

INTELLECTUAL PROPERTY RIGHTS (IPR) ASPECT IN THE FRANCHISE BUSINESS FORMAT

Budi Santoso

*Diponegoro University
budi_tmg1@yahoo.com*

Abstract

In the franchise business, there are several aspects of IPR involved in it, such as trademark, copyright, patent either ordinary or simple, industrial design, and trade secrets. Each field of IPR has its own character and forms of legal protection that differ from one another, while the most basic aspects of IPR in the world of the franchise business, name brands and trade secrets. This study aims to analyze the correlation between aspects of Intellectual Property Rights and the franchise business format and which aspects of the IPR correlate with the format of the franchise business. The results show that the franchise agreement can be categorized as a principal agreement, involving the government, and the parties, while additional agreements, which are purely an agreement between the franchisor and the franchise, can be in the form of an agreement to maintain company secrets.

Dalam bisnis waralaba, ada beberapa aspek IPR yang terlibat di dalamnya, seperti merek dagang, hak cipta, paten baik biasa atau sederhana, desain industri, dan rahasia dagang. Setiap bidang HKI memiliki karakter dan bentuk perlindungan hukum masing-masing yang berbeda satu sama lain, sedangkan aspek HKI paling mendasar dalam dunia bisnis waralaba, nama merek, dan rahasia dagang. Penelitian ini bertujuan untuk menganalisis korelasi antara aspek Hak Kekayaan Intelektual dan format bisnis waralaba dan aspek mana dari IPR yang berkorelasi dengan format bisnis waralaba. Hasil penelitian menunjukkan bahwa perjanjian waralaba dapat dikategorikan sebagai perjanjian utama, yang melibatkan pemerintah, dan para pihak, sementara perjanjian tambahan, yang murni merupakan perjanjian antara pemilik waralaba dan waralaba, dapat dalam bentuk perjanjian untuk mempertahankan perusahaan rahasia

Keywords: intellectual property rights, franchise business, trade secret.

Introduction

Most consumers in Indonesia like ready-to-eat products from franchising companies. One of them is caused by logos, symbols, words, letters, numbers, or color combinations that are attached to the brand that provide quality assurance for the products or services offered. That is, in the language of management, these brands have reached the stage of emotional branding, a stage that most brands cannot necessarily achieve. Thus talking about the franchise business, the aspect of intellectual property rights (IPR) becomes so important and an integral part of the franchise business activities.¹ Hence, the function of the brand is initially just as giving the name of a product, service, or providing the identity of an item or service, then the brand can function as a differentiator with other brands for similar goods or services.² However, the possibility of a brand can reach a high level, which is providing a quality guarantee (warranty), giving a certain image, which often reaches the highest level, namely emotional branding.³ If a brand has reached this level, the economic value of a brand is very high. Economically it can even exceed the value of a company's physical assets, whether in the form of land or other objects.

Thus, the brand which in its early stages as something tangible, looks something in the form of images, words, numbers, letters, colors, or a combination of all of them, can be transformed into something intangible/nonphysical, that is in the form of a certain brand image.⁴

¹ K. Idris, *Intellectual property: a power tool for economic growth*, vol. 888 (WIPO: 2002), p. 22. See also, Tahir M. Nisar, "Intellectual property securitization and growth capital in retail franchising", *Journal of Retailing*, vol. 87, no. 3 (2011), p. 393; Wojciech Czakon, "Network governance dynamics impact on intellectual property management: the case of a franchise system", *International journal of intellectual property management*, vol. 3, no. 1 (2009), p. 23.

² Urška Tuškej, Urša Golob and Klement Podnar, "The role of consumer-brand identification in building brand relationships", *Journal of business research*, vol. 66, no. 1 (2013), p. 53.

³ Lucia Malär, Harley Krohmer, Wayne D. Hoyer and Bettina Nyffenegger. "Emotional brand attachment and brand personality: the relative importance of the actual and the ideal self," *Journal of marketing*, vol. 75, no. 4 (2011), p. 35.

