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Development and Challenges of Using Trademark Rights as Intangible Assets in Bankruptcy Assets in Indonesia

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Abstract

Intellectual property rights in the form of trademarks rights are company assets that have economic value. In its development, trademark rights can become part of the debtor's bankruptcy estate in a bankruptcy. However, in its implementation there are challenges in the use of trademark rights as bankrupt assets in order to pay off the debts of the bankrupt debtor. This study aims to determine the development of the use of trademark rights as bankrupt assets and analyze the challenges of trademarks execution as assets of bankrupt debtors. This research is a normative legal research using a statutory approach and a conceptual approach. The results showed that a trademark as a type of object, related to the bankruptcy process, is a type of object that can be used as part of assets in the process of paying debts to creditors, because intangible assets that have economic value and trademark rights can be transferred handing over their rights to other parties is part of the bankruptcy estate. The challenges faced in the use of trademark rights as bankrupt assets are related to trademark valuation, protection status and the validity period of trademark protection, as well as related to disputes over trademarks with third parties.

A. Introduction

Trademarks is one part of the scope of intellectual property rights. Article 1 point 1 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications (hereinafter as the Trademarks and Geographical Indications Law of 2016), defines a trademark as a sign that can be displayed graphically in the form of an image, logo, name, word, letters, numbers, arrangement of colors, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more of these elements distinguishes goods and/or services produced by persons or legal entities in trading activities goods and/or services. Meanwhile, the rights to a trademarks as described in Article 1 point 5 are an exclusive right granted by the state to registered trademark owners for a certain period of time by using the trademark themselves or giving permission to other parties to use it.

The economic growth in Indonesia is closely related to business actors in their business activities. Business actors in this case tend to want their goods and/or services to be known by the wider community. So that every person or company organization that exists, will understand the importance of a name and symbol used in running a business.[1] Director of Trademarks and Geographical Indications Kurniaman Telaumbanua said that a country that uses its trademarks intensively will have a positive correlation to the econo-

1 Rahmi Jened, *Hukum Merek (Trademark Law) Dalam Era Global dan Integrasi Ekonomi)* (Jakarta: Kencana Prenada Media Group, 2015), 3.

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mic system.[2] In line with this, the International Trademark Association (INTA) stated, the results of the study show that industries that intensively use trademarks have a positive impact on a country's economy.[3]

Bankruptcy Law is a field of law related to any field of law, including civil law and intellectual property law. Bankruptcy in the business world is one thing that is not expected for every business actor. Bankruptcy is regulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter as the K-PKPU Law). The purpose of enacting this law is to protect all the rights of creditors who have receivables from debtors or parties who are later declared bankrupt. This is because usually the assets left by bankrupt debtors are less in number than the amount of their debts.

Bankruptcy is a further implementation of the *paritas creditorium* principle and the *pari passu prorata parte* principle in the property law regime (*vermogensrechts*). The principle of *paritas creditorium* means that all of the debtor's assets, whether in the form of movable or immovable property or assets that are now owned by the debtor, are bound to the settlement of the debtor's obligations. The principle of *pari passu prorata parte* means that the assets are joint guarantees for the creditors and the proceeds must be distributed proportionally between them, unless there are creditors who, according to the law, must take precedence in receiving payment of their bills.[4]

According to Article 24 paragraph (1) of the K-PKPU Law, there are several legal consequences arising from a bankruptcy decision. The main effect is on the debtor's legal authority to manage his assets. With a bankruptcy decision, the debtor's assets are subject to general confiscation. The legal status of the debtor's assets which are subject to general confiscation hereinafter in terms of Indonesian bankruptcy law is referred to as bankrupt assets (*boedel faillete*).[5]

