




**APHKI**  
Asosiasi Pengajar  
Hak Kekayaan Intelektual  
Indonesia

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*"Symphonizing Intellectual Property  
and Potential Resources for Public Welfare"*

*Faculty of Law, University of Mataram  
in cooperation with  
Association of Intellectual Property Lecturer  
of Indonesia*



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**TRADEMARK SETTINGS IN ASEAN ECONOMIC COMMUNITY IN  
CONNECTION WITH THE AMENDMENT OF THE LAW NO. 20 OF  
2016 ON TRADEMARK AND GEOGRAPHICAL INDICATIONS**

**Oleh : Delfiyanti**

**ABSTRACT**

ASEAN Economic Community aims at creating a single, production-based market which is stable, prosperous, highly competitive, and economically integrated by an effective facilitation of the traffic flows of goods and services as stated on both ASEAN Charter and ASEAN Economic Community Blueprint. Moreover, in a framework of liberalization, particularly in intellectual property right, the ASEAN member states have agreed ASEAN Intellectual Property Right Action Plan (ASEAN IPR Action Plan) of years 2011-2015. The three instruments come to be legal bases of protecting and regulating intellectual property rights in ASEAN, one of which is trademark. The attention paid to trademarks is one of ASEAN's measures of protecting the trademarks existing in ASEAN member states. Disputes in intellectual property rights, particularly trademarks-related, have a significant inclination to happen among ASEAN member states. Therefore, it needs a legal instrument for resolving them. Indonesia has participated in the three ASEAN agreements. As a consequence, Indonesia has amended an old law to enact Law No. 20 of 2016 on Trademark and Geographic Indications. The new law has stipulated some new provisions on trademark, e.g., by including non-conventional trademarks, that is, three-dimensional, audio, and hologram marks to the new law, as well as containing special provisions on geographic indication. These were intended to be in conformity with the provisions of relevant international communities, particularly ASEAN. For Indonesia, this is certainly a challenge as well as an opportunity to implement the new Trademark Law and in the same time to use the Agreement properly and to harmonize the new trademark provisions with ones in ASEAN.

**Keywords:** Regulation, Trademark, ASEAN Economic Community, and Law No. 20 of 2016.

## **A. INTRODUCTION**

At the 13th ASEAN Summit in Singapore on 19-22 November 2007 two important documents were agreed in the framework of ASEAN cooperation, the ASEAN Charter and the establishment of the ASEAN Community, one of which is the ASEAN Economic Community. The ASEAN Charter itself came into force on 15 December 2008 after the ratification of the ASEAN Member States so it has ratified a charter that makes the regional bloc a legitimate institution for the first time in its four decades since its founding. The 2008 Charter of ASEAN is a substitute for the 1967 Bangkok Declaration which has long been an instrument of establishment of ASEAN. ASEAN Charter which has legal personality (Legal Personality) becomes a new milestone for ASEAN in view of its cooperation relationship in the future.

Currently, intellectual property rights have received great attention from countries concerned with the utilization of such IPRs that can be of high economic value. In this case, ASEAN countries also provide a place for intellectual property rights especially with the liberalization of trade in the ASEAN region through the ASEAN Economic Community. This is due to the emergence of fears of mutual claims against intellectual property rights, especially the trademark.

For Indonesia itself, the existence of policies in the form of agreements in the field of intellectual property rights, especially the trademark is an opportunity as well as a challenge within the framework of the ASEAN Economic Community. This agreement will surely have an impact on Indonesia, such as the need to harmonize and synchronize the intellectual property rights, especially the existing trademarks in Indonesia, which must be harmonized with the objectives to be achieved by ASEAN within the framework of the ASEAN Economic Community.

Therefore, Indonesia should start to clean up and prepare to face trade competition with other ASEAN member countries. Some provisions of Indonesia's intellectual property rights need to be inventoried again in trade liberalization in the ASEAN region.



## GENERAL REVIEW ON INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights (IPR) or Intellectual Property Rights are equivalent words used for Intellectual Property Rights (IPR) or *Geistiges Eigentum*, in German.<sup>1</sup> The term or terminology of Intellectual Property Rights (HKI) was used for the first time in 1790. It was Fichte who in 1793 said about the property of the creator is in his book. What is meant by property right here is not a book as an object, but a book in the sense of its contents.<sup>2</sup> The term IPR consists of three keywords, namely Rights, Property, and Intellectual. Wealth is an abstraction that can be owned, transferred, bought, or sold.

