

USE OF PORTRAITS IN TRADEMARKS (STUDY ON THE CASE OF THE USE OF MRS MENEER'S PORTRAIT)

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ABSTRACT

The use of portraits in trademarks creates polemics because copyright and trademarks are part of the IPR regime which have different protection concepts and objectives. This research aims to determine, examine and analyze the legal arrangements regarding the transfer of rights to the trademark "Jamu Cap Portrait Nyonya Meneer"; to find out, study and analyze the legal protection for the use of the portrait of Nyonya Meneer in the trademark "Jamu Cap Portrait Nyonya Meneer"; and to find out, study and analyze the judge's considerations in decision no. 2/Pdt.Sus-HKI/Cipta/2020/PN Niaga Smg regarding the portrait used in the trademark. The method used in this research is a normative legal research method with the approach used being a statutory approach and a case approach. The research results show that trademark rights can be transferred based on the provisions of Article 41 paragraph (1) letter f of Law no. 20 of 2016 and the transfer is permanent. Provisions regarding the use of portraits in trademarks are not clearly regulated in the 2014 UUHC and Law no. 20 of 2016. However, it can be implicitly found in Article 9 paragraph (1) and Article 12 paragraph (1) of the 2014 UUHC and in Article 21 paragraph (2) letter a of Law no. 20 of 2016. Protection of the economic rights of the portrait of Nyonya Meneer has ended, while the protection of moral rights is still valid because they are eternally attached to their creator. Protection for the portrait of Madame Meneer was given to the photographer. The Panel of Judges decided that the Plaintiff's claim was error in persona, but what was meant was the photographer who was the creator or copyright holder of the portrait which was never mentioned in this case.

Keywords: Portrait, Trademark, Transfer of Brand Rights, Copyright.

A. Introduction

A brand is an intellectual work that has an important role in the smoothness and improvement of trade in goods and/or services, and has important strategic value, both for producers and consumers. The importance of brands for producers is to differentiate their products from other similar companies' products and is intended to build the company's image in marketing, while for consumers it is to make it easier to identify types of goods and/or services, and even become a symbol of a person's self-esteem. People who are used to the choice of goods and/or services from a particular brand, tend to use goods and/or services with that brand indefinitely for various reasons, (such as because they have known them for a long time, the quality of the product is trusted, etc.) so that the function and the benefits of a brand as a guarantee of the quality of goods and/or services will become increasingly real.¹

¹ Muhammad Djumhana, *Perkembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual*. (Bandung: Citra Aditya bakti), hlm 78.

In essence, a brand is used by the manufacturer or brand owner to protect their products, whether in the form of services or other merchandise.² The brand used must have differentiating power that differentiates it from other brands. Therefore, it is not uncommon to see that a brand can consist of more than one sign element, such as an arrangement of letters combined with a logo, image, or even a portrait.

Portraits are one of the creations protected by the 2014 UUHC. Portraits are photographic works produced using a camera. Portrait is a factor that really influences consumers to decide to purchase a product and can increase the selling value of a product. The existence of portraits makes consumers know clearly about the products being offered, not just based on words, but attractive visuals make consumers more enthusiastic and interested in the products being marketed.³ Article 1 point 10 of the 2014 UUHC states that portraits are photographic works with human objects. Article 9 paragraph (2) of the 2014 UUHC states that the use of portraits for commercial purposes must obtain permission from the creator or copyright holder.

Trademarks and copyrights are part of IPR. Even though trademarks and copyrights are under the same regime, namely IPR, the protection of both is regulated in different laws and there are differences between the protection of the two in terms of objectives. Trademarks are regulated in Law no. 20 of 2016, while copyright is regulated in the 2014 UUHC. Marks aim to protect the distinguishing signs of traded goods and/or services while copyright aims to protect creations in the fields of art, literature and science.

