



Protection for Franchisee of Unregistered Trademark

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Abstract

The administration of Indonesian franchises is specifically regulated through a Government Regulation and a Regulation of the Minister of Trade. Apart from being subject to the rules that specifically regulate, it must also be based on other legal provisions in the field of Intellectual Property and the Civil Code because franchising is an agreement that arises and is binding due to a franchise agreement. Problems that often arise are about the existence of intellectual property which is still in the registration process and not yet certified, but the business owner has franchised or entered into a partnership with other parties which results in legal uncertainty and guarantees the full use of intellectual property by the franchisee. So that researchers are interested in raising the title of research on Protection for Franchisee of Unregistered Trademark with the aim to find out what forms of legal protection for the franchisee. In this study, an empirical juridical research method is used with a statutory and case approach with primary and secondary data sources which are then analyzed way of the descriptive analysis. From this research, the results show that the protection of the franchisee in the event that intellectual property is unregistered there are several forms, namely the guarantee of intellectual property objects that must be included in the agreement clause, compensation for costs or capital and compensation as well as assistance, coaching and training so that the franchisee is the party who in good faith get their full rights.

Keywords: *Franchise; Agreement; Trademark; Protection*

1. Preliminary

Business development with a franchise and business opportunity model in Indonesia is very widespread and easy to find and it can be said that both are business sectors that are increasingly growing and mushrooming both in big cities and in remote parts of the country such as Thai Tea, Bobba Sugar, KFC, MCD, and the ones that are busy talking like the Geprek Benu brand. The implementation of franchising and business opportunities is inseparable from the role of Intellectual Property in the form of a Brand where the brand is a characteristic of a business that has an important impact on the running of business and business both in the trade of goods and services because by seeing, reading and hearing a

brand, a person can already know the exact shape and quality of a good or service that the maker will trade.¹ Franchising in Indonesia is regulated through Government Regulation Number 42 of 2007 concerning Franchising and Regulations The Minister of Trade Number 71 of 2019 concerning Franchising, while the trademarks themselves are regulated through Law Number 20 of 2016 concerning Trademarks and Geographical Indications.

In organizing a franchise or business opportunity, there must be at least two parties because the presence of these two parties is a condition of an agreement, each of which binds itself in an agreement because both business owners and business recipients must obey and obey the legal rules set out in the franchise. along with the applicable contract law rules in the Civil Code. In the provisions of Article 1 paragraph (1) of Government Regulation Number 42 of 2007 concerning Franchising, franchising is defined as a special right owned by an individual or business entity against a business system with business characteristics in order to market goods and / or services that have been proven successful. and can be utilized and / or used by other parties based on a franchise agreement. Franchise Agreement by definition is defined as an engagement in which one of the parties is given the right to utilize and / or use intellectual property rights or inventions or business characteristics owned by the other party for a fee based on the conditions set by the other party in the context of providing and / or sale of goods or services².

Based on the formulation of the article above, it is clear that franchising is a special right, a special right as intended, namely the right given to a person as a business actor to use, use, utilize business systems, intellectual property, processes and methods, goods and or services that have been proven to have distinctive features and has also been markedly successful. In addition, franchising is a business model that must be compliant and subject to the Franchise Agreement. This means that the parties, both as the franchisor and the franchisee, must bind themselves in the agreement and must carry out their rights and obligations and fulfill the elements and conditions that are determined to run a franchise as stated by R.³

The problem that often arises in these agreements is the existence of an intellectual property in the form of a brand that unregistered but the business owner has carried out and operated a franchise business and a business with a franchise model called a business opportunity. In the case of a trademark that is a characteristic and icon of a business, often in the case of registration with the competent authority, it is rejected due to objections from other parties, substantive examination or due to law that cannot be registered. This certainly creates new consequences for the business giver or franchisor, especially for the franchisee because they cannot make the best possible use of the intellectual property that has been promised beforehand, of course as a party with good intentions, franchise recipients need to get protection, especially against their rights that are violated. Therefore, the authors are interested in bringing up legal research with the title Protection for Franchisee of Unregistered Trademark with the aim to find out what forms of legal protection for the franchisee.

