

A Comparative Study of Regulations on the Use of Trademarks as Objects of Fiduciary Security Between Indonesia and Denmark

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Abstract. In practice, trademark as part of Intellectual Property Rights in the form of intangible assets is often faced with problems when the applied as a fiduciary object due to the absence of an IPR asset assessment institution as the benchmark for the said trademark to be used as an object object of guarantee. This research aims to identify the similarities and differences in trademark regulations between Indonesia and Denmark in relation to objects of Fiduciary Guarantee and to examine the factors that lead to the said similarities and differences in trademark regulations in Indonesia and Denmark. This is juridical-normative legal research using statutory, comparative and conceptual approaches. The results of the research conclude that the position of trademark as object of fiduciary security is recognised in both Indonesia and Denmark as it serves as intangible asset. This is because trademark is deemed as object, namely movable object with an intangible form and possess economic value that can be transferred as well as encumbered with fiduciary guarantees. Therefore, because a trademark can be used as a collateral object, a valuation institution is needed to support the trademark which will be used as a collateral object. The causal factor for the similarities and differences in trademark regulations in Indonesia and Denmark is due to juridical factors where there are no regulatory guidelines related to assessing the economic value of intangible assets.

Keywords: Trademark, Guarantee, Valuation

Abstrak. Merek sebagai bagian dari Hak Kekayaan Intelektual yang berupa aset tidak berwujud (intangible assets) dalam praktiknya sering kali mengalami kendala pada saat pengajuan merek sebagai benda objek jaminan fidusia dikarenakan belum adanya lembaga penilai aset HAKI sebagai tolak ukur agar suatu merek tersebut dapat dijadikan sebagai benda objek jaminan. Penelitian ini bertujuan untuk mengetahui apa yang menjadi persamaan dan perbedaan pengaturan merek diantara Negara Indonesia dan Negara Denmark tersebut kaitannya dengan benda objek Jaminan Fidusia dan Apa saja faktor penyebab persamaan dan perbedaan pengaturan merek di Negara Indonesia dan Negara Denmark tersebut. Penelitian ini merupakan penelitian hukum yuridis-normatif dengan metode pendekatan peraturan perundang-undangan, perbandingan dan pendekatan konseptual (conceptual approach). Hasil penelitian menyimpulkan bahwa Kedudukan merek sebagai benda objek jaminan fidusia baik di Negara Indonesia maupun Negara Denmark keduanya sama-sama diakui karena memiliki kedudukan sebagai intangible assets. Hal tersebut dikarenakan merek termasuk sebagai benda, yaitu benda bergerak dengan bentuk tidak berwujud serta memiliki nilai ekonomis dan dapat dialihkan juga dibebani dengan jaminan fidusia. Oleh karena itu dikarenakan merek dapat dijadikan benda objek jaminan maka dibutuhkan lembaga valuasi dalam halnya untuk menunjang merek yang akan dijadikan benda objek jaminan. Faktor penyebab dari persamaan dan perbedaan pengaturan merek di Negara Indonesia dan Negara Denmark dikarenakan faktor yuridis dimana belum adanya peraturan pedoman terkait dengan penilaian atas nilai ekonomis dari aset tidak berwujud (intangible assets).

Kata Kunci: Merek, Jaminan, Valuasi.

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INTRODUCTION

Intellectual Property Rights (IPRs) are economic rights granted by the law to a creator or inventor over a work resulting from human intellectual abilities.¹ Intellectual Property is an asset that is born from intellectual abilities or the result of thought from human expression of ideas which are then translated into concrete works such as works in the fields of technology, science, art and literature.² These works are born or produced from human intellectual abilities which involve emotions, thoughts, energy, time, creativity, feeling and intention.³

The works that have been produced can then become wealth or assets that possess value or economic benefits for human life, thus these works can also be considered as commercial assets of the creators.⁴

Additionally, the creator has moral and economic rights entitled to their creation. The moral rights of the creator shall always remain in perpetuity even though the work has been transferred to another party, while the economic rights can be entirely transferred to another party if the creator gives their permission to the other party to reproduce or duplicate the former's work.⁵

The issue of IPR as an object of collateral for credit or loans for banks or non-banks has started to emerge once more hence being widely re-discussed. Moreover, since the Indonesian Government issued Government Regulation Number 24 of 2022 on Creative Economy on the 12th of July 2022. The aim and purpose of the government in issuing such regulation is due to the mandate given by the President of the Republic of Indonesia, Ir. H. Joko Widodo, who wished to encourage the creative economy to grow and prosper. Considering the large number of entrepreneurs in Indonesia who

¹ Khoiril Hidayah, *Hak Kekayaan Intelektual*, Setara Press, Malang, 2017, p. 1

² Ermansyah Djaja, *Hukum Hak Kekayaan Intelektual*, Cetakan Pertama, PT. Sinar Grafika, Jakarta, 2009, p. 4.