⁴ Judith Lynne Zaichkowsky and Janet R. Garkey, *Defending your brand against imitation: consumer behavior, marketing strategies, and legal issues* (Westport: Quorum Books, 1995), p. 1.

Brands that are used in goods or services that have reached the level of guaranteeing product quality, even to the stage of emotional branding, are very likely to seize the market by franchising others. This paper aims to analyze the correlation between aspects of Intellectual Property Rights and the franchise business format and which aspects of the IPR correlate with the format of the franchise business.

Correlation Aspects of Intellectual Property Rights with a Business Format Franchise

An understanding of the franchise between those understood by the public in general and understanding according to the provisions of legislation turned out to be different. Generally, people understand franchises as leasing certain business formats owned by other parties for a certain period of time by paying certain compensation (royalty). While according to the provisions of Government Regulation No.42 of 2007 concerning franchising, Article 3 states the criteria that must be met to be called a franchise, namely: 1) have business characteristics; 2) proven to have provided benefits; 3) having standards for services and goods and/or services offered that are made in writing; 4) easy to teach and apply; 5) continuous support; Intellectual property rights (IPR) that have been registered.

The same criteria as above are also mentioned in Article 2 (1) of the Indonesian Minister of Trade Regulation Number: 31/M-DAG/PER/8/2008. Even in Article 2 (2), it states that:

Individuals or business entities are prohibited from using the term and or franchise name for their names and or business activities, if they do not meet the criteria referred to in paragraph (1)

This provision certainly has sanctions, although it is very unfortunate that the sanctions mentioned in Article 2 Paragraph (2) of the Minister of Trade Regulation are not expressly stated. Article 28 states that:

An individual or business entity that violates the provisions referred to in Article 2 paragraph (2), subject to sanctions as stipulated in the laws and regulations.

Thus, it can be concluded that the registered IPR is the main requirement for a franchise. Without a registered IPR there is no franchise. At least this is a franchise concept known to the Government of Indonesia. In the explanation of Article 3, it is stated that:

IPR that has been registered is an IPR related to a business such as a brand, copyright, patent rights, and trade secrets, has been registered and has a certificate or is in the process of registration in the authorized agency.

Understanding the term “registered IPR” needs to be further explained, because it seems impressed that all IPR branches get legal protection through the registration process, even though some IPR branches do not require legal protection by registration, as are copyrights and trade secrets. The concept of IPR can be divided into two categories; first, it is register right, that is, the field of IPR whose legal protection only arises when registration is carried out (brand, patent, industrial design, integrated circuit layout design); second, automatic protection, i.e. legal protection appears without the need for registration (copyrights, trade secrets). Thus, for brands (goods or services), patents, industrial designs, integrated circuit layout designs, it is understandable if the provisions of PP No. 42 of 2007 concerning Franchising requires IPRs that are “registered”, with proof of ownership rights in the form of certificates.

However, copyright and trade secrets, to obtain ownership rights, do not need to be registered,⁵ because they have been protected after the copyright or information was created or discovered. Registration can indeed be done for registration, but registration is not a requirement regarding legal protection. Registration is only a means of formality and not legality. Copyright registration is only administrative and not a means of legalization. Evidence of registration of the work issued by the Directorate General of IPR is not a certificate but in the form of a Registration for Creation.

Trade secrets also do not recognize registration for legal protection. If a trade secret is registered it will change shape, most likely to become a patent. This means that the information that had been kept secret must be published, thus not a secret anymore. Trade secrets are

⁵ The term “registration” in Law No. 28 of 2014 concerning Copyright is replaced with the term “recording”.

information that is indeed kept confidential, not published. Trade secrets are protected precisely because of their secret nature, this is unique. If in the future the Government requires registration of trade secrets, then, of course, it is not the trade secret that is registered but the contract or agreement.

