotle which is intended to bring about justice in the current distribution of IPR.

John Rawls has suggested two principles of justice that can be used as a reference in fulfilling justice in the distribution of IPR, which reads:

“First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all”.26

The two principles of justice according to John Rawls, the first place that everyone has the same rights to the broadest basic freedom, as wide as the same freedom for all people. And the second principle is that social and economic inequality must be regulated in such a way that (a) it can be expected to benefit everyone, and (b) all positions and offices are open to all.27

Otong Rosadi stated that the theory of justice put forward by John Rawls is important because of two things, firstly the procedure for achieving or seeking consensus which places individuals equal opportunities, and secondly, acknowledging the existence of inequality in society which must receive priority attention in the formulation or formation of laws and regulations.28

Furthermore, Otong Rosadi emphasized that there is a valuable lesson that can be taken from John Rawls’s theory of justice, namely the procedure of justice

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25 Otong Rosadi (n 13).[86].  
28 Otong Rosadi (n 13).[117].
proposed by Rawls is that the formation of laws must provide adequate protection for minority communities who have little access to resources in society. According to Otong Rosadi, minority communities, poor communities, or weak interest groups must be considered and become a basis for consideration in decision making when forming laws and regulations. Legislation must be drafted in order to protect the interests of everyone according to their rights, especially to provide benefits or protection for the most disadvantaged communities.

Based on the theory of justice put forward by John Rawls, Jimly Asshiddiqie wrote his opinion as follows.

“The doctrine of social justice contains the main principle that (i) everyone is deemed to have the same right to obtain and enjoy the totality of the basic freedom system which is equal and applies equally to all people; and that (ii) inequalities, both social and economic, must be arranged so that they (a) provide the greatest benefit to the most disadvantaged citizens in living together and (b) provide equal opportunities to work and gain open positions on the terms of equal opportunity which is fair for all”.

The doctrine of social justice views that everyone has the same rights to basic freedoms that can be protected by law. And statutory regulations must be able to regulate gaps in the social and economic fields, so that the realization of these statutory regulations can bring about justice for citizens, especially in the sharing of social benefits (rights) for every citizen.

In the framework of an even distribution of social benefits, Jimly Asshiddiqie suggests seven criteria that can be used to determine the extent to which the distribution of social benefits can be said to be fair, namely:

1. Distribution with equality (equal);
2. Distribution according to needs;
3. Distribution according to ability, merit, or achievements;
4. Distribution according to efforts and sacrifices;
5. Distribution according to actual productive contribution;
6. Distribution according to the requirements of common good, public interest, the welfare of mankind, or the greater good of a greater number;
7. Distribution according to the assessment of social services with the scarcity

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29 ibid.[117-118].
30 Jimly Asshiddiqie (n 7).[92].
value between supply and demand based on the dynamics of market economic forces (according to a valuation of their socially useful services), namely based on market forces (according to market forces).31

Based on the description of justice above, in relation to the distribution or distribution of intellectual property rights, it can be concluded that in terms of regulating the distribution of intellectual property rights produced by a person, it can be based on the theory put forward by Aristotle, namely that on distribution of intellectual property rights must be in accordance with their achievements. This right is given by the state to someone who has produced an intellectual creation that is manifested in a tangible way that can be useful or can be used by the community to achieve a better or prosperous life.

Based on the opinion expressed by Jimly Ashhiddiqie, it can be said that the appreciation for one’s achievements in producing intellectual creations can be given by the state fairly based on the seven criteria above, either accumulatively or not. For example, with regard to fair dealing in the protection of industrial designs as an intellectual property right granted by the state to designers based on the criteria “Distribution according to ability, merit, or achievements” or “Distribution according to effort and sacrifices.” It can be said that the granting of exclusive rights by the state to designers for the intellectual work they produce can be said to be fair because the designer has exerted all of his abilities, efforts, and sacrifices through the energy, time and cost spent to produce a design to achieve prosperity in the economic aspects as well as the existence of self.

**Industrial Design Elements**

Talking about intellectual property, substantively, the definition of IPR can be described as a right to property that arises or is born due to human intellectual abilities.32 Budi Agus Riswandi and Shabi Mahmashani wrote that the results of human thinking that are manifested in a real can produce a work known as

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31 ibid.[93].