As for the intellectual property is the wealth of all the production of intelligence power of thought such as technology, knowledge, art, literature, composition songs, papers, caricatures, and others useful for humans.<sup>3</sup> Objects regulated in IPR are works that arise or are born out of human intellectual ability.<sup>4</sup> IPR system is a private right (private rights). A person is free to apply or register his intellectual work or not. The exclusive rights granted by the State to individuals of intellectual property (inventors, creators, designers, etc.) are not intended to recognize the work (creativity) and to stimulate others to further develop it, so that with the IPR system the public interest is determined Through market mechanisms. In addition, the HKI system supports the establishment of a good documentation system of all forms of human creativity so that the possibility of generating the same technology or other works can be avoided or prevented. With the support of good documentation, it is expected that the community can utilize it maximally for their life purpose or develop it further to provide higher added value again.<sup>5</sup>

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<sup>1</sup> Syafrinaldi. 2010, *Hukum Tentang Perlindungan Hak Milik Intelektual Dalam Menghadapi Era Globalisasi*.. UIR Press.

<sup>2</sup> Ibid, p.13

<sup>3</sup> Sutedi, A, *Hak Atas Kekayaan Intelektual*, Sinar Grafika, 2009, p. 38

<sup>4</sup> *Buku Panduan Hak Kekayaan Intelektual*, Ditjen HKI, 2006, p.7.

<sup>5</sup> Ibid

Intellectual Property Right is an official translation of Intellectual Property Rights (IPR) and in Dutch referred to as *Intellectual Eigendom*.<sup>6</sup> Based on its substance, HKI is closely related to intangible objects and protects intellectual works arising from human intellectual ability. These capabilities can be works in the fields of technology, science, art and literature. In general, intellectual property rights consist of two things namely industrial property rights and Copyright. Industrial property rights consist of Patent, Trademark, Plant Variety, Trade Secret, Industrial Design, and Layout Design of Integrated Circuit. Copyright consists of Science, Art, and Literature.<sup>7</sup>

The intellectual property right is the right of material, the right to something that comes from the work of the brain, the work of the ratio.<sup>8</sup> If further explored, intellectual property rights are actually part of the object that is intangible objects (Immaterial objects).<sup>9</sup> Only a person capable of mastering his or her own brain policy can produce material rights called Intellectual Property Rights and is exclusive.<sup>10</sup>

In the Anglo-Saxon literature there is known the name Intellectual Property Rights which is then translated into Indonesian which is Intellectual Property Rights and more precisely translated into Intellectual Property Rights. The reason is that the word "property rights" is actually a standard term in the legal literature because not all Rights for Intellectual Property is a property in the real sense. It may be the right to reproduce only, or to use it in certain products and may even be in the form of "rental rights" rights, or other rights arising from such engagements as licenses, broadcast rights, and so on.<sup>11</sup>

The definition formulated by experts, Intellectual Property Rights is always associated with three elements namely the existence of an exclusive

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<sup>6</sup> Sophar Maru Hutagulung, 1956, *Hak Cipta Kedudukan dan Peranamiya di dalam Pembangunan*, Sinar Grafika, Jakarta, p. 87

<sup>7</sup> Muhammad Ahkam Subroto, *op.cit.*, p. 14.

<sup>8</sup> H. OK. Saidin, 2010, *Aspek Hukum Hak Kekayaan Intelektual (Intellectual Property Rights)*, Rajawali Pers, Jakarta, p. 9

<sup>9</sup> Sophar Maru Hutagulung, *op.cit.*, p. 105.