³ *Ibid*, p. 5

⁴ *Ibid*, p. 6

⁵ Lutfi Ulinnuha, *Penggunaan Hak Cipta Sebagai Objek Jaminan Fidusia*, *Journal Of Private And Commercial Law*, Vol. 01 No.01, November 2017, p. 87.

are currently offering great contribution to the country's economic growth, also based on the 2020 tourism industry and creative economy statistical data.⁶

Article 9 of the Government Regulation Number 24 of 2022 on the Creative Economy states that in implementing intellectual property-based financing schemes, bank financial institutions and non-bank financial institutions are allowed to utilise intellectual property as objects of collateral for loans.⁷ Additionally, Article 10 states that intellectual property that can be used as an object of collateral is in the form of intellectual property that has been recorded and/or registered to the ministry that performs the government affairs in the field of law and intellectual property that has been managed either independently and/or whose rights have been transferred to other parties.⁸

Trademark is an intellectual property in the form of intangible asset. According to Article 1 paragraph (1) of Law no. 15 of 2001 on Trademark: "A trademark is a sign in the form of an image, name, word, letter, number, color arrangement, or a combination of these elements which has distinguishing power and is used in trading activities for goods or services." Therefore, based on the provisions of article above, every sign or combination of signs that can differentiate the goods and services of a company from other companies or individuals can be deemed as a trademark.⁹

In contrast to the explanation of trademark according to Indonesian law, Denmark regulates Trademark in its Consolidation Law Number 88 dated 29 January 2019. The Law contains information regarding the provisions for the entry into force and transitional provisions adopted during the year 2016/2017 session by the Danish

⁶ Ahmad Ma'ruf, *Pertumbuhan Ekonomi Indonesia*, Jurnal Ekonomi dan Studi Pembangunan, Vol. 09 No 01, April 2020, p. 34.

⁷ Government Regulation Number 24 of 2022 on Implementing Regulations of Law Number 24 of 2019 on the Creative Economy, Article 9 which reads: "(1) In implementing the Intellectual Property Based Financing Scheme, bank financial institutions and non-bank financial institutions use Intellectual Property as an object of debt collateral." Paragraph (2) reads: "The object of debt guarantee as intended in paragraph (1) is implemented in the form of: a. fiduciary guarantee for Intellectual Property; b. contracts in Creative Economy activities; and/or c. collection rights in Creative Economy activities."

⁸ Government Regulation Number 24 of 2022 on Implementing Regulations of Law Number 24 of 2019 on the Creative Economy Article 10 "Intellectual Property that can be used as an object of debt collateral in the form of: a. Intellectual Property that has been recorded or registered with the ministry that handles government affairs in the legal sector; and b. Intellectual Property that has been managed either independently and/or the rights have been transferred to another party."

⁹ Hery Firmansyah, *Perlindungan Hukum Terhadap Merek*, Medpress Digital, Yogyakarta, 2013, p. 31.

Parliament (Folketing). Provisions regarding the application and transitional provisions for previously adopted amendments to the Trademark Law are regulated in Consolidation of Danish Law No. 223 dated 26 February 2017.¹⁰

Article 1 of the Consolidation Law Number 88 dated 29 January 2019 states that “Trademark: A commercial sign that meets the requirements as a trademark in accordance with this law as an individual trademark, guarantee or certification mark or collective mark.” Then it continues with an explanation as found in Article 2 “Individual trademark: A commercial sign that is registered or applied for as a trademark, or used as such, when the sign is used or intended to be used for certain goods or services and is capable of distinguishing those goods and services between one business and another.”¹¹

In that regards, what constitute the benchmarks for a trademark to be used as a collateral object for receivables? The Indonesian Directorate General of Intellectual Property, also known as DJKI, is yet to fully regulate the valuation of IPR assets, especially trademark in Indonesia.¹² This is due to the use of IPR as a collateral object that must first be registered and evaluated by a registered and certified appraisal institution in order to be utilised as a collateral object.¹³

Based on the aforementioned discussion, the following formulation of problems can be drawn. First, what are the similarities and differences in trademark regulations between Indonesia and Denmark in relation to object of Fiduciary Guarantee? Second, what are the factors that lead to the similarities and differences in trademark regulations in Indonesia and Denmark?

¹⁰ Consolidation of Danish Law Number 88 dated 29 January 2019.

¹¹ Consolidation of Danish Law Number 88 dated 29 January 2019, Article 1 and Article 2.

¹² Tris Palupi, Hak Kekayaan Intelektual Sebagai Jaminan Kredit Perbankan Intellectual Property As Banking Credit Guarantee, *Jurnal Negara Hukum*, Vol. 08 No. 01, June 2017, p. 38.

¹³ *Ibid*, p. 39

METHODOLOGY

The type of research used in this study is normative legal research by conducting legal studies of 2 (two) countries between Indonesia and Denmark related to the regulation of trademark as objects of fiduciary guarantees where this research uses library research or legal document studies that place the limitations on written regulations or on other supporting legal materials.¹⁴

RESULT AND DISCUSSION

Similarities and Differences between Trademarks Regulations in Indonesia and Denmark in Relation to Fiduciary Security Objects

Legal regulation is an instrument in the form of set of rules established by the state or an authorized party to regulate human behavior in a society. Regulation has a very important role in providing a sense of security, guaranteeing rights, and providing legal certainty for each individual as well as for society.

