

# Franchise Business Protection in Context of Intellectual Property Law in Indonesia

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## Abstract

Franchising is a business system of trade and services which involving franchise agreement. Franchise business has their unique logo, design, brand, even clothing and corporate appearance. In this case, the Franchisor has granted the Intellectual Property Rights (IPR) to the Franchisee and the Franchisee pays the royalties for the use of the rights or licenses. This paper will explain how franchise business protection in intellectual property law in Indonesia both in term of franchisor and franchisee protection. This paper also describes a wide range of IP owned by Franchisor for example, trade names, logos, designs or patent and the obligation of the franchisee to respect the franchiser rights.

**Keywords:** Franchising, Intellectual Property Rights

## 1. Background

Globalization brings consequences boundaries depletion of nation and countries. It is characterized by the rapid changes of human life such as economy, technology, information, transportation, and so on. Economic development has driven the people behavior which needs legal norms and policy development.

In industrial countries, the rules of business law have been prepared to anticipate the economic development in order to prevent irregularities and fraud. Similarly, in developed countries like Indonesia, there are phenomenon about the fluctuated rule of law of economy and trade. This needs to accommodate the activity and economic processes.

For economic interest, Intellectual property has been important for every country to protect their product and originality in the international trading system. Historically, Acts concerning IP has first appeared in Venice, Italy which regulated the issues of patent in 1470. Caxton, Galileo and Guttenberg were listed as inventors who appeared in this period and had monopoly on their inventions.

In modern context, franchising is a business system that has unique characteristic of trade and services especially in their product type, corporate identity (logo, design, brand, and clothes appearance of company's employees), marketing plans and operational assistance (Harjowidigdo, 1993). To protect IP right, franchisor establishes franchise agreement which involves at least two parties. The first party is called Franchisor as brands product owner. The second party, franchisee as the investor that conduct the business that has right to use the brand and business system.

Currently the franchises that have proliferated in the community are not limited to the international business similar to 5 (five) years ago, but it has developed into small businesses or street business model. In addition, the franchisor sometimes to copy the popular names trademark, such as fried chicken franchise system that mimics the five big name franchises such as KFC, CFC, Texas FC which has had a permanent legal and clear protection.

## 2. Research Problem

How does the legal protection of intellectual property rights to the Franchisor and Franchisee in Indonesia?

## 3. Franchising Defined

The term of franchise was first introduced by the institution and the development of management (SBRC). Franchising is derived from the word meaning more or special franchises and profit means profit, so that franchise has meaning of a business that provides higher profits and special business (Azwar, 2005).

Rooseno Harjowidigdo gives the formula of franchise as a business system that has certain characteristics such as type of product and cultivated forms, corporate identity (logo, design, brand even including the clothes and appearance of the company's employees), marketing plans and operational assistance. (Harjowidigdo, 1993)

Franchise is a business system in trade and services with special characteristics of its own business, both on the type and shape of the cultivated products, corporate identity (trademarks, logos, designs even include clothing appearance of the company's employees), marketing plans and assistance operations.

According Hadi Setia Tunggal, (2006) franchising is a business arrangement in which a franchisor gives the right to franchise in form of trademark that allow others to sell products or services under the brand

name.

Douglas J. Queen,(1996) defined franchising as a method of marketing and business expansion. A business can expand the market and distribution of products and services by joint marketing and operational standards. Franchisee purchase an business since it has high attractiveness and higher customer awareness with proven systems provided by the franchisor. Furthermore Queen argued that the franchisor allows franchisee to use trade names, products, techniques and processes franchise with the required standard of licensing agreement. The strength of the system and goodwill of trade name has largely depended on the franchisee consistency to follow the system and products quality.

Trade with the use of the franchise concept is built on the basis of agreement between Franchisor as the rights holder to Franchisee. Franchise agreement stipulated in Article 1319 of Civil Code, and Article 1320 regarding the validity of the agreement and Article 1338 of Civil Code about the principle of freedom of contract. It states that every person is free to make an appointment and determine the contents of the original agreement in contrary to the law, morality and public order. This means, that the Civil Code gives freedom to the parties entered into an agreement to determine the agreement contents without conflicting with the laws of decency and public order.

