

## EXCEPTIONS TO AGREEMENTS ON INTELLECTUAL PROPERTY RIGHTS IN BUSINESS COMPETITION LAW IN THE FIELD OF TECHNOLOGY INNOVATION

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### Abstract

This article aims to show that economic strength is the main foundation of a country in any part of the world; meaning that it has the same sovereignty as other countries. To achieve this, synergy between the government and the community is needed in building political will related to economic management. The state is the party that has the authority to establish ground rules that support and protect economic activity and growth. Qualitative research using literature methods or secondary legal materials, journals, and also taking from primary legal materials, namely related laws. The result of this research is the current era, technological innovation does not just stop at producing new products or services. However, in this era, technological innovation has harmed the development of existing businesses, where the presence of technological innovation has disrupted conventional business. Conditions like this by Christensen called disruptive innovation. So, there are several legal and economic problems arising from the phenomenon. In particular, an interesting legal issue in the context of the phenomenon of disruptive innovation is related to intellectual property rights.

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### Introduction

On February 2, 2021, the President of Indonesia began enforcing Government Regulation Number 44 of 2021 concerning the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition. This provides an opportunity for the Business Competition Supervisory Commission to adjust all existing commission regulations, so that they are in line with the new Government Regulation, no later than four months after this is declared to come into effect. This means that the commission has until June 2, 2021, to improve. The Government Regulation No. 44 of 2021, it is not permissible to add new norms of behavior to the Law of the Republic of Indonesia no. 5 of 1999 on the Prohibition of

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Monopolistic Practices and Unfair Business Competition in conjunction with the Law No. 11 of 2020 on Job Creation. However, this Government Regulation is more oriented as an implementing regulation on Article 118 of Law No. 11 of 2020 compared to the entire Law No. 5 of 1999. In other words, this government regulation is very minimalist if it is considered an implementation of the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition.

Based on various economic or business activities, it is certain that competition will occur between business actors. They will try to create, package, and market their products, both goods/services as best as possible so that they are in demand and purchased by consumers. Competition in business can have positive implications, on the contrary, it can be negative if it is carried out with negative behavior and causes uncompetitive economic activity (Feliz & Maggi, 2019). However, it is necessary to pay attention to the principles in management so that the objectives of sustainable development can be achieved, among these principles are ensuring certainty over the interests of entrepreneurs, consumers, and communities in the information environment, ensuring certainty of companies to have a social responsibility, ensuring certainty over the fair competition in business, and ensuring certainty over the realization of green companies (Kalachenkova et al., 2021).

Based on Article 33 in the 1945 Constitution of the Republic of Indonesia, the economic system adopted by the state is a people's economy or economic democracy that aims to realize social welfare and justice as the ideals of economic development (Elviandri, 2019). The correlation that appears later in formulating state economic policies must always try to eliminate the negative characteristics contained in the liberal economic system and socialist economic system, namely free fight liberalism which justifies the exploitation of humans, etatism in which the state and its apparatus minimize the potential and creative power of units economy outside the state sector, and economic concentration in one of the monopoly groups which is detrimental to society (Muheramtohadi, 2018).

The strength of the economy is the main foundation of a country in any part of the world; means that the country has equal sovereignty as other countries. To achieve this, synergy is needed between the government and the community in building political will regarding economic management. The state is a party that has the authority to lay down the basic rules that support and protect activities and economic growth (Effendi, 2020). Business in Indonesia is currently developing without boundaries so that it can break through the dimensions of human life and economic behavior. The existence of competition in the business provides many benefits for life, but to avoid the negative side of competition, it is necessary to make clear rules, that make both small and large business actors still run their well (Marilang et al., 2021).

Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Business Competition Law) emerged as a legal instrument that encourages the creation of economic efficiency and a climate of equal business opportunities for business actors. Apart from that, it is also a signpost to guard against unhealthy and unfair economic practices. It is this Business Competition Law which then also regulates the provisions of prohibited agreements (Mafulah, 2020). In the current context, technological innovation is closely related to intellectual property rights (IPR), especially patents. This understanding is based on the fact that many companies that currently exist in developing their products and services rely on IPR-based innovation. As a result, the company can develop in such a way, without being disturbed by competitors who intend to carry out unfair competition (Faujura et al., 2021).

