



## LEGAL CONSEQUENCES OF TRANSFER OF RIGHTS TO A TRADEMARK THAT HAS NOT BEEN REGISTERED BEFORE THE DEBTOR IS DECIDED BANKRUPT

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### *Abstract*

*This study examines the legal consequences of trademark right transfers that have not been recorded with the Directorate General of Intellectual Property (DJKI) when the seller is subsequently declared bankrupt. The main issue addressed is the legal implications for the buyer (third party) who has legally completed the trademark purchase transaction but has not yet recorded the transfer of rights before the seller was declared bankrupt. The Civil Code, Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Law Number 20 of 2016 concerning Trademarks and Geographical Indications, and other relevant regulations are all examined in this study using a normative juridical method with statutory and conceptual approaches.*

**Keywords:** Trademark, Transfer of Rights, Bankruptcy.

### **Abstrak**

Penelitian ini mengkaji akibat hukum dari pengalihan hak atas merek yang belum dicatatkan pada Direktorat Jenderal Kekayaan Intelektual (DJKI) ketika penjual merek kemudian diputus pailit. Permasalahan yang diangkat adalah bagaimana konsekuensi hukum bagi pihak pembeli merek (pihak ketiga) yang telah melaksanakan transaksi jual beli merek secara sah namun belum melakukan pencatatan pengalihan hak sebelum penjual dinyatakan pailit. Kitab Undang-Undang Perdata, Undang-Undang Nomor 37 Tahun 2004 terkait Kepailitan serta Penangguhan Kewajiban Pembayaran Utang, Undang-Undang Nomor 20 Tahun 2016 tentang Merek Dagang dan Indikasi Geografis, dan peraturan-peraturan terkait lainnya semuanya diteliti dalam studi ini memakai metode yuridis normatif atas pendekatan hukum dan konseptual.

**Kata Kunci:** Merek, Pengalihan Hak, Kepailitan.

## **I. INTRODUCTION**

According to Article 1, number 1 of the Trademark and Geographical Indications Law (hereinafter referred to as the UUMIG), a trademark is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, arrangement of colors, two- or three-dimensional, sound, hologram, or a combination of two or more of these elements to distinguish goods and/or services produced by a person or legal entity in the trading of goods and/or services. According to historical records, trademarks have been used



as identification marks since the time of Ancient Egypt, when artifacts dating from between 3000 and 1450 BC were discovered by British archaeologist Sir Arthur Evans. These remains demonstrate how trademarks were used as identifiers and stamps on commodities and livestock during the Minoan civilization, as well as during the Greek and Roman eras (Mayana & Santika, 2021).

Once a trademark is registered—that is, by registering ownership of the trademark with a government agency that can provide legal protection for the trademark—it is possible to obtain trademark rights under Article 3 of the UUMIG. The UUMIG states in Article 1 number 5 that "The State guarantees exclusive rights for a certain period to the owner of a registered trademark to use it himself or may authorize another party to use the trademark." To ensure exclusive rights and a monopoly on a trademark, no other party may use the trademark without the owner's consent. According to Rahmi Jened, exclusive rights are the ability to exclude another party for a certain period by considering existing restrictions, while rights are legally enforceable demands against one person and another party that compel the other party to act or refrain from acting (in accordance with existing law) (Jened, 2010).

According to H.U. Adil, copyrights, patents, trademarks, industrial designs, and other forms of intellectual property that are legitimate and legally recognized are examples of intangibles and intellectual creations. Intellectual property is classified as an intangible asset that carries economic and moral rights; therefore, the transfer of rights to a trademark is a way to exercise economic rights. Intellectual property rights are material rights, namely rights to objects derived from the work of the brain, intellect, or reasoning, thus considered to be intangible or immaterial (Darmawan, 2024).

The law permits the transfer of trademark ownership to another party, in addition to the right to use the trademark itself or to authorize another party to use it. The right to transfer trademark ownership is the right to grant exclusive rights previously held by the previous trademark owner to another party, thereby terminating the exclusive rights previously held by the previous trademark owner and transferring them to another party. This is not the same as granting permission to another party, where the trademark holder still enjoys the exclusive rights to the trademark. This is in accordance with the Nemoplus Principle, which states that an individual cannot transfer rights beyond what is their right and that the owner of an object is usually the person with the power to regulate it (Sofwan, n.d.).

