

Characteristics Of Trade Secrets As Property Rights In The Indonesian Property Law System

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Abstract.

This research reports on a legal study of trade secrets which are part of the Intellectual Property Rights system. Legal protection is given to trade secrets in order for trade secret right holders to be able to create a climate that encourages creation and innovation to advance Indonesian industry in order to compete in the scope of national and international business. A trade secret is information that the law considers to be a property. The classification of information as a trade secret must have economic value, be unknown to the public and kept confidential by the owner. There is a problem, namely the character of trade secrets that cannot be included in the system of property law in Indonesia, because the characteristics of trade secrets do not fulfill the elements of property rights and there is no single norm that regulates the registration of trade secret rights as property rights. Jeremy Bentham and Thomas Hobbes Theory of Legal Protection and Theory of Ownership are chosen as the analytical knife, that a trade secret is a legal right, namely a property right over an intangible movable property that arises due to a registration. The implication of this is that the trade secret law does not provide legal protection and legal certainty for the right holder.

Keywords: Trade Secrets, Intellectual Property Rights, Property, and Property Rights.

I. INTRODUCTION

The development of modern technology provides convenience in the exchange and dissemination of information, even eliminating the territorial boundaries of a country. Countries can communicate with each other and get information quickly, which has a huge impact on the world of trade. Modern technology also allows a person in a different region to easily access intellectual works from other countries, and can even imitate, copy, counterfeit, and reproduce intellectual works from other countries. Economic globalization is also increasingly developed based on the principle of trade liberalization or other free trade, which brings influence on the laws of each country involved in economic globalization and free trade. Intellectual property rights are rights given by the state to someone because of the intellectual results created in the form of literature, art and science as well as findings in the fields of technology and business [2]. Intellectual property rights have two branches, namely copyright and industrial property rights. Trade secrets are included in the industrial property branch.

The protection of trade secrets is regulated in the provisions of Law Number 30 of 2000 concerning Trade Secrets. The importance of legal protection of trade secrets is in harmony with the provisions in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) which is an annex to the Agreement Establishing the World Trade Organization which has been adopted in Law Number 7 of 1994 concerning ratification of the Agreement Establishing the World Trade Organization. Property law categorizes trade secrets as intangible movable property. The birth of property rights over trade secrets arises if the confidential information has commercial value and is not known to the public and the owner maintains the information in a proper and reasonable manner. There is a problem, namely the character of trade secrets that cannot be included in the property law system in Indonesia, because the characteristics of trade secrets do not meet the elements of property rights, namely there is no single norm that regulates the registration of trade secret rights. This paper presents the characteristics of trade secrets as property rights in the Indonesian property law system. The analysis is conducted using Jeremy Bentham's and Thomas Hobbes theories of ownership, external and internal legal protection theory.

II. METHODS

The analytical technique chosen is the normative legal research method. The truth used is coherence truth, which is the truth to get something that is axiologically a value or provision/rule as a reference for what is being examined. In this case, it is not empirical facts that will be obtained, but rather the suitability between something to be examined and the value or provision/rule or principle used as a reference. If there is conformity between the two things, that is called truth and if otherwise, there is no truth (falsity) [3]. Normative legal research in layers of legal theory. The theory of legal protection and the theory of ownership of Jeremy Bentham and Thomas Hobbes were chosen to examine all laws and regulations relating to the characteristics of trade secrets, the property law and property rights. Normative legal research is used to interpret and find legal rules to determine what are the rights and legal obligations of legal subjects in getting along in society and in the context of the existing legal order by always referring to coherence, positivism, justice, and human dignity [4].

This research uses statute approach, conceptual approach, historical approach, case approach [3]. The method used by this research to collect primary, secondary and non-legal legal materials was collected using a card system. The cards are arranged alphabetically according to the problem issues noted. Each card contains, first, the subject matter of the problem; second, the expert opinion or information required; and third, the categorical source from which the quotation was cited. The cards used for note-taking come in three forms: first, cards containing quotations, expert opinions or article norms; second, cards containing resumes or digests; third, cards containing extracts [5]. The data collection in the form of quotations, resumes and extracts are study materials that can be used as a basis for thinking to build concepts and arguments in this research. The legal materials that have been collected are studied using the normative method, namely the doctrinal method with a suggestion lens. The legal materials collected are processed by being clarified, classified, systematized and interpreted in accordance with the problems studied. After all legal materials have been obtained, they are then filtered based on the appropriate relationship with the context that has been compiled. The legal material that has been processed is then reviewed, examined by releasing it back to the context and research objectives so that conclusions are obtained as a result of the research.

