

# **TRANSFER OF INTELLECTUAL PROPERTY RIGHT AS A COMPANY ASSET IN BANKRUPTCY IN INDONESIA**

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## ***Abstract***

*The transfer of intellectual property rights (IPR) as a company asset during bankruptcy proceedings in Indonesia presents a complex legal landscape. This study examines the gap between existing legal frameworks and the practical realities faced by companies undergoing bankruptcy. Specifically, the research addresses the lack of clear guidelines on the valuation, transfer, and protection of IP rights, which are critical assets in the modern economy. This study utilizes the three research methods, which are Normative Approach and Conceptual Approach. Findings indicate significant inconsistencies and ambiguities in the legal treatment of IPR in bankruptcy cases. The aim of this research is to provide an understanding of how IPR can be included in the bankruptcy estate and distributed to entitled creditors based on an assessment by the curator. In conclusion, this research found that recommendations for legal amendments and policy interventions to bridge the identified gaps, thereby enhancing the protection and transferability of IP rights in bankruptcy contexts in Indonesia.*

**Keywords:** *Trade Mark Right; Bankruptcy; Corporation*

## **1. Introduction**

The rights arising from human intellectual efforts that provide financial gains are known as intellectual property rights. The concept of intellectual property rights underpins the notion that human intellectual pursuit necessitates time, effort, and resources. The labor has economic worth as a result of this sacrifice. This results in the requirement for incentives for successful outcomes as well as legal defense.<sup>1</sup> The term "intellectual property rights" refers to the right to property based on human intellectual abilities, which is connected to an individual's personal rights (human rights), and is regulated by Law No. 7 of 1994 concerning the ratification of the WTO (Agreement Establishing the World Trade Organization). This is defined by the World Intellectual Property Organization (WIPO) as the product of human intellect, which includes innovations, literary and artistic creations, names, symbols, pictures, and designs that are utilized in commerce.<sup>2</sup>

Several experts also provide the meaning of IPR, one of which is Muhammad Djumhana & R. Djubaedillah<sup>3</sup> explained that IPR is defined as rights derived from human creative efforts that

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<sup>1</sup> Adrian Sutedi, *Hak Atas Kekayaan Intelektual* (Jakarta: Sinar Grafika, 2013).

<sup>2</sup> Tomi Suryo Utomo, *Hak Kekayaan Intelektual (HKI) Di Era Globalisasi, Sebuah Kajian Kontemporer* (Yogyakarta: Graha Ilmu, 2010).

<sup>3</sup> Muhammad Djumhana and R. Djubaedillah, *Hak Milik Intelektual: Sejarah, Teori Dan Prakteknya Di Indonesia* (Bandung: Citra Aditya Bakti, 2003).

are communicated to the public in a variety of ways, provide benefits, are helpful in sustaining human life, and have a monetary worth. Thus, it may be said that intellectual property rights are the acknowledgement and value accorded to an individual or organization for the discovery or production of their creative work, thereby granting the right holder social and economic rights.<sup>4</sup> IPR regulate things that originate from someone's intellectual work. If a work is permitted to be used freely by other people, the benefits will only be enjoyed by other people, and the owner of the work will not receive comparable compensation.<sup>5</sup>

Article 499 of the Indonesian Civil Code defines goods as any object or right that can be owned. Material rights that guarantee (*zakelijk zekheidsrecht*) and material rights that give enjoyment are distinguished in the Civil Code. Thus, recognizing IPR as debt collateral confirms their materiality. The Civil Code classifies IPR as movable items because they may be transferred and intangible assets because they have no visible form. Some intellectual property rights systems allow the transfer of industrial design rights for “other reasons” outlined in statutes. Bankruptcy, mergers, acquisitions, and dissolution are “other reasons” for transferring IPR.

The transfer of trademark rights is an example. A trademark moves. Trademarks are guaranteed when they are profitable and tradeable. According to the specialty base, a guaranteed trademark right must be shown by a trademark certificate, which verifies registration. However, the Trademark and Geographical Indication Act does not regulate the type of assurance agency that can charge a trademark right. Trademarks have property rights based on authenticity guarantees. The Trademark Act stipulates in Article 41 that “the right to registered trademarks may be transferred or transferred for: inheritance, will, worship, grant, agreement, or other reason permitted based on the law”.<sup>6</sup>

Intellectual property rights can be transferred in certain legal events. This research focuses on trademark rights, particularly in the context of the bankruptcy process for limited liability companies. According to Law Number 20 of 2016 concerning Trademarks and Geographical Indications, trademark rights include signs that can be displayed graphically, such as images,

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<sup>4</sup> Suyud Margono and Amir Angkasa, *Komersialisasi Aset Intelektual - Aspek Hukum Bisnis* (Jakarta: Grasindo, 2002).