According to Article 1459 of the Indonesian Criminal Code (hereinafter referred to as the Indonesian Criminal Code), ownership of an item does not transfer to the buyer until the delivery is completed, as stipulated in Articles 612, 613, and 616 of the Indonesian Criminal Code. Article 613 of the Indonesian Criminal Code stipulates that the transfer of receivables under a name and other intangible assets is carried out by executing an authentic or secret deed, through which the rights to the item are transferred to another party. This is in accordance with Article 612 of the Indonesian Criminal Code, which regulates the actual transfer of movable assets, except for intangible assets. Meanwhile, the transfer of immovable assets is regulated by Article 616 of the Indonesian Criminal Code and is carried out by announcing the relevant deed. Therefore, from the moment the transfer occurs, the rights to the trademark are transferred.

In legal practice, the transfer of trademark rights is often associated with manipulative transfer practices in bankruptcy estates, such as registration by unauthorized parties or asset transfers to avoid asset execution during bankruptcy. However, what if the trademark sale and purchase occurred before the debtor entered bankruptcy, and the transfer of trademark rights had not yet been recorded with the Directorate General of Intellectual Property?

The Directorate General of Intellectual Property (DJKI) only acts upon receiving a request/application from an applicant seeking to transfer trademark rights. Therefore, careful legal scrutiny is required to determine the legal consequences of a trademark sale and purchase conducted before the seller enters bankruptcy proceedings, as well as the legal consequences of such actions.

## **II. THEORITICAL STUDIES**

Regulations regarding the registration of the transfer of trademark rights are expressly stated in Article 41 paragraph (3) of the UUMIG, which states that "Registering of the transfer of rights to a registered trademark must be requested from the Minister. The application for registration of the transfer of rights to a registered trademark must be accompanied by supporting documents." Furthermore, the explanation of Article 41 paragraph (4) of the UUMIG explains that supporting documents include trademark certificates and other evidence supporting ownership of those rights.

Regulations regarding other supporting documents besides trademark certificates are stated in Article 39 paragraph (1) of the Regulation of the Minister of Law and Human Rights (hereinafter referred to as *Perkemenkumham*) Number 67 of 2016 concerning Trademark Registration, namely attaching the required documents as proof of the transfer of trademark rights, in the form of:

- a. 1. Inheritance fatwa;  
2. will;  
3. waqf deed;  
4. gift deed;  
5. agreement deed; or  
6. other evidence permitted by law.
- b. A photocopy of the trademark certificate, an official extract of the registered trademark, or proof of application
- c. a certified copy of the legal entity deed if the recipient of the rights is a legal entity
- d. a photocopy of the applicant's identity card
- e. a power of attorney, if submitted through a proxy
- f. proof of payment of fees

Assignment (leverage or transfer of ownership rights), which refers to the transfer of an object by its owner or on behalf of another person so that the other person obtains ownership rights to the object, is one of the most significant and common methods of acquiring ownership rights in society. According to Article 1457 of the Indonesian Civil Code, there are two stages in a sale and purchase agreement. The first stage is the sale and purchase agreement, which is only mandatory. This stage does not result in a transfer of ownership; On the other hand, ownership rights are transferred in the second stage, which occurs after the transfer of ownership (Usanti & Agustin, 2012). So that the Handover (leveraging) of Trademark Rights itself means not only the physical handover of a registered trademark certificate to another party but has a deeper meaning such as the need to carry out a transfer of ownership, namely in the form of registering the transfer of rights to the relevant ministry so that the recipient of the trademark transfer rights can enjoy exclusive rights to the trademark.

### **III. RESEARCH METHODS**

Legal research is not intended to validate theories, but to offer recommendations on what should be implemented. Given that legal science is an applied science, recommendations must emerge from research findings; even in an academic setting, legal research must provide useful recommendations. Marzuki (2023) used legislative and conceptual approaches as the methodologies used based on this decision.