Although there are differences between trademarks and copyrights, cases of conflict between the two often occur. This is a result of the public's lack of understanding of IPR, especially copyright and trademarks.⁴ One of the cases of conflict between brands and copyright is the portrait copyright case between Charles Saerang as the heir of Nyonya Meneer and PT Bumi Empon Mustiko, the Food and Drug Supervisory Agency, and the Directorate General of Intellectual Property Rights.

In 2020, the Plaintiff filed a lawsuit at the Semarang Commercial Court against the Defendant because he was deemed to have violated the law and violated the copyright over the portrait of Nyonya Meneer. Previously in 2017, PT Perindustrian Njonja Meneer was

² Endang Purwaningsih, *Paten dan Merek: Economic and Technological Interests dalam Eksploitasi Paten dan Merek*, (Malang: Setara Press, 2020), hlm. 61.

³ Riefa Adzany, Neni Sri Imaniyati, Asep Hakim Zakiran, "Perlindungan Hukum Terhadap Karya Potret tanpa Izin Sebagai Iklan Ditinjau dari Undang-Undang Nomor 28 Tahun 2014 tentang Hak Cipta," *Bandung Conference Series: Law Studies*, Vol. 2, No. 1 (2022), hlm. 352.

⁴ Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum & HAM RI, "IP Talks POP HC Seri Keenam "Hak Cipta vs Merek," Direktorat Jenderal Kekayaan Intelektual Kementerian Hukum & HAM RI, 2022, diakses 1 September 2022, <https://dgip.go.id/artikel/detail-artikel/ip-talks-pop-hc-seri-keenam-hak-cipta-vs-merek?>

declared bankrupt by the Semarang Commercial Court with Decision Number 11/Pdt.Sus-Pailit/2017/PN Niaga Smg due to being unable to pay a debt of Rp. 252,000,000,000.

In this state of bankruptcy, PT Perindustrian Njonja Meneer was found to have assets that did not have physical form which were used as bankruptcy documents and sold through a bankruptcy auction by the curator, namely 72 PT Perindustrian Njonja Meneer trademarks. The buyer of the bankruptcy assets in the form of 72 trademarks was PT Aryastya Bayanaka Nuswapada which then sold them back to PT Bumi Empon Mustiko in 2019.⁵

This case started when PT Bumi Empon Musiko used a portrait of Nyonya Meneer on the packaging of telon oil products used for commercial purposes. It is known that the trademark "Jamu Cap Portrait Nyonya Meneer" contains a black and white portrait of Nyonya Meneer. This portrait has been used on all products and has become a characteristic of every product released or marketed by PT Perindustrian Njonja Meneer.

(Gambar 1. Potret Nyonya Meneer)



(Gambar 2. Merek Dagang “Jamu Cap Potret Nyonya Meneer”)



Mrs. Meneer deliberately puts her own portrait on every herbal medicine package ordered by her customers. The portrait seems to have never changed since the founding of the herbal medicine company, namely a woman smiling faintly with her hair tied in a bun. The portrait has only one purpose, namely to guarantee the authenticity of the mixture. Apart from that, he considers that the goods he sells are quality brands.⁶

In the contents of the lawsuit, the Plaintiff argued that the use of the portrait of Nyonya Meneer on telon oil using the trademark "Jamu Cap Portrait Nyonya Meneer" by PT Bumi Empon Mustika was against the law and violated copyright because the use of the portrait was

⁵ Pengadilan Negeri Semarang, Putusan Nomor 2/Pdt.Sus-HKI/Cipta/2020/PN Niaga Smg.

⁶ Khoirul Anam, "Siapa Pemilik Jamu Tradisional Nyonya Meneer yang Legendaris?," CNBC Indonesia, 2022, diakses 1 September 2022, <https://www.cnbcindonesia.com/market/20220702124900-17-352390/siapa-pemilik-jamu-tradisional-nyonya-meneer-yang-legendaris>.

not with the permission of the Plaintiff and all of Nyonya Meneer's heirs . This refers to Article 12 UUHC 2014.