<sup>10</sup> H. OK. Saidin, *op.cit.*, p. 10

<sup>11</sup> Tomi Suryo Utomo, 2010, *Hak Kekayaan Intelektual di Era Global*, Graha Ilmu, Yogyakarta, p. 2

right granted by law, the right is related to human effort based on intellectual ability and intellectual ability has economic value.<sup>12</sup>

Introduction of Intellectual Property Rights as an intangible property rights of individuals and its straightforward translation in a positive legal order especially in economic life is new in Indonesia. From the point of view of the IPR, the rule is necessary because respect, protection and protection will not only provide a sense of security, but also create a conducive climate for increased enthusiasm or passion to produce innovative, inventive and productive works. From the historical background of the intellectual property rights, it is seen that in the western country the awards of intellectual property or whatever individual thought results have long been applied in their culture which is then translated into legislation. HKI for western society is not just a legal tool used only for the protection of intellectual work of a person but is used as a means of business strategy whereby because of a commercial invention or intellectual property, it allows the inventor or inventor to exploit his/her creation economically. The result of the commercialization of the invention allows the creator of intellectual work to continue working and improving the quality of his work and be an example for the individual or other party, so that there will be the desire of others to also be able to work better so that the competition arises..

## **TRADEMARK SETTINGS IN ASEAN ECONOMIC SOCIETY**

The Association of South East Asian Nations has signed a memorandum of understanding in the field of intellectual property rights or ASEAN Framework Agreement on Intellectual Property Cooperation on December 15, 1995, in Bangkok, Thailand. While Indonesia itself is also a participant in the TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights) on the WTO and the ASEAN Framework Agreement on Intellectual Property Cooperation agreement applicable in the ASEAN region.

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<sup>12</sup> H. OK. Saidin, op.cit., p. 10

The realization of this cooperation is realized by the establishment of a special forum that addresses issues, intellectual property rights at the ASEAN level, the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC). In an effort to enhance cooperation and protection of IPR in Southeast Asia, various forms of work are similar and meetings have been held. On a regular basis, AWGIPC meets at least three times a year. The second meeting of 2013, the 42nd session, has been held in Chiangmai Thailand on 15-19 July 2013. The meeting discussed the progress of implementation of the initiatives as agreed upon under the ASEAN 2011-2015 ASEAN Action Plan. The AWGIPC dialogue partners, Australia-New Zealand under the framework of cooperation between Australia-New Zealand Free Trade Agreement (AANZFTA), World Intellectual Property Organization (WIPO), European Patent Office (EPO), Korean Intellectual Property Office (KIPO), Office for Harmonization in Internal Market (OHIM), Japan Patent Office (JPO), and video conference consultation with United State Patent and Trademark Office (USPTO). From some of these dialogue partners, KIPO is a new dialogue partner for AWGIPC where this same work will be focused on creative industry cooperation, and empowerment of SMEs.

In addition to the discussion of implementation issues, the AWGIPC Chair from Thailand has also been handed over, namely Ms. Pajchima Tanasanti to on The new chair is BG (NS) Tan Yih San, who is Chief Executive of Intellectual Property Office of Singapore (IPOS). Ms. Patchima Tanasanti has been the Chair of AWGIPC for a period of 2 years since the 36th AWGIPC meeting in Bali in 2011.<sup>13</sup>

Thus, the intellectual property protection system in ASEAN in the framework of trade liberalization through the ASEAN Economic Community 2015 is based on the ASEAN Intellectual Property Rights Action Plan 2011-2015 as contained in the Opening of the ASEAN Intellectual Property Rights Action Plan that:

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<sup>13</sup> [www.kemlu.org.id](http://www.kemlu.org.id) accessed on November 2, 2016,

*"The ASEAN IPR Action Plan 2011-2015 is designed to meet the goals of the AEC by transforming ASEAN into an innovative and competitive region through the use of IP for their nationals and ensuring that the region remains an active player in the international IP community."*

Therefore, the ASEAN Intellectual Property Rights Action Plan, which is part of the ASEAN Economic Community Blueprint, contains 28 initiatives where most of the initiatives are based on the 5 strategic objectives to be achieved:

- 1. A balanced IP system that delivers the IPBs, to enable them to deliver timely, quality and accessible IP services, and to promote the region as being favorable To the needs of users and generators of IP.*
- 2. Development of national or regional legal and policy infrastructures that address the IP-landscape and facilitate the participation of South-East Asia Member States in global IP systems at the appropriate time.*
- 3. Advancement of the interests of the region through the systematic promotion of IP creation, awareness and utilization, to ensure that IP is a tool for innovation and development; Support for the transfer of technology to promote access to knowledge; And consideration for the preservation and protection of indigenous products and services and the works of their creative people in the region.*
- 4. Active regional participation in the IP community, with closer ties to dialogue partners and institutions to develop the capacity of Member States and to address the needs of stakeholders in the region.*
- 5. Intensified co-operation among South-East Asia Member States and enhancing levels of collaboration to enhance the human and institutional capacity of IP Offices in the region.*