Related to the rights owned by every business entity cannot be separated, it can also include intellectual property rights. Intellectual property rights in the form of trademark rights are company assets that have economic value and can be categorized as intangible assets.[6] Intangible assets are part of bankruptcy assets in accordance with Article 1131 *Burgelijk Wetboek* (hereinafter as BW), namely: *"All the assets of the debtor, whether movable or immovable, whether existing or will exist in the future, shall be borne for all engagements individual"*. So that when a company is in a state of bankruptcy, the certificate of trademark rights can be withdrawn into the bankruptcy estate as long as the certificate is attached to the company. In line with this, referring to Article 1 paragraph (1) of the K-PKPU Law, if a limited liability company is declared bankrupt, then all of its assets are bankrupt assets. Thus, legal consequences will arise in the form of transfer of trademark rights in accordance with the provisions of Article 41 of the the Trademarks and Geographical Indications Law of 2016.

However, in practice, there are often challenges in using trademark rights as bankrupt assets when a bankruptcy occurs. Thus, in this paper the author will describe the development regarding the use of trademarks rights as bankrupt assets and the challenges of executing bankrupt debtors' assets, in order to find out developments and analyze the

2 Direktorat Jenderal Kekayaan Intelektual, "Direktur Merek dan IG: Upayakan Pertumbuhan Ekonomi Nasional dengan Permohonan Merek," https://dgip.go.id/artikel/detail-artikel/direktur-merek-dan-ig-upayakan-pertumbuhan-ekonomi-nasional-dengan-permohonan-merek?kategori=Berita%20Resmi%20Desain%20Industri (accessed on 9 November 2022).

3 Antara News, "INTA: Merek Dagang Berdampak Positif Terhadap Ekonomi," https://www.antaranews.com/berita/652680/inta-merek-dagang-berdampak-positif-terhadap-ekonomi (accessed on 9 November 2022).

4 Kartini Mulyadi. *Kepailitan Dan Penyelesaian Utang Piutang* (Jakarta : Rajawali Pers, 2001), 168.

5 Readytya Aji & Albertus Sentot Sudarwanto, "Akibat Hukum Putusan Pernyataan Pailit Pengadilan Niaga Nomor 03/Pdt/Sus-Pailit/2015/PN.Niaga.SMG Terhadap Harta Kekayaan Debitur Serta Perbuatan Hukum Debitur," *Jurnal Privat Law* 7, no. 1 (2019): 111.

6 Putri Dyani Larasati, "Merek Sebagai Harta Pailit Terkait Dengan Perseroan Terbatas Yang Dinyatakan Pailit," *Jurnal Hukum dan Kenotariatan* 2, no. 2 (2018): 51.

challenges of using trademark rights as bankrupt assets to formulate alternative solutions to the existing challenges.

This problem is necessary and interesting to study because in reality trademark rights can lead to legal uncertainty regarding the determination of the economic value of registered trademark rights that are transferred as a result of the company owning the rights having been declared bankrupt. In addition, if a limited liability company is declared bankrupt, trademark rights can be withdrawn as part of the bankruptcy estate by first reviewing and paying attention to the registration of the trademark and the period of protection. Therefore, the formulation of the problem in this study can be described as follows:

1. What is the position and development of trademark rights as intangible assets in bankruptcy estate?
2. What are the challenges of using trademark rights as bankruptcy assets?

B. Methods

This research uses a type of normative research with a statutory approach and a conceptual approach. According to Peter Mahmud Marzuki, the statutory approach is carried out by examining all regulations related to the legal issues being studied.[7] Meanwhile, the conceptual approach is an approach that departs from the views and doctrines that have developed in the science of law, in order to find ideas that give rise to relevant legal understandings, concepts and principles, as a basis for building a legal argument in solving legal issues faced.[8] The legal materials used in this study are primary and secondary legal materials using legal material collection techniques with library research.