Inside an agreement there is a relationship between the parties. This relationship is a legal relationship which created from legal action of rights and obligations of the parties. One party is entitled to obtain achievement while the other party is obliged to meet achievement. This requires of law involvement as an effort to provide a framework of protection guarantee for each party.

### **3.1. Franchise requirement**

In franchising agreement it must contain the following requirements:

- a. The agreement should be contained in a legal agreement authorized by law.
- b. This cooperation agreement describes in detail all the rights, obligations and duties of the franchisor and the franchisee.
- c. Each of the parties is highly recommended to obtain advice of competent legal and expert, about the contents of the agreement and with the time that is sufficient to understand it.
- d. there are three principles of a franchise agreement:
  - 1) Must be honest and clear.
  - 2) Each chapter in the agreement should be fair.
  - 3) The agreement contents must contain law enforcement.

Each franchise agreement must be developed specifically and has unique business context. Here are some factors that affect the contents of a franchise agreement.

### **3.2. The franchise agreement from the franchisor perspective**

In most franchise systems, franchisor has the right about:

- a. Logo, trademark, and goodwill associated with the brand and the business name.
- b. Format and business pattern. It is a business system that is recorded in the form of handbook (manual) as a business secret.
- c. In certain cases it contains recipes, design, and special programs.
- d. The copyright in most of the above can be in written form and are protected under Indonesian Law No. 19 of 2002 on Copyright (Law No.19 of 2002).

As described above, the franchisor includes the items in the franchise contracts that are corroborated by law (legal agreement) so that the franchisor still has the rights to the trademark and businesses models.

### **3.3. History of IP and franchise business in Indonesia**

Historically, franchise business has ambiguity from the perspective of IP rights because Indonesian culture still consider that business can be replicated by their family without any legal problems. This becomes issues in modern business because the community must learn new regulation on the franchise business faced by the community similar to the case in Western society, or more specifically, Western Europe and North America. In some areas of non-Western tradition, such as Islam, Buddhism, and Confucianism culture, the discourse about the IPR are less popular. It does not mean they has conventional civilization, but rather than their worldview (Weltanschauung) is different.

From modern economic standpoint, franchise is a right granted specifically to a person or group, to produce or assemble business system to use the business system together with other parties included in franchising agreement. While from a legal standpoint, franchise is a legal agreement between two parties to cooperate to produce, assemble, sell, marketing a unique product or service.

From a legal standpoint, franchising (franchise business) involves areas of contract law, in particular concerning the licensing agreement, law on commercial names, brands, patents, models and designs. Areas of

the law can be grouped in the field of contract law and intellectual property rights (Sumardi, 1995).

Article 1 Government Regulation Number 42 of 2007 on Franchise mention that the franchise is special rights owned by an individual or entity owning specific business system with a distinctive feature in order to market their goods and/or services that have been proven to work and can be used by other parties under the franchise agreement.

In United States, franchise business was first introduced in the 1850s by Isaac Singer, the Singer sewing machine maker, when he wants to increase sales distribution of sewing machine. Despite these efforts failed, but he who first introduced this business format in the US. Then, it is followed by more successful franchisees, John S. Pemberto as the founder of Coca Cola. It then followed by US auto industry, General Motors Industry in 1898 and US telegraph system, which has been operated by various railroad companies but controlled by Western Union that bound exclusive agreement between the car manufacturers with the dealer. (Mancuso, 1995)

From the story, franchise business system at this point is not only to sell the product in form of goods but sales and service idea. The important point of the franchise today is about the concept or idea developed by the franchisor with certain quality and standards in the perspective of legal certainty. This is really matter in context of Indonesian franchise agreement and the IP right.

The franchise law in Indonesia began on June 18, 1997, by the issuance of Government Regulation (PP) No. 16 of 1997 on Franchise. PP 16 of 1997 on this franchise has been revoked and replaced with PP 42 of 2007 on Franchise.