Even though regulations all over the world might have similar meaning and objectives, there remain substantial similarities or differences among these legal regulations in each country.¹⁵ Likewise, with regard to legal regulations relating to trademark as objects of fiduciary security in Indonesia and Denmark, certainly there are similarities and between the two countries. Among others are:

| No | Similarities | Differences | |
|----|--|---|---|
| 1. | Both countries | Indonesia | Denmark |
| | Both recognize that registered trademarks can be used as objects of fiduciary collateral | There is no assessment agency for IPR assets, which then makes it difficult for banks to offer loans. | There is a valuation institution for IPR assets namely the Danish Patents and Trademark Office. |

¹⁴ Soejono Soekamto, et.al., *Penelitian Hukum Normatif*, PT. Raja Grafindo Persada, Jakarta, 2008, p. 14.

¹⁵ University of Esa Unggul, *Faktor Yang Membuat Hukum Disetiap Negara Berbeda*, dalam artikel ilmiah, No. 01, Maret 2023, hlm. 1. <https://fh.esaunggul.ac.id/faktor-yang-membuathukum-disetiap-negara-berbeda/> accessed on 11th of July 2023, 22.20 Western Indonesian Time.

| | | | |
|----|--|---|--|
| 2. | Both are adherents of the Continental European legal system or commonly known as the Civil Law System. In this legal system, judges play the role in providing limits for making the laws. | Indonesia does not regulate in much detail regarding registration for trademark to obtain protection. | To obtain trademark protection in Denmark, the government regulates in more detail regarding trademark registration. |
|----|--|---|--|

1. Trademark as Object of Fiduciary Guarantee

There are similarities regarding trademark as object of collateral between Indonesia and Denmark, wherein along with the development of IPR as object of collateral in credit, Indonesia and Denmark have both legitimized such arrangement. Now, trademark rights are not only seen from its moral value, namely as an object of intellectual property, but also from its economic value.

Ownership of trademark rights can be transferred through various means such as inheritance, gift and agreement in accordance with Article 41 of the Trademark Law Number 20 of 2016 on Trademarks and Geographical Indications which allows the trademark to be used as an object of collateral provided that the mark has been registered and legalised with a certificate from the Directorate General of Intellectual Property Rights at the Ministry of Law and Human Rights.¹⁶

The same understanding is also stated in the Trademark Law which is contained in the Consolidation of Danish Law Number 88 of 2019. Particularly in Article 1 paragraph (1) which reads: "This Law applies to every trademark in connection with goods or services being the subject of a registration or application for registration, or rights acquired through use, and international registration valid in Denmark."¹⁷

The definition of a trademark in Denmark is similarly contained in Part 2 of Article 14 paragraph (3) point 2 which states that an agent or representative of the trademark owner cannot and is not permitted to own the trademark without the consent of the

¹⁶ Wely Saputra, Op.Cit, p. 158.

¹⁷ Article 1 paragraph (1) Consolidation of Danish Law Number 88 dated 29 January 2019.

trademark owner, unless the agent or representative has justified their actions by possessing the permission and approval from the trademark owner.¹⁸

According to J. Satrio, normatively, a trademark can be deemed as an intangible movable object for it has characteristics of material nature. These characteristics include:

- a. Having a direct relationship with certain objects controlled by the debtor;
- b. The rights to the property can be retained or transferred to certain parties;
- c. Having the nature of *droit de suite*;
- d. Having a higher position than the elders;
- e. Can be transferred to certain parties/other people.¹⁹

As trademark is an intangible movable object, the appropriate security law for a trademark is a fiduciary guarantee since a fiduciary guarantee is a security right to both a tangible movable object as well as an intangible movable object.²⁰ Fiduciary itself is the transfer of ownership rights to an object based on trust. Provided that the object whose ownership rights are transferred but whose control remains with the owner of the object. Thus, the ownership rights to intangible movable objects given as collateral are transferred by the owner to the creditor receiving the collateral, which subsequently the ownership rights to the collateral objects rest with the creditor receiving the fiduciary guarantee.²¹

A fiduciary guarantee is a guarantee certificate given by law to a financing institution that provides credit so that it can then guarantee the smooth payment of credit installments that have been given to those who apply for credit with collateral that is used as a credit contract. In its implementation, certificate for the said fiduciary guarantee as per Article 6 of Law Number 42 of 1999 on Fiduciary Guarantees should contain several clauses, including:

¹⁸ Consolidated Danish Law Number 88 dated 29 January 2019 Part 2 Article 14 paragraph (3) number 2 “An agent or representative of the trademark owner cannot and is not permitted to own the mark without the consent of the trademark owner, unless the agent or representative has justified his actions by having permission and approval from the trademark owner”.

¹⁹ Muhammad Rizki Asmar, *Op.Cit*, p. 325.

²⁰ SIP Law Firm, *Merek Sebagai Jaminan Fidusia*, <https://siplawfirm.id/merek-sebagaijaminanfidusia/?lang=id#:~:text=Hukum%20jaminan%20yang%20tepat%20bagi,maupun%20benda%20bergerak%20tak%20berwujud.>, accessed on 19th of October 2023, 20.30 Western Indonesian Time.

²¹ *Ibid*.