Trademark-related arrangements within the ASEAN economic community are not regulated in more specific and detailed but generally regulated in the ASEAN Intellectual Property Rights Action Plan 2011-2015. Action of intellectual property rights including the trademark therein is an effort to protect ASEAN Trademark of goods and services products from acts that could harm the owner of the trademark as well as the country itself.

## **IMPLICATION OF TRADEMARK SETTINGS IN CONNECTION WITH THE AMENDMENT OF THE LAW NO. 20 OF 201**

In the trade of goods or services, the trademark as one form of intellectual work has an important role for the smooth and increasing trade in goods or services. Trademarks have strategic and important value for both producers and consumers. For manufacturers, trademarks in addition to differentiate their products with other similar company products, are also intended to build a company image in marketing. For consumers, trademarks in addition to facilitate for identification and also become a symbol of self-esteem. People who are accustomed to the choice of goods of a particular trademark, tend to use goods with the trademark so on for various reasons such as because it already knows the old, reliable quality of its products, and so on so that the function of trademark as a quality assurance more real.<sup>14</sup>

The settings related to the previous trademark are Law no. 15 of 2001 on Trademark is a change from Law no. 14 of 1997 About Trademarks. The right to a trademark is an exclusive right granted by the state to the trademark owner registered in the General Register of Trademarks for a certain period of time by using the trademark itself or giving others to use it. In practice the exercise of the right to this trademark often does not conform to what is prescribed by law. So this causes a loss for the trademark owner. This action that could cause this loss is a violation of the trademark. The State has the responsibility of safeguarding the exercise of the rights to such trademark.<sup>15</sup>

The trademark protection system in Indonesia has been started since 1961, the system of copyright protection began in 1982, while the new patent system was started in 1991. Against the laws and regulations in the field of Copyright and Patent, Indonesia in 1997 and last year 2000 To amend and enforce these three laws in order to conform to the needs and Agreements of TRIPs as a consequence of Indonesia having ratified the WTO establishment

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<sup>14</sup> Muhamad Djumhana, *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual*, PT Citra AdityaBakti, Bandung, 2006, p. 78

<sup>15</sup> <http://www.cbcindonesia.com> ,downloaded on November 5 , 2014

agreement under GATT through Act No. 7 of 1994. Therefore, Indonesia is bound by the rules issued by WTO, including TRIPs deal. The TRIPs Agreement is the most comprehensive international agreement, and is a unique blend of GATT basic principles with substantive provisions of international agreements on the field of intellectual property rights, including the Paris Convention for the protection of industrial Property and the Berne Convention for The Protection of Literary and Artistic Works.<sup>16</sup>

For Indonesia itself has been enforced in the ASEAN Economic Community (MEA) since January 1, 2016 and has significance to the protection of Intellectual Property Rights in the framework of trade liberalization in the ASEAN region. With this rule, the flood of products and services will spin across the Southeast Asian region without any heavy obstacles. Products from abroad can easily enter Indonesia, and vice versa. Only product quality and packaging issues will determine who will dominate. In the view of industry in Indonesia, the ASEAN Economic Community is transformed into a double-edged knife. On one side of the MEA can facilitate the products of Indonesia marketed abroad, on the one hand also threaten the existence of indigenous products of Indonesia. Especially products that have not been patented or registered as intellectual property rights (IPR).<sup>17</sup>

Based on Kadin's data, only about 30 percent of trademarks and products that have been registered to IPR. The rest of more than 70 percent have not been registered. There are still many business actors who have not registered HKI products and their trademarks are small and medium business actors. In fact, the creative industry in Indonesia is very dynamic and growing. If business actors still have not registered their products and trademarks, they will be overwhelmed with the flood of products from abroad when the MEA is enforced. Kadin is currently pioneering efforts to participate in socializing the importance of registering this HKI to the regions or small and medium industry

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<sup>16</sup> <http://www.blogster.com/dansur/sejarah-dan-perkembangan-H-K-I>, Accessed on November 5, 2014.