The release of this Government Regulation has an objective to improve the business coaching franchise in Indonesia. It also has goal to encourage national employers, especially small and medium entrepreneurs to grow as a national Franchisor to market the product both local and national. In addition to the government regulation, both parties need to enter into law enforcement especially on the legality and reliability of business. This has an objective to create transparency of business information that can be used optimally by both parties to get their balanced rights.

In addition, the government can monitor and collate the Franchise data both the number and type of business. For the objective, the Franchisor prior to making an agreement with the Franchisee, the first party must offer prospectus submitted to the Government and the prospective Franchisee. On the other hand, if there is a deal of Franchise agreement, Franchisee shall submit to the Government about the franchise agreement.

The government regulation is expected to provide business certainty and legal certainty for the Franchisor and Franchisee in conducting their activities. Furthermore, other provisions that support the rule of law in business format franchising is as follows:

- a. The Ministry of Industry and Trade No. 259/MPP/Kep/7/1997 Date July 30, 1997 on the Implementation of Franchise Registration.
- b. Regulation of the Minister of Industry and Trade No. 31/M-DAG/PER/8/2008 on the Franchise Implementation
- c. Act No. 14 of 2001 on Patents.
- d. Act No. 15 of 2001 on Trade Marks.
- e. Law No. 30 of 2000 on Trade Secrets.

### **3.4. Legal protection of IP rights to the franchisor and Franchisee in the Franchise Agreement in Indonesia**

There are several important elements contained in the franchise based on Article 1 of Government Regulation Number 42 of 2007 on Franchise, namely:

- a. Franchising is a special right as intellectual property rights of any person or legal entity ;
- b. Franchising is held on the basis of the agreement.

### **3.5. Content of franchise agreement**

Franchise business basically contain:

- a. Franchisor as the owner/producer of goods or services with particular brand that provide certain license to the business model and marketing of goods and services.
- b. Franchisee as the party receiving the exclusive rights from the franchisor.
- c. The transfer of exclusive rights which practically covering intellectual /industrial property rights from the franchisor to the franchisee.
- d. The designation of certain areas in which the franchisee is given the right to operate in a particular region. Example: the franchisee is only allowed to operate on the Java Island.
- e. The existence of returns as the franchisee achievements paid to the franchisor in Initial Fee and Royalties and other costs agreed by both parties.
- f. The existence of the quality standards and supervision are set by the franchisor to the franchisee on a

regular basis in order to maintain the business quality.

- g. The existence of initial training, continuous training, organized by the franchisor in order to improve skills.

From an economic standpoint, franchise business is a right granted specifically to a person or group, to copy the business system. While from a legal standpoint franchise is a legal agreement between two parties to cooperate and copy the business system which has legal enforcement for both parties. In the business context, Franchise means the freedom to run their own independent business in a particular region to bring a more profitable business which is set in a specific game rules.

The presence of intellectual property rights as an important part of franchise business can be seen from the provisions of Article 1, point 1 of Government Regulation No. 42 of 2007 on Franchise, which emphasizes franchise business as special rights owned by individual or entity of business system with a distinctive feature that have been proven to work and can be used based on franchise agreement. Other regulation set by Minister of Trade No. 12/M-DAG/PER/3/2006 regarding Provisions and Procedure for Issuance of Registration Certificates Franchise asserted that "Franchise is an engagement between the franchisor and franchisee to run a business by utilizing intellectual property rights with a reward based set by the franchisor with a number of obligations to the franchisee. From both regulations we can understand that the Intellectual Property Rights is a core element of the franchise and Indonesian regulation has respected the elements of Intellectual Property Rights.

#### **4. FRANCHISE REGULATION IN INDONESIA**

Government as the authority has the power to adopt regulations concerning the business relationship to the parties and monitoring the law implementation. The laws made by the Government could be implemented well in the infringing or misappropriation. The government also provides legal protection and legal certainty to make each party to feel safe and comfortable in doing business especially in the franchise business.