C. Results and Discussion

1. Position and Development of Trademark Rights as Intangible Assets in Bankruptcy Assets

Material rights (*zakelijkrecht*) are absolute rights to an object where the right gives direct power over an object and can be defended against anyone.[9] There are things that distinguish between material rights and individual rights. A material right gives power over an object, whereas an individual right (*persoonlijkrecht*) gives a claim or charge against a person.[10]

The limitation of objects is contained in article 499 BW, which reads: "*According to the understanding of the law what is meant by objects is each item and each right that can be controlled by property rights*". Prof. Mahadi in his book entitled *Hak Milik Dalam Sistem Hukum Perdata Nasional*, the goods referred to by Article 499 BW are material objects (*stoffelijk voorwerp*), while rights are immaterial objects. This description is in line with the classification of objects according to article 503 BW, namely the classification of objects into groups of tangible objects and intangible objects. One of the immaterial or intangible objects in the form of rights is intellectual property rights.[11]

The first trademarks regulation made by the Indonesian government was Law Number 21 of 1961 concerning Company Marks and Commercial Marks. Previously, Indonesia used the Colonial Trademarks Law of 1912. In 1992, the Indonesian government renewed the regulation on trademarks in Law Number 21 of 1961 with Law Number 19 of 1992 concerning Trademarks. With the existence of this new regulation, an administrative decree related to the procedure for registering a trademark was made. In relation to the interests of trademark reform, Indonesia ratified the WIPO International Trademark Agreement. Until 1997, in order to comply with the TRIPS-GATT agreement, the government carried out a reform by issuing Law Number 14 of 1997 concerning Amendments to Law Number 19 of 1992 concerning Trademarks. There have been adjustments related to the protection of indications of origin and geographic origin. The re-

7 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2013), 133.
8 *Ibid*. 135-136.
9 Sri Soedewi, *Hukum Perdata: Hukum Benda* (Yogyakarta: Liberty, 2000), 24.
10 Subekti, *Pokok-Pokok Hukum Perdata* (Jakarta: Intermasa, 2003), 63.
11 O.K. Saidin, *Aspek Hukum Hak Kekayaan Intelektual* (Jakarta: PT Raja Grafindo Persada, 2015), 30.

newal of the Trademarks Law was carried out again to produce Law Number 15 of 2001 concerning Trademarks (hereinafter as the Trademarks Law of 2001).

In order to support and improve the business climate in Indonesia, Law Number 20 of 2016 concerning Marks and Geographical Indications was issued, which is the latest regulation currently in force. Several differences between the Trademarks Law of 2001 and the Trademarks and Geographical Indications Law of 2016 include:

1) Change in title, from the Trademarks Law to the Trademarks Law and Geographical Indications;
2) Trademark type expansion;
3) Flow changes in the trademark registration process;
4) The period of time for the trademark registration process until the certificate is issued;
5) Trademark registration renewal;
6) Arrangements regarding geographical indications;
7) Provisions on aggravation of criminal sanctions.

Along with legal dynamics, assets in the form of trademark rights can become one of the company's assets (intangible assets). Trademarks can be referred to as objects as contained in Article 499 BW. So that the trademark is included in the classification of movable and intangible objects for a company. There are 2 (two) types of rights attached to trademark rights, namely moral rights and economic rights. Both of these rights are attached to the trademark on a creativity which is an individual property right and should be given a legal protection. These economic rights are obtained due to the use of the right itself or due to the use of other parties based on a license agreement.[12]

In Indonesia, trademark rights are obtained through registration, which is called a constitutive stelsel or first to file system. The first applicant who files for registration in good faith is the party entitled to the trademark, until proven otherwise.[13] This right is an exclusive right which means that other people cannot use the same trademark for similar types of goods.

Article 1131 BW states that: "*All the debtor's assets, both movable and immovable, both those that already exist and those that will exist in the future, are borne by all of one's engagements*". Then in Article 1332 BW it is explained: "*The debtor's assets become collateral jointly for all creditors who give debt to him. Revenue from the sale of these objects is divided according to the balance, namely the size of each receivable, unless among the creditors there are valid reasons to take precedence.*" In this case, an object that can be used as a general guarantee payment if it meets the requirements, that is, the object has economic value and the right can be transferred to another party. Assets can be said as a wealth owned by the company. By recognizing the trademark as an asset, the trademark automatically has an economic value and can provide benefits for the company.

