

DISTRIBUTION OF INTELLECTUAL PROPERTY RIGHTS AS JOINT PROPERTY IN DIVORCE: A SOCIO-LEGAL STUDY

Anis Mashdurohatun¹ and Jamadi Suparman²

¹Doctorate Student of Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

²Doctoral Program Students Unissula Faculty of Law, Indonesia

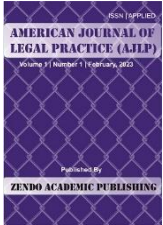
Abstract: This study examines the distribution of intellectual property rights (IPR) as joint property in divorce and aims to provide guidelines on how to distribute IPR equitably. The research method used in this study is socio-legal research, which involves primary and secondary data collection techniques such as library research and field studies analytical descriptive data analysis. The study finds that economic value obtained from all types of IPR registered during marriage becomes joint property of husband and wife, and the distribution after the marriage breaks up each gets half as long as both parties carry out their responsibilities, roles and duties properly. However, if one party is unable to carry out their responsibilities, then the distribution is in accordance with the size of their contribution in the household and the process of creating/discovering IPR. The distribution must be recorded at the Directorate General of Intellectual Property Rights. The study also highlights the need to increase knowledge and understanding of law enforcement in the field of intellectual property rights through formal education, training, certification, seminars, workshops, library access, field practice and other means. Furthermore, it emphasizes the importance of legal education, both formal and non-formal, to increase public knowledge and understanding of IPR.

Keywords: Intellectual Property Rights, Joint Property, Divorce, Distribution, Socio-Legal Research

A. INTRODUCTION

IPR as joint property is not regulated normatively in the laws and regulations governing IPR and only refers to the formulation of the concept of joint property which is regulated in general in Article 35-37 of Law Number 1 of 1974 concerning Marriage, Article 85-97 Compilation Islamic Law, and Articles 119-138 of the Civil Code (except for provisions that are declared invalid after the enactment of Law Number 1 of 1974 concerning Marriage), then normatively there is a vagueness of norms regarding IPR as joint property because in the normative formulation of joint property itself there is also still very general, incomplete and not yet adequate to respond to changes and developments in social, political, cultural, economic and technological. This obscurity of norms in practice creates many new legal problems that previously did not exist because IPR itself is a type of "new right" in property law.

One example of this problem in Indonesia is the case of a husband and wife owner of a restaurant with the registered brand "Ayam Goreng Ny. Suharti" on behalf of the husband with the logo of a picture of two chickens facing the letter S in the middle and under the picture the words "NY SUHARTI". In this case, what becomes their joint property is the right to the mark, where after the divorce, the husband and wife were decided by the court to use the same mark, namely "Ayam Goreng Ny.Suharti" for their fried chicken



restaurant business [1]. On the way, as in an interview with Tempo Magazine, Suharti once said that although both of them were given the right to use the brand, because the brand and as the official owner of the business were registered in the name of her ex-husband, her ex-husband succeeded in acquiring all the "Ayam Goreng" restaurants. Ny. Suharti" said. So Suharti, who lost all of her business, re-established her own restaurant and still has the same name "Fried Chicken Ny. Suharti" but with a different logo, namely a picture of a woman wearing a traditional Javanese dress, which is none other than Suharti's own portrait and under the picture is written "SUHARTI fried chicken" [2].

Learning from the case above, it turns out that the sharing of joint assets in the form of each file husband and wife are allowed to use the mark on the trademark rights registered at the Directorate General of Intellectual Property Rights on behalf of the husband has harmed the wife because in the IPR regime it includes trademarks. The owner of the mark has the right to prohibit anyone from using the same mark as his registered mark for the same class and type of goods/services. So that with a registered mark, the use of the mark gets legal protection because only the owner of the registered mark has the right to give permission for the use of the mark. The first to file principle adopted in the Mark protection system in Indonesia makes anyone - both an individual and a legal entity - who first registers a mark for a certain class and type of goods/services, is considered the owner of the right to the mark in question for the class and type of goods/services those services [3]. Thus in the case above, although the wife is allowed to use the brand, but because the brand is in the husband's name, the husband can acquire the restaurant, so that the wife does not get anything. From the facts on the ground in this case, it turns out that the distribution of joint property with IPR in the form of joint use of the IPR, even though the IPR is registered only by one of the husband/wife, has created another problem. This is the first problem.

Second problem in the laws and regulations, the IPR regime stipulates that IPR consists of moral rights and economic rights [4]. Moral rights are rights that are eternally attached to the Creator/inventor/inventor [5]. Meanwhile, economic rights are the exclusive rights of the

Creator/Inventor/Inventor or Intellectual Property Rights Holder to obtain economic benefits from the creation or invention [6]. As an exclusive right, IPR economic rights can be transferred by the Creator/Inventor/Inventor or Rights Holder to individuals or to legal entities. The rights that can be transferred or transferred are only economic rights, while moral rights remain attached to the

Creator/Inventor/Inventor. The transfer of rights to IPR must be carried out in a notarial (authentic) deed [7]. If this provision is related to the reality of the case above, then it is natural for the wife to be in an unfavorable position by means of the distribution as above because basically the Moral Rights which are in the name of the husband according to legal provisions cannot be transferred; only economic rights can be

¹ http://www.hukumonline.com/klinik/detail/lt5371e6d6_9a222/hak-kekayaan-intelektual-sebagai-harta-gonogini accessed on 15 December 2017

² <http://bisnis.liputan6.com/read/752879/lika-liku-dualogo-ayam-goreng-nysuharti> accessed on 15 December 2017