<sup>5</sup> Haris Munandar and Sally Sitanggang, *Mengenal Hak Kekayaan Intelektual, Hak Cipta, Paten, Merek, Dan Seluk-Beluknya* (Jakarta: Erlangga, 2008).

<sup>6</sup> Septi indrawati, “Tinjauan Yuridis Penggunaan Sertifikat Merek sebagai Jaminan dalam Proses Pengajuan Kredit Perbankan,” *Amnesti: Jurnal Hukum* 3, no. 1 (2021): 1–14, <https://doi.org/10.37729/amnesti.v3i1.889>.

logos, names, words, letters, numbers, color arrangements, in two or three dimensions, sound, holograms, or combinations thereof to differentiate goods or services.

As intangible movable objects with high economic value, trademark rights can be used as collateral for bank credit. However, the positioning of trademark rights in corporate insolvency remains unclear, and there are challenges in using trademarks as guarantees. Essentially, a trademark serves as a business's identity, differentiating it from others. Trademark rights are crucial for companies, as they can generate significant economic profits when effectively utilized.

Regarding bankruptcy, it is contained in Article 1 point 1 of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (Bankruptcy Law), namely "Bankruptcy is a general confiscation of all assets of a bankrupt debtor whose management and settlement are carried out by a curator under the supervision of a supervisory judge as stated in regulated in this law". The principle of bankruptcy is adopted from Articles 1131 and 1132 of the Indonesian Civil Code, which state that all goods, both movable and immovable, belonging to the debtor, whether they already exist or will exist in the future, become collateral for the repayment of the debtor's debts and the proceeds from the sale of all These assets are divided *pro rata* among creditors.<sup>7</sup>

The choice to file for bankruptcy has taken away the debtor's ability to control his assets. Under the supervision of a curator appointed by the Commercial Court Judge and a Supervisory Judge, all assets are placed under general seizure. The primary goal of managing and settling bankruptcy assets and resolving legal disputes between debtors and creditors is to use the profits from the sale of assets to pay off all of the bankruptcy debtors' obligations in a proportionate (*prorata parte*) and creditor-structure compliant manner. As a result, everything acquired by the bankruptcy debtor during their bankruptcy is included in their assets. The possession of trademark rights is likewise included in the list of assets that can be seized generally. The Bankruptcy Law does not specify in detail how trademark rights are assigned to creditors in the event that the debtor is deemed bankrupt. Furthermore unregulated is the necessary procedure for transferring trademark rights to separate, concurrent, or preferred creditors.

Under Indonesia's bankruptcy regime, creditors receive their share of the assets subject to the concept of *pari pasu prorata parte*. Unless there are creditors who are legally required to receive

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<sup>7</sup> Prasyda Mohammad and Moch. Najib Imanullah, "Implementasi Hak Merek Sebagai Objek Jaminan Dalam Perjanjian Penjaminan Fidusia," *Jurnal Privat Law* 9, no. 1 (2021): 174–81, <https://doi.org/10.20961/privat.v9i1.28906>.

payment of their bills first (preferred creditors), all of the bankrupt debtor's assets are a joint guarantee for the creditors, and the proceeds must be divided proportionately among them. The equitable resolution of the bankruptcy asset distribution will result from the implementation of this approach. The concept of justice in bankruptcy suggests that the bankruptcy rules can satisfy justice for the relevant parties. The goal of this fairness concept is to stop collectors from acting arbitrarily when they pursue payment of their outstanding debts from debtors without considering the interests of other creditors.<sup>8</sup>

Pailit debtors often have exclusive rights to intellectual property as an important or least valuable asset. The Law of Insolvency only governs the property that is excluded or that cannot be made a property. It does not specify in detail whether the property is a property or a right. A curator must be able to act fairly when recording all assets, both hidden and real; finding or increasing the value of assets; selling assets at the best price; distributing the proceeds of the sale of the assets to each creditor according to his plan; and dissolving unqualified debtors. However, the investigative agency has had difficulty assessing intangible intellectual property for various reasons. This will definitely affect the performance of the curator, because the curators will find it difficult to secure the intellectual property.<sup>9</sup>