IPR Aspects in a Franchise Business

Brands

Brands, in accordance with Law No. 15 of 2001 concerning brands, are a sign that can be in the form of images, names, words, numbers, letters, color arrangements, or a combination of these elements which have distinctive powers and used in trading activities of goods or services. Thus the brand is identification or the identity of a product in the form of goods or services to be easily distinguished from one another. Legal protection for the brand, as stated in Article 3 of Law No. 15 of 2001 concerning Trademarks, only given if the brand is registered in the general list of brands of the Directorate General of IPR, for this purpose, registration or registration must be carried out. Thus the rights to the brand do not appear automatically, but registration legal actions must be carried out, although registration is not necessarily accepted. Whereas in Law No. 20 of 2016 concerning Trademarks and Geographical Indications, those who revoked the provisions of Law No. 15 of 2001 concerning brands, in article 1 number 1, it is stated that brands are signs that can be displayed graphically in the form of images, logos, names, words, letters, numbers, arrangement of colors, in the form of 2 (two) dimensions and or 3 (three) dimension, sound, hologram or a combination of 2 (two) or more elements to distinguish goods and or services produced by a person or legal entity in the activities of trading goods and or services. The main difference in understanding the brand according to Law No. 15 of 2001 with Law No. 20 of 2016 lies in the accommodation of a sound mark, something that cannot be seen. As the brand definition in the 2001 Trademark Law is something visual or can be seen with the eye, while the 2016 Trademark Law introduces a brand that cannot be seen, namely a brand in the form of sound, something that is heard by the ear.⁶

⁶ In some countries, such as France and Italy, the state brand law has accommodated brands that cannot be seen with the eye, cannot be heard by the ears,

Brands are able to form perceptions in the minds of consumers or customers.⁷ This perception can be good or positive or even a bad perception. The main asset of a business is not a store, factory or owner's wealth, but actually, the perception or image of the brand for the product or service produced. Brands actually carry two attributes, namely real attributes that can be captured through touch, such as product design, performance, raw materials, size, shape, and price. Other attributes are attributes that are not real, namely in the form of perceptions or impressions of consumers who use the brand. In reality, these non-tangible attributes have a more important role in building a brand of product or service. This is due to unreal attributes that are difficult to imitate competitors because it involves more consumer emotions than real attributes. Thus, the brand is not just the name of the item that distinguishes goods from one another, but actually what distinguishes the product or the one from the other is how the process of creating the brand image in the minds and hearts of consumers, herein lies the difference between product and services that match with others. In marketing terms how to create a brand image in the minds of consumers is known as branding.

The brand is more than just an item name or a logo but includes things that have nothing to do with the function of the item but have a distinguishing feature of a product or service that is promoted in the market such as forms, letters, numbers, sounds, colors, etc.⁸ Trademarks basically promote product goods, while service brands promote services. The main function of a brand is used to distinguish similar goods or services in one class of goods. In general, brands that are considered to have differentiating power are brands that allow them to obtain brand protection, for example; 1) unique logo or symbol; 2) specially made words that are used as brands (coined marks); 3) Fanciful mark, which is a brand that sounds strange, imaginary, fantastic in relation to the use of products; 4) Arbitrary mark, a brand that sounds surprising, surprising, unexpected or unexpected in its use; 5) Suggestive

but are related to smells, especially perfume scents which are often known as a fragrance. In that countries the fragrance is part of the brands.

⁷ Keller, Kevin Lane, "Understanding brands, branding and brand equity", *Interactive Marketing*, vol. 5, no. 1 (2003), p. 7.

⁸ Stephen Elias and Lisa Goldoftas, *Patent, copyright, and trademark* (California: Nolo Press, 1996), p. 324.

and evocative mark, which is a brand that connotes product quality even though it does not clearly reveal its quality.⁹

For comparison, common and ordinary words actually do not have enough distinguishing power, but because long enough use becomes eligible to be protected as a brand, for example; 1) Name of person; 2) Terms relating to geographical area; 3) The term that explains or explains/descriptive terms, namely words that try to literally explain the product characteristics. Brands that are ordinary but have been used for a long time and are known to the public are considered to have secondary meaning.¹⁰

There are several brands that generally cannot be used as brands. First, generic marks, are general words used to specifically describe the type of product of their brands. For example, cellphone producers refer to their products as 'cellular'. This word is a description for a cellphone, but if it is used for face cream, for example, it is enough to have a differentiating power as a brand. Words that have also been considered public property, for example strong, special, thumbs, generally also cannot be used as a brand, unless modified. A brand can lose its protection because it becomes generic so it does not have distinguishing features such as Escalator, Aspirin, and Cellophane in the US.

