

## Intellectual Property Law in Bankruptcy Resolution

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**Abstract.** *This research analysis the important role of Intellectual Property Rights (IPR) in the context of bankruptcy law and Postponement of Debt Payment Obligations (Penundaan Kewajiban Pembayaran Utang/PKPU) in Indonesia. Articles in the Civil Code, such as Article 1233, as well as bankruptcy regulations regulate obligations and protection regarding company debt. Curators and company administrators play an important role in managing bankrupt company assets, including IPR. However, optimal management of IPR is often overlooked in bankruptcy resolution efforts, which should take into consideration the peace and continuity of the company's business. This research uses sociological or socio-legal methods. This method is a type of research that focuses on empirical-quantitative observation and analysis which focuses on collecting and examining secondary data, which is then followed by direct research on primary data obtained from the field or community. This research emphasizes the need for optimal recognition and management of IPR in the bankruptcy process to maximize the value of company assets and support financial recovery.*

**Keywords:** *Intellectual Property Rights; Postponement of Debt Payment Obligations; Bankruptcy; Bankruptcy Resolution.*

### 1. Introduction

Articles in the Civil Code are often the subject of discussion when discussing bankruptcy law in Indonesia. One of them is Article 1233 which covers obligations arising from agreements or laws. This is important because it is often related to understanding debt. Then, there are Articles 1131 and 1132 which discuss how a debtor's assets, whether movable or immovable, can be used as collateral for his debts. This underlines that every creditor has the same rights in collecting debts. When a company is declared bankrupt, Intellectual Property Rights (IPR) such as Patents, Brands, Industrial Designs, and others are also included in bankruptcy

regulations.<sup>1</sup> All of this can be used to pay debts to creditors. However, a bankrupt company loses the authority to manage its own assets.<sup>2</sup> Instead, it will be represented by the curator and the Heritage Center. The role of the curator is very important, responsible for managing the assets of a bankrupt company as best as possible.<sup>3</sup> However, you can also be responsible if an error or negligence occurs which causes loss to the bankruptcy estate.

Optimizing Intellectual Property Rights (IPR) assets is an integral part of bankruptcy law. This includes actions to ensure that the value of the IPR is maximized and is useful in bankruptcy and Postponement of Debt Payment Obligations (*Penundaan Kewajiban Pembayaran Utang/PKPU*) processes. Each type of IPR has different characteristics, so optimization strategies must also vary. According to Balqis & Santoso<sup>4</sup> and Serlia<sup>5</sup>, brands have an important role in business activities. Therefore, optimizing brand value when a company is in bankruptcy is very important to maintain business continuity, both during the bankruptcy process and PKPU. In conclusion, bankruptcy law takes into account not only the company's physical assets but also immaterial assets such as Intellectual Property Rights.<sup>6</sup> The management and optimization of these assets is an integral part of the bankruptcy process to ensure that creditors are paid as fairly

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<sup>1</sup> Johnson Sahat Maruli Tua, "Hak Atas Kekayaan Intelektual sebagai Harta Pailit dalam Hukum Kepailitan Indonesia," *to-ra* 5, no. 3 (2019): 113. See also: Suhaimi et al., "Perlindungan Hukum Terhadap Hak Kekayaan Intelektual (HKI) Di Indonesia," *Ius Civile: Refleksi Penegakan Hukum dan Keadilan* 5, no. 1 (2021). See also: Koukal, Pavel, and Helena Pullmannová. "Consensual security rights over intellectual property." *The Lawyer Quarterly* 8, no. 4 (2018).

<sup>2</sup> Herma Setiasih, "Analisa Yuridis Peralihan Kewenangan Direksi Perseroan Terbatas Kepada Kurator Dalam Pengelolaan PT yang Pailit," *Jurnal Hukum Inrichting Recht Wahana Wacana Bidang Hukum* 12, no. 1 (2019): 119.