This strategy utilizes a review method, or examining all regulations and provisions relevant to the author's research. Beginning with the Criminal Code, Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Law No. 20 of 2016 concerning Trademarks and Geographical Indications, and Regulation of the Minister of Law and Human Rights No. 67 of 2016 concerning Trademark Registration, the author must understand the hierarchy of laws and regulations and their principles to address the legal issues being studied.

To obtain results that are verifiable, objective, and systematically accountable, relevant legal materials are needed to address the issues being researched. The technique of collecting primary and secondary legal materials was carried out by reviewing various documents relevant to this research. The source of legal materials for this research was obtained from the decisions of the Republic of Indonesia courts regarding other lawsuits related to bankruptcy and PKPU by searching the website of the Directory of Decisions of the Supreme Court of the Republic of Indonesia. Then, to expand this research, other supporting sources were obtained from the researcher's books and library books.

### **IV. RESEARCH RESULTS**

According to Article 499 of Book II of the Indonesian Criminal Code, which defines "object" as "all products and rights that have ownership rights," trademark rights can be referred to as "objects." Material rights are the authority to manage an object as mentioned in Book II of the Indonesian Criminal Code. It is clear from this description that objects include both intangible goods and tangible/material products, and that a trademark can only be regulated after registration. Article 503 of the Indonesian Criminal Code, which stipulates that every object is either physical or non-physical, then highlights the provisions regarding objects, including goods and rights. Consequently, trademark rights can be classified as intangible objects.

John Locke used the phrase "Life, Liberty, and Property" to explain his theory of property ownership in relation to human rights. Locke's ideas stem from the fact that, in the early days of naturalism, there was a calm and secure environment and no positive laws that divided property or gave one person the power to govern others. Locke also stated that there are three essential things: 1. Our right to be free from harm; 2. Our right to obtain a portion of another person's wealth in times of great need; and 3. Our right to freely use common resources. According to Locke's three ideas, no one has the right to violate another person's human rights or prevent them from entering society (Jened, 2010).

Ownership is transferred from one person to another through the transfer of rights. Therefore, 1. actual transfer (*feitelijke levering*) and 2. legal transfer (*juridische levering*) are essential components of the transfer process. The following conditions must be met for a transfer to be considered valid (Usanti & Agustin, 2012).

### **1. Property Agreement (*zakelijke overeenkomst*)**

An agreement that results in the transfer of property rights, such as ownership, control, mortgage, or pledge. Unlike agreements listed in Book III of the Civil Code, *verbintenis* cannot result from this *zakelijk* agreement. In Book III, agreements that result in *verbintenis*—that is, one party must perform and the other party has the right to perform—are usually mandatory. Only personal rights are created by obligatory agreements; property rights are not created or transferred.

### **2. Basis for the Transfer of Ownership**

The legal relationship that gives rise to the transfer of ownership in a sale or exchange is called the legal basis. Because there is a legal basis for the transfer of ownership, Article 583 of the Indonesian Criminal Code requires transfer, meaning the transfer of ownership is mandatory. The legal relationship for the transfer of ownership is defined as the legal basis in Article 584 of the Indonesian Criminal Code. There are differing views regarding the necessity of ownership: is the transfer independent of the legal basis or dependent on it? Two lessons can be learned from this perspective, in particular: (Sofwan, n.d.)

- a. Causal doctrine: The legality of a transfer is determined solely by its basis. The transfer is valid if the basis of the right is valid. Conversely, the transfer is invalid if the basis of the right is flawed. A valid ownership right is necessary for the transfer to be valid. Deiphuis and Scholten proposed this theory.

b. Abstract doctrine: The basis of the right and its transmission are separate issues. The actual basis of the right has no bearing on the legitimacy of the transfer. A subsequent legal act independent of the legitimacy of the legal relationship that gave rise to it is known as an abstract legal act. However, the abstract doctrine of Article 584 of the Indonesian Criminal Code, which discusses transfers resulting from the basis of the transfer of ownership rights, is interpreted to mean that only the ownership rights deemed valid are sufficient for the validity of the transfer. A legal transaction known as a transfer of rights occurs when ownership rights are transferred from one individual to another. The transfer of rights can be carried out in two ways:

1. The acquisition of rights through a one-to-one transfer from one person to another, such as through sale, gift, exchange, etc., is known as *bizondere* property rights.
2. *Algemeen* property rights refer to the acquisition of rights in a general, non-individual manner, such as through inheritance or marriage, with a combination of assets (*boedelmenging*). (Subekti, n.d.)