³ Titie Rachmiati Poetri, *Penyelesaian Pembagian Hak Cipta dan Hak Atas Merek Sebagai Harta Bersama Dalam Perceraian Islam*, LEX Renaissance NO. 2 VOL. 5 APRIL 2020, page. 350

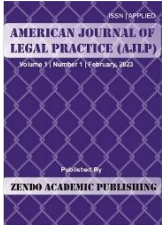
⁴ For example, for Copyright it is stated in Article 19 of the Copyright Law

⁵ Article 5 paragraph 1 of the Copyright Law

⁶ Article 8 Copyright Law

⁷ Elucidation of Article 74 paragraph (1) of the Patent

Law



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

transferred. or in simple terms, only the economic value obtained from the IPR such as royalties that can be transferred or divided while the moral rights remain attached to the inventor/creator registered with the Directorate General of Intellectual Property Rights.

From these two problems, the distribution of joint property in the form of IPR is not as easy as dividing joint property in the form of tangible goods, therefore to find the right concept for the distribution of joint property in the form of IPR requires further research and this will be the object of research in this study.

As for an example of an international case that occurred in the United States, namely a dispute between Michael Douglas and his wife named Diandra Douglas regarding the distribution of royalties on the copyright of the film Wall Street: Money Never Sleeps which has lasted for 14 years [8]. Diandra and Michael Douglas met at President Jimmy Carter's inauguration party in 1977, and married six weeks later. Diandra filed for divorce against Douglas in 1997, and it was settled in 2000 in a California Court. He received an estimated \$45 million settlement, in addition to homes in Beverly Hills and Majorca [9]. In their divorce settlement in 2000 there was an agreement made in 1998, among which Diandra got a 50% share of every money made from the film starring Douglas that was made during their two decades of marriage [10]. One of the films ever starring Douglas is the film Wall Street. Please note the film "Wall Street" was made twice. The first directed by Oliver Stone and starring Douglas with Charlie Sheen and Daryl Hannah, was released in 1987. The second, a sequel to the Wall Street film entitled "Wall Street: Money Never Sleeps." which was released in September 2010, and has grossed over \$100 million worldwide [9].

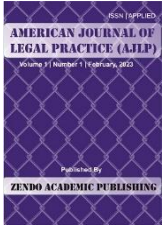
Diandra filed a lawsuit against Douglas in the New York Court for the second Wall Street film, arguing that at the time of the divorce in 2000 it was agreed that she would receive 50% of the copyright royalties on all copyright royalties for films starring Douglas during the interim marriage of the film "Wall". Street: Money Never Sleeps" is a spin-off of the first Wall Street film and the first Wall Street film was made when Diandra and Douglas were still married so that based on the divorce agreement he should have received 50% of the film's royalties. Meanwhile, Douglas denied Diandra's claim with the argument that the second Wall Street film was only a sequel to the first Wall Street, not a spin-off so that the copyright was different from the first Wall Street so that Diandra was not entitled to a 50% share of the royalties from the second Wall Street copyright [12]. By the New York Court, Diandra's lawsuit was declared unacceptable (*niet ontvankelijke verklaard*) with the consideration that Diandra's lawsuit was formally flawed in relation to relative authority so that the New York Court declared that it was not authorized to hear the case California Court [10]. The court's decision basically has not considered the material (substance) of the lawsuit, whether Diandra has the right to get 50% of the copyright royalties for the second Wall Street film or not, because the Court only considers the issue of relative authority to adjudicate not yet included in the main case.

The case above shows that royalties from copyright in the name of one of the spouses, in this case the husband, are joint property of husband and wife, as long as it was created during the marriage and the husband and wife agreed to share each half in accordance with the agreement at the time of divorce. The problem for the husband and wife is whether the royalties from the copyright will still become joint property if the royalties

⁸ <https://www.hukumonline.com/klinik/a/hak-kekayaanintelektual-sebagai-harta-gono-gini-lt5371e6d69a222> ⁹ <https://news.lalate.com/2010/11/16/diandra-douglaswall-street-spin-off-lawsuit-dismissed/> ¹⁰ <https://www.ibtimes.com/ex-wife-michael-douglas-fails-get-her-hands-wall-street-money-never-sleeps-profits-247376>

⁹ <https://www.today.com/popculture/judge-nixesdouglas-exs-wall-street-lawsuit-1C9494956> ¹² <https://www.ibtimes.com/ex-wife-michael-douglas-fails-get-her-hands-wall-street-money-never-sleeps-profits-247376>

¹⁰ <https://www.today.com/popculture/judge-nixesdouglas-exs-wall-street-lawsuit-1C9494956>



are obtained after a divorce (dissolution of marriage) even though the copyright was created during the marriage? This is certainly one of the new problems that arise regarding IPR as joint property.

To get the answer, of course, further research is needed and this will be the object of research in this study.

The case above shows that IPR as joint property still leaves its own legal problems that require a fair legal solution, including the method of distribution. All of this happens because the legal norms of IPR as joint property are still unclear because it only refers normatively to the concept of joint property whose norms are still very general and abstract which has the potential to be interpreted with multiple interpretations, while IPR itself is a right, both moral rights and economic rights, which Normatively, most of them have only received recognition and protection by the state in the last two decades after the ratification of the GATT (General Agreement on Tariffs and Trade) and TRIPS (Trade-Related Aspects of Intellectual Property Rights) [¹¹] as stated in Law Number 7 of 1994 concerning Ratification of the Agreement establishing the World Trade Organization.