Problems arise when there is bankruptcy of a company that holds Trademark rights with quite strategic status. What is meant by strategic is that the Trademark rights greatly influence the economic conditions of the company holding it.<sup>10</sup> Meanwhile, if the company is declared bankrupt, the curator will have difficulty measuring the economic value of the Trademark rights. The difficulty is caused by the fact that ownership of trademark rights is a concept of ownership of property rights which are immaterial in nature. The reality on the ground shows that curators still do not have procedural guidelines or provisions in the Bankruptcy Law regarding how Trademark rights can be transferred in the event of bankruptcy of a company. Another issue that also arises is to whom the trademark rights will be given in relation to the classification of creditors in the bankruptcy concept in Indonesia.<sup>11</sup>

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<sup>8</sup> Nindyo Pramono and Sularto, *Hukum Kepailitan Dan Keadilan Pancasila: Kajian Filsafat Hukum Atas Kepailitan Badan Hukum Perseroan Terbatas Di Indonesia* (Yogyakarta: Andi, 2017).

<sup>9</sup> Gino van Roeyen and Denise Verdoold, "A Dutch Bankruptcy: How Does It Affect Intellectual Property, Licensors and Licensees?" *Journal of Intellectual Property Law & Practice* 10, no. 8 (August 1, 2015): 601–8, <https://doi.org/10.1093/jiplp/jpv094>.

<sup>10</sup> Christian Andersen, "Legal Aspects of Asset Valuation on Copyright as Part of Boedel (Countable-List) in the Process of Bankruptcy in Indonesia Following the Latest Copyright Law Act No. 28/2014," *Central European Journal of International and Security Studies* 12, no. 4 (2018): 598–608.

<sup>11</sup> Asa Alba & Partner, Peran Kurator Dalam Pembersihan Harta Pailit Atas Hak Merek, January 10, 2024.

It's hard for curators to do their best in exploiting debtor's assets, Intellectual Property Rights (IPRs), for several reasons. First, the Directorate-General of Intellectual Property Rights has not yet registered the IPRs that should be registered. Second, the intellectual property rights, especially trademark rights, are the subject of dispute in the Court. Third, the value of IPR is difficult to decide. The Intellectual Property Rights Curator may only request the Debtor to obtain the royalties that should be received in accordance with the licensing agreement that has been made or to sell the intellectual property assets if possible.

Lawfirm Satriawan Edo & Co's<sup>12</sup> *Optimizing Intellectual Property Rights Assets of Limited Liability Companies in Bankruptcy Law in Indonesia* is one of numerous similar studies. Intellectual Property Rights (IPR) are not physical assets in the notion of special purpose asset valuation, according to economic legal research. IPR must be used alongside business, according to this view. Due to the nature and economic life of Intellectual Property Rights (IPR), going concern should partially liquidate IPR. If the business must close due to bankruptcy and the IPR must be liquidated to satisfy creditors, liquidation will fail. Second, Shafira Salal Said Nahdi<sup>13</sup> conducted a similar study, *Juridical Review of the Transfer of Trademark Rights from Bankruptcy Holders (Case Study; PT. Njonja Meneer)*. The curator transferred trademark rights in the bankruptcy of the company in line with the law, according to the research results. Researchers will study the more precise procedural features of trademark rights transfer in bankruptcy. Not only does the analysis show how the curator transferred rights legally.

This research will limit the interpretation and analysis in accordance with the title and focus on Trademark Rights as property. Furthermore, this research will also focus on transitional mechanisms that comply with the Trademarks Rights Act and the Insolvency Act. The formulation of the problem that will be analyzed in this research is first, what is the concept of IPR as a company asset in Indonesia. Second, how is the transfer of Trademark rights as company assets in bankruptcy in Indonesia.

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<sup>12</sup> Abdus Salam, "Optimalisasi Aset Hak Kekayaan Intelektual Milik Perseroan Terbatas Dalam Hukum Kepailitan Di Indonesia," *Jurnal Suara Hukum* 1, no. 1 (2019): 15–50, <https://doi.org/10.26740/jsh.v1n1.p15-50>.

<sup>13</sup> Shafira Salal Said Nahdi, "Tinjauan Yuridis Pengalihan Hak Merek Dari Pemegang Hak Atas Merek Dalam Keadaan Pailit (Studi Kasus; PT. Njonja Meneer ).-133 PDT 2020" (Thesis Undergraduate, Semarang, Universitas Diponegoro, 2022), <https://eprints2.undip.ac.id/id/eprint/5425/>.