32 Budi Santoso, *Butir-Butir Berserakan Tentang Hak Atas Kekayaan Intelektual (Desain Industri).* (Mandar Maju 2005).[53].
intellectual property. According to Khoirul Hidayah, Intellectual Property Rights (IPRs) are economic rights granted by law to a creator or inventor on a work from human intellectual abilities.

IPR is conceptually a legal right given to the results of intellectual creations (intellectual property) that have been manifested. This legal right gives rise to a monopoly right in the form of the right to use itself, the right to give permission and transfer these rights to other people and the right to prohibit other people from exercising these rights. This monopoly right is obtained because these intellectual works, whether in the fields of science, art, literature, or technology, were born at the expense of energy, time and even money. These sacrifices make the resulting work valuable. When added with the economic benefits that can be enjoyed, the inherent economic value will give rise to the conception of wealth (property) for these intellectual works.

IPR branches generally refer to TRIPs (Trade Related Aspects of Intellectual Property Organization). According to TRIPs, there are 7 main elements of protection, including: copyrights and related rights, trade marks, geographical indicators, industrial designs, patents, design of integrated circuits, protection of undisclosed information.

Broadly speaking, IPR as a legal right can be divided into two parts, namely: Copyright and industrial property rights. One of the industrial property rights is industrial design. The design of a product has actually been around for a long time, at least 2800 BC. Regulatory and legal aspects regarding design, especially those concerning industrial design, were only known in the 18th century. The creation of a work or other people who work resulting in intellectual ability is considered reasonable if they receive a reward for their work. Rewards earned can be either

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33 Budi Agus Riswandi and Shabbi Mahmashani, Dinamika Hak Kekayaan Intelektual Dalam Masyarakat Kreatif (Total Media 2009).[30].
34 Khoirul Hidayah, Hukum Hak Kekayaan Intelektual (Setara Press 2017).[1].
35 ibid.
36 Budi Santoso (n 32).[54].
37 Muhamad Djumhana and R. Djubaedillah (n 1).[285].
material or immaterial. The law provides protection for the work in the interests of the creator which can be called rights. The law provides protection for the work in the interests of the creator which can be called rights. Every right according to law has a title, which is a certain event which becomes the reason for the inherent rights of the owner. With regard to intellectual property rights, the event that is the reason for it is creation based on intellectual abilities, for example someone produces a work in the form of a beautiful design on an industrial product, that person has ownership rights to the design and is also entitled to get a reward for his work.

According to Achmad Zen Umar Purba, industrial design is an intellectual work that produces a product that has a special character in a formal or ornamental appearance, which creates an aesthetic impression and is mass produced. Protection of the right to industrial design is part of the jurisdiction of a country. The state has the right to regulate individual rights which are not solely a domestic issue, because the protection of the right to industrial design is a transnational interest. One of the aspects of State sovereignty is the external aspect, namely the highest power to establish relations with members of the international community and regulate everything that is or occurs outside the territory of that State, but as long as it is related to the interests of that State. However limited by law.

Industrial design protection arrangements are regulated in several international treaties. The Paris Convention stipulates that the protection of industrial designs is only regulated by one article, namely in Article 5 quinquies “Industrial designs shall be protected in all countries of the Union”. In The Paris Convention stipulates that industrial designs will be protected in all member countries. Furthermore, Article 25 TRIPs stipulates:

“Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs

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38 ibid.
39 Prof. Achmad Zen Umar Purba, Hak Kekayaan Intelektual Pasca TRIPs (Alumni 2011). [77-78].
40 I Wayan Parhiana, Pengantar Hukum Internasional (Mandar Maju 1990).[294-295].
or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law”.

TRIPs provides flexibility to member countries to provide protection of industrial designs that are new or original are made independently. Member countries may provide that such protection would not include a design that is essentially determined by technical or functional considerations. Each member country must ensure that the requirements for securing the protection of textile designs. Each country is free to regulate industrial designs through Industrial Design laws or through Copyright laws.41

Rahmi Jened Parinduri Nasution42 said that there are some design elements into the protection scope:

1. Creations about shapes, configurations or patterns;
2. The new look is aesthetically appealing;
3. Applied to goods that are mass produced (mass product).