Second, surname/last name. Surname basically cannot be protected as a brand, unless it has been known publicly through long-term use or through advertisements to obtain secondary meaning as a brand. Third, trade names. A trade name is a name used for business activities or business commonly used or listed on; stocks, bank accounts, invoices, letterheads. This is usually protected by the company name and registration on the company list but is not protected as a trademark/service. But if a trade name is also used to identify products/services in the market, it might be protected by brand law, if it has enough differentiating power, for example, Apple Computer Corporation, uses the Apple brand for computer product networks, Nollo Press uses the Nollo brand for online law service. However, trade names can also be protected by competition against the law. In the United States, for example, who is the first to use a brand (first use) for the first time commercial interests and attaches the brand to its products, but that is not the only way to obtain brand rights. Brand

⁹ Stephen Elias and Lisa Goldoftas, *Patent, copyright...*, p. 325-326.

¹⁰ Stephen Elias and Lisa Goldoftas, *Patent, copyright...*, p.327.

registration to PTO (patent, trademark office) and getting the filing date (date of registration) is considered as first use. In Indonesia, the rights to the brand arise because the registration of the trademark of the DG IPR in Jakarta is not based on who uses it first.¹¹

In fact, there are at least four types of brands that are widely used in business activities, namely; 1) Trademark, including the letters, names, symbols, or combinations used to identify and distinguish one item from another, usually used in advertising of tangible goods; 2) Service marks, including letters, words, names, symbols or combinations used to give identity to certain services or often known as intangible activities. It serves to distinguish services from one another, and to show the origin of the service; 3) Collective marks, is a brand that is used both for a series of certain products and services that show membership in a particular collaboration, association, certain organizations such as the American Bar Association, Lions Club, etc.; 4) Certification marks, are words, letters, names, symbols, used by individuals other than the owner stating the existence of quality, accuracy or other characteristics for goods or services such as 100% Florida's Seal of Approval (& Design).¹² In addition, there is also a Business Name, which only gives identity to a particular business by giving a certain name. However, this business name can also be used as a trademark or service such as Nollo Press and Apple Computer.¹³

Trade Secret

Since 2000, the Indonesian government has made Law No. 30 of 2000 which regulates trade secrets. The title of the Act is indeed about trade secrets and not about company secrets, but about the object of the arrangement and about everything related to company secrets and not state secrets or personal secrets. The object of the arrangement regarding information is in business or technology activities, so that it is closely related to company secrets. There are several terms used to refer to trade secret terms including undisclosed information (trips), confidential information (UK, Australia), know-how (Japan), trade

¹¹ Margreth Barrett, *Intellectual property*, 1st Edition (Smith's Review, 1997), p. 67.

¹² Deborah E. Bouchoux, *Protecting your company's intellectual property: a practical guide to trademarks, copyrights, patent & trade secrets* (New York: Amacom Management Association, 2001), p. 16.

¹³ Deborah E. Bouchoux, *Protecting your...*, p. 17.

secret, proprietary information (US). The term confidential information (UK and Australia) is very broad in scope, because it includes several senses, namely, personal secret, government secret, trade secret, artistic and literary secret. Thus, a trade secret is only part of confidential information. Examples of a personal secret such as medical records of people with HIV. Personal secret disclosures, such as the disclosure of medical reports of HIV sufferers, are personal secret violations and do not constitute a violation of the confidentiality of the employer. Although on the basis of public interest, the above reasons can be excluded. While the results of the ministers' meeting before publication can be a government secret.