Franchising is not a new industry for Indonesia. The Juridical legality has already known in Indonesia since 1997 with the enactment of the Law Number 16 of 1997 dated June 18, 1997 on Franchise, followed by the Decree of the Minister of Industry and Trade of the Republic of Indonesia Number: 259/MPP/Kep/7/1997 dated July 30 1997 on the Implementation of the provisions and Procedures for Registration Franchise. Subsequently it the amended by the Indonesian Government Regulation No. 42 of 2007, and the Regulation of the Minister of Trade of the Republic of Indonesia Number: 31/M-DAG/PER/8/2008 on the Implementation of the Franchise.

Compared to other countries, the Indonesian regulations are somewhat different from the provisions of the franchise in the United States, ranging from the Federal provisions set forth in Title 16, Chapter 1 of the Federal Trade Commission (FTC), Sub-Chapter D of Part 436 Disclosure Requirements And prohibitions Concerning Franchising & Business Opportunity Ventures, as well as in rules state based on the Uniform Franchise and Business Opportunities Act (UFBO). The regulation of franchising in Indonesia is not as restrictive settings in the United States. It has been recently issued by the Indonesian Government Regulation No. 42 of 2007 on Franchise and Regulation of the Minister of Trade of the Republic of Indonesia Number: 31/M-DAG/PER/8/2008 on the Implementation of Franchises

##### **4.1. Before Applicability of Regulation No. 16 of 1997 on Franchise**

Before implementation of the Regulation No. 16 of 1997 on Franchise, the franchise business existence in Indonesia has been actually experienced significant development. Even so, many people still question the legal basis of the franchise, since a business institution is not recognized if there is no legal basis. Although there has been no legal basis of the franchise, franchise implementation is done through an agreement set out in Book III of the Civil Code, because basically all agreements can be justified as legal if it is not in conflict with the law (Sudargo, 1985).

Before 1997, the legal basis for the franchise business is Supreme Court Decision No. 131K/PDT/1987 dated 14 November 1988 in the case of MM Zen against PT. Orient Bina Usaha regarding the leasing agency. This decision explains the leasing agency, but this case has similarities with the franchise that both are not regulated by law in the formal sense. In addition, the Supreme Court decision expressly considers that:

- a. Although leasing agencies are not regulated in the Civil Code, but with an open contract system adopted by the Civil Code, where there is the principle of freedom of contract, the parties are free to hold whatever agreements do not conflict with Article 1320 of the Civil Code;
- b. To reinforce the legal recognition of the leasing agency existence and transform the settings and control, it was released the Joint Decree of the Minister of Finance and the Minister of Trade No. 77 Kep-122/MK/IV/2/1974, and No. 30/KPBI/1974 dated February 7, 1974 May 6, 1974 on the establishment of leasing.

Regulation on the implementation of the franchise also recognized the brand licensing. However, it does not mean brand license is not recognized in Indonesia. Supreme Court decision No. 3051K/Sip/1981 dated December 26, 1983 in the case of the Gold Bond brand establishes the legal basis for licensing the brand in

Indonesia. Rules set forth in the Decision of the Supreme Court have followed the Anglo-Saxon legal system and referred it as the Gold Bond Ruling (Sudargo, 1985).

#### **4.2. Releasing of Regulation No. 16 of 1997 on Franchise**

The government regulation is derived from Code of Civil Law (Burgelijke Wetboek, Staatblads 1847 No. 23) and Law of 1934 on Corporate Settings (Bedrijfs Reglementerings Ordinance of 1934, Staatblads 1938 No. 86). The purpose of setting the franchise issues in Government Regulation PP no 16 of 1997 is to provide business certainty and legal certainty for franchise business. Government regulation is a form of effort setting, coaching, and development of the franchise in a regulation. But the franchise matters which arranged in Government Regulation PP no 16 of 1997 is still a general nature and require lower legislation to set the franchise in field.