According to Article 1320 of the Indonesian Civil Code, the transfer of trademark rights based on a contract or agreement between two parties must meet the following criteria for a valid agreement: agreement, competence, specific issues, and justifiable reasons. A trademark transfer agreement can be executed as long as the purchaser and trademark owner fulfill these requirements. Trademark rights are unique rights that can only be exercised by the owner of those rights. These rights are essentially monopolistic and exclusive. The trademark owner must grant permission to others to use the trademark.

According to Article 1338 paragraph (1) of the Indonesian Civil Code, freedom of contract stipulates that all legally made agreements are legally binding on those who make them. According to Article 1338 paragraph (3) of the Indonesian Criminal Code, an agreement must be made and executed in good faith, which is the basis for a person to enter into a formal agreement. Because the requirements for the validity of an agreement are contained in Article 1320 of the Indonesian Criminal Code, this article clarifies that the agreement must contain freedom of contract, the principles of *pacta sunt servanda*, legal certainty, and good faith (A'yun Amalia & Prasetyawati, 2019).

Once a trademark has been approved for registration, the registered trademark owner has the exclusive right to use the trademark (Saputri, 2024). Therefore, to ensure the legality

of a trademark transfer, ensuring it has a full legal impact on the new owner and third parties, and ensuring legal certainty, registration with the relevant ministry is a mandatory requirement to ensure the leveraging and transfer of ownership process in the trademark transfer is fully completed and meets the provisions of Article 41 paragraph (3) of the Indonesian Trademark Law. The acquisition of rights based on the transfer of rights is specifically stipulated in the Trademark Law, in the chapter on trademark transfers. Article 41 paragraph (1) of the UUMIG states that rights to a registered trademark can be transferred or assigned for the following reasons:

- a. inheritance;
- b. will;
- c. endowment;
- d. gift;
- e. agreement; or
- f. other reasons permitted by law.

Article 41 of the UUMIG does not explain what is meant by an agreement. However, Article 39 paragraph (1) of Minister of Law and Human Rights Regulation No. 67 of 2016 regulates the provisions that must be prepared as evidence for submitting a transfer application, namely:

1. inheritance;
2. will;
3. endowment deed;
4. gift deed;
5. agreement deed; or
6. other evidence permitted by law.

However, the sale and purchase of trademark rights without immediately registering the transfer of trademark rights does not result in legal consequences for third parties. This is because Article 41 paragraph (6) of the UUMIG stipulates that the transfer of trademark rights not registered with the Directorate General of Intellectual Property under the Ministry of Law does not result in legal consequences for third parties.

If, after the sale and purchase of the trademark, the transfer of rights is not immediately carried out, and the first party or seller of the trademark later becomes a bankrupt debtor



(hereinafter referred to as the seller or bankrupt debtor), this will impact the sale and purchase of trademark rights owned by the third party. This will result in legal consequences that can be detrimental to the third party as the purchaser of the trademark rights. Legal consequences that can be detrimental to third parties include:

### **1. Loss of Exclusive Rights to the Purchased Trademark**

Even if the third party has fulfilled their obligations as a good-faith purchaser, a trademark sale without registering the transfer of trademark rights with the Directorate General of Intellectual Property Rights (DGIP) does not have legal consequences for the third party. Therefore, if the seller, in this case, is a bankrupt debtor, the rights to the purchased trademark will revert to the bankrupt debtor, and the third party loses the right to control the purchased trademark.

This loss of ownership rights encompasses all exclusive rights inherent in trademark X, as stipulated in Article 1 number 5 of the UUMIG, which states that trademark rights are the exclusive rights of the registered trademark owner to use the trademark themselves or to grant permission to other parties to use it. Following the bankruptcy decision, the third party cannot enjoy exclusive trademark rights, including:

- a. Using the trademark;
- b. Granting licenses to third parties;
- c. Transferring trademark rights to third parties under Article 41 of the UUMIG;
- d. Using the trademark as collateral for debt;
- e. filing a lawsuit against a party using a trademark without consent.