In the United States, in the first restatement of tort, section 757 comment b, the trade secret is “any formula, pattern, device or compilation of information that is used in one's business, and gives an opportunity to obtain an advantage over competitors who do not know or use it”. Thus, it appears that a trade secret includes things that are both visible and invisible. Something that can be seen can be something written such as formulas, tools, patterns, while something that is not written and cannot be seen for example knowledge, information, expertise, skills, etc. All of these things are things that can be used as competing tools because they have a competitive value for their owners in an effort to gain profits in business activities, while others, as business competitors, do not know or do not use the information. In its development, at the beginning of 1979 uniform was made in the field of the trade secret in the US which is uniformity of 40 states in the US and the District of Columbia.

In the Uniform Trade Secrets Act, it is stated that what is meant by a “trade secret” is means information, including formulas, patterns, compilation, programs, devices, method, technique, or process that; 1) derives independent economic value, and not being readily available by proper means by, other persons who can obtain economic value from its disclosure or use, and; 2) The subject is reasonable under the circumstances to maintain its secrecy.¹⁴ In Indonesia, in Law No. 30 of 2000 concerning Trade Secrets, stated that Trade Secret is information in the field of technology or business that is not known to the public, has economic value and is useful in business activities and is kept

¹⁴ Robert P. Merges, Peter Seth Menell and Mark A. Lemley, *Intellectual property in the new technological age*, vol. 118 (New York: Aspen Publishers, 2003), p. 30.

confidential by its owner. Thus there are several elements of the Trade Secret, namely; 1) information in the field of technology and business; 2) is not publicly known; 3) has economic value; 4) useful in business activities; 5) the owner's confidentiality is maintained.

According to Law No. 30 of 2000 concerning Trade Secrets, the Trade Secret is considered to be born when someone creates or finds new discoveries in the form of information that has economic value, which due to certain considerations is deliberately stored and maintained as confidential information. The principle is that Trade Secrets are owned by people who find them. Thus, the Trade Secret will be utilized to increase IPR protection, in addition to brands, industrial design patents and copyrights. Its use is mainly to protect the idea of an idea or idea of a copyrighted work, a technical idea that has not been realized in a real form. Seeing the issue in Trade Secrets is information, especially concerning the idea of concept ideas, so it is very closely related to copyright. So that it is not wrong if David I Bainbridge argues that, copyright protects the expression of ideas but the law of confidence and protect the idea itself.

The object of trade secret is information so that it can be written or unwritten. What is in the company, both written and unwritten, as long as it is kept confidential and has competitive value as a competitive tool is a trade secret. Comparative advantage is probably derived from a piece of confidential information, an idea or state of events that are potentially exploited to attract an income or asset of a business. If the owner of the information cannot obtain economic benefits from the information, there is no trade secret in this matter. If maintaining this information will provide a comparative advantage to the owner, then this is qualified as a trade secret and this is confidential and in fact kept confidential.

Generally, the scope and objects of information are protected by trade secrets in a company, production methods, processing methods, sales methods, and other information in the field of technology or business that has economic value and is not known by the general public. Thus, tips for advancing the company, customer lists, sales data, marketing prospects, formulas, technical knowledge, consumer profiles, information about research and development, business plans, technical information (such as the operation of a machine), source code programs computer is a series of information that has commercial value and can

be used to gain profits in business activities so that it is worthy of being protected as a trade secret. This encourages information owners to try to protect it from information tapping/theft by other parties, especially business competitors.

Internal information owned by a business actor can be qualified as a trade secret if the disclosure of information will bring adverse effects to the business actor in the competition. For example, information that is usually considered a trade secret includes; 1) information relating to consumer characteristics; 2) information relating to product prices and costs; 3) the source of raw materials, especially if this part is open will result in opening the secret of the characteristics of the secrets relating to ingredients or ingredients; 4) books and business records; 5) sales information; 6) list of customers; 7) information relating to business opportunities; 8) information relating to distributors, suppliers, etc..

