



LEGAL PROTECTION OF TRADE SECRETS OVER THE POTENTIAL DISPOSAL OF TRADE SECRETS UNDER THE RE-ENGINEERING PRECAUTIONS

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ABSTRACT

The Indonesian Trade Secrets Law Number 30/2000 (ITS Law) postulates exemptions for acts that are not considered infringements to protect trade secrets. One of them is the reverse engineering of other people's trade secrets. The problem is that the ITS Law does not limit the extent to which reverse engineering can be justified. The absence of these limitations also allows attempts to disclose trade secrets under the pretext of reverse engineering. This problem ultimately results in the absence of legal certainty for the protection against trade secret disclosure, which is the sole responsibility of the trade secret owner. This article aims to re-analyze the protection provided by the ITS Law and examine the extent to which the limitations on reverse engineering can be justified in the ITS Law. This article used normative juridical research methods combined with statutory, conceptual, and case approaches. It revealed a paradox in the protection of trade secrets against the possibility of trade secret disclosure. This article concluded that changes are necessary to the ITS Law, specifically by adjusting to the basic principles of IPR protection, limiting the extent to which the reverse engineering of other people's trade secrets can be justified, and adding a "Good Faith" clause in performing reverse engineering actions.

Keywords: intellectual property rights; trade secret; reverse engineering; disclosure of trade secrets; legal certainty

INTRODUCTION

Background

Since the covenant on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) in 1994, Intellectual Property Rights (IPR) have been introduced into the international trading system, including Indonesia.¹ The existence

of Law Number 7 of 1994 concerning Ratification of the Agreement Establishment of the World Trade Organization obligates the Indonesian government to incorporate the TRIPs Agreement's provisions into its national legislation.² Countries that adhere to

1 Diana Silfiani, "Song and Music Information

Systems as a Protection of Song Copyrights in Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 16, no. 1 (2022): 11.

2 Kholis Roisah, "Kebijakan Hukum 'Transferability' Terhadap Perlindungan Hak Kekayaan Intelektual

the TRIPs Agreement have their own interpretations related to the elaboration of the meaning of IPR branches.³

In principle, the categorization of IPR refers to the provisions in PART II Standards Concerning the Availability, Scope, and Use of Intellectual Property Rights TRIPs Agreement.⁴ *The regulation categorizes the types of IPR, among others: Copyright and Related Rights; Trademarks; Geographical Indications; Industrial Design; Patent; Layout Design (Topography) of Integrated Circuits; Protection of Undisclosed Information; and Control of Anti-Competitive Practices in Contract Licensing. However, Indonesia classifies IPR types into two foremost categories of protected rights. The first category is Copyright and Related Rights and the second category is Industrial Property Rights. Industrial Property Rights include the rights to trademarks, patents, geographical indications, plant varieties, industrial designs, trade secrets, and integrated circuit management/layout designs.*⁵

*A trade secret is a subset of IPR that has distinctive characteristics from the others. Law Number 30 of 2000 concerning Trade Secrets (ITS Law) regulates the protection of trade secrets in Indonesia, and one of its distinctive features is that trade secrets are not obligated to be registered.*⁶ *Additionally, the protection of trade secrets is not time-limited until the secret has been successfully*

*disclosed.*⁷ *It means that the protection of trade secrets depends on the extent to which the trade secret owner protects the trade secret formula.*

*Dissimilarities between the protection characteristics of trade secrets and other forms of IPR protection*⁸ *trigger a particular problem. The problem lies in the type of trade secret protection in its master regulation, the ITS Law. Article 13 of the ITS Law states that a trade secret infringement occurs when a person deliberately discloses a trade secret or breaks the agreement or obligation, either written or not, to maintain the confidentiality of the relevant Trade Secret.*⁹ On the other hand, Article 15 of the ITS Law elucidates:

“The action as referred to Article 13 shall not be deemed an infringement on a Trade Secret if:

- a. the disclosure of the Trade Secret or the use of the Trade Secret is based on the interest for the security and defense, health, or safety of the public;
- b. the reverse engineering of a product that is produced from the use of the Trade Secret of another person is solely conducted for the interest of making further development of relevant products.”

From the article’s clause, it can be deduced that the ITS Law also postulates exemptions for acts that are not deemed an infringement, one of which is the act of reverse engineering products resulting from

Di Indonesia,” *Law Reform* 11, no. 2 (2015): 241.

3 Molly Land, “Rebalancing Trips,” *Mich. J. Int’l L.* 33 (2011): 433.

4 Imam Wicaksono, “Politik Hukum Pelindungan Hak Kekayaan Intelektual di Indonesia Pasca Di Ratifikasinya Trips Agreement,” *Pena Justisia: Media Komunikasi dan Kajian Hukum* 18, no. 1 (2020): 19.

5 Rignaldo Ricky Wowiling, “Penegakan Hukum Hak Paten Menurut Trips Agreement Dan Pelaksanaanya di Indonesia,” *LEX CRIMEN* 6, no. 10 (2018): 26.

6 Khwarizmi Maulana Simatupang, “Tinjauan Yuridis Perlindungan Hak Cipta Dalam Ranah Digital,” *Jurnal Ilmiah Kebijakan Hukum*, 15 (1) (2021): 13.