In the era of information technology, innovation does not only stop at producing new products or services. However, technological innovation has hurt the development of existing

businesses, which has disrupted conventional businesses. This kind of condition by Christensen is called disruptive innovation (Christensen et al., 2015). With this phenomenon, there are several legal and economic problems arise. In particular, an interesting legal issue in the context of the disruptive innovation phenomenon is related to intellectual property rights. This article explains the relations between technological innovation and intellectual property rights, and the Exceptions to Agreements on Intellectual Property Rights in Business Competition Law. Then, the description focuses on issues of protecting intellectual property rights through disruptive innovation technology.

Previous research written by Muhammad Setya Ady Syarifuddin shows that one way to resolve disputes using consensus agreements, if not realized can go through the District Court, the state guarantees legal protection for trademark owners (Syarifuddin, 2019). Marco D'Ostuni mentioned that the increase in the number of patents in Europe from year to year makes companies develop strategies to protect the company from its competitors, patent law and competition law are challenged for dispute resolution (D'Ostuni, 2021). Henk W. Volberda and colleagues describe the use of digital technology can increasing efficiency, customer satisfaction, and innovation, however, there are barriers and the need for strategies to overcome them such as minimizing cognitive barriers, expanding digital routines, and forming new organizations to gain competitive advantage (Volberda et al., 2021).

## **Research Methods**

The normative juridical method (Hoecke, 2011) is used in writing the article, tracing legislation, doctrine, and related legal literature, and analyzing the exclusion of intellectual property rights (IPR) agreements in the context of business competition law in the field of technological innovation. The data sources used are Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, Government Regulation No. 44 of 2021 on the Implementation of the Prohibition of Monopoly and Unfair Business Competition, and Regulations related to IPR protection, such as the Copyright Law, Patent Law, and Trademark Law. The analysis technique used is the interpretation of relevant articles and their application using the deductive method (Hale & Napier, 2013).

## **Result and Discussion**

### **Exceptions To Intellectual Property Rights Agreements In Business Competition Law**

The discourse as well as the challenges faced by the Indonesian nation are none other than the development paradigm in the environmental corridor that provides freedom in utilizing and exploiting existing natural resources. The anthropocentric view, the power of abundant natural resources, and the title of a developing country strengthen the destruction of the environment to achieve development ideals aimed at the interests of economic growth in this case human interests. This is due to the development ambitions of developing countries to catch up with developed countries. So development ambitions result in environmental pollution and tend to damage the environment (Suryawan & Aris, 2020).

The mechanism of competition in the market applies to every actor without exception. The business competition law protects the mechanism of the competition process without considering who is the perpetrator with the good aim of making the allocation of resources efficient. Market mechanisms that operate through healthy and fair competition and are consistent with the goal of fair distribution are expected to be able to achieve national efficiency and general welfare. In addition, business competition law is expected to be able to monitor

price discrimination and distribute market information so those who are less well off have access, opportunity or access to capital, technology, and various other business opportunities (Susanto et al., 2019). However, if various good goals to support the market mechanism are not achieved, it can result in market mechanism failure which may be carried out by market actors which is contrary to the principle of fair business competition.

Business competition law seeks to control so that acts or agreements that are anti-competitive such as cartels, monopolies, use of dominant positions, monopsony, and others can be prevented. But in reality, various market failures occur but cannot be covered, prevented, or regulated through competition law. Therefore there is a fundamental need for the importance of clear arrangements or regulations regarding types of actions or activities, certain industries, or business actors that are not included in business competition law. For example, there is a need for regulation of industries that are in the category of public interest (eg natural monopolies in the supply of clean water, electricity, or telecommunications). Where if calculated economically, the production process carried out by only one company will be able to reduce overall production costs. There are also circumstances where the use of resources that are not properly regulated against universal resources will result in externalities (Bork, 1978).

In countries that are in the process of adopting a market economy system or in the transition to a market economy, it is felt that there is a need to limit behavior aimed at exploiting the market. In addition, it is also necessary to create control mechanisms in industries that are economically uncompetitive so that market exploitation can be avoided. Therefore, there must be regulation of conditions that inhibit competition by controlling the behavior of business actors, through regulations that regulate which industries are categorized as competitive and non-competitive, or clear regulations regarding industries that are protected or excluded from regulatory regulations. This whole thing is determined by the competition policy and its implementing regulations (Edwards, 1949).