The defendant in his objection denied that the use of Mrs. Meneer's portrait in the registered mark was not against the law. The Defendant also said that the Plaintiff's lawsuit contained formal defects which resulted in the lawsuit being invalid and the lawsuit must be declared inadmissible (Niet Ontvankelijke Verklaard). One of the reasons is regarding the error in person (disqualification in person) lawsuit. That the Plaintiff has lost his right to control and manage his assets which are included in the bankruptcy estate.

Regarding this case, the Panel of Judges at the Semarang Commercial Court stated that the Plaintiff's lawsuit could not be accepted on the basis that the lawsuit was an error in persona. The plaintiff (Charles Saerang) has no legal standing or capacity to file a lawsuit. Based on this decision, the Plaintiff filed an appeal to the Supreme Court. In its decision, the Panel of Judges rejected the cassation request with the consideration that Judex Facti's decision was appropriate and correct (Judex Facti did not apply the law incorrectly).

Based on the description above, research entitled The Use of Portraits in Trademarks (Study on Cases of the Use of the Portrait of Nyonya Meneer), is important to carry out because the trademark "Jamu Cap Portrait Nyonya Meneer" is known to contain a black and white portrait of Nyonya Meneer. A portrait is one of the creations protected by copyright, the concept of protection of which is different from the brand that contains the portrait. Therefore the question arises, does the portrait of Nyonya Meneer contained in the trademark "Jamu Cap Portrait Nyonya Meneer" still have exclusive rights as a creation protected by the 2014 UUHC or is its protection included in the scope of the trademark.

B. Research Methods

A study cannot be said to be research if it does not have a research method.⁷ Research methods are one of the factors of a problem that will be discussed.⁸ The type of research used is normative legal research, namely research conducted or aimed only at written regulations or other legal materials.⁹ The nature of the research used is analytical descriptive. Descriptive analytical research is research that is intended to provide as precise data as possible about individuals, circumstances, or other symptoms.¹⁰ The approaches used are the statutory

⁷ Ismail Koto, "Perlindungan Hukum Terhadap Korban Tindak Pidana Terorisme", *Proceeding Seminar Nasional Kewirausahaan*, 2.1, (2021): 1052-1059.

⁸ Ida Hanifah, Ismail Koto, "Problema Hukum Seputar Tunjangan Hari Raya Di Masa Pandemi COVID-19", *Jurnal Yuridis* 8.1, (2021): 23-42.

⁹ Bambang Waluyo, *Penelitian Hukum dan Praktik*, (Jakarta: Sinar Grafika, 1996, hlm. 13.

¹⁰ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: Rajawali Pers, 2015), hlm. 10.

approach and the case approach. The statutory approach is carried out by examining all laws and regulations relating to the legal issue being handled, while the case approach in normative legal research aims to study the application of legal norms or rules carried out in legal practice.

The research data used is secondary data consisting of primary legal materials such as the 2014 UUHC and Law no. 20 of 2016, secondary legal materials such as books and research results in the form of theses, and tertiary legal materials such as dictionaries and sources from websites. The analytical method used is qualitative analysis.

C. Analysis and Discussion

1. Legal Arrangements regarding the Transfer of Rights to the Trademark “Jamu Cap Portrait Nyonya Meneer”

Article 1 point 1 of Law no. 20 of 2016 defines a brand as a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, 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 differentiate goods and/or services produced by individuals or legal entities in goods and/or services trading activities. A trademark is a brand used on goods traded by a person or several people together or a legal entity to differentiate them from other similar goods.