III. RESULT AND DISCUSSION

Legal protection of intellectual property in a historical perspective has existed for a long time. Around 3200 BCE (BC), the Greeks made marks attached to ceramics to show the identity of the maker [6]. The first known concept of trade secret protection was about the Chinese legend that titled Princess His-Ling-Shih, the wife of the Yellow Emperor as the goddess of Silk, around 3000 BC [7]. In the UK, a prominent trade secret case was the dispute between Queen Victoria and Prince Albert against Strange that occurred in 1849 [8]. In the Netherlands, a trade secret case was considered as a *onrechtmatige daad* in the Lindenbaum versus Cohen dispute with the Dutch Hoge Raad Decision, dated January 31, 1919 [9]. In Indonesia, the legal protection of trade secrets arose because Indonesia joined the membership of the World Trade Organization (WTO) and Indonesia must accommodate the WTO agreement on annex 1 C of the TRIPs Agreement which states that the provisions of annex 1 C apply starting in 1995, with a transitional period of 4 years after or in 2000, then Indonesia enacted Law Number 30 of 2000 concerning Trade Secrets, of which there are 19 Articles governing trade secrets in the trade secret law. The regulation on trade secrets is the implementation of the requirements and agreements for Indonesia's participation in the WTO and the TRIPs Agreement [10]. Trade secret is information that is not known by the public in the field of technology and/or business, has economic value because it is useful in business activities, and is kept confidential by the owner of the trade secret [11]. Trade Secret has many equivalent terms. Countries adhering to the common law system refer to trade secrets as Confidential Information, while the TRIPs agreement calls trade secrets Undisclosed Information.

The common law system and the TRIPs agreement do not mention the term trade secret, but the terms used in the common law system and the TRIPs agreement lead to the term trade secret [12]. Even each country has its own term to refer to trade secrets, such as the terms trade secret, undisclosed Information, Know How, Confidential Information, and Proprietary Information [13]. The scope of trade secrets includes

methods of production, processing, sales, or other information in the fields of technology and/or business that have economic value and are not known by the general public [11]. The characteristics of trade secrets, namely that the information must be confidential, have economic value, the information is only known by certain people and is not generally known by the public, is used to carry out commercial business activities or can increase economic profits, the owner maintains its confidentiality with reasonable and feasible steps. The owner of a trade secret has the right to use the confidential information owned by him/herself, or to grant a license to another party and can prohibit other parties from disclosing the confidential information to third parties for commercial purposes. The owner of the trade secret can also transfer the ownership rights of the trade secret through inheritance, grants, wills, written agreements or causes justified by laws and regulations [11]. Trade secrets are part of intellectual property rights in the field of industrial property rights which are categorized as property in the Indonesian legal system of property, namely intangible movable property [14].

According to the Civil Code, the definition of property is every item and every right that can be controlled by property rights. This means that everything that can be owned by a legal subject is referred to as a property or legal object [15]. In order to become a legal object, it must meet certain conditions, namely in the control of the legal subject and have economic value [16]. Because trade secrets have economic value and the elements of trade secrets fulfill the elements of property, then a confidential information that has economic value is categorized as a property. Meanwhile, property rights over trade secrets are born and arise based on trade secret laws [11]. The claim that trade secret rights arise under the trade secret law justifies that trade secret rights in Indonesia use the theory of ownership of legal rights. According to Jeremy Bentham, the so-called rights are only legal rights. The only real rights are legal rights. For Bentham, legal rights are the product of law. About property rights and law, Bentham stated that property rights and law are born together and die together. Before the law is made, there will be no property rights, and vice versa, removing the law, it will eliminate the right to ownership of something [17]. In Bentham's view, law is the command of a sovereign or law is positive law [18], so trade secrets in Indonesia are legal rights created by law which is a product of state power. Justification of trade secrets as legal rights is also in accordance with Thomas Hobbes' theory of ownership. For Hobbes, property rights are legal rights. That ownership of something is created by law, where the law is the product of the state. Each person has rights that exclude the rights of every other person and the rights that exclude are the product of the state. Without protection from the state, everyone will potentially have the same rights for the same thing [19].