On the other hand, business information will not be protected by Trade Secrets if it can be developed independently with little difficulty. Information that generally cannot be qualified as a trade secret, including general guidelines for workers/employees/employees and personal policies that discuss the rights and responsibilities of workers. Trade secrets sometimes involve a new approach, formulas, tools, or methods for business activities, but an original structural innovation or reorganization of information that is publicly available that creates comparative advantage can be qualified as a trade secret if kept confidential. Much of the information that is currently rearranged so that it can be more easily stored and retrieved from computer databases is sometimes known as knowledge engineering, which is a new machine that can be retrieved format that may qualify as an innovation compilation, this is classified as a trade secret if maintained confidentiality because this allows a business to analyze old information into new ways that can provide excellence in the competition.

A database is a type of information that is organized in a way and given a searchable facility. An encyclopedia is an example of a database that is arranged alphabetically and contains information that can be retrieved through the subject. The term database is now understood as a database computer. Computer databases usually contain information that is linked in a way that can be quickly retrieved, either in a specific/specific way or in combination with other items. The database may be protected as a Trade Secret. For example, databases that provide

information for book publishers to identify parties or people who buy books in the previous year will qualify as trade secrets if they are kept confidential. Databases often contain copyrighted material or material owned by someone other than the database owner so that in the case of a database of archives or storage of newspapers or magazine articles then the copyright to the article is still owned by the original creator or publisher, even this database type can still consider a trade secret because of the way the material is organized as added value to the material itself.

The formula for a product that is stored and adds competitive value to business people can be qualified as a trade secret. A formula can contain several combinations, compositions that produce a special product. For example, many formulas have been given trade secret status for soft drinks, floor cleaners, or rat poisons. Ideas can be protected as Trade Secrets if they are generally unknown among business people and offer competitive advantages and are created in secret. The real value of an idea ultimately depends on the commercial success it achieves. An idea that offers a possibility that can help in a business competition should be maintained as a trade secret until it shows a rare or independent and different thought unless a golden opportunity to gain a profit as a potential competitor is lost. Protection of trade secrets is also available for ideas which later become an invention until a patent is obtained. Once an idea becomes a patent, the idea becomes part of the patent. Thus, the information becomes public property and is publicly available and is therefore no longer considered a Trade Secret. Protection of Trade Secrets over ideas should not be compared to copyright protection which only protects the real form of an expression of ideas and not the idea itself because of these differences, the rules of trade secrets can be better at providing legal protection for a concept and the development stage of a creation before finally being realized in a tangible form can be seen and published. In this phase, copyright protection takes over.

A list of customers from a business may qualify as a trade secret if the list contributes to the profit of competing for business and is kept confidential. In the rules of trade secrets, there are several types of customer lists; 1) list of customers maintained by retailers; 2) list of customers maintained by professionals; 3) list of customers maintained by large traders. A list of customers maintained by retailers and

professionals is mostly qualified as trade secrets for reasons; 1) the names of individuals in the list are usually obtained as a result of direct efforts by retailers or professionals in order to build goodwill; 2) The DP gives the owner a competitive advantage through significant retailers or professionals. The list of customers who are in large traders often does not qualify as trade secrets because retailers or distributors are usually easily identified through the merchant manual or other sources. Such a list usually does not have a competitive advantage for its owner but does not apply, for example, bookstore lists made in the form of books are technically very valuable for book merchant distributors.

Traditional knowledge can also be a trade secret. For example, an international organization known as the International Chamber of Commerce identifies industrial know-how in the applied knowledge, methods and data needed to realize or implement techniques that serve industrial purposes. Industrial knowledge is different from business knowledge which normally includes marketing techniques. The type of information covered by the term industrial knowledge will qualify as a trade secret if it is specified and not commonly known in the business community so that it can be used as a competition tool for the company and maintained as a trade secret within the company. In France, Germany, Japan, and the US, and many other countries, industry knowledge can be defined as trade secrets when a process is common or a method is patent or patented or something else is publicly available. For example, the method of making a sword has been widely known in Japan, but such factors as ceramics, heating with fire and temperature often determine whether a sword will be good or fail. Because industrial knowledge is associated with several factors that can be used as competitive tools, it can be qualified as a trade secret.