Rahmi Jened Parinduri Nasution43 stated that protection is given to design features which are visible (visual appearance) applied to an item (article) and not the item itself. The appearance of a beautiful design does not have to be such noble beauty like fine art, but practically, the design gives the user or owner an item to enjoy his life, giving a feeling of pleasure, freshness, comfort, and so on. In Indonesia, it is required by law that a design registered must be a new design. That means the design has to be compared with pre-existing designs. New requirements, in this case, means that the design to be registered (protected) has not been know or used before within six months prior to the filling date of design registration.44 So

41 Rahmi Jened (n 2).[254]
42 ibid.[255].  
43 ibid.[256].  
44 ibid.[256-257].
that the design can be used to produce a product, goods, industrial commodity, or handicraft that is mass produced.

Design requirements that can be protected are new or original. The new design requirements are close to the patent requirements, namely novelty. In some ways, a design is considered new if it is clearly different from the design that was prior art. A design is considered new if it has a special appearance that is different from prior art. Acquisition of Industrial Design Rights in Indonesia adheres to the first to file principle, meaning that Industrial Design Rights are granted through registration and granted for new designs. Protection is given based on the principle of first to file, so it must be met claims novelty or originality.

The period of protection given to industrial designs according to Article 26 (3) TRIPs stipulates: “The duration of protection available shall amount to at least 10 years.” This is also regulated in Article 5 Paragraph (1) of Law Number 31/2000 which stipulates that “Protection of Industrial Design Rights is granted for a period of 10 (ten) years from the Filing Date.”

Designers or parties who register industrial designs will get Industrial Design Rights which have certain rights. According to Article 26 (1) TRIPs, the rights of Industrial Design Rights Holders are:

“The owner of a protected industrial design shall have the right to prevent third parties not having the owner’s consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes”.

The provisions in the TRIPs become a reference in Law Number 31/2000 in Article 1 Number 5 and Article 9 which reads as follows:

“Industrial design is a creation concerning the shape, configuration, or composition of lines or colors, or lines and colors, or a combination thereof in

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45 ibid. Perlindungan Hukum Desain Industri. Makalah yang disampaikan pada Pelatihan Hak Atas Kekayaan Intelektual (HAKI) VI Bagi Para Dosen Perguruan Tinggi Wilayah Indonesia Timur yang diseleggarakan oleh Fakultas Hukum Universitas Airlangga bekerjasama dengan Indonesia Intellectual Property Society (IIPS), Surabaya, 27 Agustus sampai dengan September 2001.[7].
46 ibid.[260].
47 ibid.
three or two-dimensional forms that give an aesthetic impression and can be realized in three-dimensional or two-dimensional patterns and can be used to produce a product, goods, industrial commodity, or handicraft. The holder of industrial design rights has the exclusive right to exercise his industrial design rights and to prohibit other people without their consent from making, using, selling, importing, exporting and/or distributing goods that are granted industrial design rights”.

Meanwhile, the limitation of the Exclusive Rights according to Article 26 (2) TRIPs stipulates:

“Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties”.

The limitation given to Industrial Design Rights which concerns the exception in Article 4 of Law Number 31/2000 that Industrial Design Rights cannot be granted if the Industrial Design is contrary to the prevailing laws and regulations, public order, religion or morals. The use of industrial designs for research and education purposes, as long as it does not harm the reasonable interests of the holders of industrial design rights, is not considered a violation (Article 9 Paragraph (2) of Law No. 31/2000).

**Fair Dealing Concept in Industrial Design**

The concept of fair dealing/fair use is widely known in copyright protection. There are two doctrines of restrictions on copyright, namely ‘fair dealing’ and ‘fair use’. Fair dealing doctrine is very commonly used in the UK and countries with commonwealth and civil law jurisdictions. Meanwhile, the fair use doctrine is used by the United States. The term fair dealing is similar to fair use. According to Sanusi Bintang, fair dealing or fair use, generally applied by many countries that allow the multiplication of creation, but do not qualify as copyright infringement.48

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Fair dealing doctrine was first used in France and Germany before this doctrine was included in the Berne Convention for the Protection of Literary and Artistic Works in 1928. Fair dealing’ doctrine in the UK is based on moral rights. Moral rights are author’s rights over the work of his creation, the term is generally used in civil law countries. According to Rr Diyah Ratnajati in his thesis stated that the purpose of moral rights is to protect the personality or reputation of the creator and copyright holder of copyright works. According to the literature, fair dealing has a meaning including the following:

“Fair dealing is a user’s right in copyright law permitting use of, or “dealing” with, a copyright protected work without permission or payment of copyright royalties. The fair dealing exception in the Copyright Act allows you to use other people’s copyright protected material for the purpose of research, private study, education, satire, parody, criticism, review or news reporting, provided that what you do with the work is ‘fair’. If your purpose is criticism, review or news reporting, you must also mention the source and author of the work for it to be fair dealing”.