7 Syahriyah Semaun, “Perlindungan Hukum Terhadap Rahasia Dagang,” *DIKTUM: Jurnal Syariah dan Hukum* 9, no. 1 (2011): 30.

8 Anastasia E. Gerungan, “Perlindungan Hukum Terhadap Rahasia Dagang Ditinjau Dari Aspek Hukum Perdata dan Pidana di Indonesia Oleh: Anastasia E. Gerungan,” *Jurnal Hukum Unsrat* 22, no. 5 (2016): 19.

9 Antonio Rajoli Ginting, “Tinjauan Hukum Sistem Pemberian Royalti Bagi Pemain Film,” *Jurnal Ilmiah Kebijakan Hukum* 15, no. 1 (2021): 21.

the use of other people's trade secrets.¹⁰

The problem is that the ITS Law does not limit the extent to which reverse engineering of products derived from the use of other people's trade secrets can be justified. Furthermore, the absence of limitations on reverse engineering may lead to the disclosure of trade secrets under the pretext of reverse engineering. It ultimately results in the absence of legal certainty for the protection of trade secrets from disclosure, with the trade secret owner bearing sole responsibility for its protection.

Abundant studies have analyzed the protection of trade secrets in Indonesia, including the analysis of trade secret theft decisions. The first research was proposed by Said Buchari.¹¹ The study's findings are related to the legal basis for making legal constructions in applying the form of error as the basis for criminal liability against the defendants of the crime of trade secret disclosure. The second article discussed the effectiveness of implementing the trade secret law. Published by Hadi Santoso, it was discovered that Law Number 30 of 2000 concerning Trade Secrets can be stated to be ineffective due to various factors predisposing it, including legal factors, law enforcement factors, and cultural factors.¹² The third article was written by Vince Kristiawan Zai and it concerned the licensee's responsibility for the disclosure of trade secrets. The

study concluded that the license holder's responsibility for trade secret leakage takes the form of filing a claim for compensation and being held criminally liable. The dispute settlement for trade secret infringements can be submitted to the District Court, or it can be done through arbitration or an alternative form of dispute resolution.¹³ The fourth article was proposed by Riandhani Septian Chandrika and is entitled *Perlindungan Hukum Perjanjian Lisensi Rahasia Dagang di Indonesia*.¹⁴ The article uncovered several philosophical aspects that underlie the protection of trade secret license agreements in Indonesia, including the theory of rights, the theory of contract, and the theory of unlawful acts. The fifth is the research by Anmad Pratiwi entitled *Perlindungan Hukum Rahasia Dagang Setelah Berakhirnya Perjanjian Kerja*.¹⁵ The study examined the legal aspects related to the potential disclosure of trade secrets by workforces whose work contracts had terminated. This article concluded that the protection of trade secrets is retained even after the employment contract is terminated. No research has specifically discusses the disclosure of trade secrets under the reverse engineering pretext, making this research stimulating to discuss.

This article aims to re-analyze the legal protection of trade secrets in Indonesia and to examine the extent to which the limitations of reverse engineering in the ITS Law can be justified. This article is divided into sections. Following the introduction, the

10 In the Elucidation of Article 15 letter b of Law Number 30 of 2000 concerning Trade Secrets, what is referred by "*Rekayasa Ulang*" (reverse engineering) is an act of analysis and evaluation to find out information about existing technology.

11 Said Buchari, "Analisis Terhadap Putusan Mahkamah Agung Nomor 2085 Pid. Sus/2008 dalam Perkara Tindak Pidana Pencurian Rahasia Dagang" (Thesis, Universitas Pasundan, 2012), 2.

12 Santoso Hadi, "Perlindungan Atas Rahasia Dagang Dan Efektivitas Penerapan Undang-Undang No. 30 Tahun 2000 Tentang Rahasia Dagang (Studi Kasus Pada Pt Mkk, Jakarta)" (Thesis, Universitas Tarumanagara, 2006), 4.

13 Vince Kristiawan Zai, "Tanggungjawab Pemegang Lisensi Terhadap Pembocoran Rahasia Dagang Menurut Undang-Undang No 30 Tahun 2000 Tentang Rahasia Dagang" (Thesis, Universitas HKBP Nommensen, 2018): 24.

14 Riandhani Septian Chandrika, "Perlindungan Hukum Perjanjian Lisensi Rahasia Dagang di Indonesia," *Jurnal Hukum Bisnis Bonum Commune* 2, no. 1 (2019): 11.

15 Agustina Ni Made Ayu Darma Pratiwi, *Perlindungan Hukum Rahasia Dagang Setelah Berakhirnya Perjanjian Kerja* (Yogyakarta: Universitas Atma Jaya, 2014), 64.

second section of this article discusses trade secret protection against potential disclosure of trade secrets, which is examined through text and context studies. The third section explores the formulation of the legal protection of trade secrets in Indonesia in response to the potential disclosure of trade secrets through reverse engineering. In the closing, conclusions and recommendations are provided.

Problem Formulations

Discourse on this issue conveys several problems that this article will respond to:

1. What are the problems with the legal protection for trade secrets in Indonesia based on Law Number 30 of 2000 concerning Trade Secrets?
2. What is the formulation of legal protection for trade secrets in Indonesia over the potential disclosure of trade secrets under the reverse engineering pretext?