<sup>3</sup> Iustika Puspita Sari, and Ahyuni Yunus, "Tanggung Jawab Perusahaan Terhadap Pemenuhan Upah Pekerja dalam Proses Pemberesan Boedel Pailit," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 8, no. 3 (2019): 408. See also: Hendra Haryanto, and John Calvin, "Actio Pauliana Sebagai Upaya Kurator Dalam Kepailitan Berdasarkan Putusan Nomor 61 PK/Pdt. Sus-Pailit/2015," *Binamulia Hukum* 10, no. 1 (2021): 8. See also: Tryandari, Maya. "Legal protection for bankruptcy curators in the resolution of bankruptcy cases." *Journal of Law and Legal Reform* 2, no. 3 (2021): 422.

<sup>4</sup> Wizna Gania Balqis and Budi Santoso, "Arti Penting Perlindungan Merek Terdaftar Bagi Komunitas Penghasil Produk Ekonomi Kreatif," *Jurnal Pembangunan Hukum Indonesia* 2, no. 2 (2020): 210.

<sup>5</sup> Marc Fischer and Alexander Himme, "The financial brand value chain: How brand investments contribute to the financial health of firms," *International Journal of Research in Marketing* 34, no. 1 (2017): 138

<sup>6</sup> Christian Andersen, "Legal Aspects of Asset Valuation on Copyright as Part of Boedel (Countable-List) in the Process of Bankruptcy in Indonesia Following the Latest Copyright Law Act No. 28/2014," *Central European Journal of International & Security Studies* 12, no. 4 (2018). See also: Alexander Savelyev, "Some risks of tokenization and blockchainization of private law," *Computer Law & Security Review* 34, no. 4 (2018): 864.

as possible and that the company can restart or complete the bankruptcy process in the best way.<sup>7</sup>

The wealth of a company is not only limited to physical objects such as buildings, land or vehicles. There are also intangible assets, such as distributor networks, advertising programs, training materials, share annuities, customer relationships, and Intellectual Property Rights (IPR). Even though IPR does not have a physical form, it functions as collateral for the company's debt.<sup>8</sup> Even though there are no specific regulations in the Civil Code regarding IPRs, in civil law, IPRs are considered as legal objects that are subject to the Law on IPRs and also Book II of the Civil Code, especially regarding laws regarding objects. The decision to postpone debt payments (PKPU) has a different impact from the decision to go bankrupt.<sup>9</sup> When bankrupt, the company's assets are placed under supervision and the company cannot carry out legal activities on the company's assets.<sup>10</sup> However, in PKPU, company assets are still under supervision but the company can still carry out legal activities on these assets with the help of administrators appointed by the court.<sup>11</sup> This manager is responsible for managing the company's assets and can be subject to sanctions if errors or omissions occur that cause loss to the company's assets.

In bankruptcy situations, curators often prioritize the settlement stage, such as selling company assets, rather than managing the peace or continuity of the

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<sup>7</sup> Oksana Pirogova et al., "Optimizing trading company capital structure on the basis of using bankruptcy logistic models under conditions of economy digitalization," in *IOP Conference Series: Materials Science and Engineering* 497, no. 1 (2019): 012129. See also: Alessandro Gennaro, "Insolvency risk and value maximization: A convergence between financial management and risk management." *Risks* 9, no. 6 (2021): 105.

<sup>8</sup> Bibekananda Panda and Sara Joy, "Intellectual Property-Based Debt Financing by Indian Banks: Scope and Challenges," *IUP Journal of Bank Management* 18, no. 3 (2019). See also: MH SH, "Dysfunctional Regulations and Ineffective Implementation of Intellectual Property Rights-Based Banking Collateral: A Critical Analytical Study," *NTUT Journal of Intellectual Property Law and Management* 58, (2020). See also: Toshiyuki Kono and Claire Wan-Chiung Cheng, "IP and debt finance: Cross-border considerations," *Security Interests in Intellectual Property*, (2017): 52.