Industrial secret such as engineering, technology or science or mechanical processes, secret process formulas, unregistered industrial designs, manufacturing techniques and methods, confidential knowledge of machinery and equipment are secret examples in the industrial field. Laws in several countries, such as Japan, distinguish between industrial secret and commercial secret. In the US, courts generally equate all trade secrets as mentioned above. In other languages whether or not trade secrets are information in the business field,

industry knowledge or industry secrets have no legal consequences in the US.

Trade secrets legally still exist and remain protected even though many people know them, insofar as they are kept in business activities that have such trade secrets. For example, in large companies, trade secrets may be known by hundreds or even thousands of people, however, as far as business people remain, there are real practices to keep the public or other business actors unknown, so that the status of trade secrets for that information is maintained.

Article 3 of Law No. 30 of 2000 concerning trade secrets states that trade secrets obtain legal protection if the information is confidential, has economic value, and is kept confidential through proper efforts. Thus, information to obtain legal protection as a trade secret must at least fulfill three conditions. First, the information is confidential, meaning it is only known to a limited extent by certain parties or is not generally known by the public. Thus, in a secret company, it is possible not only to be known by the director or commissioner, but also known to several heads of departments, or almost all employees. Basically, if it is not yet a secret that is generally known to the public, it is still classified as confidential information. Second, this information has economic value, meaning that it can be used to run business activities or businesses that are commercial in nature or can increase profits economically. Thus the value of the information is reflected in the success of bringing profits to the owner, or at least that information becomes so important because it is a tool to compete with its competitors.

Third, the information is kept confidential by efforts as it should, meaning that there are steps that are appropriate and appropriate to safeguard the secret. Thus this condition requires real efforts or concrete steps from the owner of the secret to keeping the secret. One company with another company can be ascertained there are different efforts in maintaining the company's secrets. Examples that can be taken as concrete steps to safeguard trade secrets include requiring employees not to divulge important company information by signing statements to keep company secrets or often known as a Confidentiality Agreement, and making agreements to maintain company secrets with parties outside the company that potential to divulge company secrets, for example between companies with agents, distributors, notaries, legal

consultants, accountants, valuing companies, etc. This contract is often known as the Non-Disclosure Agreement.

In addition to the conditions as mentioned above, there are still other requirements, namely the information must be continuously used in the business of the owner of a Continuous use. Thus it does not include things that are only once or sometimes used in the business of the owner of a Trade Secret.¹⁵

Franchise Agreement

In Article 4 PP. No. 42 of 2007 concerning Franchising, stated that; 1) Franchising is held based on a written agreement between the Franchisor and the Franchisee in accordance with Indonesian law; 2) In the event that the agreement referred to in paragraph (1) is written in a foreign language, the agreement must be translated into Indonesian.

Seeing the provisions of Article 4 above, it is clear that the existence of a franchise must be stated in the form of an agreement and must be a written agreement. However, as we know, a written agreement basically can be made under the hand, it can also be made in the form of a Notary Deed. Thus, for franchising, in accordance with the provisions of Article 4 PP. No. 42 of 2007, there was no obligation to put it in the form of a Notary Deed. Whereas for the sake of proof if a dispute occurs, it is certainly more powerful and valid if it is set forth in the form of a Notary Deed, considering some of the advantages of the Notary Deed function compared to the underhanded deed in relation to the function as evidence. In Article 1 paragraph 7 of Law No. 30 of 2004 concerning Notary Position, it is stated that the Notary Deed is an authentic deed made by or before a Notary according to the form and procedure stipulated in this law. The Notary Act as an authentic deed has the evidentiary power that the deed does not have under the hand, namely: the power of outward proof (*Uitwendige Bewijskracht*), formal proof of power (*Formele Bewijskracht*), materiel (*Materiele Bewijskracht*).