2. Research Methods

In the preparation and research, the author uses the empirical juridical research method, which is a study using secondary legal materials supported by legal materials sourced from field research. According to Abdulkadir Muhammad, this research is also said to be legal research on the application of

¹ Rachmadi Usman.(2003) *Hukum Hak Kekayaan Intelektual Perlindungan dan Dimensi Hukumnya di Indonesia*, Bandung:Alumni. pp. 321

²Burhanuddin S.(2009). *Hukum Kontrak Syariah*, Yogyakarta: BPFE. pp. 241

³R. Subekti.(2008). *Hukum Perjanjian*, Jakarta:Penerbit PT. Intermasa. pp.1

normative legal provisions in action on any particular legal event that occurs in society⁴. The approach used in this research is a statutory approach and a case approach supported by primary legal materials and secondary materials, then from the data that has been collected and obtained, it is analyzed descriptively in accordance with the predetermined approach.

3. Findings and Discussion

3.1 Franchising

The concept of implementing franchising in Indonesia is regulated through Government Regulation of the Republic of Indonesia Number 42 of 2007 concerning Franchising and Regulation of the Minister of Trade of the Republic of Indonesia Number 71 of 2019 concerning Franchising. Franchising comes from the word "wara" which means more and "profit" which means profit, but in society the term franchise is rarely used and more to the term franchise⁵. Franchising is a special right that is owned by an individual or business entity against a business system with business characteristics in order to market goods and / or services that have proven successful and can be utilized and / or used by other parties based on a franchise agreement.⁶ The characteristic of a business as referred to in this Article is a business that has superior characteristics and is different from other businesses in the form of management, methods and procedures as well as the system being implemented.

Before entering into a franchise agreement, the franchisor must first submit the Offer Prospectus to the prospective franchisee because it is a requirement as regulated by law. Prospectus is a statement made in writing from the giver to the Franchisee that contains the identity of the franchisor, the legality of the franchise business, the history of business activities, the organizational structure of the franchisor, the financial statements of the last two years, the number of business places, a list of franchisees and the rights and obligations of the franchisor and franchisee.⁷

In the event that the prospectus is well responded to by the prospective franchisee, then both of them can proceed to the stage of making an agreement known as a Franchise Agreement. The thing that needs to be considered in entering into a franchise agreement is the existence of registered intellectual property. Intellectual property that is often used in franchising is a brand, which in the trademark protection system in Indonesia regulates that what is meant by a brand assigns that can be displayed graphically in the form of images, logos, names, words, letters, numbers, arrangements, colors, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more of these elements to distinguish goods and / services produced by persons or legal entities in trading activities of goods and / or services "⁸. Another understanding according to experts is that the brand is a name or symbol that is associated with a product or service and gives rise to the meaning of a psychologist or association. Brand also means a name and symbol that is distinguishing and to identify goods or services of a particular seller or group of sellers and distinguish them from goods or services produced by competitors.⁹

⁴Abdulkadir Muhammad. (2004). *Hukum dan Penelitian Hukum*, Bandung: Citra Aditya Bakti. pp. 134

⁵Abdulkadir Muhammad. (2010). *Hukum Perusahaan Indonesia*, Bandung: PT. Citra Aditya Bakti, pp.560

⁶ Pasal 1 ayat (1) Peraturan Pemerintah Nomor 42 Tahun 2007 juncto Pasal 1 ayat (1) Peraturan Menteri Perdagangan Republik Indonesia Nomor 71 Tahun 2019.