In legal field practice, dividing IPR as joint property is not as easy and simple as dividing joint assets in the form of tangible (material) assets such as land, cars, houses and others, because HKI is rights in the form of intangible objects (intangible property) related to with recognition from the state through registration, protection period, recording, moral rights, economic rights, royalties, licenses and other matters that regulate IPR. This of course needs a fair legal solution for husband and wife that is in accordance with the characteristics of IPR which is certainly different from other property, even to more technical matters, such as the procedure for distribution after the breakup of a husband and wife marriage in order to be able to become a comprehensive solution, holistic and fair for husband and wife.

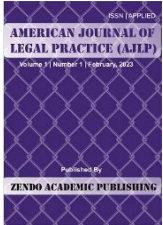
Meanwhile, the way in which IPR is distributed also requires its own legal solution. The method of distribution includes at least two things, namely first, the percentage of the share of each husband and wife, and second, the technical distribution.

First, it is related to the percentage of the share of each husband and wife after their marriage breaks up, which is more related to the role of each husband and wife in the formation of joint property in general and their role in the household. Normatively, this is related to Article 37 of Law Number 1 of 1974 concerning Marriage which states that if a marriage breaks up, joint assets are regulated according to their respective laws. In his explanation what is meant by "the law" is respectively religious law, customary law and other laws. For Muslims, it is divided according to Islamic law which has been normalized into positive law through article 96 paragraph (1) and 97 of the Compilation of Islamic Law where each husband and wife gets half of the joint property. Certain indigenous peoples can use customary law that applies in their respective regions, for example in some areas of Central Java it is customary to divide property together with husbands getting two-thirds and wives one-third based on the principle of "sakupul sakgendong". This distribution procedure is also known on the island of Bali based on the principle of "sasuhun-sarembat." Likewise in the Banggai islands, there is the *dua pertiga-sepertiga* (two-thirds-third principle) [¹²]. Meanwhile, non-Muslims and those who do not use customary law can use Article 128 of the Civil Code, each husband and wife gets one-half.

If you want to get a fair distribution solution, the normatively regulated distribution needs to be reviewed with a philosophical, sociological and normative approach because these norms first arose from

¹¹ Dalam sidang di Puntadel Este, Uruguay, tahun 1986. Lihat: Mahkamah Agung RI, *Gatt, Trips, dan Hak Atas Kekayaan Itektual (HKI)*, (Jakarta: Mahkamah Agung RI, 1996), page. 4.

¹² Muhamad Isna Wahyudi, *Pembaharuan Hukum Perdata Islam : Pendekatan dan Penerapan* (Bandung: Bandar Maju, 2014), page. 81.



social construction in the household with a standard role where the husband as the breadwinner and the wife as a housewife took care of all household matters, while the social construction is slowly starting to change. Therefore, if the fact is that the standard role has changed, it is necessary to construct a new law that is more equitable for each husband and wife according to the size of their respective roles.

If the above concept is applied in the context of the concept of dividing IPR as joint property, then it must be seen that the role of husband and wife in the formation of the IPR, who is the inventor/holder of the IPR? and how big the partner's role in the discovery, both material and non-material roles such as energy, support, and sacrifice of their rights were not fulfilled by the couple. For example, the IPR is discovered by the husband so that the husband is the holder of the IPR. Even though the inventor and holder of the IPR is the husband, in the distribution, it must be seen where the funds come from, whether the wife also helps in the form of funds and personal energy, the extent of the wife's support in the discovery, the extent to which the wife takes care of the household and children while the husband works until produce the IPR. For the sake of justice, all of these things must be used as instruments to conceptualize the division of IPR as joint property.

Second, the technical division related to the specifics and characteristics of IPRs that have been regulated in the laws and regulations concerning IPRs, such as those related to ownership of IPRs belonging to business entities or individuals; legality of IPR registration; IPR protection period; regarding royalties that have been, are currently and will be running; license agreements with third parties; how to calculate the resulting economic value; when the IPR is protected and has economic value: before, during or after the marriage; and there are many other things that must be considered so that the legal solution can truly be a comprehensive, holistic and fair solution for husband and wife if their marriage breaks up [13].

B. RESEARCH METHOD

C. RESEARCH RESULTS AND DISCUSSION

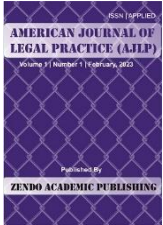
A. Developing Intellectual Property Rights as Shared Assets After Judicial Decisions Based on Justice Through Legal Culture

As described in the previous chapter, the researcher concludes that a culture of society that does not yet have full awareness of the importance of knowledge and understanding related to IPR will lead to weaknesses in society, including:

1. Community rights related to IPR cannot be obtained at all or less than they should be.
2. The culture of Indonesian society that adheres to communal and spiritual values is increasingly unable to influence the IPR culture which prioritizes individualism and materialism, but on the contrary it is the IPR values that will erode the values in the culture of Indonesian society.