Civil law doctrine stipulates that parties who enter into an agreement in good faith must be protected from losses arising from circumstances beyond their control, especially if the third party is unaware that the seller (bankrupt debtor) will be in bankruptcy.

### **2. Trademark Rights Included in Bankruptcy Law**

According to R. Soeroso, activities undertaken by an actor to achieve a desired outcome have legal consequences regulated by law (Soeroso, 2005). A legal event or action that results in a legal relationship that gives rise to the rights and obligations intended by the parties is said to have legal consequences. When a trademark is bought and sold without being registered with the Directorate General of Intellectual Property Rights (DJKI), the

rights to the trademark are legally returned to the seller, or in this example, the bankrupt debtor, in accordance with the bankruptcy decision.

The third party is the party who suffers as a result of this bankruptcy decision; the purchased trademark has no legal consequences for them and remains the subject of a lawsuit filed by the seller, the first party. Even if the seller has relinquished the purpose of performance (leverage) and accepted the transfer of performance (a sum of money), this does not constitute substantial evidence in bankruptcy proceedings. The notion that special law (*lex specialis*) supersedes general law (*lex generalis*) applies to Indonesian law. While the Trademark and Geographical Indications Law specifically regulates the protection of use and dispute resolution, the Indonesian Criminal Code (KUHP) is the *lex generalis*, containing general rules for obligations, agreements, debt principles, and other topics.

The legal consequence is that the restitution of the performance performed by the parties is the final outcome of the bankruptcy decision, so that the trademark will revert to the ownership of the buyer or debtor in bankruptcy.

### **3. The Buyer's Position as a Concurrent Creditor**

As is known, the sale and purchase of a trademark that is not transferred will not have legal consequences for third parties as purchasers of the trademark. If the seller (bankrupt debtor) of the trademark has been declared bankrupt, all assets belonging to the bankrupt debtor will be included in the bankruptcy estate, including the rights to the trademark owned by the bankrupt debtor.

As a third party suffering losses due to this decision, the third party can only apply as a creditor to reclaim their rights. However, bankruptcy practices have a payment order: 1. Bankruptcy costs and curator's fees, 2. Separatist creditors (who hold collateral), 3. Preferred creditors (laborers, employees, and taxpayers), 4. Concurrent creditors (who do not hold specific collateral). If the bankruptcy assets are insufficient, as stipulated in Article 189 paragraph (3) of the PKPU Law, concurrent creditors must be given a portion determined by the supervisory judge.

The third party's status is not included in the category of secured creditors because they lack material collateral, nor are they included in the category of preferred creditors because their claims are not granted special rights by law. Therefore, Defendant II's status is a concurrent creditor, meaning a creditor who has no collateral and no special rights.

Concurrent creditors will receive payment proportionally or even no payment at all. This payment sequence indicates that concurrent creditors are last in line after all payments from priority creditors have been made.

The losses suffered by the third party include the loss of ownership rights to the brand and the purchase price, all of which are wasted. If the third party has already begun using the brand in its production or marketing activities, the losses will be even greater because it will have to replace all promotional materials, product packaging, and rebuild its branding with a new brand.

#### **4. Lengthy Payment Process as a Concurrent Creditor**

To obtain the money paid in the trademark sale and purchase transaction, the third party must apply as a concurrent creditor. The seller (bankrupt debtor) must return the performance to the counterparty of the canceled transaction following bankruptcy law.

If the bankruptcy decision includes an order that the agreement be canceled, the seller must return the money received, and the buyer must return the performance transferred to him. The seller (bankrupt debtor) must return the proceeds from the sale of the trademark received from the third party. Article 1266 of the Civil Code regulates the cancellation of an agreement, implying a reciprocal obligation to return the performance, as follows:

"The condition of cancellation is always deemed to be included in reciprocal agreements, when one party fails to fulfill its obligations. In such cases, the agreement is not void by law, but cancellation must be requested from the judge."