### **Disruptive Innovation Phenomenon**

The existence of disruptive innovation in a business activity has created two implications, namely; First, disruptive innovation has spawned a new business practice based on new technology (Cozzolino et al., 2018); and second, disruptive innovation has created a pattern of business behavior based on the use of technology as a producer of works (Longxi & Leitao, 2019). The first implication emphasizes that disruptive innovation has produced new technology that supports the implementation of new business practices. When viewed from the point of view of protecting intellectual property rights, this new technology is very important to protect. Several reasons can be put forward, namely;

First, to produce new technology, very high costs are required (Liu et al., 2020), so, logically, the costs incurred must be refunded. Through the protection of intellectual property rights, this is possible to do, bearing in mind that intellectual property rights can be commercialized, such as licenses, buying and selling, and so on, which ultimately can return research and development investments; and second, by producing new technology that supports a new business practice, it means that this new technology can provide added value capture and value creation (Howell et al., 2018). When a new technology provides added value, the technology owner must want to protect this new technology from all kinds of competitors' fraud. The current method can be done through the protection of intellectual property rights. Even though the new technology generated through disruptive innovation is important to protect intellectual property rights.

Even though the new technology generated through disruptive innovation is important to protect intellectual property rights, it must be understood that when it comes to protecting

the new technology, intellectual property rights must be based on the requirements stipulated in the laws and regulations on intellectual property rights and other related matters. For example, new technology can be protected by patents when it meets certain requirements: (1) novelty; (2) can be applied in industry (Wang & Chen, 2019); (3) inventive move; and (4) does not include inventions that cannot be patented (Veugelers & Wang, 2019). In the context of this fourth requirement, inventions that cannot be patented include:

- a. processes or products whose announcement, use, or implementation is contrary to laws and regulations, religion, public order, or decency (Ayu Palar & Rasiah, 2019);
- b. methods of examination, treatment, medication, and/or surgery applied to humans and/or animals (Karjoko et al., 2020);
- c. theory and methods in science and mathematics;
- d. living creatures, except for microorganisms (Sriwiset, 2022); or
- e. essential biological processes to produce plants or animals, except for non-biological processes or microbiological processes (Kokane, 2022).

By paying attention to the terms of the patent, it is clear that an invention can be patented, not only limited to elements of novelty and inventive steps and can be applied in the industry, but it is also very important in terms of granting this patent to pay attention to the conditions that do not include inventions that cannot be granted a patent.

Related to the fourth requirement of new technology that can be protected by patents and the phenomenon of disruptive innovation that produces new technology, where the new technology in use or implementation can conflict with laws and regulations, religion, public order, or decency, patents for new technology cannot be given.

In the case of conflicting with laws, one of which is by referring to Business Competition Supervisory Commission Regulation No. 2 of 2009 on Guidelines for Exceptions to the Application of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition on Agreements relating to Intellectual Property Rights. Based on this provision, if there is a use of IPR (a patent license agreement) that does not meet the requirements of IPR—in this case, the recording of a license agreement—or if there are conditions that clearly indicate the occurrence of monopolistic practices and unfair business competition and do not clearly show an anti-competitive nature of business, then the provisions of Law No. 5 of 1999 can be enforced. This implies that the use or implementation of the new patented technology is contrary to laws and regulations. Therefore, the new technology cannot be patented.

### **Innovation And Disruptive Innovation**

The doctrine of innovation in business cannot be separated from the teachings of Joseph Schumpeter (1934) on creative destruction. According to him, an organization must innovate with new goods, new methods, new resources, and a new market (Schumpeter, 1943). Schumpeter's thinking greatly influences business actors, especially in the private sector. Although, in principle, the concept of innovation can also be adopted by public bodies, as was done by Osborne and Gaebler in 1993 in their book Reinventing Government (Neo & Chen, 2007). Then, in 1994, Clayton Christensen proposed the theory of disruptive innovation, the main objective of which is to fill market gaps in an existing market that has been dominated by big players (incumbents). The way to close this market gap is through innovation and simplifying the innovation itself without reducing the innovation in it. According to Christensen, the focus on developing this very specific market gap is the main concept of disruptive innovation, not breaking down existing markets. Departing from the mistake above, Christensen argues:

There's another troubling concern: In our experience, too many people who speak of "disruption" have not read a serious book or article on the subject. Too frequently, they use the term loosely to invoke the concept of innovation in support of whatever it is they wish to do. Many researchers, writers, and consultants use "disruptive innovation" to describe any situation in which an industry is shaken up and previously successful incumbents stumble. But that's much too broad a usage (Christensen et al., 2015).