Objectives

The purposes of this article include:

1. To analyze the problem of the legal protection of trade secrets in Indonesia based on Law Number 30 of 2000 concerning Trade Secrets.
2. To discuss the formulation of the legal protection of trade secrets in Indonesia over the potential disclosure of trade secrets under the reverse engineering pretext.

Research methods

This study employed a normative juridical method. This research also combined it with the Reform Oriented Research method.¹⁶ It was applied to evaluate the feasibility of existing regulations and to recommend necessary changes to the regulations. This model was developed using a legal reform research methodology to provide suggestions

for changes to existing laws. The model ultimately prompted researchers to propose changes to the law (legal reform).

1. Research Approach

This research utilized several approaches. The first method is statutory approach. It was conducted by reviewing all laws and regulations pertaining to the legal issues under consideration.¹⁷

The second approach is conceptual approach. It was completed in order to design a problem or idea for which no legal regulation exists.¹⁸ This research also referred to and was guided by IPR principles, specifically the principle of trade secret protection, and revealed it in legal scholar views or legal doctrines.¹⁹

The third method is case approach. This approach was accomplished by examining cases relating to the issue of trade secret protection, including cases that had become court decisions pertaining to trade secret disputes and have permanent power.²⁰

2. Data collection Method

The method of collecting data for this study is documentation. In this case, the documents used as references were legal documents such as laws and regulations, court decisions, as well as books and journals that discuss doctrines related to IPR and trade secrets. The sampling technique in this study was drawn from several cases involving the disclosure of trade secrets on a national and international scale.

3. Analysis Method

This study used inductive techniques for the data analysis. This research began with a discussion of specific legal concepts related to trade secrets and their cases and problems, then drew

¹⁶ Aan Efendi, Dyah Octorina Susanti, and Rahmadi Indra Tektona, *Penelitian Hukum Doktrinal* (Yogyakarta: LaksBang Justitia, 2019), 12.

¹⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2005), 44.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

them into general terms related to IPR principles.

Then it is followed by a legal analysis of the laws that specifically regulate IPR and trade secret protection. This analysis process was carried out in stages. *First*, determining whether the ITS Law and other IPR protection regulations apply as a whole to existing legal issues or concerns. *Second*, thoroughly reading the ITS Law and other IPR protection regulations to identify the elements required. *Third*, comparing or matching the required elements to the issue of trade secret protection and determining how the ITS Law was implemented.

DISCUSSION

Issues of Legal Protection of Trade Secrets in Indonesia Based on Law Number 30 of 2000 concerning Trade Secrets

This section elucidates the problems of the legal protection of trade secrets under the ITS Law. This section instigates by reassessing trade secret protections in terms of text and context against potential trade secret disclosures. This section discusses the assessment of the ITS Law regulation on the practice reality of protecting trade secrets, particularly the potential for trade secret disclosure.

In the next subsection, this study discusses the paradox of trade secret protection in the ITS Law on the potential for disclosing trade secrets. In this section, this study discusses the paradox of the trade secret protection regulation in the ITS Law, which has not been fully able to protect trade secrets against potential disclosure.

Trade Secret Protection over Potential Trade Secret Disclosure: between Text and Context

Ad Recte docendum oportet primum inquirere nomina, quia rerum cognitio a

nominibus rerum dependet,²¹ a profound classical legal postulate, states that understanding a legal concept must begin with a definition.²² On this basis, to comprehend the various forms of trade secret protection and infringement, it is necessary to first comprehend the definition of trade secret. Referring to Article 1 point 1 of the ITS Law, "trade secrets" are defined as knowledge that is not identified by the public on technology and/or business that has economic value, because it is useful for business activities and whose secrecy is protected by the owner of the trade secret. The scope of trade secret protection includes production methods, processing methods, sales methods, or other information in the field of technology and/or business that has economic value and is unknown to the public.²³

Trade secrets can be protected by the ITS Law if they are classified as confidential information, have economic value, and are kept confidential through appropriate efforts.²⁴ Information pertaining to trade secrets will remain confidential as long as its information is only identified by certain parties or is not

21 Moch. Marsa Taufiqurrohman et al., "The Use of Necessitas Non Habet Legem and Wederspanningheid in Law Enforcement for Covid-19 Vaccination in Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 4 (December 31, 2021): 477.

22 Moch Marsa Taufiqurrohman and Dilla Restu Jayanti, "Regulasi Regenerasi Petani Dalam Konteks Ketahanan Pangan: Sebuah Upaya Dan Jaminan Perlindungan Hak Atas Pangan" 13, no. 1 (2022): 44.

23 Sudjana Sudjana, "Progresivitas Pelindungan Terhadap Pencipta Dalam Mendorong Ekonomi Kreatif di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 13.

24 In the explanation of the ITS Law, it is stated that "with necessary efforts" are all steps that contain measures of fairness, feasibility, and propriety that must be conducted. For example, within a company, there must be standard procedures based on general practices that apply in other places and/or which are outlined in the company's internal regulations. Likewise, in the company's internal regulations, it can be determined how the Trade Secret is maintained and who is responsible for the confidentiality.

identified by general public. Information regarding trade secrets is also considered confidential if the owner or parties in control have taken appropriate and proper steps. This concept explains that a trade secret is maintained as long as the owner of a trade secret can keep the information secret, whether regarding production methods, processing methods, sales methods, or other information in the field of technology and/or business that has an economic value from being identified by the public.