<sup>17</sup> [www.republika.co.id](http://www.republika.co.id) Accessed on August 16, 2016.

centers. Communication will be built by Kadin with a new government to help small business actors face MEA next year.<sup>18</sup>

MEA is the result of an agreement of ASEAN leaders a decade ago to form a single market in Southeast Asia by the end of 2015. This is done so that ASEAN's competitiveness increases and can compete with China and India to attract foreign investment. The establishment of this single market will allow one country to sell goods and services easily to other countries throughout Southeast Asia so that the competition will be tighter. Therefore, the government needs to establish the right rules regarding IPR protection so that the creative people of Indonesia can contribute without worry, his work will be hijacked in the market. Especially in the vortex of the ASEAN Economic Community (MEA), the legal protection of their economic rights is absolute in order to win the regional and global competition of Indonesian creative people. According to Kanwar and Everson in his study in 32 countries between 1981-1990, IPR protection has a significant impact on investment in research and development. According to this research, a very strong IPR protection will spur innovation and technological progress of a country. Economic growth of a country is closely related to the protection of IPR. The more open the economic system of a country, the protection of IPR will play its role in supporting the country's economic growth. Based on the results of Gould and Gruben (1996) research, in his research in 95 developed and developing countries from 1960-1988, found that the stronger the protection of IPR in a country, it will have a very significant impact on the economy in countries that apply An open economic system.<sup>19</sup>

Based on the above data, Intellectual Property Rights (IPR) has a very important role in encouraging economic growth of a country. Therefore, it is necessary to strengthen the role of the government to strengthen the protection of IPR in the country should be improved, so that with the strengthening of IPR

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<sup>18</sup> Ibid

<sup>19</sup> Kanwar, S. and Evenson, R. E. (2003), "*Does Intellectual Property Right Protection Spur Technological Change. Oxford Economic Papers*, 55(2): 235-254 in *Intellectual Property Rights, Innovation, and Economic Growth in Sub - Saharan Afric*



protection, will have an effect on the progress of technology research and the growth of new businesses in the country, which will sustain knowledge-based economic growth in Indonesia.<sup>20</sup>

In the trade of goods or services, the trademark as one form of intellectual work has an important role for the smooth and increasing trade in goods or services. Trademarks have strategic and important value for both producers and consumers. For manufacturers, trademarks in addition to differentiate their products with other similar company products, are also intended to build a company image in marketing. For consumers, trademarks in addition to facilitate in identification and also become a symbol of self-esteem. People who are accustomed to the choice of goods from a particular trademark, tend to use goods with the trademark so on for various reasons such as because it is familiar with old, reliable product quality, and etc so that the function of the trademark as a guarantee of quality more real.<sup>21</sup>

With the new Law no. 29 of 2016 on Trademarks and Indications of Georgian is based on the following considerations:

- a. In the era of global trade, in line with the international conventions Indonesia has ratified, the role of Trademarks and Geographical Indications is of paramount importance in maintaining fair business competition, equity, consumer protection and the protection of Micro, Small and Medium Enterprises and domestic industries ;
- b. That in order to further improve services and provide legal certainty for the industrial, trade and investment in the face of local, national, regional and international economic developments and the development of information and communication technology, it is necessary to be supported by a legislation in the field of Trademarks and Geographical Indications Which is more adequate;
- c. That in Law Number 15 of 2001 concerning Trademark there are

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<sup>20</sup> [www.ambadar.co.id](http://www.ambadar.co.id) accessed March 18, 2017.