One example of phenomenal disruptive innovation is the iPod 14 product released by Apple Inc. in 2001. According to the CEO of Apple Inc., the launch of the iPod answered the problem of the high price of a song unit from the previously existing media variants, namely: CD, Flash, MP3 CD, and Hard Drive. The problem of the high price is what finally made Apple Inc. continue to innovate until it finally created the iTunes Store business ecosystem.

The definition of market competition in past economics often used price as the main parameter in viewing the factors that affect competition itself (Graef et al., 2014). However, it is often forgotten that in modern market competition, technology has a very large influence. Especially for companies that are already established and feel they are leading the industry, ego, and self-confidence are often too big to turn a blind eye to innovations made by competitors or newcomers. The technology that emerged after that was slowly accepted by consumers and replaced the technology provided by these established companies. After all, this is the basis for how an innovation that replaces something is easier to call a disruptive innovation.

It is very difficult to determine when exactly this disruptive innovation first appeared in the world. However, the term disruptive innovation was popularized by Clayton M. Christensen in 1997 (Christensen et al., 2015). Disruptive innovation was first popularized by the term disruptive technology. Christensen introduces disruptive innovation as a form of distraction for newcomers. These newcomers compete with established incumbent companies.

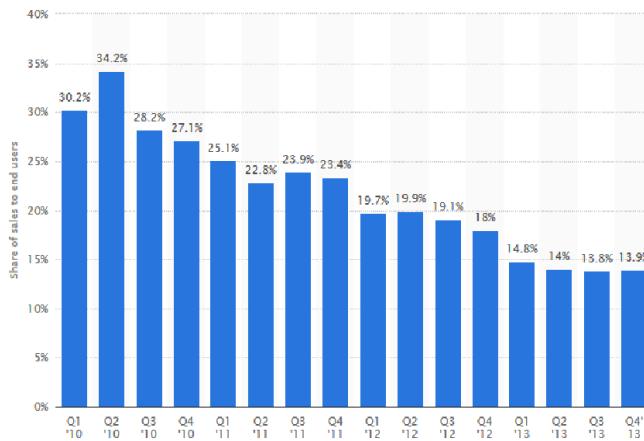


**Figure 1. Disruptive Innovation Models**

Source: Latin American and Caribbean Competition Forum (OECD, 2016)

Disruptive innovations are happening in different parts of the world. In Europe, for example, the biggest case that ever happened was with the Nokia Company. The cell phone, which in its heyday was dubbed the cell phone of a million people, finally had to recognize the Android and iOS systems as disruptive innovations. At first, Nokia was still full of confidence in its Symbian system. The company feels that its market is highly dependent on Symbian. Even when Apple released the iPhone in 2007, Nokia still felt unrivaled and continued its Symbian as a flagship. Meanwhile, its new competitor, Android, continues to strengthen its position in the market. Nokia's Symbian market share began to decline when Apple introduced the iPhone 3G in 2008. The end of Symbian began to be seen when Android was introduced by Google via

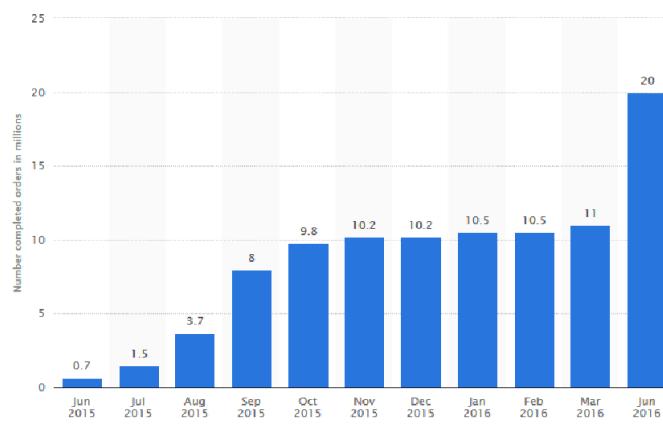
HTC devices. Starting in 2010, Nokia's Symbian market share continued to fall, leaving only 13.9% in 2013.