This statement is also mentioned clearly in Article 3 paragraph (1) of the ITS Law:

“Trade Secret shall be given protection if the information is confidential and has economic values and the secrecy of which is maintained with necessary efforts.”

The explanation of Article 3 paragraph (1) of the ITS Law explicates the phrase “with necessary efforts” as all steps that contain measures of fairness, feasibility, and propriety that must be completed. For example, within a company, there must be standard procedures based on general practices that apply elsewhere and/or are outlined in the company’s internal regulations. Likewise, how the trade secret is maintained and who is responsible for the confidentiality can be determined in the company’s internal regulations. This provision shows an interpretation that the responsibility for the confidentiality of the trade secret belongs to its owner. It means that the protection of trade secrets can be annulled if their information is publicly available.

One of the protections of trade secrets is in the form of sanctions against any trade secret infringements. A trade secret infringement occurs when someone deliberately discloses a trade secret, or breaks the agreement or obligation, either written or not, to maintain the confidentiality of the relevant trade secret.

²⁵ This concept is in line with the doctrine of good faith in conducting an agreement. Article 1338 paragraph (1) of the Civil Code (KUHPer) stipulates:

“All legally executed agreements shall bind the individuals who have concluded them by law.”

The phrase “shall bind the individuals who have concluded them by law” can be interpreted as a binding agreement on the parties, and thus the parties must fulfill their promises. That meaning is expressed by the statement: the agreement shall bind the individuals who cover it. Just as the law regulates the rights and obligations of the general public, the agreement stipulates the rights and obligations of the parties to the agreement.

Meanwhile, the phrase “who have concluded them” refers to the parties to the agreement. If it is termed “binding by law”, it means that, just as the law binds individuals, so do agreements. The only difference is that the law regulates individuals in general, whereas the agreement regulates only the rights and obligations between the parties to the agreement.²⁶

On the other hand, the phrase “all legally executed” corresponds to Article 1320 of the Civil Code, which in doctrine is interpreted as a provision that governs the validity of an agreement. Based on that article, an agreement is valid if it satisfies the conditions stated there. The first condition is that “there must be a consent of the individuals who are bound thereby.” If this requirement is related to Article 1338, paragraph (1) of the Civil Code, then we can state that the parties to the agreement are legally bound by it. It means

²⁵ Duwi Handoko and Sekolah Tinggi Ilmu Hukum Persada Bunda, “Politik Hukum Kriminalisasi Dan Dekriminalisasi Di Bidang Hak Cipta,” *Jurnal Ilmiah Kebijakan Hukum* 13, no. 1 (2019): 4.

²⁶ Read: Article 1340 of the Civil Code.

that the parties to the agreement, who have agreed on the promises in the agreement, are obligated to fulfill them. This provision implies that the promise is legally binding.

Nevertheless, the question still arises. If the agreement not to disclose trade secrets is also part of the treaty law regime, and if its breach is also considered a breach of the agreement, then why are there criminal sanctions for it? whereas the breach of the agreement is supposed to be resolved civilly. To answer this question, it is necessary to consider the legal principle "*Lex Specialis Derogat Legi Generalis*," which states that special laws override general laws. In this case, the provisions in the Penal Code are general legal provisions, while the provisions in the ITS Law are special legal provisions. In this regard, it can be concluded that the provisions in the ITS Law override those in the Penal Code so that infringements of the trade secret disclosure agreement can be subject to criminal sanctions.

Furthermore, the ITS Law stipulates that a person is considered to have violated the trade secret of another party if he obtains or maintains the trade secret in a manner that is conflicting with the prevailing laws and regulations. These infringements can be deemed complaint offenses, as they are liable to imprisonment for a maximum of two years and/or a maximum fine of Rp.300,000,000.00.²⁷ This concept has relevance to acts involving the theft of confidential information. In Indonesia, there are currently several articles in the Penal Code concerning information that must be kept confidential, such as those contained in Articles 112, 113, 114, 115, and 116 of the Penal Code. Article 32 paragraph (2) of the ITS Bill. First, Article 112 of the Penal Code

(KUHP) states:

"Any person who deliberately either reveals or informs or smuggles into the hands of a foreign power, a king or a community, documents, news or information concerning a case of which he knows that secrecy has been ordered by the interest of the state, shall be punished by capital punishment or life imprisonment or a maximum imprisonment of seven years."

Article 113 of the Penal Code postulates:

- (1) Any person who having in his possession secret documents, maps, plans, drawings or objects relating to the defense or the external security of Indonesia or having knowledge of the content of such secret documents or of the form and the composition of such secret object, deliberately wholly or partially either reveals said documents or objects, or the content, the form or the composition thereof, or communicate them to others or smuggles them into the hands of others who are not authorized to take cognizance thereof, shall be punished by a maximum imprisonment of four years.
- (2) If said documents or objects which are in his possession or of which he has knowledge, are because of his profession, the punishment may be enhanced with one third.