Trademark as a type of object, related to the bankruptcy process, is a type of object that can be used as part of the assets in the process of paying debts from debtors to creditors, because intangible assets are part of bankruptcy assets. Bankruptcy assets are the assets of a person or entity that has been declared bankrupt which is controlled by the Probate Court. Bankruptcy assets themselves can be in the form of objects, goods, or rights.[14]

The bankruptcy statement is not solely due to the inability to pay debts, as stipulated in Article 2 of the K-PKPU Law which states that: "*A person is declared bankrupt if he has two or more creditors and does not pay off at least one debt that has matured and can be collected, was declared bankrupt by a court decision, either at his own request or at the request of one or more of his creditors*." So it can be understood that bankruptcy can

12 Gatot Supramono, *Menyelesaikan Sengketa Merek Menurut Hukum Indonesia* (Jakarta: Rineka Cipta, 2008), 13.

13 Rahmi Jened, *Hukum Merek (Trademark Law) Dalam Era Global dan Integrasi Ekonomi)* (Jakarta: Kencana Prenada Media Group, 2015), 144.

14 Sari Ela Kartika & Advendi Simangunsong, *Hukum dalam Ekonomi* (Jakarta: Grasindo, 2008), 5.

occur when a person or debtor is unable to pay creditors for their debts that are due. This inability must also be accompanied by a concrete action to file, whether voluntarily carried out by the debtor himself or by a third party on a request for a bankruptcy statement to the court.[15]

In line with the condition of all the bankrupt debtor's assets which are in general confiscation as a result of a bankruptcy decision from the court, the bankrupt debtor is no longer able to carry out legal actions related to the assets he owns.[16] To carry out legal actions concerning their assets, the curator shall be carried out under the supervision of the Supervisory Judge.[17]

Based on Article 21 of the K-PKPU Law, bankruptcy includes all assets owned by the debtor at the time the bankruptcy decision was pronounced as well as everything that was acquired during the bankruptcy. An object can be used as bankruptcy assets as long as it has a selling price/value. The curator is obliged to settle debtors' debts to creditors. Debtors who own assets in the form of trademark rights that have commercial value, the assets will be managed to settle debts to creditors. Assets under the control of the curator or the Probate Court, if it is felt that it has a selling value, then the property is sold through an auction or if it has a selling value to be developed, then the object will be endeavored so that it can continue to produce and increase the profits of the bankruptcy estate in order to settle the debt debtor.

To find out the value of trademark rights owned by a limited liability company declared bankrupt, it can be traced through the financial statements of the bankrupt debtor. In the financial statement column, trademark rights are a type of intangible asset. Intangible assets are non-monetary assets or assets whose value cannot be ascertained from time to time by taking into account market values, which can be identified without physical form and provide economic rights and benefits to the owner of the asset. Trademarks are intangible assets related to marketing (marketing related intangible assets), namely those used in the marketing or promotion of products or services.[18]

Because of a trademark is an asset whose value cannot be ascertained from time to time, if the trademark is withdrawn in bankruptcy assets, in this case the valuation is an important aspect to pay attention to. The existence of a valuation is expected to show the independence of the curator in terms of selling assets. The curator can sell between the limit price and the highest price of an asset based on the valuation provided by the appraisal. Appraisal will conduct an appraisal of an object, whether movable or immovable, tangible or intangible, the purpose of which is to provide an estimate and opinion of the economic value of the object of appraisal in accordance with the Indonesian Valuation Standards.

Appraisals that have the authority to provide an appraisal of trademarks or intangible movable objects are those with a business license. Based on Article 2 paragraph (3) of the Minister of Finance Regulation Number 125/PMK.01/2008 concerning Public Appraisal Services, the scope of work of a business licensed appraisal includes:

a) Business entity;
b) inclusion;
c) Securities including their derivatives;
d) Company rights and obligations;
e) Intangible assets;
f) Economic losses caused by certain activities or events to support various corporate actions or material transactions;
g) Fairness opinion.