Saidin is of the opinion that a brand is a sign to differentiate similar goods or services produced or traded by a person or group of people or legal entities from similar goods or services produced by other people, which have differentiating power or as a guarantee of its quality and use in trading activities of goods or services.¹¹

Based on the provisions of Article 1 point 5 of Law no. 20 of 2016, it is known that the right to a trademark is an exclusive right granted by the state to the owner of a registered trademark for a certain period of time by using the trademark himself or giving permission to another party to use it. The meaning of exclusive rights to brands functions like a monopoly, only valid for certain goods and/or services. The right to a trademark is granted to the holder of the right to the trademark who has good intentions and is given recognition by the state if the trademark has been registered. For trademark rights holders who have registered their trademark, they should have legal certainty that they have the rights to the trademark.¹²

There are 2 (two) types of rights attached to trademark rights, namely economic rights and moral rights. These economic rights are in the form of profits in the amount of money

¹¹ Saidin, *Aspek Hukum Hak Kekayaan Intelektual (Intelektual Property Rights)*, (Depok: Rajawali Pers, 2019), hlm. 457.

¹² Putri Dyani Larasati, “Merek Sebagai Harta Pailit Terkait dengan Perseroan Terbatas yang Dinyatakan Pailit”, *Jurnal Hukum dan Kenotariatan* 2, No. 2 (Agustus 2018), hlm. 53.

obtained due to the use of the brand rights themselves or due to use by other parties based on a license agreement. A trademark gives special rights or absolute rights to the holder of the trademark, so that right can be defended against anyone.¹³

In property law, the right to a brand is categorized as a movable object that has no body. This categorization is based on Article 499 jo. Article 503 of the Civil Code states that "according to the law, what is called property is every item and every right that can be controlled by property rights." Article 503 of the Civil Code classifies objects into 2 (two) forms, namely "every object has a body or no body". Both articles emphasize that the objects of property rights are goods and rights. What is meant by goods are tangible objects whose appearance can be seen, while rights are intangible objects, in this case copyright which is part of IPR.

Brand rights are intangible movable objects. Intangible movable objects whose nature can be divided so that they can be transferred in whole or in part to another party. The transfer in whole or in part is indicated by actions carried out with the use of intellectual property rights as regulated in the Civil Code or in special laws.¹⁴

Transfer is the process, method, act of transferring transfer, replacement, exchange, alteration. Meanwhile, rights are the power to do something (because it has been determined by law, regulations or authority according to law. The transfer of intangible movable objects, in this case the right to a trademark, is the transfer of rights to another party or recipient of the rights in a manner determined by law. Brands and Geographical Indications.¹⁵

Article 41 paragraph (1) Law no. 20 of 2016 states that the transfer of rights to a brand can be transferred and ownership transferred to another party through inheritance, will, endowment, gift, agreement, or for other reasons justified by statutory regulations. The transfer of rights to a trademark for other reasons is justified by the provisions of statutory regulations, as long as it does not conflict with the provisions of statutory regulations. This is related to Law no. 37 of 2004, this can be done by selling it to another party to cover the debt of the bankrupt debtor as stated in Article 184 paragraph (1) and Article 185 paragraph (1) and (2) of Law no. 37 of 2004.

Article 184 paragraph (1) Law no. 37 of 2004 states that the curator must start clearing up and selling all bankruptcy assets without the need to obtain the debtor's approval or assistance if:

¹³ Muhammad Djumhana dan R. Djubaedillah, *Hak Milik Intelektual (Sejarah, Teori, dan Praktiknya di Indonesia)*, (Bandung: Citra Aditya Bakti, 2014), hlm. 223.

¹⁴ Pramuvti Rizki Dhian dan Kholis Roisah, "Akibat Hukum Pengalihan atas Merek Terdaftar Berdasarkan Akta Hibah Wasiat", *Notaris* 11, No. 1, (2018), hlm. 134.

¹⁵ Pramuvti Rizki Dhian dan Kholis Roisah, *loc. cit.* hlm. 134.

- a. The proposal to administer the debtor company has not been submitted within the time period as regulated in this law, or the proposal has been submitted but rejected; or
- b. Management of the debtor company is stopped.

Furthermore, Article 185 paragraphs (1) and (2) Law no. 37 of 2004 states that all objects must be sold in public in accordance with the procedures specified in statutory regulations. In the event that a public sale cannot be achieved, a private sale can be carried out with the permission of the supervising judge.