Article 114 of the Penal Code:

Any person through whose negligence the secret documents or objects referred to in Article 113, with the custody or storage of which he is in charge, their form or their composition have been wholly or partially disclosed or have come into the possession or cognizance of other persons who are not authorized to have knowledge thereof, shall be punished by a maximum imprisonment of one year and six months or a maximum light imprisonment of one year or a maximum fine of three hundred Rupiahs.

²⁷ Deslaely Putranti and Dewi Analis Indriyani, "Perlindungan Indikasi Geografis Oleh Masyarakat Perlindungan Indikasi Geografis Pasca Sertifikasi Di Yogyakarta," *Jurnal Ilmiah Kebijakan Hukum* 15, no. 3 (2021): 13.

Article 115 of the Penal Code:

“Any person who wholly or partially examines or takes cognizance of secret documents of objects referred to in Article 113, of which he knows or must reasonably suspect that they are not destined to be known by him, or makes or causes to make copies or abstracts in whichever script or language, prints, portraits or imitations or does not hand the said documents or objects to an official of the justice or the police or the local government if he obtains possession thereof, shall be punished by a maximum imprisonment of three years.”

Article 116 of the Penal Code:

“The conspiracy to commit the crimes described in Articles 113 and 115 shall be punished by a maximum imprisonment of one year.”

However, the ITS Law also postulates exemptions for acts that are not considered trade secret infringements. The first of these acts is the act of disclosing trade secrets for the use of defense, security, health, or safety of the public. The second act is the reverse engineering of the product produced by the use of another person’s trade secret, and it is conducted solely for the purpose of further developing the relevant product.²⁸

Meanwhile, trade secrets can only be transferred if the owner gives the trade secret license to another party.²⁹ The owner of the trade secret may also prohibit the licensee from using or disclosing it for commercial purposes to third parties. The handover of trade secret rights is only permissible through inheritance, grants, written agreements, or other reasons justified by laws and

regulations, with the addition of documents pertaining to the transfer of rights registered with the Directorate General of Intellectual Property Rights.³⁰

Trade Secret Protection Paradox over Potential Trade Secret Disclosure

Despite the fact that the ITS Law provides rules for the protection of trade secrets in text, the law fails to meet the criteria for adequate protection in context. When examining the trade secret protection arrangements governed by Article 13 of the ITS Law, it may appear that the law only protects potential infringements from within the company/trade secret owner. It does not provide preventive measures against possible infringements by parties outside of the company/trade secret owner.³¹

Article 13 of the ITS Law states that:

“An infringement on Trade Secret takes place when a person deliberately discloses the Trade Secret or breaks the agreement, or the obligation, either written or not, to maintain the confidentiality of the relevant Trade Secret.”

If the article is examined using simple legal logic, considering the nature of trade secrets that competitors and even the public should not identify, then the phrases “discloses the Trade Secret”, “breaks the agreement”, and “the obligation, either written or not” can only be triggered by an internal party of the company/trade secret owner. It proves that this article cannot protect against potential infringements of trade secrets committed by a third party.

28 Ahmad Jazuli, “Penyelesaian Permohonan Pendaftaran Paten Dalam Rangka Peningkatan Pelayanan Publik,” *Jurnal Ilmiah Kebijakan Hukum* 12, no. 3 (2018): 21.

29 Tri Sedyaty, “Harmonisasi Prinsip-Prinsip Trips Agreement Dalam Hak Kekayaan Intelektual Dengan Kepentingan Nasional,” *Fiat Justisia Jurnal Ilmu Hukum* 8, no. 4 (2014): 595.

30 Edward James Sinaga, “Pengelolaan Royalti Atas Pengumuman Karya Cipta Lagu Dan/Atau Musik,” *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020): 24.

31 Fatimah Nurul Aini and Indirani Wauran, “Pemenuhan Prinsip Fair Use Dalam Cover Lagu Berdasar Hukum Hak Cipta Indonesia,” *Jurnal Ilmiah Kebijakan Hukum* 15, no. 1 (2021): 6.

On the other hand, Article 14 of the ITS Law declared:

“A person shall be deemed to have committed an infringement on a Trade Secret of another party if he obtains or possesses the Trade Secret in a manner that is contrary to the prevailing laws and regulations.”

Indeed, the provisions in Article 14 of the ITS Law implicitly cover the possibility of infringements committed by a third party if they are conducted in a way that is contrary to the applicable laws and regulations. However, this provision does not possess legal certainty. It is due to several exceptions outlined in Article 15 of the ITS Law.

Article 15 of the ITS Law postulates an exception for acts that are considered a trade secret infringement. These exceptions include the act of disclosing trade secrets or the reverse engineering of a product produced by the use of a trade secret of another person is conducted solely for the purpose of further developing the relevant product.

These exceptions, in particular the authorization of reverse engineering of a product produced by the use of a trade secret of another person, — as the focus of this article — show that there are gaps and potential infringements that cannot be protected by the ITS Law.

Indeed, in this case, Article 15 letter b of the ITS Law can also be interpreted as providing limitations on the permitted forms of reverse engineering. Article 15 letter b of the ITS Law explains that an act is not considered a trade secret infringement if:

“the reverse engineering of a product that is produced from the use of the Trade Secret of another person is solely conducted for the interest of making further development of relevant products.”