## **2. Method**

This study utilized the doctrinal research method with content analysis as well as two approaches as data analysis methods: the legal research approach and the conceptual approach. As it's doctrinal research, it reviews the principles and norms of positive law. The legal research approach will formulate some rules on the main issues to be discussed. In this way, it will be discovered that the regulator already exists, is already sufficiently comprehensively regulated, or is not yet.<sup>14</sup> A conceptual approach was also applied to review the concepts of the transfer of rights over IPR based on views and doctrines in legal practice.

## **3. Results and Discussion**

### **3.1. IPR as Objects, Can Be Owned and Transferred**

Technological and scientific breakthroughs continue to present IP challenges. Initially, managing IP was straightforward: it involved mastering and exploiting human-created innovations. However, IPR have become more complex than mere property rights and are now integral to economic discussions. The lack of clear restrictions on trademark rights in bankruptcy cases has led to numerous arguments and disagreements over how creditors should execute and calculate these rights. These issues, along with legal conflicts over execution methods and auction mechanisms, can create the impression of non-transparency and failure to reflect true market value.

Given that many trademark rights owners face financial difficulties, this situation can potentially disrupt the economy, especially in Indonesia, leading to significant economic losses when a court declares a trademark owner bankrupt. Although it is generally agreed that filing for bankruptcy must consider the interests of both the debtor and the applicant, the bankruptcy process for companies holding trademarks remains unclear. Certain assets may be excluded from bankruptcy, and the debtor loses ownership of bankruptcy assets once the Commercial Court declares bankruptcy. At that moment, the debtor's assets are universally confiscated.

Intellectual property rights, being abstract, are harder to value than tangible assets like land or buildings, where economic value can be assessed using the Sales Value of the Tax Object. Trademarks, which can be words, logos, or symbols identifying a company or product, cannot be easily monetized by curators, affecting creditor payments. Curators often omit trademark rights

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<sup>14</sup> Tunggal Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1–9, <https://doi.org/10.22219/aclj.v4i1.24855>.

from bankruptcy estates due to a lack of understanding of IP rights, leading to incomplete asset recovery for creditors. Companies obtain trademarks through legal transfer, similar to land rights.

Article 499 BW regulates trademark rights, which have economic worth and can be exchanged or transferred through an agreement. Locke believes intellectual works belong to their creators since they are human-made. Wealth is ownership and substance in human-created intellectual creations. In accordance with Locke, the producer of intellectual labor owns the right to its results. Knowing one owns something is wealth. Recognizing ownership implies acknowledging intellectual property. Thus, intellectual property has material rights. Intellectual property rights are intangible by nature because they are rights. The IPR owner, who owns his intellectual work, can act freely with it according to natural law<sup>15</sup>.

It is very important to remember that IPR has intangible properties but is contained in tangible objects. Ownership of tangible objects does not mean owning the intangible objects contained therein. Thus, the existence of IPR in an object limits the ability of the owner of the tangible object to do what they want. For example, owning a book does not mean one owns the copyright to the intangible goods contained in the book. In other words, people who own a book cannot copy or sell the book without the permission of the copyright owner<sup>16</sup>.

Civil law rules acknowledge that property might belong to persons or legal entities. This implies that the owners of IPRs have the same right to defend them as they do other property. As to Article 570 of the Civil Code, property rights denote an individual's entitlement to exercise unrestricted enjoyment and control over an object. Therefore, the owner of an object has the right to utilize it in a safe manner without hindrance from third parties. This implies that the right to defend an object from third parties belongs to the person who possesses property rights and full authority over it. According to Article 574 of the Civil Code, the owner of the right has the right to demand the return of any object that is taken without the owner's consent and is subject to control.

Article 584 of the Civil Code lists five means to get property rights: claim, attachment, time limits, inheritance, and civil events–based transfer. Basic IPR transfer provisions say that IPR can be transferred for legal reasons including inheritance, gifts, wills, written agreements, etc. IPRs are material rights, so the procedure for transferring them, which is another legal procedure,

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<sup>15</sup> Indirani Wauran-Wicaksono, "Hak Kekayaan Intelektual Sebagai Benda: Penelusuran Dasar Perlindungan HKI Di Indonesia," *Jurnal Refleksi Hukum* 9, no. 2 (2015): 137–38, <https://doi.org/10.24246/jrh.2015.v9.i2.p133-142>.

<sup>16</sup> Indirani Wauran-Wicaksono.

confirms that the Civil Code's procedure for transferring public property rights applies to IPRs. Property rights must always be transferred. Since IPR is an intangible movable object, its transfer must be formalized administratively by an authentic or private deed.