In general, things arranged in PP 16, 1997 includes the definition of the franchise, the definition of the parties in the franchise, the franchise agreement, the rights and obligations of the parties in the franchise, and the registration of the franchise. Whereas, PP No 16 of 1997 defines franchises as follow:

*“Engagement where one party is given the right to utilize and or using intellectual property rights or inventions or distinctive characteristics from other party with a reward-based on the requirements set by the other party, in order to provide and or sale of goods or services.*

From the given definition, it can be described some points:

- a. Franchise business is an engagement.
- b. As an engagement, franchise is subject to the general provisions of the engagement set forth in Code of Civil Law.
- c. Franchising involves the right to utilize and or use of intellectual property rights or the discovery of a distinctive feature. Intellectual property rights include, among other brands, trade names, logos, designs, copyrights, trade secrets and patents. And what is meant by the invention or trademark or distinctive feature e.g. management system, method or manner of sale or distribution arrangement which is a special characteristic of its owner.

As a result of the regulation, from certain degree, the franchise is no different than conceptual license (Wealth Property Rights), particularly regarding the franchise trade name for the product of goods or services. This showed indirectly that Government Regulation No. 16 of 1997 also recognizes the existence of two forms of franchise business that is franchise in the form of a trademark license or products and franchise as a business format.

#### **4.3. Franchise with a reward-based on certain requirements to sell goods or services.**

Franchising is not given freely. Granting the franchise always associated with a certain form of reward. In general, there are two kinds of compensation that may be requested by the franchisor. The first is the direct compensation in the form of monetary value (direct monetary compensation), and the second is indirect compensation in the form of monetary value.

Direct compensation in the form of monetary value includes:

- a. Lump-sum payment, a sum of money which has been calculated in advance (pre-calculated amount) to be paid by the franchisees at the time of franchise agreement agreed by the franchisor. This payment can be done at once or in several times repayments.
- b. Royalty or payment multiplied by a certain percentage which calculated from the amount of production and/or sale of goods or services produced or sold under a franchise agreement. This concept accompanied by bonding a minimum or maximum amount of a certain royalties. The amount of royalties related to the amount of production, or sales to be paid as profits licensee.

#### **4.4. indirect and non-monetary compensation**

Furthermore, the points included in the indirect compensation of non-monetary value (indirect and non-monetary compensation) is:

- a. Profits as a result of the sale of capital goods or raw materials, semi-finished materials including finished goods, which is a package with the provision of the franchise and are often made in the form of an exclusive purchase agreement.
- b. Payments as dividends or interest in case the franchisor also provide financial assistance in the form of equity (equity participant) or in the form of loans (loan) either in short-term or long-term.
- c. Cob shifting or the transfer of some costs to be incurred by the franchisor. The transfer is usually release the franchisee from any costs obligation necessary included in the offered franchise package.
- d. Data acquisition of business market activities conducted by the licensee. By this means the franchisor have wider access to further develop the franchise.
- e. Possible occurrence of cost savings by the franchisor in many ways. This is possible because, in principle, the implementation of franchise operations given the peak of the franchisees. This means that



the franchisor is only just enough to supervise the operations of franchise business. From PP 16 of 1997, the compensation under the regulation is just reward of direct compensation in the form of monetary value (direct monetary compensation). It can be seen from the statement that compensation is "...based on the requirements and or sale of goods or services."

According to Article 2 of Regulation No. 16 of 1997, it confirmed that the franchise agreement must be made written in Indonesian language and subject to the Indonesia laws. This means that the franchise agreement should not be subject to the laws of other countries.

#### **4.5. written statement**

Furthermore, Article 3 paragraph (1) PP 16 of 1997 specifies that franchisor must submit written a statement to the franchisee before making the agreement especially about the items of :

- a. Franchisor name as the description of the business activities. This is the information about the franchisor regarding its identity, including the name or address of the franchisor, the experience of the success or failure during the running of the franchise, a description of the franchisee, engagement, and financial condition.
- b. Intellectual property rights or inventions or distinctive feature as the object of the franchise.
- c. Requirements which received by franchisee, including payment method, compensation, marketing areas, and quality control.
- d. Assistance or facilities offered by the franchisor to the franchisee.
- e. Information about the franchise prospects which covering the basis used in the transparent information about the business prospects.
- f. Rights and obligations of the franchisor
- g. The Assistance or facilities provided in the form of training, financial assistance, marketing assistance, accounting assistance and guidelines.
- h. Termination, cancellation, and the extension of the franchise agreement and other matters that need to be known to the franchisee in the implementation of the franchise agreement.