The phrase “is solely conducted for the interest of making further development of relevant products” does not necessarily provide a specific limitation on the required reverse engineering act. Even though the explanation of Article 15 letter b of the ITS Law on the purpose of reverse engineering is limited to the notion of reverse engineering³², the article’s explanation does not limit the extent to which reverse engineering of products from the use of another person’s trade secret can be considered legal. There are no limitations on the extent to which reverse engineering of those products can be justified and deemed legal, leaving a gap for potential trade secret infringements under the pretext of reverse engineering.

In fact, there are cases of trade secret infringements due to the absence of limitations on such reverse engineering acts. It can be seen in the case of PT. Basuki Pratama Engineering (PT. BPE) against PT. Hitachi Constructuin Machinery Indonesia (PT. HCMI). In 2008, PT Basuki Pratama Engineering filed a compensation claim through the Bekasi District Court against PT. Hitachi Constructuin Machinery Indonesia for approximately Rp.127 billion, for allegedly violating trade secrets. The lawsuit was filed due to an alleged infringement of trade secrets through unauthorized use of production methods and or methods for selling boiler machines.

PT. BPE was engaged in the manufacture of industrial machines, initially producing wood drying machines. PT. BPE claimed to be the owner of trade secrets pertaining to the production and sales methods of boiler machines in Indonesia. PT. BPE believed that its trade secrets had been disclosed by former employees who worked of PT. HCMI.

³² Elucidation of Article 15 letter b states: What is meant by “reverse engineering” is an act of analysis and evaluation to reveal information about an existing technology.

PT. BPE objected to the acts of its former employees, who produced boiler machines using the production and the boiler machine sales methods outlined in PT. BPE's blueprint without consent and rights.³³

In Case No. 280/PDT.G/2008/PN.BKS., PT. HCMI then gave a defense statement that its employees did not imitate PT. BPE's blueprint of the production and sales method of boiler machines. PT. HCMI assumed that its boiler machine was **the result of innovation** by a former PT. BPE employee. On the other hand, PT. HCMI claimed that the employee had information on boiler engine technology prior to joining PT. BPE.

Then, in Decision Number 280/PDT.G/2008/PN.BKS, the judge granted part of the lawsuit filed by PT. BPE, stating that PT. HCMI had violated trade secrets and determining PT. BPE as the owner of trade secret rights for the production and sales methods of boiler machines in Indonesia. Despite the fact that the lawsuit filed by PT. BPE was ultimately granted, this case showed that there is a high likelihood that the disclosure of trade secrets on the pretext of reverse engineering will reoccur if the ITS Law does not limit the extent to which such reverse engineering can be justified.

Furthermore, the ITS Law cannot protect against the potential theft of trade secrets by competitors engaging in economic espionage. It is evidenced by the absence of a provision in the ITS Law that protects trade secrets against potential economic espionage. In fact, economic espionage crimes are a highly serious issue for developed countries, and it is also possible for them to occur in Indonesia.

There are no provisions in the ITS Law that regulate criminal acts of theft and economic espionage related to trade secrets. In the previous ITS Bill, the economic espionage was included as a provision

requiring regulation.³⁴ Economic espionage related to trade secrets can be interpreted as an intentional infringement of trade secrets committed with the intent to benefit foreign governments and classified as an act of economic espionage.³⁵

Economic espionage can be identified by the following activities:³⁶ *First*, stealing, or taking for oneself, carrying or concealing without consent, or obtaining trade secrets through by fraud, cunning, or fraudulent means; *Second*, reproducing, **imitating**, sketching, drawing, photographing, retrieving data, inputting data, modifying, destroying, photocopying, **replicating**, **transmitting**, delivering, sending, dispatching by post, communicating, or conveying trade secrets without consent; *Third*, receiving, purchasing, or possessing trade secrets, with the intent of stealing, obtaining, or **modifying them without consent**; and, *Fourth*, trying to commit the infringement as referred to in the first to third acts.

In comparison, the theft of trade secrets in the United States is also categorized as a federal crime that meets the criteria of economic espionage. The US Economic Espionage Act was issued by President Bill Clinton on October 11, 1996. However, the ITS Law in Indonesia cannot provide protection against stolen trade secrets through economic espionage, especially if the espionage act is then re-engineered.

If we analyze it, the reverse engineering acts permitted by Article 15 of the ITS Law are the same as those internationally recognized as economic espionage. It is certainly a

33 Court Case Number 280/PDT.G/2008/PN.BKS.

34 Said Buchari, "Analisis Terhadap Putusan Mahkamah Agung Nomor 2085 Pid. Sus/2008 dalam Perkara Tindak Pidana Pencurian Rahasia Dagang" (Thesis, Universitas Pasundan, 2012), 46.

35 Edwin Fraumann, "Economic Espionage: Security Missions Redefined," *Public Administration Review* 57, no. 4 (1997): 12.

36 Mark Button, *Economic and Industrial Espionage* (Berlin: Springer, 2020), 79.

paradox showing that the ITS Law does not provide legal protection for trade secrets in Indonesia. Moreover, the drawbacks of the ITS Law, in its development, may hinder the promotion of IPR protection in Indonesia.