- a. Identity of the parties giving and receiving the fiduciary;
- b. Data on the principal agreement guaranteed by the fiduciary;
- c. Description of the object that becomes the fiduciary collateral;
- d. The value of the guarantee;

Indonesia and Denmark are both members of the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), which requires both countries to adapt their laws and regulations in the field of IPR to WTO's TRIPs (Trade Related Aspects of Property Rights) Agreement. Additionally, Indonesia and Denmark are also equally committed to acceding to the Madrid Protocol in national and international agreements.²²

The ties between Indonesia and Denmark in their participation in the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO) mean that these two countries are obliged to implement and harmonize their legislation with the clauses in TRIPs (Trade Related Aspects of Property Rights) Agreement. Considering this international agreement has already been in force definitively.²³ Apart from that, the two countries are also subject to the Paris Convention for the Protection of Industrial Property, hereinafter referred to as the Paris Convention.²⁴

The Convention was first started in 1883 and until 1976, the Convention had been signed by 82 countries. Indonesia and Denmark are included. In this Convention, the terminology of IPR includes: patent, utility model, industrial design, trademark, service mark, trade names, indications of source or application of origin, and repression of unfair competition.²⁵ In line with the terminology in this Convention, Indonesia and Denmark have both stipulated that IPR in the form of a trademark can be used as an object of fiduciary security.

These two countries are also adherents of the Continental European legal system or commonly known as the Civil Law System. In this legal system, the role of judges is

²² Muhammad Rizki Asmar, *Op.Cit*, p. 328.

²³ Tommy Hendra, *Perlindungan Merek*, Yayasan Pustaka Obor Indonesia, Jakarta, 2018, p. 26.

²⁴ *Ibid*, p. 28.

²⁵ *Ibid*, p. 27.

to set limits in the law-making process. In countries that adhere to civil law, the judiciary does not use a jury system.²⁶ Civil law systems are also the forms of legal sources in the formal sense in regards to the Civil Law legal through the formation of statutory regulations, customs and jurisprudence. A country with this legal system places a constitution at the highest hierarchy of statutory regulations. All countries that adhere to this legal system certainly have a written constitution.²⁷

The similarities between Indonesia and Denmark are also proven by the cooperation between Indonesia and Denmark in terms of Intellectual Property. Quoted from the KI Agenda on 6th of November 2020, DJKI will apply the KI system at DKPTO which has received ISO 9001. ISO 9001 is an international standard in the field of quality management systems in terms of the quality/service management systems it produces. This is one of the commitments of DJKI to improve protection and public services in the field of Intellectual Property.²⁸

The intellectual property rights that are included in the nature of objects that are corporeal and material object (tangible assets) can be tied to fiduciary guarantees and pledges such as buildings, machines and other infrastructure whose physical form is visible. Meanwhile, intellectual property rights that are considered as intangible assets that are ethereal can only be tied to fiduciary guarantees such as Human Resources (HR), trademarks, designs and other items that are not visible to the naked eye apart from tangible assets.²⁹

The word asset is used to provide a definition of IPR, namely “Intellectual property is the property right in an intangible asset - or right in the product of mind”. In essence, intangible assets are something that has valuable worth, but its form is not visible to the eye. One example is the presence of popularly-known trademarks.³⁰ There are

²⁶ Praise Junta, *Perbandingan Sistem Hukum Civil Law dan Common Law Dalam Penerapan Yurisprudensi Ditinjau Dari Politik Hukum*, “Dharmasisya” *Jurnal Program Magister Hukum Universitas Indonesia*, Vol. 02 No. 02, June 2022, p. 1029.

²⁷ *Ibid.*

²⁸ Directorate General of Intellectual Property, *Membangun Kerjasama Dengan Kantor KI Denmark*, <https://www.dgip.go.id/artikel/detail-artikel/demi-kemajuan-sistem-djki-membangunkerja-sama-dengan-kantor-ki-denmark?csr=2646285619882535194>, accessed on 1st of October 2023, 12.30 Western Indonesian Time.

²⁹ Indra Rahmatullah, *Op.Cit*, p. 50.

³⁰ Indra Rahmatullah, *Op.Cit*, p. 62.

unique features of IPR as an intangible asset, such as: Limited ownership (partial excludability) and non-market ability.³¹

The IP Evaluation used by the Denmark in assessing IPR assets is also by considering the fact that a trademark has exchange value; capital; riches. Trademark as intangible asset in physical form also casue the trademark to have its value determined depending on the costs incurred and the value of the trademark on its own.³² Currently, only copyrights and patents are legally recognized as objects of debt collateral based on the laws in force in both Indonesia and Denmark.³³

Trademark is movable object. The appropriate guarantee law for trademakr is thus Fiduciary Guarantee as it is a security right for both tangible movable objects and intangible movable objects. Fiduciary is the transfer of ownership rights to an object based on trust. The object whose ownership rights are transferred remains in the control of the owner of the object. Therefore, the ownership rights to objects given as collateral are transferred by the owner to the creditor receiving the collateral which subsequently the ownership rights to the collateral object rest with the creditor receiving the collateral.³⁴

2. Appraisal Institution for Assessment of IPR Assets (Valuation Mechanism)

The existence of an appraisal institution for IPR assets or valuation mechanism in Denmark has made a significant difference between the regulation of trademark as collateral object. Where the valuation institution becomes an important instrument in relation to the trademark as an object of fiduciary guarantee. Considering that a trademark is recognised as an object, it is therefore an intangible asset.

