

The Nature Of Trademark Rights As An Object Of Debt Collateral

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Abstract

Trademark rights could be used as an object of debt security based on the provisions of the Government Regulation on the Creative Economy. However, in practice, banks had not accepted trademark rights as debt collateral, thus causing legal uncertainty for trademark owners. Purpose: This study aimed to discover the nature of trademark rights as an object of debt security; the determination of the economic value of trademark rights as an object of debt security; and the ideal concept of trademark rights as an object of debt security that provided legal certainty. Method: This study used normative legal research methods using the statute approach, conceptual approach, and comparative approach, with the technique of collecting legal materials through a literature study and analysed qualitatively. Conclusion: 1) The nature of intellectual property rights over trademarks as an object of debt security was intangible movable assets that could be used as collateral because they were transferable and had economic value.

Keywords: *Trademark Rights; Debt Security; Intellectual Property Rights; Debt Collateral*

INTRODUCTION

Indonesia is a country with enormous potential for Intellectual Property Rights (IPR) (1), IPR is a right that arises from the results of thought power that produces a product or process that is useful for humans, which is essentially the right to enjoy economically the results of an intellectual creativity (2). IPR is an exclusive right granted by the state to creators, creators, or inventors of works that have commercial value, either automatically or through registration. The concept of exclusive rights granted to IPR holders not only serves as evidence of protection in cases of legal disputes. However, along with the increasing growth of the global market, IPR can also be used as collateral to obtain bank credit (3). Also against the need to promote effective and adequate protection and to ensure that processes and enforcement measures do not become barriers to trade (4).

Of the several categories of intellectual property rights, which will be discussed in this study are Trademark rights. Trademark rights as intellectual property are regulated in Law Number 20 Year 2016 on Trademarks and Geographical Indications (hereinafter abbreviated as Trademark Law and Geographical Indications). After the registration of Trademark, the right to Trademark will be born for the owner as stated in Article 1 Point (5) of the Trademark and Geographical Indications Act that the right to Trademark is an exclusive right granted by the state to the owner of a registered Trademark for a certain period by using the Trademark itself or giving permission to other parties to use it. Rights to Trademark must first have proof of ownership obtained from Trademark registration, which is evidenced by the Trademark certificate. The transfer of rights to the Trademark can be done according to Article 41 Paragraph (1) of the Trademark and Geographical Indications Act, namely that a right to a registered Trademark may be transferred or assigned due to a: a) inheritance, b) will, c) waqf, d) grant, e) agreement; or d) other causes justified by laws and regulations.

The regulation becomes the basis that the Trademark Law and Geographical Indications have been regulated that the transfer of rights to Trademark can be done based on the agreement. However, although the rights to Trademark can be transferred, in the Trademark Act and Geographical Indications are not found legal basis related to the placement of Trademark rights as an object of collatera (5). Trademark rights can be categorized as intangible movable property because Trademark rights are rights that have value and can be considered in global trade (6).

The right to trademark as an object of collateral should be recognized as a legal reform, but in fact it has not provided protection and legal certainty. According to Hans Kelsen's theory of legal certainty, law is a

norm. Norm is a statement that emphasizes the should or das sollen aspect, by including some rules for action to be taken. Each human being has freedom, but in living together he bears the responsibility of creating an orderly common life (7).

Trademark rights as debt collateral does not yet have certainty and adequate legal protection because in practice not all banking and non-banking institutions can accept IPR, especially trademark rights as collateral. because there is no legal basis that regulates the classification of trademark rights as a collateral object and what collateral institutions can encumber trademark rights. Another reason is that it is difficult to determine the economic value of trademark rights because trademark rights are not physical assets and there is no competent and accountable institution that can assess the assets of trademark rights and there is no mechanism for the execution of the rights to trademark in case of bad credit or default and the market that will accommodate IPR assets on trademark in case of bad credit or default.

METHODOLOGY

The type of research used in this research is normative legal research, namely legal research conducted by examining library materials or secondary data (8). The approach used in this research is as follows:

Statute approach: The statute approach is an approach that is carried out by examining the laws and regulations relating to the problem under study. Conceptual approach: is an approach that departs from the views and doctrines that develop in legal science. The comparative approach: is an approach that is carried out by comparing the laws of a country with laws from one or more other countries that regulate the same thing. The source of legal materials in this research uses library materials. The legal materials used include: Primary Legal Materials Mukti Fajar and Yulianto Achmad explained that primary legal materials are legal materials that are authoritative, meaning that they have authority, which is the result of actions or activities carried out by institutions authorized to do so. Primary legal materials can be in the form (9) :

Civil Code

Law Number 42 Year 1999 on Fiduciary Guarantee.

Law Number 20 Year 2016 on Trademarks and Geographical Indications

Government Regulation Number 24 of 2022 concerning the Implementing Regulations of Law Number 24 of 2019 concerning the Creative Economy.

Secondary Legal Materials

Secondary legal materials are legal materials obtained through literature studies. Secondary legal materials can be in the form of law books, legal journals, research results, papers, articles, and the internet related to the problems to be studied.

The legal material collection technique used to obtain the necessary data is library research. In this study secondary data was collected by using a literature study, which is a method used in collecting data through written data by using content analysis (10). Analysis of legal materials is an activity in research in the form of conducting a study of the results of data processing. The analysis of legal materials used is a qualitative approach. Qualitative approach is an approach that is carried out by parsing data and compiling sentences that are arranged in an organized manner. The descriptive research is a positive legal structure used by the author as a reference to solve the legal problems discussed in the research (11).