⁷Moch Najib Imanullah. (2012). *Urgensi Pengaturan Waralaba Dalam Undang-Undang*, Yustisia Volume 1 Nomor 2 Mei-Agustus pp.20

⁸ Pasal 1 ayat (1) Undang-Undang Nomor 20 Tahun 2016 tentang Merek dan Indikasi Geografis

⁹A.B Susanto dan Himawan Wijanarko. (2004), *Power Branding Membangun Merek Unggul dan Organisasi Pendukungnya*. Jakarta:Mizan Publika, pp.5

In the trademark registration system in Indonesia, the steps that must be taken at least to obtain a trademark certificate are: first, the applicant submits a trademark registration to the Minister in this case who is in charge of trademark registration, namely the Directorate General of Intellectual Property at the Ministry of Law and Human Rights of the Republic of Indonesia. Second, the announcement period. Third, substantive examination. Fourth, be registered. In terms of registration, often the reason for rejection of a mark is the similarity between one mark and another, this is due to a lack of understanding and knowledge of the existence of a mark which results in rejection. Even though the brand is very important in conducting a franchise,

3.2 Agreement

Franchising is inseparable from an agreement between one person and another person or a legal entity in an agreement. The agreement is specifically regulated in the Civil Code (hereinafter referred to as the KUHperdata). This means that apart from being subject to special regulations the franchise must also comply to the general rule of law. The agreement is regulated in Article 1313 of the Civil Code which states that an agreement is an act whereby one or more people bind themselves to one or more other people, more simply that an agreement is an agreement recognized by law.¹⁰ As for the agreement, there are elements of the following:

- a. Deeds;
- b. One or more people to one or more other people;
- c. Tie himself up.¹¹

The agreement law regulates that there are legal conditions that must be fulfilled by the parties before entering into an agreement because this legal condition is the precursor to whether or not the agreement can be implemented and is binding or in other words it applies as a law which is binding on both parties without there are loopholes that can create legal uncertainty. The requirements that must be fulfilled before entering into an agreement are regulated in Article 1320 of the Civil Code, namely the existence of agreement, skill, a certain matter and a lawful cause.¹² The existence of elements that are valid conditions are divided into 2 (two) categories, namely first, the objective conditions where if the objective conditions in the agreement are not fulfilled then the agreement is null and void or an agreement has been canceled since the beginning, the law considers the agreement never existed.¹³ Meanwhile, the second is a subjective condition where this condition must be fulfilled because if it is not fulfilled, the agreement that has been made can be canceled.¹⁴

In general, agreements are made by parties who are mature or legally capable, but sometimes there are parties who take advantage of certain conditions and conditions to benefit themselves so that in these conditions an agreement is still held. This is where the important side of good faith must exist because basically good faith must exist before the agreement is made. Good faith is likened to a bridge that connects one city to another because something that is done in good faith will be done well too, but on the other hand, if the agreement is held in bad faith even from the very beginning before the agreement, the implementation will experience obstacles. . Good faith is not a condition for the validity of an agreement as contained in Article 1320 of the Civil Code. The element of good faith is only implied in the "implementation" of an agreement, not in the "making" stage of an agreement. Because the element of

¹⁰S. B Marsh And J. Soulsby.(1980). *Hukum Perjanjian terjemahan Abdulkadir Muhammad*. Bandung:Alumni.pp.93

¹¹Irawan Soerodjo. (2016). *Hukum Perjanjian Dan Pertanahan Perjanjian Build, Operate and Transfer (BOT) Atas Tanah Pengaturan, Karakteristik, dan Praktik*. Yogyakarta:LaksBang Pressindo. pp. 14

¹²Abdulkadir Muhammad. (2000). *Hukum Perdata Indonesia*.Bandung:Citra Aditya Bhakti. pp.228

¹³ Retna Gumanti.(2012)*Syarat Sahnya Perjanjian*.pp.4

¹⁴Budi Sunanda.(2013). *Pembatalan Perjanjian Jual Beli Tanah Meskipun Akta Jual Beli Tanah dari PPAT oleh Pengadilan Negeri (Studi Penelitian Putusan di Pengadilan Negeri Bireuen Nomor 11/Pdt.G/2008/PN-BIR, tanggal 23 Februari 2009)*. Jurnal Ilmu Hukum Pascasarjana Universitas Syiah Kuala. ISSN 2302- 0180. Vol. 2. No. 1. Agustus.