<sup>9</sup> Krista Yitawati and Adi Sulistiyono, "The Mechanism of Suspension of Debt Payment Obligations (PKPU) in the Indonesian Bankruptcy Law During the Covid-19 Pandemic," In *2nd International Conference on Law Reform* (Netherlands: Atlantis Press, 2021), 29. See also: Ismail Rumadan, Pri Pambudi Teguh, and Chandra Yusuf, "Government Policy in Settlement of Bankruptcy Applications and Postponement of Debt Payment Obligations in the Covid-19 Pandemic Crisis in Indonesia," In *2nd International Conference on Law Reform (INCLAR 2021)*, (Netherlands: Atlantis Press, 2021), 19.

<sup>10</sup> Hartana, "Initial public offering (ipo) of capital market and capital market companies in Indonesia," *Ganesha Law Review* 1, no. 1 (2019): 42. See also: John Armour and Mari Sako, "AI-enabled business models in legal services: from traditional law firms to next-generation law companies?," *Journal of Professions and Organization* 7, no. 1 (2020): 28.

<sup>11</sup> Ronald Saija and Kadek Agus Sudiarawan, "Perlindungan Hukum Bagi Perusahaan Debitur Pailit dalam Menghadapi Pandemi Covid 19," *Batulis Civil Law Review* 2, no. 1 (2021): 70. See also: Kyunghoon Kim, "Matchmaking: Establishment of state-owned holding companies in Indonesia," *Asia & the Pacific Policy Studies* 5, no. 2 (2018): 314.

company's business. In fact, there are several company assets that are closely related to business continuity and the value of these assets will be higher if the company continues to operate (going concern).<sup>12</sup> This is contrary to the concept of bankruptcy law which actually pays more attention to the management stage, especially in supporting peace and continuity of the company's business. Even though Main Elements Description (*Unsur Utama Keterangan/UUK*) and PKPU regulate peace in bankruptcy and provide opportunities to cancel bankruptcy status, this practice is rarely carried out, especially in optimizing intangible assets such as IPR.<sup>13</sup> From the fact that debt restructuring and company restructuring activities during bankruptcy are relatively few, it can be concluded that the management stage in bankruptcy is more focused on resolution objectives rather than supporting the continuity of the company's business.<sup>14</sup> This is contrary to the concept of bankruptcy law which should pay more attention to efforts to support the peace and continuity of the company's business.<sup>15</sup> Although Main Elements Description (*Unsur Utama Keterangan/UUK*) and PKPU provide regulations regarding peace in bankruptcy and provide the opportunity to continue the company's business after peace, this practice is rarely carried out, especially in optimizing intangible assets such as IPR.

## 2. Methods

Sociological legal research is a type of research that focuses on empirical-quantitative observation and analysis.<sup>16</sup> The initial stage focuses on collecting and

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<sup>12</sup> Arash Azadegan et al., "Supply chain disruptions and business continuity: An empirical assessment," *Decision Sciences* 51, no. 1 (2020): 39. See also: Carmen Păunescu and Ruxandra Argatu, "Critical functions in ensuring effective business continuity management. Evidence from Romanian companies," *Journal of Business Economics and Management* 21, no. 2 (2020): 498.

<sup>13</sup> Francesco Chirico et al., "To patent or not to patent: That is the question. Intellectual property protection in family firms," *Entrepreneurship Theory and Practice* 44, no. 2 (2020): 340. See also: Cédric Durand and William Milberg, "Intellectual monopoly in global value chains," *Review of International Political Economy* 27, no. 2 (2020): 405.

<sup>14</sup> Herry Anto Simanjuntak, "Prinsip prinsip dalam hukum kepailitan dalam penyelesaian utang debitur kepada kreditor," *Jurnal Justia* 2, no. 2 (2020): 21. See also: Rai Mantili, "Actio Pauliana Sebagai Upaya Perlindungan Bagi Kreditor Menurut Kitab Undang-Undang Hukum Perdata dan Undang-Undang Kepailitan dan Penundaan Kewajiban Pembayaran Utang (PKPU)," *ADHAPER: Jurnal Hukum Acara Perdata* 6, no. 2 (2021): 28. See also: Olusola Joshua Olujobi, "Combating insolvency and business recovery problems in the oil industry: proposal for improvement in Nigeria's insolvency and bankruptcy legal framework," *Heliyon* 7, no. 2 (2021).