However, a bankrupt seller who no longer has the authority to manage their assets and therefore cannot directly make payments to third parties, as Article 26 of the PKPU Law stipulates that all debtor obligations arising after the bankruptcy declaration decision is issued cannot be paid from the bankruptcy estate unless it benefits the bankruptcy estate.

For sellers (bankrupt debtors) who have a legal obligation to return money, but do not have the legal ability to carry out this obligation directly, this implementation depends entirely on the creditor payment process managed by the curator.

Therefore, third parties entitled to recover the performance cannot directly collect from the bankrupt debtor, but must register as creditors in the bankruptcy process. Their receivables will be verified and matched with those of other creditors, and payments will be made proportionally from the proceeds of the sale of the bankrupt's assets. In accordance

with Article 115 paragraph (1) of the UUK-PKPU Law, "All creditors are required to submit their respective receivables to the curator along with calculations or other written information indicating the nature and amount of the receivables, accompanied by evidence or copies, and a statement regarding whether the creditor has special rights, liens, fiduciary guarantees, security rights, mortgage rights, security rights over other objects, or rights to retain objects."

Although the debtor's receivables from third parties have been acknowledged and included in the list of fixed receivables, the acknowledgement of receivables does not imply that the third party will receive full payment. As previously explained, concurrent creditors are in a disadvantaged position, and payments are made *pro rata* (proportional) if the bankruptcy estate is insufficient to cover all receivables. According to Article 1132 of the Civil Code, each party has the following rights to fulfill obligations from the assets of the obligated party (debtor): 1. *Pari passu*, which refers to collective payment; 2. *Prorata parte*, which is determined proportionally by comparing the total value of each receivable to the debtor's assets. (Shubhan, 2008)

In the process of buying and selling trademark rights, a well-intentioned third party is significantly disadvantaged by the transfer of rights to a trademark that is not registered with the Directorate General of Intellectual Property Rights. According to Wirjono Prodjodikoro, an agreement is a legal relationship relating to property between two parties in which one party makes a promise or is deemed to have made a promise to do or not do something, and the other party has the right to demand that the promise be fulfilled. (Prodjodikoro, 2022), but this is useless if the third party does not face the legal consequences of the sale and acquisition of trademark rights.

## **V. CONCLUSION**

Based on an analysis of the legal consequences of the transfer of trademark rights that have not been registered before the debtor is declared bankrupt, the following conclusions can be drawn:

1. The transfer of trademark rights that is not registered with the Directorate General of Intellectual Property Rights (DGIP) does not have legal consequences for the third party (the buyer) as stipulated in Article 41 paragraph (6) of the UUMIG. Even though the sale and purchase transaction has been conducted legally and meets the requirements of Article

- 1320 of the Civil Code, and a legal transfer (leveraging) has occurred, without registration with the DGIP, the transfer is not legally recognized.
2. If the seller (debtor) is subsequently declared bankrupt before registration is carried out, the trademark is still legally registered in the name of the bankrupt debtor and is therefore included in the bankruptcy estate under Article 21 of the Bankruptcy Law. The legal consequences are very detrimental to the buyer, namely: (1) loss of exclusive rights to the purchased trademark; (2) the trademark reverts to the bankrupt debtor's property and is included in the bankruptcy estate; (3) the buyer's status changes to that of a concurrent creditor, who is last in line for repayment. and (4) a lengthy, uncertain, and unlikely full refund process.
  3. Even if a good-faith buyer has fulfilled their obligations, the principle of *lex specialis derogat legi generali* causes the provisions of the UUMIG, as special law, to override the general provisions of the Civil Code. The ratio legis of the registration provisions is to provide legal certainty and publicity regarding the status of brand ownership.
  4. To avoid the risk of significant losses, business actors and legal practitioners must understand that registering the transfer of brand rights with the DJKI is an absolute requirement and must be carried out immediately after the transaction. Delaying registration opens the door to the risk of seller bankruptcy, which can occur at any time.
  5. Greater legal awareness is needed among the parties in trademark transactions to promptly register the transfer of rights. Furthermore, additional legal protection mechanisms for good-faith buyers, such as an escrow system or repayment guarantee, should be considered to minimize the risk of loss in such situations.

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