Evidently, there have been several cases related to the theft of trade secrets through economic espionage, followed by their reverse engineering. Among them are those related to the dispute between T-Mobile and Huawei. In early 2019, T-Mobile accused Huawei of stealing its proprietary robot technology called Tappy. This robot is used to test smartphones by imitating the movements of human fingers. Huawei is accused of stealing T-Mobile's trade secrets through paid employees who were ordered to investigate the technology as an act of economic espionage.

A similar case has also been encountered by Motorola Solutions. In early 2020, a giant communication company in China, Hytera Communications, was proven to have stolen trade secrets. Meanwhile, Motorola Solutions, as the plaintiff, received nearly US\$765 million in compensation. The dispute began on March 14, 2017, when Motorola Solutions filed a trade secret theft complaint. In its allegation, the two-way radio and repeater developed by Hytera Communications were presumed to be using Motorola Solutions' trade secrets obtained through economic espionage.

Formulation of Legal Protection of Trade Secrets in Indonesia over the Potential Disclosure of Trade Secrets through Reverse Engineering Acts

Prior to providing a formulation of trade secret legal protection in Indonesia over the potential disclosure of trade secrets through reverse engineering, it is necessary to readjust the principles of trade secret protection in Indonesia with the IPR protection principles universally.

Intellectual Property Rights are the rights arising from or born of human ability. Intellectual Property Rights are exclusive

right within the scope of technology, science, or arts and literature.³⁷ Ownership is not of the goods, but of the outcomes of human intellectual abilities and creativity, such as ideas or concepts.³⁸

In responding to the problems in this research, several IPR principles must be considered. The first is the principle of IPR ownership as an exclusive right. It means that these rights can be asserted against anyone, and those who have them can sue for infringements committed by anyone. The owner of intellectual property rights also has monopoly rights, which he can use to prevent others from making or using his invention without consent.³⁹ If it is related to the protection of trade secrets in Indonesia, in particular against permitting reverse engineering of trade secret products belonging to others, an indicator should have been established to what extent such acts can be justified so as not to conflict with the exclusive rights of the trade secret owner.⁴⁰

The second is the principle of morality. In the protection of intellectual property rights, there is a moral principle that includes intellectual honesty. It means that, when applying intellectual honesty, the safeguarding, use, and creation of intellectual property rights must not conceal the origin of intellectual works.⁴¹ Any act of disclosing trade secrets through reverse engineering would be against this principle. Moreover, the absence of an assessment indicator for reverse engineering acts renders trade secret

37 Maria Alfons, "Implementasi Hak Kekayaan Intelektual Dalam Perspektif Negara Hukum," *Jurnal Legislasi Indonesia* 14, no. 3 (2018): 301.

38 Khoirul Hidayah, *Hukum Hak Kekayaan Intelektual* (Batu: Setara Press, 2017), 34.

39 Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia* (Bandung: Mandar Maju, 2011), 39.

40 Yoyo Arifardhani, *Hukum Hak Atas Kekayaan Intelektual: Suatu Pengantar* (Jakarta: Prenada Media, 2020), 179.

41 Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia* (Bandung: Mandar Maju, 2017), 55.

protection in Indonesia incompatible with the intellectual honesty principle in IPR.⁴²

The third is the principle of economic and moral protection. The creation of intellectual works requires time, intellectual creativity, facilities, a large amount of money, and dedication. Intellectual work has a lavish economic value. Therefore, the creator or inventor must be guaranteed by law to receive economic benefits from his work. In addition, the creator or inventor is protected by moral rights, namely the right to be recognized as the creator or inventor of intellectual work.⁴³ Permission to freely re-engineer trade secrets belonging to other people will eliminate the recognition of the creator of the trade secret. Thus, the reverse engineering act that can be carried out freely is contradictory to this universally recognized IPR principle.⁴⁴

There are two formulations offered by this research for protecting trade secrets against the potential disclosure of trade secrets through reverse engineering: internal and external protection. The first is from the internal side of the trade secret owner. It is undeniable that the prevalent source of trade secret infringements occurs within company, such as employees, owners, or third parties who identify trade secrets. Given that the responsibility for protecting trade secrets lies with the trade secret owner, strict internal safeguards are required through the application of contractual principles to trade secrets.

Furthermore, it will not be a problem when the formulation is considered a technical

regulation that cannot be regulated in a law but can be regulated through derivatives. This is due to the fact that there are currently no derivatives that govern the technical provisions of the ITS Law. The technical provisions related to the contractual principles outlined in derivatives are critical, especially as a form of additional protection for trade secrets in Indonesia.

The contractual principle emphasizes the premise that the confidential nature of trade secrets must be agreed upon.⁴⁵ In accordance with the terms of the agreement, the confidentiality of the trade secret must be maintained by the party to the agreement.⁴⁶ It will compel those who maintain the confidentiality not to disclose the information. This formulation conforms with the provisions of Article 3 paragraph (1) of the ITS Law. In the article included in the explanation, it has been determined that there is an obligation for the owner of the trade secret to take "with necessary efforts." That phrase refers to all steps that contain measures of fairness, feasibility, and propriety that must be completed. For instance, a company must have standard procedures based on general practices that apply elsewhere and/or as outlined in its internal regulations. Similarly, the company's internal regulations can specify how the trade secret is maintained and who is responsible for its confidentiality.