<sup>15</sup> Amir Ali Khushk and Peace Works, "Impact of Locus of Control (LOC) and organizational commitment on employee performance-study of service sector, Pakistan," *International Journal of Law and Peace Works* 6, no. 5 (2019): 2. See also: Brian Ganson, "Business (not) for peace: Incentives and disincentives for corporate engagement on good governance and peaceful development in the African context," *South African Journal of International Affairs* 26, no. 2 (2019): 210.

<sup>16</sup> David Tan, "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum," *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 8, no. 8 (2021): 2467.

examining secondary data, which is then followed by direct research on primary data obtained from the field or community. The main aim of this research is to evaluate the level of effectiveness of the application of law in practice and to find solutions to problems that occur in society.<sup>17</sup> This research method involves an in-depth interview process with sources who have expertise and experience in the field being researched. This is done to obtain quality and relevant primary data. The collected data is then analyzed carefully and thoroughly to provide adequate answers to the questions. Sociological or socio-legal legal research is an effort to understand social dynamics and legal practices in society as a whole. Through this empirical-quantitative approach, to identify existing problems, evaluate the implementation of existing laws, and find appropriate solutions according to the social context faced. This research has great potential to make a significant contribution to the development of legal policies that are more effective and relevant to society's needs.

### **2.1. Dynamics of IPR During Bankruptcy**

The management of company assets affected by bankruptcy, especially Intellectual Property Rights (IPR), has not been optimally carried out by curators. One of the main problems is that IPR has not been registered with the Directorate General of IPR, as well as legal disputes regarding IPR, especially Copyright, where it is difficult to determine its value. The curator can only take limited actions such as ensuring the Debtor obtains royalties in accordance with the existing license contract or selling IPR rights if possible. The main reason for less than optimal IPR management is because IPR has not been registered, so optimization actions are only carried out on IPR that is registered and still has value when the company goes bankrupt. These optimization steps include continuing existing licensing agreements and liquidating IPR. However, the possibility of IPR liquidation depends on the interest of potential buyers. Curator actions related to IPR optimization are still limited to assets that can increase bankruptcy budget income, such as IPR that are in the licensing process and that can be sold. If there is a license agreement that is still valid when the company is declared bankrupt, the curator will check the validity of the agreement and determine whether it needs to be continued. If it is not necessary to continue, the curator will determine the receivables that must be received by the Debtor. If there is no applicable license agreement, IPR will be optimized through settlement, namely by selling IPR assets through auction or private sale.

In the context of Postponement of Debt Payment Obligations (*Penundaan Kewajiban Pembayaran Utang/PKPU*), the majority of management does not have experience in optimizing IPR assets, because the main focus is on settling peace

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<sup>17</sup> Vikas Kumar et al., "Circular economy in the manufacturing sector: benefits, opportunities and barriers," *Management decision* 57, no. 4 (2019): 1068.

with creditors.<sup>18</sup> Management rarely takes specific action against IPR assets, and obstacles to management actions related to IPR are not significant because the PKPU decision did not have a significant impact on the company's previous activities. Management tends to prioritize peace-related activities over managing company assets and activities. However, continue to monitor the company's activities so that they continue to run normally and continue to think about ways to improve the company's performance, because the company's condition can affect the acceptance of the peace proposal by creditors.<sup>19</sup> From the perspective of Economic Law theory, optimizing IPR in bankruptcy and PKPU situations is very important because it can increase the value of company assets and maximize potential income. The concept of Continuing Company Business (going concern) in bankruptcy emphasizes the need to maintain the continuity of company operations during the bankruptcy process to maximize the value of assets that can be sold or used as collateral. Therefore, IPR optimization steps in the context of bankruptcy and PKPU must be carefully considered to ensure optimal results for all parties involved.