Article 4 paragraph (1) of PP 16 of 1997 requires the parties to give priority to the use of goods or materials domestic products which conform to the quality standards of goods and services supplied or sold under a franchise agreement.

Then Article 7 PP 16 of 1997 requires the registration of a franchise agreement along with a statement on the Ministry of Industry and Trade. Registration is done by the franchisor (the franchisee) within no later than 30 (thirty) days from the entry into force of the Franchise Agreement. If these rights are violated, the Ministry of Industry and Trade will provide the toughest sanctions in the form of cancellation of the Trading License.

#### **4.6. Regulation No. 42 of 2007 on Franchise**

Government Regulation Number 42 of 2007 on Franchise has replaced Government Regulation No. 16 of 1997. The Government Regulation Number 42 of 2007 on Franchise is based on the government's efforts to improve guidance of the Indonesian franchise actors to encourage national employers, especially small and medium-sized businesses to grow as the franchisor empowered their national competitiveness in domestic and abroad, especially in order to market the national product.

The government sees the need to know the legality and reliability of the franchisor from outside and inside the country in order to create transparency of business information that can be used optimally by national efforts in marketing of goods and/or services through franchise business. In addition, the government needs to monitor and collate the data franchise, both the number and type of business franchise. To that end, before the franchisor makes franchise agreements with franchisees (franchisee), the franchisor must submit to the government the franchise offering and the prospective franchisee. Moreover, in case of a franchise agreement, the franchisor must submit to the government about the franchise agreement. This new regulation has created better business certainty and legal certainty for both parties in marketing their products.

From the regulation, it is expected that the franchise sold in the market is really a marketable business that has proven its worth to be developed by the franchisee. The Government Regulation No. 42 of 2007 contains one important thing of business which can be franchised as contained in Article 3. The requirements of business are characterized by profitable and standardized product, services of goods as well as registered intellectual property rights.

To further ensure the feasibility of the franchised business, in other parts of the regulation, the franchisor is required to demonstrate to the franchisee (prospect customers). The contents of the offered prospectus must contain identity of franchisor data, operations legality, business activities history, organizational structures, last two years financial statements, the number of establishments, the list of former franchisee, and the rights and obligations of the franchisee and the franchisor.

In this regulation it listed liabilities of the franchisor to provide guidance in the form of training,

operational guidance of management, marketing, research and franchisee development on an ongoing basis. There is an administrative sanction of cancellation of Franchise Registration Certificate for the franchisor which does not give guidance to the franchisee as referred in Article 8 after three times issuance of written warning letter.

Other important thing is that the business franchise can be established by written agreement between the franchisor with the franchisee under Indonesian law. This has been confirmed in Article 4, paragraph (1) that, "franchising is held by a written agreement between Franchisor and Franchisee to pay attention to the laws of Indonesia". In addition, paragraph (2) stated that, "In terms of the agreement referred to in subsection (1) that agreement is written in a foreign language, the agreement must be translated into Indonesian language"

Other thing that is important in the franchise agreement is the provision of Article 10 of No. 42 of 2007 contains the franchisor and the franchisee must register their business to the Department of Commerce no later than one year after the enactment of Government Regulation No. 42 of 2007, namely, till the date of 23 July 2007. The Ministry of Commerce will issue a letter of franchise registration if the proposal meets the requirements. The letter registration valid five years and can be extended. If this regulation is violated, then it subject to administrative sanctions of a fine of Rp. 100 million or cancellation of Franchise Business Registration Certificate as stipulated in Government Regulation No. 42 of 2007. The goal is to educate and discipline the franchise entrepreneurs in Indonesia to adhere to the rules.

However, the Government Regulation No. 42 of 2007 also has shortcomings. This rule has juridical problems that can be an obstacle in the development of small and medium enterprises. The strict Government regulations have feared franchise business actors which limit the small businesses to expand their business.