Another definition of fair dealing, namely: fair dealing is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. From these two definitions, it can be seen that the concept of fair dealing is widely used in copyright protection. This protection is given in relation to the use of Copyright by other parties (not the holder of exclusive rights over intellectual property rights).

Industrial design also applies the concept of fair dealing. However, this concept is an exception, in the sense that it is only in certain cases. Related to this, Rahmi Jened has revealed cases related with the following exceptions:

“The protection practices of Industrial Design in Europe and America have repairs clause given based on lobbying from the spare parts manufacturing industry. Repair clause contains a rule that the actions of manufacturers and...

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49 Diyah Ratnajati, ‘Perbandingan Doktrin Fair Use Pada Internet Antara Amerika Serikat Dan Indonesia’ (Program Megister Ilmu Hukum, Program Pascasarjana, Universitas Diponegoro, Semarang 2008).[13]
50 ibid.
51 ibid.
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Spare parts manufacturers for the purpose of repairing complex products (cars) must be permitted without violating Industrial Design Rights, such as repairing car windows, if complete and adequate information has been provided to consumers⁵⁴. Fair dealing in industrial designs in Indonesia is more on restrictions on exclusive rights (from the point of view of rights holders) and restrictions on the use of industrial designs by other parties (fair use) in the field of research and education.

In Indonesia, regulation of restrictions or fair dealing by non-exclusive rights holders or the public on industrial designs can be seen in Article 9 Paragraph (1) and (2) of Law Number 31/2000. Ownership of copyrighted works does not necessarily make a person monopolize and enrich themselves on the economic rights they have obtained⁵⁵. In order to balance owner’s rights with the interests of the community, it is necessary to have fair dealing for the community. ‘Fair dealing’ in industrial designs is contained in Article 9 Paragraph (1) and (2) of Law Number 31/2000 which stipulates the following.

**Article 9**

(1) The holder of industrial design rights has the exclusive right to exercise his industrial design rights and to prohibit other people without their consent from making, using, selling, importing, exporting and / or distributing goods that are granted industrial design rights.

(2) Exempted from the provisions referred to in paragraph (1) is the use of Industrial Designs for research and education purposes as long as it does not harm the reasonable interests of the holder of the Industrial Design rights.

The word “use” of industrial designs is contained in the Elucidation of Article 9 of Law Number 31/2000 that “use” is meant here only for research and education purposes, including research and development testing. However, such use may not be detrimental to the reasonable interests of the designer, whereas what is meant by “reasonable interest” is the use for educational and research purposes, generally not included in the use of the right to an Industrial Design as referred to in paragraph (1). In the field of education, for example, the ‘reasonable interests’ of the designer

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⁵⁴ Rahmi Jened (n 2).[262].
will be harmed if the Industrial Design is used for all educational institutions in that city. The criterion of importance is not only measured by the presence or absence of commercial elements, but also by the quantity of use. As stated by Rr Diyah Ratnajati, the doctrine of fair dealing in the UK cannot at all be applied to matters outside the fields of education, research and knowledge enhancement and information dissemination.\textsuperscript{56} \textit{It can be seen that fair dealing in industrial designs itself is implicitly emphasized in the protection of moral rights, whether it is for the interests of exclusive rights holders or the use of limited industrial designs by other parties.} However, it can be seen in the article “reasonable interest” that the main objective is more to protect economic rights for exclusive rights holders. The word “reasonable interests” itself refers to the article above it.