Denmark has a valuation agency known as the Danish Patent and Trademark Office, hereinafter referred to as the DKPTO, whose official website can be accessed via www.d.kpto.org.³⁵ The valuation institution takes the form of special software media

³¹ Indra Rahmatullah, Op.Cit, p. 55.

³² Indra Rahmatullah, Op.Cit, p. 86.

³³ Muhammad Rizki Asmar, Op.Cit, p. 328

³⁴ Laina Rafianti, Op.Cit, p. 7

³⁵ Danish Patent and Trademark Office, Intellectual Property Rights : Action Plan For An Innovative Denmark, <https://www.dkpto.org/> , accessed on 12th of July 2023, 20.30 Western Indonesian Time.

which is deliberately designed to identify IPR assets that will be valued, known as the European Patent Office (EPO). This system uses online media called IP Evaluation to assist companies in evaluating the IPRs they own.³⁶

This IP Evaluation is used in applications to provide insight into the assessment of IPR assets.³⁷ DKPTO has been integrated into the Danish IPR office. This system is free to access and use by anyone who wishes to know the value of their IPR assets.³⁸ IPR owners can access a variety of information through this website, one of which is that IPR owners can evaluate the value of the Intellectual Property they own and overview the prices of patents and copyrights on the market.

IPR which will be used as a collateral object must first be registered and evaluated by a registered and certified appraisal institution so that it can then be properly used as a collateral object.³⁹ The method used to carry out this valuation uses qualitative and quantitative methods through scoring and clear information.⁴⁰

Currently, DKPTO only provides certain types of IPR that can be valued through their site, such as patents, trademarks and industrial designs that can be carried out through an online valuation system facility.⁴¹ The use of trademarks, copyrights, patents and other intellectual property used as collateral objects must first carry out IP financing. What is meant by IP financing is the process of gaining access to credit.⁴²

The implementation of IP financing was welcomed by Small and Medium Enterprises, hereinafter referred to as SMEs and entrepreneurs in Denmark as this can also help companies and SMEs in Denmark to grow stronger in terms of economics as well as legal protection for the IPR assets they own. It is felt that the existence of an appraisal

³⁶ Danish Patent and Trademark Office, IP Evaluation, <https://ip-tradeportal.com/valuation/ip-evaluation.%20aspx>, accessed on 13th of July 2023, 13.20 Western Indonesian Time.

³⁷ Ibid

³⁸ Danish Patent and Trademark Office, Driving Growth and Development for Businesses, <https://www.dkpto.org/about-us>, accessed on 12th of July 2023, 20.30 Western Indonesian Time.

³⁹ Ibid

⁴⁰ Indra Rahmatullah, Op.Cit, p. 149.

⁴¹ Danish Patent and Trademark Office, Driving Growth and Development for Businesses, <https://www.dkpto.org/about-us>, accessed on 12th of July 2023, 21.30 Western Indonesian Time.

⁴² WIPO, Intellectual Property Financing – An Introduction, https://www.wipo.int/wipo_magazine/en/2008/05/article_0001.html, accessed on 14th of July 2023, 15.23 Western Indonesian Time.

institution for IPR assets has reduced obstacles for SMEs and companies in partaking in fair business competition.

The government is considered to have overcome the obstacles that may threaten them from protecting their rights by registering and evaluating their IPR assets. Considering valuation is a process for identifying and measuring the benefits and risks of an asset in the form of intangible assets owned, the existence of this valuation institution makes it easier to carry out considerations in decision making towards the proposed credit.⁴³

Another difference is that to obtain trademark protection in Denmark, Danish citizens do not always have to register their trademark in Danish soil. Trademark registration can be carried out throughout the European Union which the protection provided in 27 (twenty-seven) EU member countries. Although another way to register is to register directly in Denmark.⁴⁴

This mechanism is clearly different from trademark registration in Indonesia, which can only be done within the territory of Indonesia.⁴⁵ There are differences in the reasonings between Indonesia and Denmark regarding why a trademark cannot be registered. In Denmark a trademark cannot be registered if:

1. The trademark is formed into a sign that cannot be considered a trademark;
2. The trademark does not have any distinctive character;
3. The trademark only consists of signs or indications which in trade can be used to indicate the type, quality, quantity, purpose, value or geographical origin of goods or services, time of production of goods or provision of services or other characteristics of goods or services;
4. The trademark exclusively consists of signs or indications which are customary in the language currently in force or common trade customs to designate goods or services;
5. The trade only consists of:

⁴³ Danish Patent and Trademark Office, Intellectual Property Rights : Action Plan For An Innovative Denmark, <https://www.dkpto.org/> , accessed on 14th of July 2023, 20.30 Western Indonesian Time.

⁴⁴ Marcaria.com, Denmark Trademark Registration, https://www.marcaria.com/ws/en/register/trademarks/trademark-registrationdenmark?gad=1&gclid=Cj0KCQjw1OmoBhDXARIsAAAYGSHqjXbr5RE63HlaKhU5Y_uoa5xT1rEKiL2EsIb9r55Xug6NT4tjrUaAvHTEALw_wcB , accessed on 1st of October 2023, 10.30 Western Indonesian Time.