In order for the culture of the IPR regime to accommodate the culture of the Indonesian people, the researcher agrees with Prof. Anis Mashdurohatun, namely through legal education, especially related to IPR as joint property [17]. Naturally, the function of education [18] is to empower humans not only to become supporters of the prevailing value system but even more so to process it according to the demands of the times, even to become one of the social forces that contribute to giving shape, style, and direction to people's lives

¹³ <http://www.hukumonline.com/klinik/detail/lt5371e6d69a222/hak-kekayaan-intelektual-sebagai-harta-gonogini> accessed on 15 December 2017 ¹⁷ Delivered in the Professor's Inauguration Speech, Prof. Dr. Hj. Anis Mashdurohatun, SH.,M.Hum Presented at the Open Senate Meeting of Sultan Agung Islamic University Semarang on October 15, 2020 ¹⁸ Education is a conscious and planned effort to create a learning atmosphere and learning process so that students actively develop their potential to have religious spiritual strength, self-control, personality, intelligence, noble character, and skills needed by themselves, society, nation and state. Article 1 number 1 of Law Number 20 of 2003 concerning the National Education System.



in the future. Education [¹⁴] is a teaching and learning process that familiarizes people as early as possible to explore, recognize, understand, realize, appreciate, and practice the values that are mutually agreed upon as commendable, desirable and useful for the life and development of personal self, society, state and nation. Meanwhile, the education system in Indonesia has so far ignored matters relating to cultural values, nobility of character, because these values are considered given, have been alive and entrenched in Indonesian society since the time of their ancestors. Therefore, it is considered redundant if it is included in the education system, allowing students to learn from the community or their parents [²⁰].

Education is a cultural subsystem that has a strategic role in utilizing human potential to become better, more mature, intact, and productive. Education is not only prepared for the development of human potential, but also anticipates the adverse effects of the tendency to develop human culture [²¹].

Adi Sulistiyono [²²] explained that if people still want the nobility of cultural values to continue to live in society from generation to generation, every level of society must continue to fight for every aspect of life, without it, a cultural value that is considered noble by the community will die. Thus, education must shape the hearts and feelings of students because the problem of values, identity, egalitarian attitude, forgiveness, and trusting others is primarily a matter of the heart, a matter of affection, and not merely a matter of knowledge. For this reason, schools must also teach children to build trust between themselves, control themselves, teach children to admit mistakes and get used to apologizing, keep children away from revenge, teach children to stay away from violence, keep promises (commitments), stay away from pride, and demeaning others. Based on this, schools must carry out cognitive, affective, and conative coaching behavior under penalty of fines; (2) regulations that oblige people to compensate people they have injured in certain ways; (3) rules that specify what must be done to create a will, contract or other arrangement that gives rights and creates obligations; (4) the court must determine what the rules are and when they are violated, and to determine the penalty or compensation to be paid; (5) the legislature must make new regulations and abolish the old ones. See H.L.A.Hart, *Konsep Hukum*, Cintya Press, Jakarta, 2011, hlm. 3-4 dengan judul asli *Concept of Law*, Penerjemah: Mohammad Nashihan dan Ronny F. Sompie.

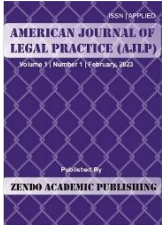
As mentioned above, that education is a cultural subsystem that has a strategic role in utilizing human potential to become better, mature, intact, and productive. Education is not only prepared for the development of human potential, but also anticipates the adverse effects of the tendency to develop human culture [¹⁵]. In order to be able to develop IPR as a common property in accordance with the culture of the Indonesian people, there should be legal education related to IPR as a joint property to the community either through formal or non-formal education so that the legal culture of IPR in Indonesia is in accordance with the cultural values of the Indonesian people.

B. Developing Ways of Distributing Intellectual Property Rights as Joint Assets After Dissolution of Marriage Based on Justice Values

In order to find the concept of how to divide joint property in the form of IPR after divorce based on the value of justice, the researchers analyzed it using a normative legal approach, jurisprudence and court decisions, legal theory namely Distributive Justice Theory and Syirkah Abdan/A'mal and Syirkah Mufawadhah, the judge's opinion through survey data results, and comparisons with other countries.

¹⁴ Any educated person can be expected to be able to identify salient traits in some of the following framework ways. These characteristics consist of: (1) regulations that prohibit or command certain types of

¹⁵ See Ine Kusuma Aryani, *Pendidikan Kewarganegaraan Berbasis Nilai*, Ghalia Indonesia, Jakarta, 2010, page. 4.



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

Normatively, in accordance with the distribution of joint assets after the marriage is broken up, it is regulated in Article 37 of Law Number 1 of 1974 concerning Marriage which states that if the marriage breaks up, the joint property is regulated according to their respective laws. In his explanation what is meant by "the law" is respectively religious law, customary law and other laws. For Muslims, it is divided according to Islamic law which has been normalized into positive law through article 96 paragraphs (1) and 97 of the Compilation of Islamic Law where each husband and wife gets half of the joint property. Certain indigenous peoples can use customary law that applies in their respective regions, for example in some areas of Central Java it is customary to divide property together with husbands getting two-thirds and wives one-third based on the principle of "*sakpikul sakgendong*". This distribution procedure is also known on the island of Bali based on the principle of "*sasuhunsarembat*." Likewise in the Banggai islands, there is *dua sepertiga-sepertiga* (the two-thirds-third principle) [16]. Meanwhile, non-Muslims and those who do not use customary law can use Article 128 of the Civil Code, each husband and wife gets one-half.

From the description above, it can be concluded that the distribution of joint assets after the divorce according to normative law is to get half or half of each. However, in practice in court, the normative provisions are not implemented by judges in all decisions. In several decisions, due to certain considerations, the judge handed down the decision on the distribution of joint assets with the distribution of each ex-husband and wife not being normative by half/half, but varied: 60:40, 1/3:4/3, 1/4:3/4, and others with various considerations. These decisions are based on the Jurisprudence of the Supreme Court of the Republic of Indonesia Number 266 K/Ag/2010 dated July 12, 2010, which is also included in the Landmark Decision of 2011, which contains the rule of law: "The wife gets (three quarters) of joint property because joint property is produced by the wife and husband do not provide for the children and wife for 11 years" [17].