\textbf{Justice in Fair Dealing on Industrial Design}

The concept of fair dealing in copyright protection can be found in industrial designs. The concept of fair dealing in industrial designs is contained in Article 9 of Law Number 31/2000. According to Article 9 paragraph (2) it can be seen that actually the use of industrial designs for research and education purposes is not allowed unless such use does not harm the reasonable interests of the holder of the Industrial Design right. This can be seen in the article which reads “... as long as it does not harm the reasonable interests of the holder of the Industrial Design right”. So, the use of industrial designs for research and education purposes is still permissible as long as it does not harm reasonable interests in terms of making, using, selling, importing, exporting, and / or distributing goods granted industrial design rights. The use referred to here is the use only for research and education purposes, including research and development testing. However, such use must not be detrimental to the reasonable interests of the Designer. According to the Elucidation of Article 9 of the Industrial Design Law what is meant by “reasonable interest” (fair dealing) is as follows.

\textsuperscript{56} Diyah Ratnajati (n 49).[14].
“Reasonable interest” is the use for educational and research purposes, in general, it is not included in the use of Industrial Design rights as referred to in paragraph (1). In the field of education, for example, the reasonable interest of the designer will be harmed if the Industrial Design is used for all educational institutions in that city. The criterion of importance is not only measured by the presence or absence of commercial elements, but also by the quantity of use.

From the explanation above, it still needs to be studied regarding several problems, namely *first*, a reasonable quantity or amount of the use of industrial designs for research and education purposes is permitted; *second*, legal subjects or whoever gets the exemptions referred to in Article 9 paragraph (2) of the Industrial Design Law; *third*, granting of exclusive rights to research results (including research and development tests) in accordance with the results of research as referred to in Article 9 paragraph (2) of the Industrial Design Law.

Before entering into ‘justice in fair dealing on industrial design’, we will first discuss the three problems above as follows: *First*, the quantity or fair amount of permitted use of industrial designs for research and education purposes. From the explanation of Law Number 31/2000, it does not specify how much or what quantity the use of an Industrial design for research and education purposes is permitted. In the explanation of Law Number 31/2000 only examples are given in the field of education, for example, the reasonable interest of the designer would be harmed if the Industrial Design was used for all educational institutions in the city. In the explanation of Law Number 31/2000 only examples are given in the field of education, for example, the reasonable interest of the designer would be harmed if the Industrial Design was used for all educational institutions in the city. There is no further explanation regarding how many quantities or quantities that can be used as a measure to determine that the use of the industrial design includes fair use. In Article 9 paragraph (2) Law Number 31/2000 stipulates that “… as long as it does not harm the reasonable interests of the holder of Industrial Design rights.” When linked with the explanation of Article 9 paragraph (2), there are several points that can be concluded to determine fair use in industrial designs, namely:
1. The criterion of importance is not only measured by the presence or absence of commercial elements, but also by the quantity of use.

2. The quantity or amount used cannot be clearly determined. Thus, this lack of clarity in terms of quantity allows judges to interpret and rationalize cases or disputes that occur in the judicial process in the context of a fair legal discovery. The quantity or quantity used cannot be clearly determined. Thus, this lack of clarity in terms of quantity allows judges to interpret and rationalize cases or disputes that occur in the judicial process in the context of a fair legal discovery.

3. The number of uses of industrial designs can be said to be detrimental to the owner of the industrial design rights if it can be proven that the use of industrial designs has violated Article 9 paragraph (1) of Law Number 31/2000, namely if another party (not the owner of the Industrial Design rights) has committed the act of making, using, sells, imports, exports, and/or circulates goods that are granted industrial design rights, without the approval of the owner of the industrial design rights. And the use of industrial designs in quantity can be proven to have caused real losses for the owners of industrial design rights.

Second, regarding legal subjects or whoever gets the exemptions referred to in Article 9 paragraph (2) of the Industrial Design Law. The first owner of the design is usually the creator (designer) unless there are special conditions. The subject of industrial design according to Article 6-8 of Law Number 31/2000 is as follows.

Article 6

(1) Those entitled to obtain industrial design rights are designers or those who receive said rights from the designer.

(2) In the event that a designer consists of several people jointly, the right to industrial design is given to them jointly, unless agreed otherwise.

Article 7

(1) If the industrial design is created in official relation with other parties in the official environment, the authority of industrial design rights is the party where the design created, unless there is another agreement between two parties without ignoring the creator rights if the use of industrial designs...
design is expanded outside official relation.

(2) The provisions as referred to in paragraph (1) shall also apply to Industrial Designs made by other people based on orders made in an official relationship.

(3) If an Industrial Design is made in a working relationship or based on an order, the person making the Industrial Design is deemed to be a Designer and Right Holder to Industrial Design, unless agreed otherwise between the two parties.