⁴⁵ Directorate General of Intellectual Property, Proses Pendaftaran Merek, <https://dgip.go.id/menu-utama/merek/proses-pendaftaran-merek> , accessed on 1st of October 2023, 12.30 Western Indonesian Time.

6. A shape or other characteristic resulting from the nature of the product
7. A shape or other characteristic of the product that is necessary to obtain technical results;
8. A shape or other characteristic that adds substantial value to the product;
9. The trademark violates the law, public order or morality;
10. The trademark is deceptive to the public (for example, regarding the nature, quality or geographical origin of goods or services);
11. The trademark has not been authorized by the competent authority in accordance with the Paris Convention or includes a badge, symbol or identification mark of public interest, unless the competent authority has given its approval to the registration of the trademark;
12. The trademark is prohibited from being registered as a trademark based on applicable law or international agreements to which the European Union or Denmark is a party; and which provides protection for designation of origin and geographical indications;
13. The trademark cannot be registered as a trademark under applicable law or international agreements to which the European Union is a party and which provide protection for traditional appellations for wine;
14. The trademark is prohibited from being registered as a trademark under applicable law or international agreements to which the European Union is a party and which provides protection for traditional specialization guarantees; or
15. The trademark consists of, or reproduces its essential elements, a denomination of an earlier plant variety protected by plant variety rights and relates to plant varieties of the same or closely related species.⁴⁶

Factors that lead to the similarities and differences in trademark regulations in Indonesia and Denmark

From the abovementioned similarities and differences in trademark regulations in Indonesia and Denmark, the factors are identified to have led to these similarities and differences are the following:

1. The existence of an appraisal institution for IPR assets (valuation mechanism)

⁴⁶ Lexology, Trademark regulation in Denmark, https://www.lexology.com.translate.google/library/detail.aspx?g=edb7546d-4bb6-4c68-bf01-61f86c2000f6&_x_tr_sl=en&_x_tr_tl=id&_x_tr_hl=id&_x_tr_pto=wapp, accessed on 2nd of October 2023, 19.30 Western Indonesian Time.

The growing issue related to IPRs being used as collateral objects in fiduciary guarantees has turned several countries, including Denmark into a comparative country that has started to formulate regulations and valuation mechanism of IPRs as collateral objects. It is due to the development of IPR assets to be used as collateral objects which cannot be separated from the existence of such special institutions.

This special institution is one of the legal aspects that determines the course of a country's economy. While concepts and aspects provide technical support in implementing legal policies related to the economy.⁴⁷ However, the situation is different in Indonesia, wherein there is no assessment of IPR assets or appraisal institutions. Indonesia, as a developing country and is heading towards modernizing its Intellectual Property Rights law, should be aware of the importance of this institution.

There is nothing wrong with emulating, studying, comparing and then taking measures to apply the legal rules and regulations related to appraisal institutions or valuations of IPR assets in Denmark and other developed countries. Economics and law can be integrated and combined since they have the same goal, namely public welfare.⁴⁸

However, in its application, there remain the needs for regulatory norms and stricter set of rules to be used as a reference in assessing IPR assets so that they can then be applied and utilised as the basis for assessing the said object as fiduciary guarantee. What is meant by IPR asset appraisal institution or valuation is the work process or activity of a party in providing an estimate or opinion on the economic value of a property, whether tangible or not.⁴⁹

The appraisal is carried out based on the results of an analysis of objective and relevant facts using applicable assessment methods, parameters and principles. The appraisal process itself can be divided into 2 (two) parameters, including appraisal of property

⁴⁷ Indra Rahmatullah, Op.Cit, p. 78.

⁴⁸ Trias Palupi, Op.Cit, p. 37.

⁴⁹ Trias Palupi, Op.Cit, p. 37.

and appraisal of business.⁵⁰ However to this date, there is no special institution that functions to assess IPR assets.

Even though the statutory regulations have expressly stated that IPRs that have been created can be objects of collateral. However, there are no guidelines for assessing the economic value of intangible assets, which is due to the difficulty of predicting the value of trademarks, thus banks subsequently face difficulties in determining the value of the trademark as there is no IPR asset assessment institution. Which then results in the norm being left as a legal norm without a clear implementing regulation due to the absence of the actual institutions and/or regulations on the matter.⁵¹

This is an obstacle as to why trademark cannot be fully recognized, and it is difficult to actually utilise it as object of fiduciary guarantee since there is no law that refers to the basis of legality which can be a reference for recognizing trademark as object of fiduciary guarantee. Consequently, this resulted in the unclear concept of due diligence.⁵² Due diligence is an essential process to be able to ascertain the subject and object of IPR ownership that will be used as object of collateral.⁵³

Due diligence is an assessment activity that requires accuracy and expertise, as well as competence in obtaining data and analyzing the data. This is certainly crucial considering the provisions regarding due diligence are also regulated in Article 6 letter a of the Fiduciary Guarantee Law.⁵⁴

In the case of banking institution, a credit must outline the responsibility for appraisal and must also define the procedures regarding the standard of an formal appraisal, including references to the appraisal or value of the object that will be pledged as collateral.⁵⁵ It is because in practice, valuation itself is a tool for achieving strategies in

⁵⁰ Trias Palupi, Op.Cit, p. 48.