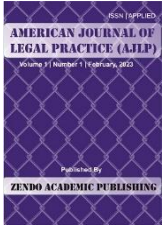
This jurisprudence, in principle, strengthens the percentage of shared assets with the Appeal Decision of the Yogyakarta Religious High Court Number 34/Pdt.G/2009/PA.Yk dated 19 November 2009 and the First Level Decision of the Bantul Religious Court Number 229/Pdt.G/2009/PA.Btl dated August 20, 2009. Since the decision of the first instance, appeal to cassation, in the verdict, the distribution of joint property has been consistent with for the wife and for the husband, unchanged.

This jurisprudence in the development of the following years, was widely used as a legal basis in the consideration of court decisions at the first level and appeals, although the division was not the same as that of the jurisprudence. The jurisprudence is explicitly understood by the judges that the percentage of the distribution of joint property between husband and wife may deviate from the normative provisions, namely that each husband and wife is half, if any of the husband/wife does not carry out their responsibilities, obligations and duties properly, then the percentage of the distribution is depending on how much they carry out their responsibilities and how big their contribution is in the formation of joint assets, there is no definite percentage, depending on the judge's consideration on a case-by-case basis in order to achieve justice. This can be seen from the results of Nurul Hak's [18] research on the Bengkulu Religious Court's decisions regarding the distribution of joint assets after divorce for wives who have careers. The results of this study indicate that

¹⁶ Muhamad Isna Wahyudi, *Pembaharuan Hukum Perdata Islam : Pendekatan dan Penerapan* (Bandung: Bandar Maju, 2014), page. 81.

¹⁷ Landmark Decision of the Supreme Court of the Republic of Indonesia 2011, Jakarta: Supreme Court of the Republic of Indonesia, 2011, p. 297

¹⁸ IAIN Bengkulu Lecturer



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

the consideration of the Bengkulu Religious Court judges in deciding the case for the distribution of joint property for wives with careers, the majority of the decisions are based on the provisions of the Islamic Law Compilation (normative with half each), some judges explore other legal sources as required by Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power and the principle of *ius novita novit*, in deciding the case for the distribution of joint assets of the Bengkulu Religious Court judges on a case-by-case basis (with a variable percentage instead of 50:50) [¹⁹].

In several decisions of the Religious Courts, it was found that the judges of the Religious Courts in dividing joint assets accompanied the existing laws and regulations, so that the judges did not use the normative law as a basis for consideration or even contradicted the articles of the law as long as the articles of the law were no longer in accordance with developments and a sense of community justice (*contra legem*), among the decisions that can be sampled are as follows:

1. The decision of the Earth City Religious Court Number 387/Pdt.G/2016/PA.Ktbm dated April 5, 2017, handed down a decision with the distribution of joint assets of 40% for the wife and 60% for the husband.
2. The decision of the Masamba Religious Court Number 299/Pdt.G/2017/PA.Msb dated October 17, 2017, handed down a decision with the distribution of joint assets of 1/3 for the wife and 2/3 for the husband
3. The decision of the Bukit Tinggi Religious Court Number 618/Pdt.G/2012/PA.Bkt, issued a decision with the distribution of joint assets of 2/3 for the wife and 1/3 for the husband.

Of the three decisions above, in principle in their consideration are couples who cannot carry out their responsibilities, obligations and duties in the family properly in accordance with the provisions of religious law, state and local culture (which do not conflict with religion and the state) and/or their contribution. Smaller in support and formation of common property, gets a smaller share.

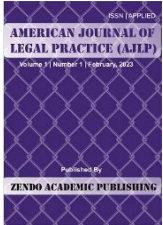
The concept of the division of joint property based on contributions in marriage provides space for judges to explore the values of justice in society and make decisions that reflect the values of substantive justice which is one of the constitutional messages in upholding the principle of justice in the judicial process. Judges are not only "*la bouche de la loi*" (the mouthpiece of the law), the judge must dig with his mind to find the law in handling the cases he handles, so that he can decide with a fair decision. More concretely, this is manifested in court decisions which read: "For Justice Based on God values" not "For Legal Certainty Based on Prevailing Laws" [²⁰²¹].

The division of joint property by considering the portion of the contribution of husband and wife in domestic life in accordance with their obligations and their contribution in the formation of joint property is inherent with distributive justice, namely a justice that demands that everyone get what is their right by looking at the portion of their respective achievements. Justice that demands that each party get what is their right

¹⁹ Nurul Hak, *Pembagian Harta Bersama Pasca Perceraian Bagi Isteri Yang Berkarier (Studi Terhadap Putusan Pengadilan Agama Bengkulu)*, QIYAS Vol. 2, No. 2, October 2017, page. 165

²⁰ M. Beni Kurniawan, *Pembagian Harta Bersama Ditinjau Dari Besaran Kontribusi Suami Istri Dalam Perkawinan (Kajian Putusan Nomor*

²¹ /PDT.G/2012/PA.Bkt), Judicial Journal Vol. 11 No. April 1 2018, p. 50-51



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

proportionally. Justice that shares rights and obligations fairly and proportionally according to the role of each husband and wife in the household [²²].

In addition, the distribution of joint assets in the form of post-marital IPR based on the value of justice, can be analyzed using the Syirkah Abdan/A'mal theory and Syirkah Mufawadhah.

Syirkah Abdan/A'mal is a form of business cooperation between two or more parties, each of which only contributes work (charity), or in the form of expertise, be it physical or intellectual, without capital contributions (mal). Examples are mental work (such as scriptwriters) or physical labor (such as masons). This type of syirkah does not require the same profession so as to allow cooperation between the party who contributes his mental work and the other party whose physical work [²³].