## 2.2. Optimizing IPR in Bankruptcy According to a Legal Perspective

The assets that have the most dominant role are of course assets that have a special purpose such as patents, trademark rights, trade secret rights, industrial design rights, distributor networks, consumer networks, advertising systems, and so on. Assets that have the most dominant role when the company is running normally will have a low value at the time of liquidation.<sup>20</sup> Special use assets are generally not traded assets and are not subject to market value and have value within the business entity in which they are located. The right way to maximize activities in Postponement of Debt Payment Obligations (*Penundaan Kewajiban Pembayaran Utang*/PKPU) or activities to continue the company's business (going concern in bankruptcy) is to reorganize or restructure the company. Company restructuring will increase the capabilities of assets that have special purposes through better capital or management, so that assets with special purposes will have a higher value. Corporate reorganization laws are conventionally justified as a way to preserve the going concern value of a company: Specific assets in a particular company have a higher value combined within that company than elsewhere.

Assets that have special purposes will be saved from decline in value, considering that the value of assets with special purposes at the time of business continuity is

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<sup>18</sup> Mieke Yustia Ayu Ratna Sari and Riza Yudha Patria, "Tantangan Pemanfaatan Hak Kekayaan Intelektual Sebagai Solusi Permodalan," *Law Review* 20 (2020): 119.

<sup>19</sup> Alfitra Rinaldo and Indra Afrita, "Juridical Review Against Rejection Of Peace In The Case Of Bonded Company," *JILPR Journal Indonesia Law and Policy Review* 2, no. 2 (2021): 74.

<sup>20</sup> Abdus Salam, "Retracted: Optimalisasi Aset Hak Kekayaan Intelektual Milik Perseroan Terbatas dalam Hukum Kepailitan di Indonesia," *Jurnal Suara Hukum* 1, no. 1 (2019): 29.

higher than the value at the time of liquidation. Efforts to restructure a company in a state of bankruptcy will be relevant if it is carried out based on considerations, including: the bankrupt company has assets intended for certain economic activities, these assets must remain the property of the company, and the absence of these assets greatly affects the company's wealth.<sup>21</sup> Thus, after considering several ways to maximize Intellectual Property Rights assets in the context of business continuity, the company's business activities will continue (going concern in a state of bankruptcy), the bankrupt debtor represented by the Curator can carry out payment negotiations and increase business capital, then the company will be managed independently by the Debtor. Carry out company restructuring actions, whether merger, acquisition or consolidation, with other parties or with your own creditors and Optimize IPR through Liquidation. All forms of transfer of Intellectual Property Rights are intended to pay the Debtor's debt to the Creditor. If we refer to the theory of value in liquidation, it can be seen that assets that have a special purpose will have a low value at the time of liquidation, so that the more special an asset is, the lower the value of that asset will be in liquidation. In liquidation, special purpose assets may have value but little or no value. The value of Intellectual Property Rights is not only measured based on its use, the economic age factor also determines it.

The economic life of Intellectual Property Rights assets is very determining in choosing liquidation or business continuity actions. Intellectual Property Rights that can be partially liquidated do not necessarily have good value at the time of liquidation, because this will be seen at the time of liquidation and this is related to the economic life which is determined in accordance with the period of ownership of the Intellectual Property. The longer the effective life (remaining economic life), the greater the possibility of the asset being partially liquidated (partial liquidation). The principle or guideline used is that the shorter the remaining economic life of an asset, the less feasible it is to liquidate and if forced to do so, it will result in losses. If the optimization of a brand in a state of bankruptcy is only carried out through liquidation, it is recommended to liquidate the brand within a period of no more than 3 (three) years after the brand is no longer used, because the Trademark Law regulates that marks are not used within a period of 3 (three) year will be revoked. by the government. When a company is in the period of Postponement of Debt Payment Obligations (PKPU), the Intellectual Property Rights assets can still be optimized by the Company. Only actions related to these problems must be carried out together with management. The Management together with the Company management need to evaluate all business units, take actions deemed necessary such as narrowing or expanding the

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<sup>21</sup> Alusianto Hamonangan et al., "Peranan Kurator Terhadap Kepailitan Perseroan Terbatas," *PKM Maju UDA* 2, no. 1 (2021): 29.

business, increasing capital, converting debt into shares, etc., as long as these actions are carried out. not related to asset liquidation.