<sup>21</sup> Muhamad Djumhana, *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual*, PT Citra Aditya Bakti, Bandung, 2006, p.78.

still shortcomings and has not been able to accommodate the development needs of the people in the field of Trademark and Geographical Indication and not enough to guarantee the protection of local and national economic potentials so that need to be replaced;

Based on Article 1 of Law no. 20 of 2016 on Trademark, the definition of trademark is a sign that can be displayed graphically pictures, logos, names, words, letters, numbers, colorations, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sound, hologram, or combination of 2 or more of them to distinguish goods and/or services produced by a person or legal entity in the trading activities of goods and/or services. Furthermore, the trademark is differentiated above:<sup>22</sup>

1. Trademarks are Trademarks used on goods traded by a person or persons jointly or by a legal entity to distinguish with other similar goods.
2. A Service trademark is a trademark used on services traded by a person or persons jointly or a legal entity to distinguish from other similar services. 4. Collective trademarks are trademarks used on goods and/or services of the same characteristics as to the nature, general characteristics, and quality of the goods or services and their controls which will be traded by several persons or legal entities jointly to differentiate with goods And/or other similar services.

The Right to Trademark is an exclusive right granted by the state to the owner of the trademark registered for a specified period of time by using the trademark itself or granting the other party permission to use it.<sup>23</sup> While the right to Geographical Indication is an exclusive right granted by the state to the

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<sup>22</sup> Undang - Undang No. 20 of 2016 concerning Merek.

<sup>23</sup> Pasal 1 angka (5) UU No. 20 Tahun 2016 tentang Merek dan Indikasi Geografis.

registered Geographical Indicator, in the name of reputation, quality, and characteristics under which the protection of such Geographical Indications is still present.<sup>24</sup>

In the framework of the realization of the ASEAN IPR Action Plan 2011-2015 in the ASEAN Economic Community, Indonesia has adjusted to amend some of its laws and regulations within the scope of intellectual property rights such as Law no. 15 of 2001 with Law no. 20 of 2016 on Trademark and Geographical Indication on the basis of the consideration of the establishment of the new Law no. 20 of 2016 that in the era of global trade, in line with international conventions that have been ratified by Indonesia, the role of Trademarks and Geographical Indications becomes very important, especially in maintaining fair business competition, shielding, consumer protection and the protection of Micro, Small and Medium Enterprises and Domestic industry. To further improve services and provide legal certainty for industry, trade and investment in the face of local, national, regional, and international economic developments and the development of information and communication technology, it is necessary to be supported by a legislation in the field of Trademark and Geographical Indication more adequate. Therefore, Law Number 15 of 2001 concerning the trademark still lacks and has not been able to accommodate the development needs of the people in the field of Trademark and Geographical Indication and not enough to guarantee the protection of local and national economic potentials so it needs to be replaced.<sup>25</sup>

Therefore, the legal implication of the participation of Indonesia in the ASEAN Economic Community, especially in the field of intellectual property rights is to adjust the changes to various provisions of intellectual property rights of Indonesia such as changes to the arrangement of Trademark as well as Geographical Indication. The impact of the openness of goods and services traffic within the framework of the ASEAN Economic Community has also

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<sup>24</sup> Pasal 1 angka (7) UU No. 20 Tahun 2016 tentang Merek dan Indikasi Geografis.

<sup>25</sup> Pembukaan UU No. 20 Tahun 2016 tentang Merek dan Indikasi Geografis

provided an opportunity for developments in the field of intellectual property rights with the introduction of new innovation goods among ASEAN member countries so that a legal protection system is required. It is also stated in the ASEAN Action Plan related to Intellectual Property Rights (ASEAN Action Plan 2011 -2015).

## **CLOSING**

1. Legal protection of intellectual property rights, especially Trademarks implemented in the framework of trade liberalization in the ASEAN Economic Community (ASEAN Economic Community) is manifested in the form of international agreements as stipulated in, first; The ASEAN Charter of 2008 and the second; In the ASEAN Plan of Action on Intellectual Property Rights 2011-2015 (ASEAN Intellectual Property Rights Action Plan).
2. The implications of Indonesia's participation in the ASEAN Economic Community's treaty impose the obligation to harmonize and synchronize the Indonesian national legal arrangements, especially in the field of trademarks with those in ASEAN. Therefore, Indonesia has harmonized and synchronized its Trademark Law by amending the Act. Amendment of the Law in question is Law no. 15 of 2001 has been replaced by Law no. 20 of 2016 on Trademarks and Geographical Indications. This is in line with international treaties ratified by Indonesia where the role of copyright, trademark and geographical indication is very important, especially in maintaining fair business competition, protecting consumers, and protecting Micro, Small and Medium Enterprises and domestic industries.

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