Meanwhile, Syirkah Mufawadhah is a form of business cooperation where each party (syarik) involved in the contract agrees to issue the same capital provided that profits and losses are also divided equally. They also bear the *kafalah* and *wakalah* equally [³¹]. The marriage contract is basically a cooperation contract between husband and wife in carrying out the joint responsibility of running a household in which there are rights and obligations. Charity work in marital life is the obligation of husband and wife in managing the household with different duties and responsibilities as regulated in marriage/household law. The result of this collaboration, as long as each husband and wife carry out their obligations according to their duties properly, the results of the husband and wife become the result so that the husband and wife marriage contract can be categorized as Syirkah Abdan / A'mal.

The duties and responsibilities of the wife in forming a household are actually the same, that is, they both have an interest in managing and running the household well, only with different roles, but the same responsibilities. Therefore, if each husband and wife carry out their responsibilities properly in accordance with their respective roles and duties, if the household gets results in the form of assets including IPR as a form of this type of property, then each of them gets an equal share. equally i.e. one-half each. This can actually be categorized as Syirkah Mufawadhah. Thus, if each husband and wife carry out their responsibilities, roles and duties properly, if one of the husband/wife creates/invents a type of intellectual property rights and obtains economic rights from the intellectual property rights, the economic rights of the intellectual property rights are divided in half, each receiving one-half. . However, if one of the husband/wife does not or does not carry out their responsibilities, roles and duties properly and on the one hand their partner carries out more than their proper responsibilities, roles and duties, then the husband/wife who does not carry out their responsibilities, roles and duties properly will have should get a smaller percentage in proportion to their contribution to the household/establishment of the IPR and conversely the spouse who carries out more than the responsibilities, roles and duties that should get a smaller percentage in proportion to his contribution in the household/establishment of the IPR.

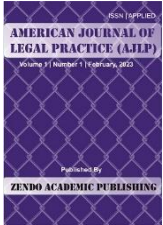
D. CONCLUSION

Developing IPR as a common property based on the value of justice can be done through the substance, structure, and legal culture. In general, all types of IPRs, namely Copyrights, Trademarks, Plant Variety Protection, Trade Secrets, Industrial Designs and Layout Designs of Integrated Circuits can become joint

²² Zakki Adhliyati, Achmad, *Melacak Keadilan dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, dan John Rawls*, Undang:

Journal of Law, Vol. 2, No. 2 (2019), p. 417-418

²³ Wahbah al-Zuhaili, *Op.Cit.*, 3876-3877 ³¹ Ibid.



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

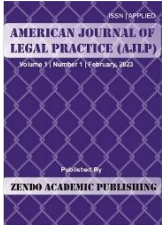
14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

assets of husband and wife because they can be categorized as one of the types of property as referred to in Article 91 paragraph (1) and paragraph (3) Compilation of Islamic Law (KHI), namely joint property in the form of intangible objects (*onlichamelijke zaken*/immaterial/intangible property in the form of rights. In more detail whether the Economic Rights of Intellectual Property Rights are joint assets or not, if it is related to the time of creation/discovery, its registration and acquisition, while the percentage distribution of joint assets in the form of post-marriage IPR based on the value of justice is that each husband and wife gets one-half if the IPR is in the name of the husband/wife and the husband/wife carries out their responsibilities, roles and duties properly as head/wife. housewives, but if the IPR is in the name of the husband/wife and spouse, it is not enough If they are able to carry out their responsibilities, roles and duties well in the household, the percentage distribution can be based on consideration of the magnitude of the role and contribution of each husband/wife in the household and the magnitude of the role and contribution of each husband/wife in the creation/discovery of intellectual property rights. The principle of proportionality) are considered together. Husband/wife who does not or does not carry out their responsibilities, roles and duties well in the household so that their role and contribution in the creation/discovery of IPR is also less, it will get a smaller percentage and vice versa husband/wife who has carried out their responsibilities, roles and duties more than it should be in the household so that its role and contribution in the creation/discovery of IPR is also greater, so it will get a higher percentage. The results of the distribution of joint assets in the form of IPR contained in a decision or agreement in front of an authorized official must be recorded at the Directorate General of IPR, because the transfer of IPR Economic Rights will only have legal consequences for third parties after being registered/registered at the Directorate General of IPR, this is in accordance with the provisions of Article 3 Law Number 13 of 2016 concerning Patents, Article 41 of Law Number 20 of 2016 concerning Marks and Geographical Indications, Article 69 paragraphs 4 and 76 of Law Number 28 of 2014 concerning Copyright, Article 40 paragraphs 3 and 4 of the Law Law Number 29 of 2000 concerning Protection of Plant Varieties, Article 5 paragraphs 3 and 4 of Law Number 30 of 2000 concerning Trade Secrets, Article 31 paragraphs 3 and 4 of Law Number 31 of 2000 concerning Industrial Design, and Article 23 paragraph 3 and 4 Law Number 32 of 2000 concerning Layout Design of Integrated Circuits. Legal Structure Side, Increasing knowledge, understanding and experience of law enforcement in the field of intellectual property rights through formal education, training, certification, seminars, workshops, library access, field practice and other means. In terms of legal culture, increasing knowledge and understanding of the community in the field of intellectual property rights through legal education, both formal and non-formal.