A bankruptcy decision results in all of the debtor's assets at the time the bankruptcy declaration decision is pronounced and everything obtained during the bankruptcy becomes general confiscation. Based on Article 24 paragraph (1) Law no. 37 of 2004, it is known that a bankruptcy decision results in the loss of the debtor's authority to control and manage his assets which are included in the bankruptcy assets, from the date the decision to declare bankruptcy is pronounced. Therefore, the bankruptcy estate is controlled by the heritage center and the settlement is carried out by the curator under the supervision of the supervising judge. This is based on the provisions of Article 1 point 1 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 27/PMK.06/2016 concerning Instructions for Implementing Auctions. What is meant by bankruptcy assets (bankruptcy boedel) includes all assets of the bankruptcy debtor and everything obtained during the bankruptcy.

All of the debtor's existing and future assets, both movable and immovable. This is as stated in Article 1331 of the Civil Code, which states that all of the debtor's existing and future assets, whether movable or immovable, are collateral for the repayment of the debt he or she has created.

Article 185 paragraph (1) Law no. 37 of 2004 states that all objects must be sold in public in accordance with the procedures specified in statutory regulations. Thus, brand sales must be carried out in public by means of auction. An auction is the sale of goods open to the public with written and/or verbal price offers that increase or decrease to reach the highest price, preceded by an auction announcement. This is as stated in Article 1 point 1 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 27/PMK.06/2016 concerning Instructions for Implementing Auctions.

The transfer of rights to a trademark cannot be done verbally, but must be done in writing with a private agreement or with authentic words made by a public official or notary. However, it is known that Law no. 20 of 2016 does not require the obligation to use an authentic deed so that it can be made privately. A private agreement certainly still has legal consequences as long as the agreement is not denied by the parties, this means that the parties acknowledge and confirm what is written in the private deed so that in accordance with the

provisions of Article 1857 of the Civil Code, the private deed has the force of evidence to be used as evidence in court.¹⁶

Brand rights are part of material rights, namely intangible movable objects. This refers to Article 613 of the Civil Code which states that the transfer of receivables in the name of and other items without a body is carried out by making an authentic or private deed which transfers the rights over the items to another person.

The transfer of trademark rights must be registered with the Directorate General of Intellectual Property Rights to be recorded so that the legal consequences of the transfer of trademark rights apply to the party concerned and third parties. This registration creates property rights, so it applies to everyone. The transfer of rights to a brand due to a bankruptcy decision from the commercial court is permanent so that the original owner of the brand no longer has exclusive rights to the brand. Because, through the transfer of rights to a brand due to a bankruptcy decision, those who have exclusive rights to the brand and those concerned are obliged to arrange and finance the official registration of the transfer of rights to the brand to the Directorate General of Intellectual Property Rights. Thus, the rights to the trademark "Jamu Cap Portrait Nyonya Meneer" are transferred permanently to PT. Bhumi Emphon Mustiko.

2. Legal Protection for the Use of the Portrait of Nyonya Meneer in the Trademark "Jamu Cap Portrait Nyonya Meneer"

Copyright based on Article 1 point 1 UUHC of 2014 is defined as "the creator's exclusive right which arises automatically based on declarative principles after a work is realized in real form without reducing restrictions in accordance with the provisions of statutory regulations." The explanation of Article 4 of the 2014 UUHC explains that the exclusive rights referred to are rights that are only intended for the creator so that no other party can exploit these rights without the creator's permission. Copyright holders who are not creators only have part of the exclusive rights in the form of economic rights.

There are 2 (two) rights included in copyright, namely moral rights and economic rights. Moral rights are rights that cannot be disturbed by anyone because moral rights are rights that are always attached to wherever the work is created, even though the creator has died. Moral rights are non-transferable or cannot be transferred or assigned¹⁷, However, the exercise of these rights can be transferred by will or other reasons in accordance with statutory provisions after the creator dies. This is stated in Article 5 paragraph (2) of the 2014 UUHC.