"good faith" in terms of making an agreement can already be covered by the elements of "legal causes" or "lawful causes" of Article 1320.¹⁵

Good faith is a principle of contract law whose nature and characteristics are sometimes difficult to determine because good faith is related to the behavior of the legal subject itself so that in proving whether good faith exists or not, it is still presumptive whether good faith exists or not. Apart from this principle, it must also fulfill other principles, namely in the form of freedom of contract, consensualism, binding strength, legal equality, balance, legal certainty, morals, propriety and habits. Good faith and true agreement cannot be released just like that because basically every person who enters into the agreement is given the freedom to enter into an agreement according to the methods and provisions regulated by the parties to the agreement as long as it does not conflict with applicable national law. As is Peter Mahmud Marzuki's opinion, that people are free to do or not make an agreement, free with whom he entered into an agreement, free about what was agreed upon and free to determine the terms of the agreement.¹⁶ This means that the implementation of the agreement based on good faith that must exist from the beginning before the agreement is made, both parties should each obtain their respective rights and not be violated by any one thing that has become a right and of course the parties are aware of their obligations to carry out something. achievements to others.

3.3 Legal Protection of Franchisor

The franchisee as the subject of an agreement with good intentions should receive appreciation in the form of legal protection in the case of an agreement made between the franchisor and the franchisee. People are often deceived by businesses that act in the name of franchising even though it is not a franchise and does not meet the specified conditions, but this business is a business opportunity where in Indonesia there are at least more than 2200 business opportunities.¹⁷ Both franchises and business opportunities have similar characteristics, namely in the form of partnerships. What distinguishes the two is the most visible in terms of the existence of intellectual property. Business opportunities are not specifically regulated through legislation in Indonesia but in practice this business is very widespread and easy to find.

In the implementation of franchising and business opportunities, the franchisor should and have pocketed a brand intellectual property certificate because the existence of a brand becomes its own value to differentiate between one business and another so that when the public knows the existence of the brand it can immediately be remembered and even become a reference for transactions. . As described in the previous section, this legal protection cannot be separated from the good faith of an agreement. Public ignorance often becomes the momentum for business expansion with a franchise or franchise model. As said by the Chair of the Indonesian Franchise Association that it is very unfortunate that in Indonesia a business model has emerged in the name of a franchise which is basically not a franchise but a business opportunity, and the worst case is that requests for processing from the authorities can be passed, the government must try to provide a legal umbrella so that business recipients do not lose any more because the business provider is solely looking for maximum profit by taking advantage of the momentum of public ignorance. In implementing a business model like this, it is imperative that in addition to the existence of a registered trademark, it must also be supported by several other intellectual property that can provide assurance and support business operations in the form of patents, invention rights, industrial designs and trade secrets.¹⁸

¹⁵ Munir Fuady.(2001) *Hukum Kontrak (Dari Sudut Pandang Hukum Bisnis*. Bandung: PT. Citra Aditya Bakti.pp.81.

¹⁶Peter Mahmud Marzuki.(2003). *Batas-Batas Kebebasan Berkontrak, Yuridika*, Volume 18 No.3, pp.31

¹⁷ Anang Sukandar.(2020).Wawancara eksklusif secara online melalui percakapan via telephon.

¹⁸ Anang Sukandar.(2020).idem

Registration of trademarks when there is rejection and the brand has been used in the conduct of a business, either a franchise or a business opportunity, referring to Article 1 paragraph (3) of the Government Regulation of the Republic of Indonesia Number 42 of 2007 concerning Franchising states that the Franchisee is an individual or business entity that is granted rights by the Franchisor to take advantage and / or use the Franchisee owned by the Franchisor. This means that based on this provision, it is clear that the Franchisee or business partner as a person with good intentions needs to obtain legal protection because in the event that the franchise agreement is made, he has the right to utilize and use it so that when the Franchisor's mark cannot be registered or in other words there is a rejection.