One of the articles which are considered potentially hinder small businesses to expand its business through franchising is Article 3 and Article 8, which requires the franchisor to provide training, operational guidance, management, marketing, research, and continuously development to the franchisee. It is implied that franchisor must have its own training institute which sometimes burdening small businesses. If it is not conducted, then the franchisor may be sanctioned by the government with a fine of 100 million rupiahs.

Actually in the franchise business in Indonesia, the provisions have hindered and minimized the growth of business opportunities on behalf of the franchise. In effect, many businesses face new difficulties in their training activities.

However, the provisions of Articles 3 and 8 also have other weakness. On the one hand the government wants to empower small and medium businesses as a franchisor is reliable and competitive at home and abroad, but on the other hand the new government regulations become a burden for small-scale franchisor since Article 3 can only be met by medium and large enterprises. Small businesses sometimes have smaller capital and lower ability to meet these criteria. Yet according to Law No. 9 of 1995 on Small Business, small business is a business with a maximum net worth Rp. 200 million, excluding land and buildings, as well as an annual turnover of less than USD 1 billion. While of approximately 480 franchise brands, 80% classified as small level. Therefore, the Government Regulation No. 42 of 2007 was supposed to be included legal aspects of the relationship between the franchisor and the franchisee in more detail relationship.

But the Government Regulation No. 4 of 2007 also has a positive side to organize simultaneously and develop small businesses in Indonesia. Government involvement is needed to organize all Indonesian small businesses to grow. The government should support the development of the franchise and develop a more effective government regulation in managing a franchise business in Indonesia with guidance from the government. In addition, the effectiveness of the government regulation is very dependent on the Government commitment to issue consistent regulations.

In addition, the presence of Government Regulation No. 42 of 2007 is very important as a filter to limit the proliferation of business opportunity or franchise with unproven business existence. With such government regulation then it is expected that the franchisee investment is guaranteed and bring business opportunities.

#### **4.7. legal protection against the franchise**

When we look at the Government Regulation No. 42 of 2007 on Franchise, there are several concepts of legal protection against the franchise, namely:

- a. Article (3) letter f states that franchise is an intellectual property right that has already registered. So that there is legal certainty in deploying the franchise, eliminating about the franchise doubtness;
- b. The presence of provisions that require the creation of a franchise agreement in Indonesian;
- c. The franchisor obligation to provide the prospectus before making the franchise agreement, so it protects the interests of the prospective franchisee. The existence of these rules provide space for prospective franchisees to first study the franchise in question;
- d. There is a minimum requirement to include a clause in the franchise agreement in order to create equilibrium of each party position to the agreement as well as providing legal protection.

#### **4.8. Barriers in the Legal Protection of intellectual property rights in the Franchise Agreement**

Based on the Regulation of the Minister of Trade No. 12/M-DAG/PER/3/2006 regarding Provisions and Procedure for Issuance of Registration Certificates Franchise, then the franchisee may assign know-how it receives to the other party as regulated in Article 3 to allow the franchisor to give the right to make further franchise agreement. It is based on the premise that the Regulation provides an option (not prohibition) of the parties, to make further franchise agreement. If there is an obligation for the franchisee to keep secret and not tell any other of third party that obtained from the franchisor, it must be included in the agreement.

At the time of the franchisor is bound to a franchise agreement with the franchisee, the franchisor is not allowed to the sell franchised products or services similar to same agents in adjacent locations. When this occurs it can lead to inter-unit franchise competition in these locations. This restriction also applies to the third party franchisee.

In granting exclusive rights to use and/or marketing products or services in a particular area, the parties have to consider the regulations relating to unfair competition. An exclusive right to use and/or marketing products or services which prohibited under the Act No. 5 of 1999 has an objective to eliminate monopolistic practices and unfair business competition in Indonesia.

If the franchisor terminate the franchise agreement before the term expires, the franchisor can make another franchise agreements if all problems arising from the agreement that ended and already settled in an affidavit shared between the parties.