### **3.2. Intellectual Property Rights as Company Assets**

A business requires an idea to attract customers, so there needs to be innovation in the business model, using a business model as a characteristic of the company and a formal representation of good business practices.<sup>17</sup> Provisions regarding the transfer of IPR clearly states that IPRs are assets that can be used to fulfill bankruptcy decisions, even though the Bankruptcy Law does not regulate this matter at all. So, it can be said that IPR as a company asset must also be optimized in settling the assets of bankrupt debtors. The hope is that IPR assets can increase the acquisition of bankruptcy assets, so that creditors' rights can be fought for optimally. However, the problem in the field is that the process of assessing IPR assets takes a long time, whereas curators are given limited time by the Bankruptcy Law to immediately complete payments to creditors.<sup>18</sup>

Currently, only tangible assets are managed and cleared by the Curator, while intangible assets can only be managed and cleared if their value is certain. Management of IPR assets as intangible assets by the Curator can only be carried out if there is a license contract related to the IPR assets. In practice, the Curator does not seriously consider debtors' IPRs to fulfill debts to their creditors because IPRs are unstable assets, so processing them takes a long time and the results are uncertain. However, curators are required to carry out processing and settlement quickly so that creditors immediately obtain their rights, and are required to avoid a decline in asset values. For these reasons, many IPRs are considered unreliable, despite their ability to provide optimal payments to debtors' creditors. This scheme is in line with one basic theory of IPR, namely utilitarianism. The utilitarian perspective has relevance to other forms of intellectual property in the context of bankruptcy cases. Utilitarian theorists generally support the creation of intellectual property rights as an appropriate way to promote profits for the majority.<sup>19</sup>

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<sup>17</sup> Normalita Destyarini, "Assistance for Legal Aspects of Digital Start-Ups at the Incubation Stage," *Indonesian Journal of Legal Community Engagement* 6, no. 2 (2023): 332–46, <https://doi.org/10.15294/jphi.v6i2.71574>.

<sup>18</sup> David Heller, Leo Leitzinger, and Uwe Walz, "Intellectual Property as Business Loan Collateral: A Taxonomy of Institutional and Economic Determinants," *GRUR International* 73, no. 5 (May 1, 2024): 379–92, <https://doi.org/10.1093/grurint/ikae043>.

<sup>19</sup> Menell, Peter S., "Intellectual Property: General Theories" (United States of America: Edward Elgar, 2000), 129–49, <https://dlc.dlib.indiana.edu/dlcrest/api/core/bitstreams/444f314a-71bd-46c8-98a4-2cd0ac70d980/content>.



If the IPR owner experiences bankruptcy or PKPU, the curator and administrator are free to choose the most appropriate way to optimize the IPR, because statutory regulations do not specifically determine how to optimize the IPR. If we look at the Article 72 and Article 234 of the Bankruptcy Law, these two articles clearly state that curators and administrators are responsible for actions taken regarding IPR ownership. Optimizing IPR during bankruptcy will basically depend on the cause of the bankruptcy, as well as other factors attached to IPR, such as the legality and nature of IPR. If the reason for the company's bankruptcy is cash flow mismanagement and no other reasons related to IPR, then the curator can ideally ask for expert opinion in that context. This is also done in order to measure the significance of the impact caused by the existence of the company's IPR as a cause of bankruptcy.

Property Rights, as a type of IPR, hold a vital position in a company compared to other types of IPR. This is because trademark rights represent the value and reputation of a company.<sup>20</sup> Trademark rights that are viewed in this way can have an impact on two sides, negative or positive for the company.<sup>21</sup> If it has a positive impact, then it will significantly provide more benefits. This then, when linked in the context of the company's condition as a bankruptcy debtor, becomes a difficult task for the curator. In bankruptcy cases, there are several obstacles to optimizing IPR. First, the value of IPR is difficult to determine *Appraisal*, making it difficult to sell. Second, there are IPRs that are owned by the Debtor but are not registered, so it cannot be ensured that the Debtor is the legal owner of the IPR. Third, the IPR owned by the Debtor is in dispute with a third party.<sup>22</sup>

As a company asset, in the event of bankruptcy, the curators must maximize the value of the Trademark Rights owned by the bankruptcy debtor so that it is able to support the fulfillment of payments to creditors.<sup>23</sup> Even though the law does not prohibit the Curator from taking action against Trademark Rights belonging to a bankrupt debtor, the curator must still carry out a previous examination involving an expert or experts. If Trademark Rights are identified as part of the bankruptcy budget, an assessment needs to be carried out to determine whether the Trademark Rights can be optimized or not. This can be done because some of the obstacles mentioned

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<sup>20</sup> Christoph Antons, "The Recognition and Protection of Well-Known Trade Marks in Indonesia," *Journal of Intellectual Property Law & Practice* 3, no. 3 (March 1, 2008): 185–93, <https://doi.org/10.1093/jiplp/jpm252>.