Based on the provisions of Article 1337 of the Criminal Code which states that a cause is prohibited if the cause is prohibited by law or if the cause is contrary to decency or with public order. The provisions of this article organize the making of a franchise agreement in which if the agreement does not fulfill the elements of a franchise, based on this provision, the franchise agreement made is a forbidden agreement because the franchise conditions are not fulfilled. The purpose of regulating franchising in the Indonesian legal system is to provide legal certainty and an orderly administration so that people do not arbitrarily run a business but must follow applicable procedures. Whereas in the event that the Franchisor's obligations are not fulfilled to the Franchisee, based on the KUHperdata Article 1243 that "compensation for costs, losses and interest due to non-fulfillment of an agreement, will then begin to be obliged, if the debtor, after being declared negligent in fulfilling the contract, continues to neglect it, or if something that must be given or made, can only be given or made, can only be given or made within a grace period that has been passed".¹⁹ The use of the legal basis of the KUHperdata in terms of non-fulfillment of obligations by the Franchisor is to provide a legal umbrella when there is a negligence caused by and originating from the agreement because the implementation of a franchise is an agreement that arises because of a franchise agreement, considering the special rules regarding franchising do not specifically regulate how it will look. protection and what the franchisee or business recipient can strive for in the event of negligence or breaking of promises so that the existence of the KUHperdata cannot just be separated from franchising.

According to Pujiyono in his book, he said that at least there are several forms of law enforcement that can be done to overcome the occurrence of violations, namely in the form of administrative law, civil law and criminal law. It is emphasized that these sanctions are aimed at the main threat, both in special and general prevention against every form of violation of intellectual property rights.²⁰ This is inseparable from IPR which has become part of an international issue that must receive special and serious attention to tackle every form of violation, besides that it is also caused by the large number of violations by business actors in Indonesia, many judges do not understand the regulations that govern about IPR and because of the ignorance of the public regarding the existence of IPR law.²¹

Thus, there are several forms of protection for franchise recipients, namely in the form of assistance and training and coaching as well as prosecution for compensation according to applicable laws. Not only that, according to Rachmat Agung Nugroho, an Intellectual Property consultant, said that "in terms of the implementation of the intellectual property franchise being used, it is still in the registration process and has not been certified, so do not use Franchise Agreement but rather a Cooperation or Partnership Agreement, in its clause. It should also include a clause regarding guarantees in the form of replacement or amendment to intellectual property if it turns out that later the intellectual property being requested is rejected, so that in addition to providing legal certainty, this is certainly beneficial for both parties."²²

¹⁹Ahmadi Miru. (2008). *Hukum Perikatan*. Jakarta: Rajawali Pers. pp.12

²⁰Pujiyono. (2004). *Intellectual Property Rights Crime*. Semarang: Faculty of Law, Undip. Pp. 1

²¹Adi Sulistiyono. (2004). *Haki Dispute Resolution Mechanism*. Surakarta: UNS Press. Pp. 9

²²Rachmat Agung Nugroho. (2020). *Konsultan Kekayaan Intelektual Republik Indonesia*. Wawancara eksklusif secara langsung di kantor Franchisefirst Indonesia. Surakarta. Jawa Tengah

In the event that the requirements for running a franchise are not fulfilled in the form of rejection of registered intellectual property, then when the franchisor does not have good intentions to fulfill the franchisee's rights as a legal subject that deserves to be protected, the franchisee can submit legal remedies for the cancellation of the agreement accompanied by legal remedies to the court so as to provide an opportunity for the fulfillment of the franchisee rights.

Conclusion

The operation of a franchise must be based on the legal rules governing franchising and the KUHperdata because the franchise and the agreement is an inseparable unit. One of the requirements for holding a franchise is in the form of intellectual property. In practice, the franchisor does not pay attention to the importance of intellectual property and only focuses on business expansion, so that the impact on the franchisee because when the intellectual property owned by the franchisor does not have a certificate, it is still very possible to be rejected by the brand examiner so that the recipient the franchisor cannot make full use of the intellectual property of the franchisor. The franchisee as a party with good intentions needs to be protected and this is inseparable from the awareness of the franchisor himself to carry out full achievements to the franchisee in the form of return of capital and compensation, and there is a need for a government role to provide assistance and guidance and training. specifically, to the franchisor before entering into a franchise agreement and especially providing education on franchise law to the franchisee so that the franchisee is not used by unscrupulous individuals due to their ignorance. Apart from this, it is also necessary for the government to provide a clear legal umbrella regarding legal steps and solutions to the franchisee so as to provide legal certainty to the franchisee.

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