There are 3 (three) methods that are commonly used by appraisers in the practice of valuing intellectual property rights, namely:[19]

15 Sutan Remy Sjadeini, *Memahami Undang-Undang No. 34 Tahun 2004 Tentang Kepailitan* (Jakarta: Pustaka Utama Grafiti, 2009), 28.

16 Yuhelson, *Hukum Kepailitan di Indonesia*, (Gorontalo: Ideas Publishing, 2019), 133.

17 Kadek Indra Dewantara & Dewa Gde Rudy, "Kewenangan Kurator dalam Mengurus dan Menguasai Aset Debitor Pailit," *Jurnal Kertha Semaya* 7, no. 9 (2019): 11.

18 Larasati, *Op.cit*., 56.

19 Indra Rahmatullah, *Aset Hak Kekayaan Intelektual Sebagai Jaminan Dalam Perbankan* (Yogyakarta: Deepublish, 2015), 142-144.

a) Cost Approach
b) Market Approach
c) Income Approach

A trademark can become an asset in a company provided that the trademark must be attached to the company and apply immediately. This means that the certificate of rights over the trademark must be in the name of the company concerned. In the event that a trademark certificate is registered under an individual's name, it cannot be used as part of the company's assets and cannot immediately become bankrupt assets. In addition, not all trademarks have a profit, trademarks that are registered with the Directorate General of Intellectual Property Rights do not necessarily provide value to the trademarks that are registered. Trademark value can be achieved if the asset can be commercialized through a licensing agreement or other means so that the trademark can be said to be bankrupt property.

Efforts to execute trademark rights on the implementation of court decisions if a limited liability company is declared bankrupt can be carried out in 2 (two) ways, namely through public auctions and private sales which are carried out based on an agreement between the owners of trademark rights and potential purchasers of trademark rights. The right to a trademark which is included in the bankrupt assets of a limited liability company can be known if the registration of the trademark is registered in the name of the limited liability company concerned. The role of appraiser services is very necessary in order to calculate the fair value of the trademark so that it does not harm the trademark owner and potential trademark buyers.

2. Challenges in Implementing the Use of Trademark Rights as Bankruptcy Assets

A bankruptcy decision gives a legal consequence to a limited liability company that is declared bankrupt and loses civil rights to manage its assets. A trademark as a bankruptcy property is an object that can be used as an asset for payment of debtors' debts to creditors and also serves as collateral for the company's debts. Trademark rights in their position as material rights that can be used as bankrupt assets when a bankruptcy occurs, the implementation often encounters several challenges. Some of them are:

a. Trademark valuation in bankruptcy estate settlement

The curator's authority is based on Article 69 of the K-PKPU Law, namely managing and settling bankruptcy assets. This task can be carried out after a bankruptcy declaration is made, so that the debtor no longer has the right to manage and settle his assets which are included in bankruptcy assets. The obstacle faced by curators when meeting intangible assets such as trademark rights is that assets like this must be assessed first by a certified appraisal.[20] So that it will be known, what is the real value of the trademark rights, taking into account the benefits for the company and the market value. Because only the Public Appraisal Services Office (KJPP) with a business license can evaluate trademarks. Therefore, Indonesia also needs a special institution that is established in the framework of intellectual property valuation.