Thus, the granting permission includes the use of the rights of franchise owners in the field of intellectual property rights. Licensing is sometimes referred to as licensing activities in term business interest. Regular license agreement is not the same as the franchise agreement. Regular license agreement only covers the areas of activity, for example granting licenses for the use of a particular brand or license the manufacture one/several specific types of goods. While the franchise agreements, the licensing involves many kinds of intellectual property rights, such as commercial names, brands, models and designs.

Actually, the franchise has a broader scope than just granting a license permits to use specific types of goods.

In addition to the above, if the franchise agreement is not followed by an agreement between their employees and the franchisee to protect trade secrets, this will be a separate issue. In these circumstances the franchisee may not perform IP infringement but their employee is a third party that will have the potential to perform impersonation of the franchisor trademark, considering the franchisee employees also know exactly trade secrets of the company. Therefore, it should be established an agreement between the company and employees to protect the trade secrets of a franchise.

Therefore, the author suggested for both parties to make agreement between the employees and the franchisee company to protect trade secrets. The agreement shall contain the following:

- a. Employees shall from time to time to explain fully in written about the implementation of work, invention, design, and improvement developed by employees.
- b. the agreement must be applied to all the patent, copyright, trademark, trade secret or any other legal protection in the regular working hours in the company including those developed using the company's facility or outside the company facility.
- c. All the invention will become the sole and exclusive property rights of the franchisee company and considered as part of TRADE SECRET INFORMATION, both of which have or have not been realized in a tangible form.
- d. Employee agrees that each invention will be considered as a discovery or creation of Work Made For Hire and the company will be regarded as the inventor or creator of the creation. In situations where an invention or creation is defined not as "Work Made For Hire", then the employee, without being able to revoke must transfer all rights of ownership over the creation of the company.
- e. Employees will assist and cooperate with the company during the employees working in the company with responsibility for the full cost of the company to obtain and have all patent, copyright, trademarks, trade secrets or other legal protections in connection with the invention in the franchise business.
- f. Employees shall sign all documents relating to the invention and obtain legal protection for the invention and submit full ownership rights and proprietary in the face of lawsuits of any of the other parties to the company.
- g. Employees will not get additional compensation in any form for all resulting Invention of employees working in the company.
- h. Employees stated that during the period of the employees working in the company, the employees will not be divulged any trade secrets, confidential information and/or information that belong to any party. In addition, the employees stated that all actions implied by this agreement must be executed by the employees, and the capacity obligations of employees in the company will not violate the prohibition of disclosure of Confidentiality or Non-Disclosure Agreement. Assignment of Intellectual Property Rights



Agreement with anyone must consider the employee is well positioned which not limited to employees, consultants, contractors. Employees shall bear all responsibility and release the company from any claims that may arise from any party at a later date.

- i. Penalties in the form of compensation for a certain amount will be charged against the employee in situations where employees commit a violation of the contents of this agreement.
- j. Employees approved and granted permission for the company to notify new company where employees work or to anyone who hire employees at a later date, the existence of the obligations of the employees of the company, as stated in this agreement.
- k. Every clause in the franchise agreement must have a binding legal force of the employees. It is intended to guard the integrity of the company's interests, the replacement of people or institutions or other forms of entity.
- l. Employees must agree to the law and are entitled to become parties to this agreement.
- m. Every clause in this agreement must be separated and independent. If there is a clause that is declared invalid or outperforming with applicable law, the other clauses will not be affected and the clause declared will not be invalid or outperforming in the enforceable maximum extent possible under the law.
- n. The agreement must be made and valid in force under the law of the Republic of Indonesia.

### Conclusion

The franchise agreement in Indonesian context has legal protection especially about the payment of compensation, agreement cancellation, and troubleshooting. This is in accordance with Article 34 and Article 36. For franchisee protection it is in accordance with Article 33 (4) and Article 36

Especially about the provisions of the rights and obligations between the franchisor and franchisee which is made in a separate article regarding legal protection provisions essentially to provide adequate legal protection including legal protection for the parties in case of overmacht.

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