REFERENCES

- Gowers. (2006). *Gowers Review of Intellectual Property*, (Norwich: Her Majesty's Stationary Office).
- Khisni. (2017). *Perkembangan Hukum Islam (Ikhtiyar Pendidikan Doktor Membekali Calon Mujtahid Menggali Maqashid Syariah Untuk Mewujudkan Hukum Islam Yang Konstekstual* (Semarang: UNISSULA Press).
- Schwabach. (2007). *Intellectual Property*, (California: ABC-CLIO, Inc.,).
- Abdul, K. M. (2007). *Kajian Hukum Ekonomi Hak Kekayaan Intelektual*, (Bandung: Citra Aditya Bakti, cet.II,).
- Abdul, M. (2012). *Aneka Masalah Hukum Perdata Islam di Indonesia* (Jakarta: Kencana).
- Abdul, M. (2008). *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, (Jakarta: Kencana).



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

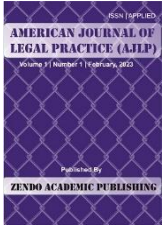
Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

- Abu Ishaq, al-S. (2003). *al-Muwafaqat* (Kairo: alMaktabah al-Taufiqiyah) vol. II.
- Achmad, A. (1996). *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)* (Jakarta:Chandra Pratama).
- Achmad, A. (2015). *Menguak Tabir Hukum*, Edisi Kedua, (Jakarta: Kencana).
- Achmad, A. (2009). *Menguak Teori Hukum dan Teori Peradilan* (Jakarta: Kencana).
- Adi, S. (2017). “*Membangun Kolaborasi Hukum HKI dan Ekonomi Kreatif Di Era Globalisasi*” Seminar Internasional Dan Call Paper Symphonizing Intellectual Property For Public Welfare, Kerjasama Universitas Mataram Dan Asosiasi Pengajar Hukum Kekayaan Intelektual (Aphki) Lombok, 20-23 Agustus 2017. Product capabilities dynamic on industrial design carved wood in small and medium enterprises (SMES). *International Journal of Applied Engineering Research*, 12, 89.
- Afrillyanna, P. (2005). *TRIPs-WTO dan Hukum HKI Indonesia Kajian Perlindungan Hak Cipta Seni Batik Tradisional Indonesia* (Jakarta: Asdi Mahasatya).
- Ahamad, R. (2010). *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*, (Jakarta: Sinar Grafika).
- Ahmad, M. R. (2015). (Direktur Jenderal Kekayaan Intelektual Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum dan Ham RI), *Perkembangan Kekayaan Intelektual Secara Nasional Dan Global* (Dipresentasikan pada Seminar Nasional Hak Kekayaan Intelektual Sebagai Objek Wakaf Fakultas Hukum Universitas Islam Indonesia, Yogyakarta tanggal).
- Al-Baihaqi. (2013). *Al-Sunan al-Kubra*, Dar alKutub al-,Ilmiyah, Beirut, Juz 10, Hadits No. 20537.
- Andi Ayyub, S. (2006). *Tamasya Perenungan Hukum dalam “Law in Book and Law in Action” Menuju Penemuan Hukum (Rechtsvinding)*, (Yarsif Watampone, Jakarta).
- Anis, M. (2020). *Komunal Vs Eksklusif: Pembadanan Nilai-Nilai Hukum Islam Dalam Membangun Hukum Hak Kekayaan Intelektual*, Pidato Pengukuhan Guru Besar Prof. Dr. Hj. Anis Mashdurohatun, SH,.M.Hum Disampaikan dalam Rapat Senat Terbuka Universitas Islam Sultan Agung Semarang pada Tanggal.
- Anis, M. (2016). *Mengembangkan Fungsi Sosial Hak Cipta Indonesia (Suatu Studi Pada Karya Cipta Buku)*. Surakarta: UNS Press.
- Anis, M. (2020). *Selected Legal Issues In Indonesia And Malaysia: Transfer of Intellectual Property Rights* (Studies on the division of joint property (Gono gini) Post-Divorce), (Semarang, Unissula Press).
- Anthony, A. (2013). *The Limit of Law*, Butterworths, London, 1980, hlm. 38 dalam Otje
- Salman S, Anthon F. Susanto, *Teori Hukum: Mengingat, Mengumpulkan, dan Membuka Kembali*, ctk.Ketujuh, (Refika Aditama).



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

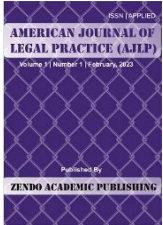
Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