Article 8

The provisions as referred to in Article 7 paragraph (1) and paragraph (2) do not remove the designer’s right to have his name listed on the Industrial Design Certificate, General Register of Industrial Designs and the Official Gazette of Industrial Designs.

Article 6 of Law Number 31/2000 stipulates that those who are entitled to obtain industrial design rights are designers or those who receive these rights from designers. The designer can be done alone or by several people. Another party who receives Industrial Design rights is a party granted Industrial Design rights by a designer or a previous Industrial Design Right Holder by transferring Industrial Design rights through inheritance, grants, wills, written agreements, or other causes justified by statutory regulations. (Article 31 Paragraph (1) Law Number 31/2000).

Article 9 paragraph (2) of Law Number 31/2000 does not further elaborate on who can use the industrial design in the context of exempted usage. This means that anyone is allowed to use the industrial design for research and education purposes, including test of research and development. The fair use of this industrial design (exceptions in use of the design in Article 9 paragraph (2)) provides the widest possible opportunity for other parties to be able to research and develop an existing design (which has attached an exclusive right to the design), so that it is possible for other parties to create (design) a new industrial design that has a distinguishing power or can be similar to the existing industrial design. That way, the existence of industrial designs resulting from research (including research and development tests) carried out by other parties (whoever) is allowed. Bearing in mind that other parties who are allowed to do so can be in the form of legal entities, non-legal
entities, agencies that are part of the government, private agencies, persons, groups of people (associations), and so on.

Third, if the design of the research results is allowed, then the next question is whether the design of the results of the research (including research and development tests) carried out by other parties can be given exclusive rights if they meet the novelty element? The element of novelty which is the basis for registration of industrial designs is stipulated in Article 2 and Article 3 of Law Number 31/2000 as follows.

Article 2

(1) Industrial Design Rights are granted for new Industrial Designs.
(2) An Industrial Design is considered new if on the Filing Date, the Industrial Design is not the same as the existing disclosures.
(3) Previous disclosures as referred to in paragraph (2) are disclosures of Industrial Designs which before:
   a. receipt date; or
   b. priority date if the application is filed with a priority right; has been announced or used in Indonesia or outside Indonesia.

Article 3

An Industrial Design is not deemed to have been announced if within a period of 6 (six) months before the Filing Date, the Industrial Design:
   a. has been shown in a national or international exhibition in Indonesia or abroad which is official or recognized as official; or
   b. has been used in Indonesia by the designer in the framework of an experiment for the purpose of education, research or development.

The article above explains that an industrial design that can be registered is a design that meets the element of novelty. Furthermore, Article 6 paragraph (1) and (2) Law Number 31/2000 stipulates that “those entitled to obtain Industrial Design Rights are designers or those who receive such rights from designers.” And “in the case that the designer consists of several people together, the right to industrial design is given to them collectively, unless agreed otherwise.” Article 1 point (2) states that “a designer is a person or several people who produce an industrial design.” According to Article 1 point (2), a designer is anyone who can do or produce industrial designs, a designer can be done by one person or several people. What is meant by a person in the article includes a legal entity or non-legal
entity. From this description it can be concluded that a person or several people who can produce industrial designs and these designs have met the novelty element, then the resulting designs (including the results of research in which there are research and development tests) can be registered and the designer is entitled to industrial design rights from the results of the research he has done.

Based on the description above, the use of industrial designs without the permission of industrial design rights holders is allowed provided that the use of industrial designs is carried out within the framework of research and education; the research and education that has been carried out has’t been detrimental to the owner of industrial design rights in real, which means that the loss must be proven first; The legal subject who conducts research may also be any person or party other than the holder of Industrial Design Rights who is an individual, legal entity or non-legal entity; design results from research can be registered and entitled to exclusive rights if they meet the element of novelty.

Given that Indonesia was originally a developing country and considered IPRs to be new, for this purpose the formation of Law Number 31/2000 was intended to advance the industrial sector by increasing competitiveness by utilizing the role of industrial design, as stated in the general section on the explanation of Law Number 31/2000 as follows.

“Indonesia as a developing country needs to advance the industrial sector by increasing competitiveness. One of these competitiveness is to take advantage of the role of Industrial Design which is part of Intellectual Property Rights. Cultural diversity combined with efforts to participate in the globalization of trade, by providing legal protection for industrial designs will accelerate the development of national industries”.