<sup>21</sup> Lily H. Fang, Josh Lerner, and Chaopeng Wu, "Intellectual Property Rights Protection, Ownership, and Innovation: Evidence from China," *The Review of Financial Studies* 30, no. 7 (July 1, 2017): 2446–77, <https://doi.org/10.1093/rfs/hhx023>.

<sup>22</sup> Siti Fatimah et al., "Aspek-Aspek Hukum Dalam Dunia Bisnis" 5, no. 3 (2022): 609–20, <https://doi.org/10.59141/jist.v3i05.425>.

<sup>23</sup> Elena Cirmizi, Leora Klapper, and Mahesh Uttamchandani, "The Challenges of Bankruptcy Reform," *The World Bank Research Observer* 27, no. 2 (August 1, 2012): 185–203, <https://doi.org/10.1093/wbro/lkr012>.

previously are acceptable for valid reasons, such as if other assets of greater value will be disturbed by actions that are only aimed at optimizing the value of Trademark Rights, or if the Debtor does not have sufficient commitment to optimize the value of the Trademark Rights it owns. If the Curator does not have the ability to assess Trademark Rights himself, the Curator is not required to assess Trademark Rights himself. However, if the Curator does not have the ability to do so, the Trademark Rights can be assessed together with the debtor's assets at the beginning of the management and settlement process by involving an asset appraisal service institution (*appraisal*).

Statement of Financial Accounting Standards (PSAK) 19 (updated 2010) defines intangible assets as identifiable non-monetary assets devoid of physical substance. The entity's privileges or rights determine the value of intangible assets. As previously explained, trademark rights in law are ownership rights over intangible movable objects. Accounting for these assets is not as easy as accounting for tangible assets because they are intangible. One of the reasons why recognizing and measuring intangible assets often causes problems is that most intangible assets are generated internally (companies or people), not purchased from external parties. Therefore, it is difficult to determine the historical costs that will be used as a basis for measuring the value of these intangible assets. In addition, PSAK 19 stipulates that the company is expected to make a profit from the products produced from the Trademark during its protection period. During its protection period, the value of the Trademark should also be checked to see whether the value of the Trademark asset itself may decline<sup>24</sup>.

Valuation of Trademark Rights as collateral is a component to support Trademark Rights as collateral. This issue has prevented banks from accepting IPR guarantees.<sup>25</sup> There is no clear concept in Indonesia regarding the assessment of IPR assets, IPR assessment institutions, *due diligence* IPR, especially Trademark Rights. Because of this lack of clarity, there will be no clear legal guarantee protection in Indonesia. This then also has an impact in the context of bankruptcy. Valuation, according to WIPO, is “The process of identifying and measuring financial benefits of on assets”, and the valuation of IPR as an asset is intangibles “a process to determine the monetary value of subject IP”.<sup>26</sup> Valuation usually aims to help achieve strategies in terms of resource

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<sup>24</sup> I Gede Agus Kurniawan, “Valuasi Merek Sebagai Jaminan Kredit Perbankan: Relevansi Dalam Pembentukan Lembaga Penilai Kekayaan Intelektual,” *Jurnal Magister Hukum Udayana* 9, no. 4 (2020): 3, <https://doi.org/10.24843/JMHU.2020.v09.i04.p08>.

<sup>25</sup> Christine Greenhalgh and Mark Rogers, “The Value of Intellectual Property Rights to Firms and Society,” *Oxford Review of Economic Policy* 23, no. 4 (December 1, 2007): 541–67, <https://doi.org/10.1093/oxrep/grm035>.