This contractual principle is applicable if, at the time the information is received, the party that will identify the secret agrees to a number of provisions in the agreement. *Firstly*, there are requirements that explicitly oblige the parties to keep the received information

42 M. Hawin and Budi Agus Riswandi, *Isu-Isu Penting Hak Kekayaan Intelektual Di Indonesia* (Yogyakarta: UGM Press, 2020), 98.

43 Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia* (Bandung: Mandar Maju, 2017), 55.

44 Adami Chazawi, *Tindak Pidana Hak Atas Kekayaan Intelektual (HaKI): Penyerangan Terhadap Kepentingan Hukum Kepemilikan Dan Penggunaan Hak Atas Kekayaan Intelektual* (Malang: Media Nusa Creative (MNC Publishing), 2019), 44.

45 Indriyana Dwi Mustikarini, "Perlindungan Hukum Rahasia Dagang Terhadap Masyarakat Ekonomi ASEAN (MEA)," *Perspektif Hukum* 16, no. 1 (2016): 75.

46 Ghiand Carlo Legrands, "Perlindungan Hukum Bagi Pemilik Rahasia Dagang," *Lex Privatum* 1, no. 4 (2013): 19.

confidential.⁴⁷ *Secondly*, it must be implied that there is an obligation to keep the information received confidential⁴⁸. For instance, the relationship between an entrepreneur/owner of trade secrets and employees, doctors and their patients, lawyers or notaries and their clients. *Thirdly*, there is no requirement with the party with legal control over the information.⁴⁹ For example, the information may be obtained by chance or by accident or because of another relationship, or through industrial espionage, economic espionage, or computer data piracy. However, because the information occupies the same moral area as a breach of trust, based on one of the principles of the agreement, "Good Faith", the recipient of the information must still maintain its confidentiality.⁵⁰

The second formulation is that of external protection, specifically by making changes to the ITS Law. The change is made in two ways. First, a change is made to the clause in Article 15 of the ITS Law that permits the reverse engineering of products derived from trade secrets belonging to other people. The amendment to the article involves the addition of a "Good Faith" clause in conducting reverse engineering acts.

The principle of good faith has two meanings. The first interpretation is good faith in an objective sense. An act must be performed by complying with the norms of propriety and decency. It indicates that the trade secret act must be carried out without causing harm to either party.

The second interpretation is good faith in a subjective sense, or the notion of good faith

that lies in one's inner attitude.⁵¹ In this case, good faith in conducting reverse engineering must comply with the principle of intellectual honesty. It means that the use and creation of intellectual property rights must not conceal the origin of the intellectual works.

The second change is providing provisions that explicitly specify any acts deemed to be contrary to the prevailing laws and regulations based on Article 14 of the ITS Law. These acts include theft of trade secrets, reverse engineering without good faith, or economic espionage.

CONCLUSION AND RECOMMENDATION

Conclusion

There is no limitation to the extent to which reverse engineering of products resulting from the use of the Trade Secret of another person is justified by the ITS Law. This fact triggered a number of problems. The lack of these limitations on the extent to which reverse engineering of products resulting from the use of the Trade Secret of another person can be justified and said to be legal created a potential gap for the disclosure of trade secrets under the pretext of reverse engineering.

There are two ways to improve the legal protection of trade secrets in Indonesia internally and externally. First, internally, the protection can be done by applying contractual principles. The second effort is the formulation of external protection, specifically by modifying the ITS Law. The change is made

47 Chandrika, "Perlindungan Hukum Perjanjian Lisensi Rahasia Dagang di Indonesia." *Jurnal Hukum Bisnis Bonum Commune* 2, no. 1 (2019): 13"

48 Ibid.

49 Ibid.

50 Putri Ari Safitri and Ni Luh Gede Astariyani, "Pembatalan Merek Oleh Pihak Yang Tidak Berhak: Kajian Itikad Baik," *Kertha Wicara: Journal Ilmu Hukum* 8, no. 9 (2019): 1.

51 Amila Desiani, Muhamad Amirulloh, and Agus Suwandono, "Implementasi Asas Itikad Baik Dalam Perlindungan Konsumen Atas Pembatalan Transaksi Yang Dilakukan Oleh Situs Belanja Elektronik," *ACTA DIURNAL Jurnal Ilmu Hukum Kenotariatan* 2, no. 1 (2018): 56.

in two ways. First, change is made by limiting the act of reverse engineering products produced from trade secrets belonging to other people based on Article 15 of the ITS Law. It is done by adding a “Good Faith” clause in the reverse engineering act. The second change is providing provisions that specify explicitly any conduct deemed to be contrary to the prevailing laws and regulations based on Article 14 of the ITS Law.

Recommendation

Several recommendations are required to enhance the legal protection of trade secrets to their maximum extent. The following recommendations are: First, clarify the status of protection against the potential disclosure of trade secrets in the revision of the ITS Law. Second, establish operational regulations in derivatives as part of the implementation of the revised ITS Law. Third, conduct further research to fortify the argument regarding the protection of trade secrets from the potential disclosure in the future.

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