⁵¹ Public Relation of Faculty of Law University of Indonesia, Hak Cipta Sebagai Jaminan Fidusia Tehambat Sistem Valuasi, <https://law.ui.ac.id/hak-cipta-sebagai-jaminan-fidusia-terhambat-sistem-valuasi/> , accessed on 10th of August 2023, 15.30 Western Indonesian Time.

⁵² Ibid

⁵³ Trias Palupi, Op.Cit, p. 49.

⁵⁴ Gede Agus, Op.Cit, p. 782.

⁵⁵ Gede Agus, Op.Cit, p. 768.

terms of development, resource allocation, measuring investment levels so that they can then fulfil the needs optimally.⁵⁶

Without any institution assessing the IPR assets, it is difficult for IPRs in that are in the form of intangible assets to be utilized commercially by their owners and to guarantee that the value of rights encumbered by fiduciaries can be enjoyed by fiduciary holders if the debtor defaults in the future. In that regards, such has caused the tendency of the banks to reject copyright in the form of intangible assets as fiduciary collateral due to valuation issues.⁵⁷

Essentially, Indonesia has a Directorate General of Intellectual Property, hereinafter referred to as DJKI, but the function of DJKI is yet to be directed at assessing IPR assets. DJKI basically runs the duty of carrying out the formulation and implementation of policies in the field of IPR in accordance with the provisions of statutory regulations.⁵⁸

There are several functions of DJKI, including:

- a. Formulation of policies in the field of legal protection of intellectual property, settlement of applications for registration of intellectual property, investigations, resolution of disputes and complaints of intellectual property violations, cooperation, promotion of intellectual property, and information technology in the field of intellectual property.
- b. Providing technical guidance and supervision in the field of legal protection of intellectual property, completion of applications for registration of intellectual property, investigations, resolution of disputes and complaints of intellectual property violations, cooperation, promotion of intellectual property, and information technology in the field of intellectual property.
- c. Implementation of monitoring, evaluation and reporting in the field of legal protection of intellectual property, completion of applications for registration of intellectual property, investigations, resolution of disputes and complaints of intellectual property violations, cooperation, promotion

⁵⁶ Gede Agus, *Op.Cit.*, p. 771.

⁵⁷ Public Relation of Faculty of Law University of Indonesia, *Hak Cipta Sebagai Jaminan Fidusia Tehambat Sistem Valuasi*, <https://law.ui.ac.id/hak-cipta-sebagai-jaminan-fidusia-terhambat-sistem-valuasi/> , accessed on 10th of August 2023, 15.30 Western Indonesian Time.

⁵⁸ Directorate General of Intellectual Property, *Struktur Organisasi*, <https://www.dgip.go.id/tentang-djki/struktur-organisasi/direktorat-jenderal-kekayaan-intelektual> , accessed on 12th of July 2023, 17.30 Western Indonesian Time.

of intellectual property, and information technology in the field of intellectual property

- d. Implementation of DJKI administration.
- e. Implementation of other functions assigned by the Minister.⁵⁹

Therefore, the absence of an appraisal institution or institution for evaluating trademarks to be used as objects of collateral means that there is no clear legal umbrella thus the trademark rights cannot be properly used as objects of fiduciary guarantee yet. In providing credit with IPR as object of collateral, banks are still hampered by applicable regulations, namely Article 43 of Bank Indonesia Regulation Number 14/15/PBI/2012 on Assessment of Commercial Bank Asset Quality and Article 45 of Financial Services Authority Regulation Number 16/POJK.03/2014 on Asset Quality Assessment of Sharia Commercial Banks and Sharia Business Units.⁶⁰

Although in practice, not many banks are able to accept trademark as objects of fiduciary collateral, there remain a good number of requests for IPR assessments from companies. In the Indonesian practice, companies highlight transactions, internal use and other purposes as reasons for assessing the IPR they own. The assessments that have so far been carried out are only based on the Indonesian Appraiser Code of Ethics (KEPI) and the Indonesian Appraisal Standards (SPI).⁶¹

According to Minister of Finance Regulation Number 101/PMK.01/2014 on Public Appraisers, the definition of appraisal is a work process to provide a written opinion on the economic value of an object which is carried out in accordance with Indonesian appraisal standards.⁶² Therefore, it is crystal clear that it is time for Indonesia to eventually establish an appraisal institution for IPR assets.

Denmark is one of the countries that has an advanced Intellectual Property system and sits on the 6th (sixth) rank in the 2020 Global Innovation Index based on World Intellectual Property Organization (WIPO) data.⁶³ With that being said, there is

⁵⁹ Ibid

⁶⁰ Muhammad Rizki Asmar, Op.Cit, p. 330.

⁶¹ Gede Agus, Op.Cit, p. 772.

⁶² Gede Agus, Op.Cit, p. 775.