<sup>26</sup> Gordon V. Smith and Russell R. Parr, *Valuation of Intellectual Property and Intangible Assets, 3rd Edition*, 3rd Edition (John Wiley & Sons Inc; Subsequent edition, n.d.).

allocation, development, and measuring investment levels to achieve optimal needs. This valuation is usually used for businesses such as acquisitions, mergers, investment guarantees, royalty determination, tax reports, purchase or sale of IPR, IPR licenses, IPR franchises, including in the process of settling bankruptcy debts by curators in the context of bankruptcy.<sup>27</sup>

### **3.3. Bankrupt Debtor Trademark Rights Transfer Mechanism**

In the event that the firm holding the rights is declared bankrupt, trademark rights, like corporate assets, must be transferable to other parties who are legally entitled to the rights. The process of transferring rights is certainly not carried out without clear measures. Before it can be transferred, trademark rights must meet the existence requirements. Trademark Rights, like other IPRs, are intangible movable objects in accordance to Articles 1150 and 1162 of the Civil Code. There must be evidence to support that the trademark right exists. According to Article 25 paragraphs (1) of Law number 20 of 2016 concerning Trademarks and Geographical Indications (Trademark Law), a trademark certificate is issued by the Minister from the time the trademark is registered. Therefore, documents showing rights to a trademark must have a certificate issued by the Minister.

Apart from the fact that existence must be real, the transfer of Trademark Rights belonging to the bankruptcy debtor must also be carried out properly. Feasible meaning that the capacity of the Trademark Rights are comparable to the value of the creditor's receivables that will receive the transfer.<sup>28</sup> As explained in the previous discussion sub-chapter, the process of assessing reputation and the economic impact of a Trademark Right is absolutely necessary.

Since only registered trademarks have legal protection, discussions about trademark deletion or transfer should begin with trademark registration. The Trademark Law states in Article 1 Number 5 that "The right to a Trademark is an executives right that granted by the state to the owner of a registered Trademark for a certain periods of time by using the Mark himself or giving permission to another party to use it". In these provisions, the phrase "registered trademark owner"

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<sup>27</sup> I Gede Agus Kurniawan, "Valuasi Merek Sebagai Jaminan Kredit Perbankan: Relevansi Dalam Pembentukan Lembaga Penilai Kekayaan Intelektual."

<sup>28</sup> Andrea Tosato, "Security Interests over Intellectual Property," *Journal of Intellectual Property Law & Practice* 6, no. 2 (February 1, 2011): 93–104, <https://doi.org/10.1093/jiplp/jpq168>.

shows how important the trademark registration process is, which is carried out first by use<sup>29</sup>. After the clarity of the Trademark owner is fulfilled, then the Trademark rights can be transferred.

If bankruptcy occurs, the bankrupt debtor who holds trademark rights can transfer his trademark rights in several ways. But the owner of the trademark cannot complete the transfer procedure by themselves. According to Indonesian bankruptcy law, a curator managing bankruptcy assets must work under the direction of a supervising judge. During the bankruptcy estate settlement phase, the curator may liquidate business assets to satisfy debts owed to creditors. Asset sales for the company must be conducted in a public manner. In this instance, the company's trademark rights will likewise be sold at public auction as an intangible asset. In this case, the sale and purchase agreement permitted in the Civil Code allows the sale of Trademark rights through auction. The goal of public sales is to achieve the highest price and is carried out transparently. An execution auction is a public sale of the bankruptcy estate<sup>30</sup>.

Compliance with an agreement is crucial. Mariam Darus Badruzaman defines “content of the agreement” as what both parties expressly state about their rights and obligations. A trademark transfer agreement, such as buying and selling a trademark, transfers trademark rights from the owner or holder to another party. Trademark rights are acquired under this arrangement. Trademark Rights execution auction procedures: with the supervising judge’s authorization, the bankruptcy curator designated by commercial decision files a written request to execute the company’s assets.<sup>31</sup> After the application is accepted by the court, the Commercial Court confiscates the company's assets. The curator submits the execution auction request to the Head of the local State Property and Auction Services Office (KPKNL) to determine the auction date. Auctions have a limit value, or minimum price. The curator, the vendor, sets the restriction. Since the appraiser or appraiser determines the selling value of the Trademark Rights to be offered, their appointment must be carefully and with good intentions from both parties. Auction announcements are published daily after the curator sets the value limit. Fan growth is the goal. Movable goods execution auctions are announced in the newspaper daily at least six days before the auction.

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<sup>29</sup> Djolly A. Sualang and Marthen L. Lambonan, “Peralihan Hak Merek Berdasarkan Perjanjian (Tinjauan Menurut Hukum Merek Indonesia),” *Lex Privatum* X, no. 1 (January 2022), <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/38072>.