**Figure 2 Nokia Market Share 2010-2013**

Source: Statista (Statista, 2014)

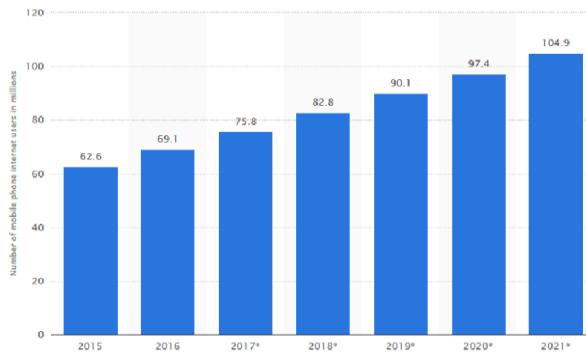
When it was founded in 2011, not many people knew about Gojek, an alternative to online motorcycle taxis in Indonesia. Gojek started with twenty drivers in 2011. Until the end of 2016, Gojek drivers had reached 200,000 people. The more stable position in the public transportation market makes Go-Jek expand its business to other cities such as Yogyakarta, Surabaya, Manado, Medan, Semarang, and Balikpapan. During the journey in 2015, Gojek experienced a significant increase. The Gojek application has been downloaded 1,600,000 times. Usage also increased sharply, reaching 138% every month. In 2016, Gojek launched a new GoCar service that provides car transportation services. Finally, at the end of 2016, Gojek's investment value was recorded at US\$550 million.



**Figure 3. Gojek completed the order progress**

Source: Statista (Statista, 2016)

Today, Indonesian people really cannot be separated from gadgets. This should become the awareness of business actors to develop their businesses online. It is estimated that by 2024, there will be 104.9 million people who can and consistently use the internet via gadgets. This should be realized as the potential to get maximum benefits through various gadget platforms, such as online applications on iOS, Android, MIU, and so on.



**Figure 4. Internet Users Through Gadgets (Indonesia, in Million People)**

Source: Statista (Statista, 2023)

## Conclusion

Competition law in Indonesia recognizes exceptions to emphasize that the rule does not apply to certain types of actor's behaviors or activities. Competition law generally provides exceptions based on agreements, for example, intellectual property rights (IPR) agreements. IPR is an incentive, and the reason for being given monopoly rights and protection is because IPR requires resources and time to obtain. To strengthen the position of supervising business competition and as a door for harmonization between the intellectual property rights (IPR) licensing regime and business competition law, Article 50, letter b, of Law No. 5 of 1999. This article explains that agreements related to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial product designs, integrated electronic circuits, and trade secrets and related agreements franchises are exempt from the provisions of Law No. 5 of 1999. IPR is an incentive, and the reason for being given monopoly rights and protection is because IPR requires resources and time to obtain it. The Intellectual Property Rights Law itself guarantees that inventions, patents, and other inventions will be protected before they become public property (public domain). This factor becomes a determinant for the company because this incentive is considered a way to dominate the market but is not a violation of the law.

The meaning of innovation can be in a broad sense, namely the introduction of new and better products and the application of new business methods and production processes, while innovation can also, in a narrow sense, mean new technology in the form of products and/or processes. Innovation itself, at this time, has given birth to a phenomenal concept, namely, disruptive innovations. Disruptive innovation is a technology that changes conventional business models or consumer expectations. There are two implications of disruptive innovation: first, disruptive innovation has spawned a new business practice based on new technology; second, disruptive innovation has created a pattern of business behavior based on the use of technology as a producer of works. These two implications have created several problems in the protection of intellectual property rights. The first question is whether every disruptive innovation that produces new technology will always receive protection from intellectual property rights, while the second question is whether technological creations result from disruptive technology.

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