Furthermore, the explanation states that:

“The legal protection given to Industrial Design Rights is intended to stimulate creative activities of designers to continually create new designs. In the context of creating a climate capable of encouraging the spirit of the creation of new designs and at the same time providing legal protection, the provisions of Industrial Designs are compiled in this Law. Protection of Industrial Design Rights is granted by the Republic of Indonesia if requested through a registration procedure by a designer, or a legal entity entitled to such Industrial Design Rights”.
In order to balance rights between rights holders and society. For this reason, it is necessary to develop the role of regulating industrial design in accordance with the goals of legal ideals (rechtsidee) in the basis of the state ideology, namely Pancasila, one of which is social justice for all Indonesian people. According to Muhammad Hoiru Nail and Made Arya Utama, the formation of legislation which is to be made and implemented in Indonesia is also inseparable from the nuances of the Pancasila through the principles of Pancasila. The principles of Pancasila will be used as guidelines in legal behavior for the community. This legal behavior that is built with the spirit of the nation’s soul (volkgeist) will certainly provide direction and progress in legal development that society aspires to so that law becomes the only spirit / breath of society in carrying out all its activities because it departs from the soul of the community itself. So, the goals of legal ideals can be realized well in Indonesia.

The supreme goal of law is justice. A sense of justice must be enforced in every line of human life related to legal issues, because law requires the realization of justice. Therefore, all efforts related to absolute law must be directed to find a legal system that is most suitable and in accordance with the principle of justice. Fair dealing contained in industrial design law is designed to fulfill a sense of justice for the public. This means that fair dealing contained in industrial designs has met the constitutive elements of all definitions of law. As stated by Huijber as followed by Muhammad Syukri Albani Nasution et al that fair is a constitutive element of all definitions of law.

As described earlier, in principle the justice proposed by Aristotle requires proportional equality, one of which is in terms of distributing certain things between

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60 Muhammad Syukri Albani Nasution et al, Hukum Dalam Pendekatan Filsafat (Kencana 2016).[214].
61 ibid.[213].
62 ibid.[214].
63 ibid.
two or more people with the right ratio. In addition, the award must be in accordance with the achievement, because what is fair in distribution must be in accordance with the achievement in a certain sense. In regulating industrial design rights, requires the distribution of rights proportionally, in accordance with the services.

Based on the description of fair dealing in industrial design arrangements above. It can be said that the granting of rights to industrial design rights holders (designers) and granting rights to the public in order to take advantage of the industrial design rights of the holders contains the principle of proportionality, each (right holder and society) can use the right to a design fairly in accordance with services or achievements (role). In addition, fair dealing has met the principle of proportional equality or equal rights (equal opportunities) in obtaining rights to utilize intellectual property.

Referring to what was stated by John Rawls, that the existence of inequality or inequality (rights holders and society) in obtaining resources, especially in intellectual property, has been regulated in such a way by law (in this case Law Number 31/2000) so that the community as parties those who are less fortunate in enjoying economic rights to intellectual property resources may benefit as well. Given that the holder of the right to industrial design is the party who owns the business, sacrifice, ability or achievement, the holder of the right to industrial design is entitled to the industrial design he produces to be used according to his wishes with limitation or restricted by Law. (Article 28J paragraph (2) of the 1945 Constitution). Meanwhile, the community is a party that does not have a role in producing the industrial design, in order to maintain the balance of rights and social functions of property rights mandated by the values of Pancasila, the community is allowed to use it for the purposes of education and research fairly as long as it does not harm the rights of the rights holders industrial design. Thus, the practice of social virtue (social justice) can be realized. This is also in accordance with the ideals of Indonesian state law, namely social justice for all Indonesian people. Thus, as stated by Koerniatmanto Soetoprawiro, the concept of social justice conveyed by Rowls is not only that all the same or equal freedoms of each person are protected only,
but especially also that basic freedoms are effectively carried out by all parties in society who are concerned, to a degree that the comfortable atmosphere of freedom feels the maximum for the worst off (those who are less fortunate).  

Fair dealing in Law Number 31/2000 provides regulation by distributing rights and obligations equally in society in such a way that everyone has the opportunity to benefit from it and actually bears the same burden. So that the industrial design regulation is in accordance with the objective of its legal protection, which is intended to stimulate creative activity of designers to continuously create new designs. Because everyone has the opportunity to be a designer.