⁶³ Directorate General of Intellectual Property, Demi Kemajuan Sistem DJKI Membangun Kerja Sama Dengan Kantor KI Denmark, <https://www.dgip.go.id/artikel/detail-artikel/demi-kemajuan-sistem-djki->

nothing wrong with the Indonesian State collaborating with and/or learning from Denmark regarding the rules and regulations relating to the much-needed appraisal institution. In separate circumstance, Indonesia has also entered into a strategic cooperation with the Denmark to advance the Intellectual Property system.

However, the other strategic collaboration is not intended to evaluate trademark as object of fiduciary guarantee. Quoted from the news released on the official website of the DJKI, the strategic cooperation takes the form of training programs, technical exchanges to increase capacity, raise awareness and better protect intellectual property rights and cooperative activities that may be carried out by both parties based on mutual understanding between the two countries.⁶⁴

This is extremely unfortunate because several countries, including Denmark as a comparison country, had already established and perform the practice of having a special institution for IPR valuation. Although in practice, Denmark does not use a separate appraisal, this is because the task of assessing IPR assets is carried out by the national Intellectual Property office which is carried out in various ways.

2. Differences in the legal systems

Lawrence M. Friedman, in his book *American Law an Introduction*, puts forward the Legal Structure theory which reads: A legal system in actual operation is a complex organism in which structure, substance, and culture interact. A legal system is the union of “primary rules” and “secondary rules.” Primary rules are norms of behavior, secondary rules are norms about those norms – how to decide whether they are valid, how to enforce them, and so on.⁶⁵

This theory states that the legal system is a structural system that determines whether or not the law can be implemented properly. Which consists of 3 (three) primary elements, namely legal structure, legal substance and legal culture.⁶⁶ Where these

membangun-kerja-sama-dengan-kantor-ki-denmark?csrt=2646285619882535194 , accessed on 11th of August 2023, 17.50 Western Indonesian Time.

⁶⁴ Ibid.

⁶⁵ Farida Sekti, Pemberantasan Korupsi Di Indonesia: Perspektif Legal System Lawrence M. Freidman, *Jurnal El-Dusturie*, Vol. 1 No.01, June 2022, p. 32.

⁶⁶ Ibid.

three components are differentiating factors related to the regulation of registered trademark as object of fiduciary guarantee in Indonesia and Denmark.

Elaborated further, the legal system is a unity of primary legal regulations which are customary norms with secondary regulations which are norms that will determine whether the customary norms are valid and can be applied or not in a country.⁶⁷ The main elements of the legal system according to Lawrence M. Friedman's theory include:

- a) Legal Structure (Legal Structure)
- b) Legal Issues (Legal Substance)
- c) Legal Culture (Legal Culture)

According to Lawrence M. Friedman, these three main elements of law then influence the success or implementation of law in a country, which synergize with each other to achieve the objectives of legal regulation.⁶⁸

CONCLUSION

The position of trademark as object of fiduciary guarantee in both Indonesia and Denmark are both recognized as they are deemed intangible assets. This is because trademark is included as object, namely movable object with an intangible form that has economic value and can be transferred and are encumbered with fiduciary guarantees. Therefore, since a trademark can be used as a collateral object, an appraisal institution is needed to support the trademark which will be used as an object of collateral. As collateral object, a trademark must first be registered and evaluated by a registered and certified appraisal institution so that it can then be properly used as an object of fiduciary guarantee. This valuation institution is crucially needed to clarify the concepts related to due diligence and valuation of IPR assets.

⁶⁷ Ibid.

⁶⁸ Luthfi Ansori, Op.Cit, p. 154.

Indonesia needs synergy in regulating collateral within its legal system, especially regarding the regulation of valuation of Intellectual Property. As for the urgency of having a special institution to address intangible assets, an IPR asset assessment institution or valuation institution is extremely necessary for Indonesia to be able to actualise trademark as object of fiduciary guarantee. It is because one of the supporting factors for IPR assets in the form of trademark to be used as object of fiduciary guarantee is its valuation; and one of the obstacles for trademark to be used as object of collateral is that there is no legal umbrella that regulates them and there is a need for stricter rules and uniform guidelines to be used as reference in assessing IPR assets in the form of intangible assets such as trademark. Denmark as a comparison country has its valuation institution known as the Danish Patent and Trademark Office (DKPTO), that can be accessed via the online website. The valuation assessment system used by Denmark utilises an online media called IP Evaluation to assist companies in evaluating their IPRs. Denmark has made it easier for its citizens to register and carry out valuations if they wish to apply for collateral.

It is time for the Indonesian government to form clearer regulations regarding the said valuation. Regulations are needed, whether in the form of government regulations or ministerial regulations as a reference. It is also time for the Indonesia to establish its own institutions and/or regulations related to the valuation of Intellectual Property Rights to support synergy in the law of collateral in Indonesian legal system. With the existence of a special institution related to valuation, it will make it easier for banks as credit recipients to execute trademark rights that are used as collateral objects.

It is necessary to immediately establish stricter statutory guidelines relating to the details of trademark as one of the IPR assets which can be object of collateral. As stated in the Copyright and Patent Law, this is of high importance considering that to this date, there is no legal umbrella that clearly regulates the matter at hands.

COMPETING INTEREST

There is no conflict of interest in the publication of this article.

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