¹⁶ *Ibid.*, hlm. 132.

¹⁷ Zuvia Makka, "Aspek Hak Ekonomi dan Hak Moral dalam Hak Cipta", *Jurnal Akta Yudisia* 1, No. 1 (Februari 2016), hlm. 7.

Economic rights are the creator's right to enjoy the economic benefits of his creation. These economic benefits are a manifestation of the nature of copyright itself, namely that creations which are products of human thought have value, because these creations are a form of wealth even though they are intangible. Economic rights are transferable or can be transferred or assigned so that the creator or copyright holder can transfer their work to someone else.¹⁸

Basically Article 1 point 1 of Law no. 20 of 2016 does not mention portraits as one of the signs that can be used on brands. This article only states that signs that can be used as distinguishing marks for goods and/or services produced by individuals or legal entities in goods and/or services trading activities are images, logos, names, words, letters, numbers, color arrangements, 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.

Portraits are one of the works protected by copyright which includes economic rights. Article 1 point 10 of the 2014 UUHC defines portraits as photographic works with human objects. What is meant by photographic works are all photos produced using a camera. If there is a portrait in the brand, the party wishing to use the portrait must first ask permission from the copyright holder or owner of the portrait. This is as regulated in Article 9 UUHC of 2014 which states that every person is prohibited from using portraits for commercial purposes without permission from the creator or copyright holder for publishing the work; the multiplication of creation in all its forms; translation of works; adapting, arranging or transforming works; distribution of the work or copies thereof; performance of creation; announcement of creation; creation communication; and rental of creations.

Likewise, Article 12 of the 2014 UUHC states that the use of portraits for commercial purposes, duplication, announcement, distribution and/or communication of portraits created for commercial advertising or advertising purposes must be based on the written consent of the person being photographed or their heirs. The use of portraits for commercial purposes without such approval violates the provisions of Article 21 paragraph (2) letter a U of Law no. 20 of 2016 which states that an application is rejected if the mark is or resembles the name or abbreviation of a famous person, photo, or the name of a legal entity owned by another person, unless with written approval from the person entitled to it.

The provisions of Article 21 paragraph (2) letter a of Law no. 20 of 2016 above is similar to the provisions relating to the use of registrable marks regulated in The Lanham Act.

¹⁸ *Ibid.*, hlm. 6.

In 15. U.S.C. 1052 (Section 2 of The Lanham Act): Trademarks Registerable on Principal Register; Concurrent Registration mentioned that:¹⁹

“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow”

Based on the provisions above, it is known that Indonesia and the United States provide restrictions that portraits cannot be registered as trademarks, unless there is written permission from the person in the portrait.

Legal protection is the right of every citizen, and on the other hand, legal protection is an obligation for the state itself. Therefore, the state is obliged to provide legal protection to all its citizens.²⁰ Copyright protection for portraits in the 2014 UUHC adheres to the principle of automatic protection which is in line with the Bern Convention of 1886. This means that copyright protection for portraits is granted automatically from the moment it is successfully realized in real form, whether in digital or printed form. Thus, without any recording being carried out by the creator during his lifetime, the heirs are still entitled to protection of their economic rights for the commercial use of portraits.

Portrait copyright protection as described above is given to the photographer or photographer, not to the object being photographed, in this case Mrs. Meneer or her heirs. This refers to Article 1 point 12 of the 2014 UUHC which states that portraits are photographic works with human objects. In the concept of copyright, copyright protection is given to works originating from the creator or copyright holder. In the world of photography, the creator and copyright holder of the portrait is the photographer. The photographer has 2 (two) roles, namely as the creator of the photo he has produced and he is also the copyright holder for the portrait.