Based on the description above, it can be concluded that according to the theory presented by Aristotle and John Rowls, fair dealing in industrial design is given with the aim of being able to balance the rights between the holders of Industrial Design rights and other parties (the public) in accordance with the fairness it conveys. Rights obtained by holders of Industrial Design rights and society in accordance with their respective accomplishments. Holders of industrial design rights (exclusive rights) have the right to monopolize the designs of their work with certain limitations, namely not to violate the prevailing laws and regulations, public order, religion or morals. For the sake of fairness, the exclusive right to monopolize industrial designs is given restrictions and there is also freedom for the community (other parties) to be able to use these designs only for educational and research purposes. So that the community (all circles) can utilize / use these designs for educational and research activities to be able to spur people’s creative ideas with the aim of improving community welfare by producing new designs and obtaining economic and moral benefits. Fair use rights in industrial designs that already have these rights reflect fairness on the distribution of rights (benefits) for the most disadvantaged citizens or communities (do not have intellectual property rights and cannot enjoy moral and economic rights over these rights).

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65 ibid.[237].
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Fair dealing in industrial designs has provided a sense of justice for the community because in the principle of fair dealing there is a community’s right to the work of others which can be used to improve their welfare in all respects. Justice according to Aristotle and Rawls, who believes that justice that guarantees the interests of all parties (public interest) fairly is contractual justice in accordance with the values contained in Pancasila (which is the nation’s political consensus), namely the value of social justice for all Indonesian people. Indonesia as a developing country must be able to compete with other countries and prosper its people by always adhering to the values of Pancasila. When linked to the fifth postulate “Every law must improve the welfare of society” means that every law discussed by the House of Representatives with the joint approval of the President must:

1. Creating community welfare.
   Every law is not detrimental to the public interest and must prosper the community in all aspects of life.
2. Avoid from interests that harm the community
   Laws born on the basis of collective agreement must prioritize the interests of the community over the interests of certain groups/groups.

The concept of fair dealing is a manifestation of the value of social justice embodied in the legislation on industrial design, namely Law Number 31/2000. Law No. 31/2000 has guaranteed the value of fairness in the use of industrial designs for designers and the public of all circles. This is in accordance with what was conveyed by Candra Irawan regarding the principles that are used as the basis for political law and regulation of Intellectual Property Rights in Indonesia, including the principle of human benefit or the principle of humanity and the principle of balancing the interests of individuals and society. That way, more and more people will feel the goodness and benefits of industrial design by maintaining a fair balance of rights between designers and society (other parties).

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66 Backy Krisnayuda, Pancasila Dan Undang-Undang (Kencana Prenada 2017).[250].
Conclusion

The concept of fair dealing in industrial designs is that industrial designs can be used or used by other parties for educational and research purposes. Fair dealing of industrial designs can be justified as long as it does not harm the interests of the Industrial Design Right Holder. This means that the use of industrial designs can be allowed if it is not proven to have seriously harmed the economic and moral interests of the Industrial Design Right Holder.

Fair dealing in Industrial Designs is embodied in Article 9 Paragraph (2) of Law Number 31/2000. The concept of fair dealing is realized in order to fulfill the values of justice contained in Pancasila. This is evidenced by allowing the Indonesian people to properly use existing industrial designs for which the rights of the holders are still attached to the industrial design. Thus providing opportunities for the public to be able to spur their creative ideas in producing new designs that they can use for their own welfare with ensure that the rights of industrial design holders remain well protected. Thus, the award for intellectual work (industrial design) is based on individual achievements as expressed by Aristotle. Designers are given more rights over their achievements, namely monopolizing the industrial designs they produce in a limited way, while the public is still given the right to use these industrial designs as long as they do not harm the reasonable interests of the designer. In other words, fairness in a fair transaction in the protection of industrial designs can be achieved in the form of fulfilling the right to balance between the rights of designers and society. Justice for both is if between rights holders and the community have the opportunity to use and enjoy the available industrial designs. Industrial design rights holders have limited monopoly rights and the public has the opportunity to use limited industrial designs for their welfare. This is in accordance with what Aristotle said that justice is given according to values or appropriateness which are not the same.
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