RESULT AND DISCUSSION

Economic Value of Trademark Rights

The calculation of the economic value of trademark rights is based on an assessment of the reputation of the trademark in the world of trade in goods and or services, the range of marketing areas and / or registration in several countries. Thus, the longer the brand will be more famous and for that economic value will be higher. The existence of economic value indicates that the right to trademark is one of the objects that have economic value and worth the money that can be traded (marketable). However, not all trademark rights have economic value and are worth the money that can be traded (marketable). Therefore, the assessment of the economic aspect must be done to determine the extent to which the

trademark meets the economic requirements as a credit guarantee and has a value or price based on economic calculations.

Table 4.1. Juridical Terms and Economic Terms of Trademark as Collateral

No.	Juridical Requirements	Economical Requirements
1.	A trademark can be pledged if it already has rights..	The trademark rights must be easily transferable or transferable to other parties.
2.	The relevant trademark rights are the debtor's own property.	The economic value of brand rights should be stable and it is better if it can increase in the future.
3.	The trademark rights to be pledged must still be within the protection period during the credit granting period.	The relevant trademark must be reputable and have a market share.
4.	The trademark rights to be pledged must be free from collateral ties with other parties.	The existence of the financial statements of the company that owns the trademark rights in order to know the trademark rights that will be used as collateral has economic value or not.
5.	The trademark right is not in dispute with a third party.	

After the trademark rights granted by the debtor have met the juridical and economic requirements to be used as credit collateral and have been approved by the bank, the trademark must be immediately bound as credit collateral. To safeguard the interests of the bank, the binding must be done through a collateral institution.

In the application for granting credit submitted by the prospective debtor to the bank, the prospective debtor is required by the bank to submit a guarantee to him and even often required to provide an additional guarantee of credit for certain reasons. If the trademark is to be used as collateral, then the trademark is included in the material collateral. This is because according to Bekartini Caroline, the trademark has the properties contained in the property security rights such as (12) :

A trademark is the personal property or right of the trademark owner;
has economic value;
can be assigned or transferred;

It has the nature of *droit de suite*, which follows the object wherever it is..

Mechanism of Valuation of Trademark Rights as Debt Collateral Objects

The guaranteed agreement is an assessor, debt collateral can be in the form of objects so that it is a material guarantee and or in the form of a debt guarantee promise so that it is a personal guarantee (13). Property collateral provides property rights to the collateral holder. The valuation of rights to the brand is an important part of ensuring bank trust. This is the reason why banks have not accepted intellectual property as collateral because there is no clear concept of how to assess intellectual property rights, especially trademark rights. Credit policies in the banking industry should clarify valuation responsibilities and establish formal and standardized appraisal procedures, including reference to reappraisal during the credit renewal or extension process. For each type of credit facility, there should be a description explaining the types and limitations of permissible appraisals. In addition, the appraisal procedures and differences between different types of loans should also be detailed, including the ratio of the loan amount to the appraised value of the project and collateral.

One aspect that supports trademark rights as a guarantee is the valuation of the trademark rights Several methods are used in the valuation of intellectual property rights, one of which is trademark rights that are commonly used in practice, namely (14) :

Cost Approach: The Cost Approach is a valuation method that calculates the future benefits of ownership by calculating the amount of money required to replace the future service capabilities of the intellectual property being valued.

Market Approach: The Market Approach is carried out by using price data that shows the value of assets based on prices agreed by others as fair prices in open market transactions with identical or comparable assets, where there is price information.

Income Approach: An income approach valuation aims to assess market value by calculating the present value of future economic benefits..

In Indonesia, brand rights are still not recognized by banks as collateral. However, many companies are asking for IPR valuation. Trademark rights adhere to the constitutive principle or in other words must be registered, but in fact there are many duplicate violations of brands even to well-known brands(15), then from this, internationally there are various reasons that encourage companies to conduct valuations or valuations of IPR. In practice in Indonesia, companies value their IPRs for transaction reasons, internal use, and other purposes. These valuations are carried out by professionals by complying with the Indonesian Appraisal Code of Ethics (KEPI) and Indonesian Valuation Standards (SPI). According to the Minister of Finance Regulation Number 101/PMK. 01/2014 concerning Public Appraisers, that appraisal is a work process to provide a written opinion on the economic value of an object of appraisal in accordance with Indonesian Appraisal Standards (basic guidelines that must be obeyed by appraisers in conducting appraisals) (16).

In general, the appraiser before cooperating or being assigned by the bank to assess assets, first asks what the asset will be valued for, for example for credit guarantee purposes or for others. This is because the valuation criteria are adjusted to the characteristics of the needs of the asset valuation. This will provide a reasonable and objective assessment of each valuation process. However, the existence of intellectual property appraisers, especially trademark rights, is not yet clear due to the limited competence of intellectual property appraisers, especially trademark rights, both internal appraisers in banks and public appraisers, which makes it difficult to apply trademark rights as collateral to obtain loan capital in banks. Therefore, there is a need for a special institution of intellectual property appraisers, especially trademark rights, which handles the assessment of intellectual property so that the assessment can run coordinated and systematic.

CONCLUSION

The nature of the rights to the trademark as an object of debt collateral is basically intangible movable objects and included in the property rights under Article 449 and 503 of the Civil Code so that it can be used as collateral in the bank because the rights to the trademark meets the elements to be used as collateral, namely transferable and has economic value.

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