Based on Article 59 UUHC of 2014, it is known that copyright protection for portraits is valid for 50 years from the first announcement. Thus, it can be understood that the protection of economic rights for portraits is valid for 50 years from the time it is first announced, and after the protection period ends, the portrait becomes public property (public domain). If you

¹⁹ FindLaw, “15 U.S.C. § 1052 - U.S. Code - Unannotated Title 15. Commerce and Trade § 1052. Trademarks registrable on principal register; concurrent registration,” FindLaw, 2018, diakses 18 Desember 2022, <https://codes.findlaw.com/us/title-15-commerce-and-trade/15-usc-sect-1052.html>.

²⁰ Ida Bagus Kade Fajar Bukit Purnama (et), “Perlindungan Hukum atas Karya Cipta Fotografi Berdasarkan Pasal 40 ayat (1) Huruf K Undang-Undang No. 28 Tahun 2014 tentang Hak Cipta”, *Jurnal Hukum dan Kewarganegaraan* 4 No. 4 (Agustus 2021), hlm. 608

look closely at the appearance of Madame Meneer in the portrait, it can be estimated that the portrait was taken when Madame Meneer was 25 to 35 years old. This means that the portrait was made between 1920 and 1930, while PT. Njonja Meneer Industry was founded in 1919. Therefore, it can be estimated that the age of this photo is around 90 to 100 years.²¹

The use of the portrait of Nyonya Meneer for the first time in the trademark "Jamu Cap Portrait Nyonya Meneer" is considered a form of announcement of copyright on the portrait so that when linked to the provisions of Article 59 UUHC of 2014, the portrait of Nyonya Meneer, which is more than 50 years old, has lost protection. for its economic rights and is now in the public domain.

3. Judge's Considerations in Decision No. 2/Pdt.Sus-HKI/Cipta/2020/PN Niaga Smg Regarding Portraits Used in Trademarks

Based on Decision No. 2/Pdt.Sus-HKI/Cipta/2020/PN Niaga Smg, it can be seen that there was an error in the legal considerations formulated by the Panel of Judges. In its consideration it was stated that:

"... that the portrait/photo of Law Ping Nio/Nyonya Meneer is an image/logo as part of an integral element of the trademark 'Jamu Cap Portrait Nyonya Meneer' and therefore the use of the portrait/photo of Law Ping Nio/Nyonya Meneer is with the permission of the owner portraits/photographs or their heirs so that Law Ping Nio/Nyonya Meneer has consciously relinquished its ownership rights to the creation in the form of paintings.portret/photos of Madame Meneer to PT. Njonja Meneer Industry."

The assessment of the Panel of Judges above shows that the rights to the portrait of Mrs. Meneer are owned by Mrs. Meneer or Mrs. Meneer's heirs. This assessment is of course not in line with the 2014 UUHC provisions which state that the copyright for portraits is held by the photographer or photographer.

Portraits are a work protected by copyright. In the concept of copyright, copyright protection is given to works originating from the creator or copyright holder. This provision is regulated in Article 1 point 1 UUHC of 2014. In this case, the photographer is the creator and copyright holder of the portrait of Nyonya Meneer.

The photographer as the creator and copyright holder of the portrait of Nyonya Meneer has moral and economic rights attached to it. Moral rights are rights that must remain eternally attached to the creation created by the creator, while economic rights are the exclusive rights of the creator or copyright holder to obtain economic benefits from the creation. Article 9

²¹ Saddam Shauqi, "Protection of Creator's Economic Rights to Portrait Copyright (A Case Study of Using Nyonya Meneer's Portrait)," *IPR-Review* 3, No. 02 (Juli 2020). 241-250, hlm. 247.

paragraph (2) of the 2014 UUHC states that commercial use of a work must obtain permission from the creator or copyright holder.

It is true that the Plaintiff's claim is error in persona because the Plaintiff does not have the legal standing or capacity to file a lawsuit. Based on the provisions of the 2014 UUHC, the person who has the right to sue is the photographer or photographer as the creator or copyright holder, not Mrs Meneer's heirs. But unfortunately, the photographer was never mentioned in this case.