<sup>30</sup> Dona Bella Faustine Law and Japansen Sinaga, “Akibat Hukum Kepailitan Perseroan Terbatas Sebagai Badan Hukum Atas Merek Dagang Dalam Boedel Pailit,” *Jurnal Law Pro Justicia* V, no. 2 (June 2020), <https://ejournal-medan.uph.edu/lpj/article/view/605>.

<sup>31</sup> Mulyani S., “Realitas Pengakuan Hukum Terhadap Hak Atas Merek Sebagai Jaminan Fidusia Pada Praktik Perbankan Di Indonesia,” *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat* 11, no. 2 (2016): 347, <http://dx.doi.org/10.56444/hdm.v11i2.347>.

After the new recipient of the rights shows proof of payment, the owner must submit a Trademark rights certificate, or ownership document, along with the Trademark rights purchased from the auction. The supervisory court over trademark rights may authorize private sales if no offers are received or if interested parties submit bids after the general auction is re-announced. Curators can apply to sell Trademark rights privately by attaching a proposal containing a sales plan. To ensure transparency and publicity, the curator can also communicate the sale plan to debtors, creditors and the creditor committee. If the supervisory judge feels that the reasons given by the curator are sufficient, the supervisory judge will issue a decision to sell the Trademark Rights privately.

In order to transfer trademark rights under a sale and purchase agreement, a notary public must create an authentic deed on behalf of the parties. The Minister shall document the transfer of rights to the Mark Rights upon completion of the necessary document review, and the announcement will be published in the Official Mark Gazette. After that, new owner of Trademark Rights will receive an Official Quotation from the Directorate General of Intellectual Property, indicating that the rights to Trademark Rights have been transferred to him. Thus, ownership of the Trademark Rights will be transferred to the new owner<sup>32</sup>. The process of transferring trademark rights aims to create a sense of justice for creditors who are entitled to them. This equitable distribution is compared with the distributions of the bankrupt debtor's other assets. This mechanism is based on the principle of dividing the debtor's assets as follows: Firstly, the principle of *pari passu*, where all creditors jointly receive repayment without any creditor being given precedence. Secondly, the principle of *prorata parte*, where repayment is proportional and calculated based on the size of each creditor's receivable compared to the total receivables, applied to the debtor's assets.

In Indonesia, the process of transferring trademark rights from bankrupt debtors is intricate and governed by both bankruptcy and intellectual property regulations. Indonesia's Trademark Law and Bankruptcy Law are the primary statutes that oversee the transfer of trademark rights during bankruptcy. The integration of these legal frameworks ensures effective management and transfer of trademark rights, even in cases of insolvency. The role of the bankruptcy curator is crucial in this procedure. The curator is responsible for overseeing the sale or transfer of trademark

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<sup>32</sup> Dona Bella Faustine Law and Japnsen Sinaga, "Akibat Hukum Kepailitan Perseroan Terbatas Sebagai Badan Hukum Atas Merek Dagang Dalam Boedel Pailit."

assets, appraising their value, and ensuring that creditors receive the maximum possible return from the sale.

Accurate valuation of trademark rights is essential. Since trademarks are intangible assets, determining their fair market value can be challenging for the curator. To optimize creditor recovery, the sale or transfer process must be transparent and compliant with legal standards. Several challenges arise in this process, such as the potential undervaluation of trademark rights, a limited market for some trademarks, and complex legal issues related to the transfer. Ensuring the process is efficient and fair to all involved parties is vital.

There are opportunities for improving the efficiency and clarity of the transfer mechanism. Better market conditions for trademark transactions, stronger legal frameworks, and enhanced regulations for curators could lead to more favorable outcomes. Overall, while Indonesia has a structured mechanism for transferring trademark rights from bankrupt debtors, continuous adjustments and improvements to the legal and procedural framework are necessary to address current challenges and make the process as efficient as possible for all stakeholders.

#### **4. Conclusion**

The study concluded that the transfer of IPR as an asset of a company in the bankruptcy process in Indonesia indicates that there is uncertainty in the guidelines for the value, transfer, and protection of IPR. The study found inconsistencies in the legal treatment of IPR in bankruptcy cases, indicating the need for legislative amendments and policy interventions to improve the protection and transferability of IPR. As a company's asset, trademark rights, and the other IPR as well, can be used as collateral in bank credit applications, but there is no clear mechanism in Indonesian insolvency law on how this right can be optimized for the payment of creditors' debts. The study recommends improvements in the insolvency legal concept in Indonesia in setting the types and categories of property that can be part of the assets pailit.

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