- Antony, A. (1981). *The Effectiveness of Law*. Dalam *Valparaíso University Law Review*, 15, Winter. Dalam <http://www.advokatmuhammadjoni.com/opini/artikel-el-hukum/181-efektifitas-penerapan-hukum.html>
- Badan Pembinaan Hukum Nasional. (2019). *Dokumen Pembangunan Hukum Nasional Tahun 2019*, (Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia RI, Jakarta).
- Bagir, M. (2009). “Beberapa Catatan Tentang Penafsiran”, *Majalah Hukum Varia Peradilan* Tahun XXIV No. 285 Edisi Agustus, Jakarta: Ikatan Hakim Indonesia,
- Bambang, S. (2015). *Metode Penemuan Hukum Upaya Mewujudkan Hukum Yang Pasti Dan Berkeadilan*, (Yogyakarta: UII Press).
- Black’s Law Dictionary. (1968). Hermeneutika didefinisikan sebagai “*The science of art construction dan interpretation. By the phrase “legal hermeneutics” is understood the systematic body of rules which are recognized as applicable to the construction and interpretation of legal writings.*” Lihat Henry Campbell Black, *Black’s Law Dictionary* (Revised Fourth Edition) (Minnesota: West Publishing).
- Budi, S. (2011). *HKI Hak Kekayaan Intelektual* (Semarang: Pustaka Magister).
- Budiono, K. (2016). *Teori Hukum Dilema antara Hukum dan Kekuasaan* (Bandung: Yrama Widia).
- Colston, & Galloway, J. (2010). *Modern Intellectual Property Law*, (Oxon (UK): Routledge).
- Carl, B. (1966). *History and Hermeneutics* (Philadelphia: Fortress). Disampaikan pada Pidato Pengukuhan Guru Besar Prof. Dr. Hj. Anis Mashdurohatun, SH, M.Hum Disampaikan dalam Rapat Senat Terbuka Universitas Islam Sultan Agung Semarang pada Tanggal 15 Oktober 2020
- Djauhari. (2017). *Penelitian Hukum Sosiologis (Legal-Social Research)* (Bahan Ajar Program Doktor Ilmu Hukum Universitas Islam Sultan Agung Semarang disampaikan pada tanggal). Doc. WIPO/GRTKF/IC/1/3, *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – An Overview*,
- Dutfield, G. (2003). *Intellectual Property Rights and the Life Science Industries: A 20th Century History*. (Hampshire: Ashgate Publishing Limited).
- Eddy Damian dalam wawancara dengan Harian Kompas mengatakan bahwa bangsa Indonesia memiliki sifat komunal. Lihat Kompas, Sabtu, 6 Oktober 2007 dalam Candra Irawan, *Politik Hukum Hak Kekayaan Intelektual Indonesia: Kritik Terhadap WTO/TRIPS Agreement dan Upaya Membangun Hukum Kekayaan Intelektual Demi Kepentingan Nasional*, Mandar Maju, Bandung, 2011.
- Elisabeth Nurhaini Butarbutar, *Hukum Harta Kekayaan Menurut Sistematisasi KUH Perdata dan Perkembangannya* (Bandung: Refika Aditama, 2012).
- Endang, P., Theo, N., & Hassanain, H. (2022). Teori Utilitarianisme Jeremy Bentham: Tujuan Hukum atau Metode Pengujian Produk Hukum?, *Jurnal Kontitusi*, 19(2).
- Esmi, W. (2013). *Penelitian Hukum* (Makalah dipresentasikan pada Workshop-Pelatihan Penyusunan Proposal Tesis Universitas Swadaya Gunung Jati, Cirebon, 2017), hlm. 4-5; Indriawan Seto Wahyu



American Journal of Legal Practice (AJLP)

Volume.1, Number 1; February-2023;

Published By: Zendo Academic Publishing

<https://zapjournals.com/Journals/index.php/ajlp>

14131 Alder St NW, Andover, Minnesota, USA

zapjournal@gmail.com, editorial@zapjournals.com

Wibowo, *Semiotika Komunikasi Aplikasi Praktis Bagi Penelitian dan Skripsi Komunikasi* (Jakarta: Mitra Wacana Media).

Faisal. (2010). *Menerobos Positivisme Hukum*, Rangkang Education, Yogyakarta.

Fatwa MUI Nomor 1/Munas VII/MUI/5/2005 tentang Perlindungan Kekayaan Intelektual (HKI); Wahbah al-Zuhaili, *al-Fiqh al-Islami wa Adillatuh* (Beirut: Dar al-Fikr al-Mu`ashir. 2004), vol. IV, hlm. 2861-2862; Fath al-Duraini, *Haqq al-Ibtikar fi al-Fiqh al-Islami al-Muqaran*, (Beirut: Mu`assasah al-Risalah. 1984), hlm. 20; Keputusan Majma` al-Fiqh al-Islami Nomor 43 (5/5) Mukhtar V Tahun 1409 H/1988 M tentang al-Huquq al-Ma`nawiyah.

Guba. & Lincoln. (1994). "Competing Paradigm in Qualitative Research" dalam Norman K. Denzin & Yvona Lincoln (Eds), *Hanboek of Qualitative Research*, (London: Sage Publications).

Fahmi Al Amruzi, H. M. (2014). *Hukum Harta Kekayaan Perkawinan Studi Komparatif Fiqh, KHI, Hukum Adat dan KUHP* (Yogyakarta, Aswaja Pressindo).

Mac Queen, H., Waelde, C., & Laurie, G. (2008). *Contemporary Intellectual Property: Law and Policy*, (Oxford: Oxford University Press).

Hart, H. L. A. (2011). *Konsep Hukum*, Cintya Press, Jakarta, 2011, hlm. 3-4 dengan judul asli *Concept of Law*, Penerjemah: Mohammad Nashihan dan Ronny F. Sompie.

Hak Cipta diatur Pasal 58, Pasal 59 Pasal 60 UU Hak Cipta; Hak Terkait diatur pada Pasal 63 UU Hak Cipta ; Hak Paten diatur pada Pasal 22 dan 23; Hak Merek diatur pada Pasal 28 dan Pasal 35 UU Merek; Hak PVT diatur pada Pasal 4 UU PVT; Hak Desain Industri diatur pada Pasal 5 UU Desain Industri; dan Hak DTLST diatur pada Pasal 4 UU DTLST.

HAS Natabaya, *Sistem Peraturan Perundangundangan di Indonesia* (Jakarta: Mahkamah Agung, 2006)

Hayyan ul Haq, *Legal Instruments for an Optimal Utilization of Information and Technology under the Intellectual Property Regime: A Study on the Implication of the Creator and Inventor Doctrine for the Utilization of Intellectual Products through Technology Transfer for the Greatest Benefit of People in Indonesia*, (Utrecht University, Nederland, 2011)

Hilman Hadikusuma, *Hukum Perkawinan Adat* (Bandung: Citra Aditya Bakti, 1990).