Article 59 paragraph (1) of the 2014 UUHC states that protection of the economic rights of creators or copyright holders is valid for 50 (fifty) years from the first announcement. The portrait of Madame Meneer is a portrait that is thought to have been taken when Madame Meneer was 25 to 35 years old. This means that the portrait was made between 1920 and 1930, while PT. Njonja Meneer Industry was founded in 1919. Therefore, it can be estimated that the age of this photo is around 90 to 100 years.

Thus, based on the provisions of Article 59 paragraph (1) of the 2014 UUHC, the protection of the economic rights of Madame Meneer's portrait has ended and has become public domain. However, photographers still have moral rights attached to them. These moral rights cannot be removed even though the copyright protection period has expired.

Protection of moral rights is a manifestation of Article 6 bis of the 1928 Berne Convention and Article 69 paragraph (1) of Law Number 39 of 1999 concerning Human Rights. Article 6 bis of the 1928 Bern Convention states that:

“independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, would be prejudicial to his honour or reputation.”²²

Furthermore, Article 69 paragraph (1) of Law Number 39 of 1999 concerning Human Rights states that "every person is obliged to respect other people's human rights, morals, ethics and rules of life in society, nation and state." Therefore, the protection and fulfillment of moral rights which are closely related to respect for the integrity and identity of the creator of his creations must not be ignored.

Satjipto Rahardjo said that legal protection is providing protection for human rights that are harmed by other people and that protection is given to the community so that they can enjoy all the rights granted by law.²³ In relation to this case, it is true that Mrs Meneer's heirs do not have the right to file a lawsuit because the copyright holder for the portrait is a

²² Faiza Tiara Hapsari, "Eksistensi Hak Moral dalam Hak cipta di Indonesia." *Jurnal Masalah-Masalah Hukum*, (2012), hlm. 463.

²³ Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI-Press, 2010), hlm. 69.

photographer who is not mentioned at all in this case. The panel of judges who examine, try and decide on this case must provide a decision that provides legal protection without ignoring the existence of the photographer who still has moral rights to the portrait.

Article 53 Law no. 48 of 2009 requires judges to be responsible for the determinations and decisions they make. The determinations and decisions made must contain the judge's legal considerations which are based on appropriate and correct legal reasons and foundations. This is the legal basis for a judge to make considerations that do not deviate from the law. This is important for the judge so that his decision does not give rise to new cases. Therefore, the judge must make a decision that provides justice for the Plaintiff and Defendant by making appropriate legal considerations.

D. Conclusion

The transfer of rights to a trademark due to a bankruptcy decision is regulated in Article 41 paragraph (1) letter f of Law no. 20 of 2016 that trademark rights can be transferred and transferred for other reasons justified by statutory regulations. The transfer is also regulated in Articles 24, 16, 184 paragraph (1) and Article 185 paragraphs (1) and (2) of Law no. 37 of 2004. The transfer of trademark rights through reasons justified by law due to a bankruptcy decision from the commercial court is permanent.

Portraits are one of the works protected by copyright. The use of portraits as signs in trademarks is regulated in Article 9 paragraph (1) and Article 12 paragraph (1) of the 2014 UUHC and Article 21 paragraph (2) of Law no. 20 of 2016. The use of portraits as signs in trademarks must be with permission from the creator or copyright holder because in fact portrait copyright protection is given to the photographer. The use of a portrait in a trademark does not eliminate the exclusive rights that exist in the portrait so that the portrait attached to the trademark is still protected by copyright.

The Panel of Judges' Decision in Decision No. 2/Pdt.Sus-HKI/Cipta/2020/PN Niaga Smg has not provided comprehensive legal protection. This is because the Panel of Judges does not see photographers as creators or copyright holders. The photographer who was never mentioned in this case is a problem because based on the 2014 UUHC, the photographer is the creator or copyright holder of the portrait. It is true that the Panel of Judges accepted Defendant I's exception that the lawsuit was error in person, but what should have been meant was the photographer because only the photographer has the right to sue as the creator or copyright holder, not Mrs. Meneer's heirs..

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