Management needs to carry out an investigative audit to find out the Intellectual Property Rights owned by the company, review the legality, analyze the capacity of each Intellectual Property Right in business activities, and if necessary assess and record it in the financial reports.<sup>22</sup> The brand assessment process increases the amount of information a company has about its brand and must be developed so that it can be used as a management tool for value creation.<sup>23</sup> A good brand assessment process is a tool that helps maintain a coherent strategy. Carrying out company brand assessment actions, for example company brand assessment actions can be carried out by management in collaboration with appraisers and public accountants. These assessment actions are important in order to create management value, as a way to help maintain a coherent strategy over time, and to allocate and maintain marketing resources consistently. The company's business activities during PKPU are not much different from the situation before PKPU, when PKPU the company's business activities were still running. normally, making it easier for management to optimize the Debtor's wealth, especially Intellectual Property Rights.

### 3. Conclusion

The importance of managing Intellectual Property Rights (IPR) in the context of business activities, especially in situations of bankruptcy and Postponement of Debt Payment Obligations (*Penundaan Kewajiban Pembayaran Utang/PKPU*). This underlines the need for recognition and optimal use of these intangible assets, as well as the important role of curators and administrators in understanding and assessing the value and prospects of companies facing bankruptcy situations. First of all, it is important to understand that Intellectual Property Rights (IPR) are often not specifically identified as assets in a company's financial statements. This causes the true value of these assets to not be clearly revealed. Several factors that cause this to happen are that there is no legal recognition of the IPR, perhaps because it has not been registered or there is an ownership dispute. IPR itself is part of intangible assets, which in asset valuation theory are included in the category of assets with special purposes. This means that IPR should be utilized in conjunction with the company's business activities. However, it should be remembered that the liquidation of part of IPR must be carried out carefully, especially in a company continuity situation. Consideration must be given to the

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<sup>22</sup> Veronica Root Martinez. "Complex compliance investigations," *Columbia Law Review* 120, no. 2 (2020): 250. See also: Danson Kimani et al., "Blockchain, business and the fourth industrial revolution: Whence, whither, wherefore and how?," *Technological Forecasting and Social Change* 161, (2020): 120254.

<sup>23</sup> Gianluca Elia et al., "A multi-dimension framework for value creation through big data," *Industrial Marketing Management* 90, (2020): 618.



nature and economic life of IPR so that it does not harm the company as a whole. In the context of bankruptcy or PKPU, the role of the curator becomes very important. The curator must understand well the company's IPR capacity, and this involves the involvement of assessing officials and other experts. A comprehensive understanding of IPR will help in determining the appropriate steps in managing and utilizing these assets.

Decision making regarding the use of IPR must involve the opinions of experts. Curators and company administrators must carry out a comprehensive assessment of the company's condition, including its potential and future prospects. In assessing a company's prospects, IPR must be included as part of the evaluation. If the company still has prospects for growth, then the best choice is to choose PKPU. This provides an opportunity to restructure debt and allow the company to remain operational. However, if the company's prospects are very bad and there is no other way but to go bankrupt, then the curator must consider the Debtor's business continuity phase as one way to maximize the use of IPR. To ensure optimal use of IPR, laws and regulations need to regulate standards for managing and resolving IPR during bankruptcy and PKPU periods. This will help ensure that IPR assets are managed and utilized appropriately to support the company's business continuity. In this overall context, it is important for all relevant parties, including curators, company administrators, and experts involved, to work together to manage and utilize IPR effectively. This will help in maximizing the value of company assets and increase the chances of successful financial recovery in a bankruptcy or PKPU situation.

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