One of the obstacles faced by the curator in maximizing trademark rights during bankruptcy is that the creditor feels the auction limit price is too expensive or unreasonable and the debtor feels disadvantaged because the sale of his bankruptcy assets, in this case the trademark, does not sell because the limit price is too high so there are no interested parties. In accordance with Article 44 of the Regulation of the Minister of Finance Number 27/PMK.06.2016 concerning Instructions for Implementation of Auctions it states that the seller (in the case of an execution auction is the curator) sets a limit value based on an assessment by an appraiser or appraiser. To overcome the above matters, it is best if the determination of the limit price involves the services of an appraiser who is able to estimate the price of the debtor's bankruptcy assets that are to be auctioned off. Once the auction has been held, but there are no interested parties who buy bankruptcy assets in the form of trademark and

20 Johnson Sahat Maruli Tua, "Intellectual Property Rights as Bankruptcy Property in Bankruptcy Law in Indonesia," Journal of Law to-ra 5, no. 3, (2019): 115.

re-auctions have been carried out but there are still no bids. Then the purchase of a trademark can be done by means of underhand sales between the debtor who owns the trademark and the prospective buyer.

b. The trademark has not been registered or the trademark protection period has ended

When a debtor owns a trademark but apparently has not registered it with the Directorate General of Intellectual Property, then the debtor cannot be said to be the legal owner of trademark. Therefore, a trademark that has not been registered cannot be classified as bankrupt assets in a bankruptcy, considering that legal protection for a mark can only be obtained through a registration with the Directorate General of Intellectual Property based on a first to file system. So that the curator must first register the trademark in order to be able to legally declare that the trademark in question is part of the debtor's bankrupt assets.

If a company has receivables from a trademark rights license agreement with a value of receivables paid annually, then the appraisal will evaluate the license agreement. If there is no license agreement, research on the company's asset balance arising from the sale of products from that trademark will be carried out.

In the bankruptcy case Njonja Meneer Number 11/Pdt.Sus-Pailit/2017/PN.Niaga. Smg. there are certificates of trademark rights that have expired, which are only valued by an appraisal in the amount of 6.4 billion, due to reasons of uncertainty regarding the granting of the request for an extension of 72 certificates of trademark rights by the Directorate General of Intellectual Property. Meanwhile, the Supervisory Judge approved the sale of 72 certificates of trademark rights at a price of 10.25 billion.

Optimization of trademark rights is only carried out on trademark that have been registered and still have value when the company goes bankrupt, by continuing the license agreement that previously existed and liquidating trademark assets.[21]

If there is a license agreement regarding trademark rights that is still being implemented when the company is declared bankrupt, then the license agreement will be analyzed whether it needs to be continued or not, if it is not necessary to continue, then the curator will carry out calculations regarding the receivables that should be received by the debtor. If there is no ongoing licensing agreement, then trademark rights are optimized through settlement, namely by selling trademark rights assets either through auctions or private sales.

c. There is a trademark rights dispute with a third party

When the trademark rights owned by the debtor are in dispute with a third party as referred to in Article 29 of the K-PKPU Law, all cases brought against a bankrupt debtor since bankruptcy were declared null and void. So it is not clear who is said to be the legal owner of the trademark rights in question.

As for the trademark rights which are currently in a state of dispute, of course they cannot be stated solely as part of the assets of the bankrupt debtor. Except when the debtor acts as a plaintiff, the case will still be carried out pending the outcome of the court's decision.

D. Consclusion

A trademark is an intangible movable object that gives exclusive rights in the form of economic rights and moral rights attached to the trademark owner, thus making the trademark a high-value ownership asset. Regarding a limited liability company that is declared bankrupt and has trademark rights attached to it, this trademark right can be withdrawn as bankruptcy property in accordance with the provisions of Article 1131 BW jo. Article 21 of the K-PKPU Law. Efforts to execute trademark rights on the implementation of court decisions if a limited liability company is declared bankrupt can be carried out in 2 (two) ways, namely through public auctions and private sales which are carried out based

21 Johnson Sahat Maruli Tua, "Hak katas Kekayaan Intelektual sebagai Harta Pailit dalam Hukum Kepailitan di Indonesia," *Jurnal Hukum to-ra* 5, no. 3, (2019): 115.

on an agreement between the owners of trademark rights and potential purchasers of trademark rights. The challenges faced in using trademark rights as bankrupt assets include, among others, related to trademark valuation, protection status and validity period of trademark protection, as well as related to disputes over trademarks with third parties.

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