From the outward aspect, the value of proof of the Notary deed must be seen as it is not seen as anything because outwardly it does not need to be contested with other evidence. If anyone considers that a Notary Deed does not fulfill the requirements as a deed, then the person

¹⁵ Margreth Barrett, *Intellectual property: cases and materials*, (West Academic, 2007), p. 3.

concerned must prove that the deed is outwardly not an authentic deed. This kind of proof must go through a court suit. The Plaintiff must be able to prove that outwardly the deed that is the object of the claim is not a Notary Deed. While formally, the Notary Act provides certainty about an event, day, date, month, year, hour (hour) facing, and the parties facing, signature of the parties/viewers, witnesses, and Notaries, and prove what is seen, witnessed, Notary heard (on official deed/minutes), and recorded statements or statements of the parties/viewers. Materially, the Notary Deed provides certainty about the material, that what is stated in the deed is a valid proof for the parties making the deed or those who get the rights and apply to the public, unless there is evidence to the contrary (*tegenbewijs*). Information or statements that are contained/contained in official deeds (or minutes), or statements of the parties given/delivered before a Notary and the parties must be considered correct.¹⁶ Looking at the three aspects above, which is the perfection of the Notary Deed as an authentic deed in providing proof value, it should be a written franchise agreement which is the main requirement for a franchise business as a Notary deed and not a lower-than-Deed proof certificate Notary Public.

Conclusion

Considering that the aspect of IPR is so important in the franchise business, it is necessary to look at each field of IPR in the franchise business by conducting an audit before the signing of the franchise agreement. The franchise agreement has specificity due to the occurrence of the desired by legislation. Thus, it is actually not a two-party agreement, between the franchisor and the franchise, but a three-party agreement, because the government is also involved in it, this is because the format has also been determined by the government. The Franchise Agreement can be categorized as a principal agreement, involving the government, and the parties, while additional agreements, which are purely an agreement between the franchisor and the franchise, can be in the form of an agreement to maintain company secrets (Confidentiality Agreement or Non-Disclosure Agreement). Brand Law and Trade Secrets are the dominant aspects of IPR in the business format with a franchise.

¹⁶ Margreth Barrett, *Intellectual Property...*, p. 72-73.

Bibliography

- Barrett, Margreth, *Intellectual property, 1nd edition*, Smith's Review, 1997.
- Barrett, Margreth, *Intellectual property: cases and materials*, West Academic, 2007.
- Bouchoux, Deborah E, *Protecting your company's intellectual property: a practical guide to trademarks, copyrights, patent & trade secrets*, New York: Amacom Management Association, 2001.
- Czakon, Wojciech. "Network governance dynamics impact on intellectual property management: the case of a franchise system." *International journal of intellectual property management*, vol. 3, no. 1 (2009), pp. 23-38.
- Elias, Stephen and Lisa Goldoftas, *Patent, copyright, and trademark*, California: Nolo Press, 1996.
- Idris, K., *Intellectual property: a power tool for economic growth*, vol. 888, WIPO, 2002.
- Keller, Kevin Lane, "Understanding Brands, Branding and Brand Equity", *Interactive Marketing*, vol. 5, no. 1 (2003), pp. 7-20.
- Malär, Lucia, Harley Krohmer, Wayne D. Hoyer, and Bettina Nyffenegger, "Emotional brand attachment and brand personality: the relative importance of the actual and the ideal self", *Journal of marketing*, vol. 75, no. 4 (2011), pp. 35-52.
- Merges, Robert P., Peter Seth Menell, and Mark A. Lemley, *Intellectual property in the new technological age*, vol. 118, New York: Aspen Publishers, 2003.
- Nisar, Tahir M., "Intellectual property securitization and growth capital in Retail Franchising", *Journal of retailing* 87, no. 3 (2011), pp. 393-405.
- Tuškej, Urška, Urša Golob, and Klement Podnar. "The Role of Consumer-Brand Identification in Building Brand Relationships." *Journal of business research*, vol. 66, no. 1 (2013), pp. 53-59.
- Zaichkowsky, Judith Lynne, and Janet R. Garkey, *Defending your brand against imitation: consumer behavior, marketing strategies, and legal issues*, Westport, CT: Quorum Books, 1995.