The form of legal protection in trade secrets is External legal protection, namely legal protection created by the state and Internal legal protection, namely legal protection created by the parties themselves on the basis of an agreement [20]. In the trade secret law, there is only one provision, namely in Article 1 number 2 which can be used as an indication that trade secret rights are legal rights. The article states that trade secret rights are rights to trade secrets arising under the trade secret law. Based on this provision, it can be determined that trade secret rights are legal rights, because they arise under the trade secret law. This means that trade secrets are the product of laws made by the competent authority and not created from a moral order [21]. Intellectual property as a property is different from physical property, where the property is intangible. These property are creative works and creations that are manifestations or expressions of ideas realized in tangible forms such as software, books, confidential information are referred to as objects. Intellectual property objects do not have the characteristics of scarcity, as possessed by physical property. Intellectual property objects are generally easy to reproduce and share, such as countless copies of Microsoft Word digital programs, which can be reproduced and distributed at zero marginal cost [22]. The characteristics of a trade secret fulfill the elements of an intellectual property object. In order for a subject to claim to be the owner of an intellectual property in the sense of a trade secret, the registration process is needed to obtain property rights over the trade secret. Because of the justification of the theory of ownership in the explanation above, classifying a trade secret as a legal right, which is a right that arises through the registration process with the authorities, so that the name listed on the property certificate is the owner of the object and has property rights over the property. The right of ownership over a property is referred to as a property right.

A property right is a right that gives direct control over a property, which can be defended against any person. Property rights can be divided into two, namely absolute property rights, which are property rights that can be defended against anyone who violates these rights and relative property rights, which are property rights that can only be defended against certain people [23]. The principles underlying property rights, including, *First*, the principle of a closed system, meaning that property rights are limitative, that is, people may not hold property rights, except those that have been regulated in law. What has been determined by law must be obeyed and may not be deviated from. *Second*, the principle of following the property, namely that property rights always follow the property, where, and in whose hands the property is located. *Third*, the principle of publicity, namely proof of ownership through an announcement from an authorized institution based on a deed or certificate made by an authorized institution [24]. Based on the explanation above about intellectual property rights, trade secrets, property and property rights, there are problems, namely the character of trade secrets that cannot be included in the system of property law in Indonesia, because the characteristics of trade secrets do not fulfill the elements of property rights, and there is no single norm that regulates the registration of trade secret rights in the trade secret law so that the implications of this make the trade secret law does not provide legal protection and legal certainty for its right holders. The characteristics of trade secrets have three main points, namely *first*, the information must be valuable and applicable in the world of trade or business, *second*, the information is not known to the public and *third*, the owner keeps the information confidential in a proper and reasonable manner.

It is not known how a legal subject obtains property rights over the trade secret. Because there are no positive legal norms in the trade secret law that regulate the registration of trade secrets so that the owner of trade secrets has property rights over trade secrets. There is no express provision to determine whether a trade secret is a natural right or a legal right. If a trade secret is a natural right, it must be disclosed to determine who owns it and those who first disclose a trade secret to the public are presumed by law to be the owners. Registration of a natural right with the competent authority does not create a right to the intellectual property. Registration of a natural right only makes the state recognize the right to the object in accordance with the usual declarative principle of natural rights. However, by announcement, it contradicts the characteristic of trade secret that it should not be known by the public and the owner keeps the information confidential, hence trade secret is not a natural right. If a trade secret is a legal right, then there must be a positive legal norm provision on registration to provide legal certainty for the holder. Because registration will provide legal protection to the name of the registered legal subject. The clue that trade secrets are legal rights is only found in one article, namely Article 1 number 2 of the trade secret law, so trade secrets are legal rights, only the regulation of the form of legal protection is incomplete, so it can be said that there is a vacuum of positive legal norms related to the registration of trade secrets as property rights. If approached by comparing the characteristics of trade secrets and the characteristics of property rights,

namely *first*, related to the principle of a closed system in property rights in accordance with trade secrets, because both arise based on the law. *Second*, related to property rights in the principle of following the object, the ownership of trade secrets can also follow the property. For example, if the owner of a trade secret grants a license to another party, the ownership of the trade secret remains with the owner and does not transfer to the licensee. The licensee can only enjoy the trade secret as agreed in the agreement.

Third, regarding the principle of publicity, trade secrets do not recognize announcements, because only registered property is announced by the registering institution. The third characteristic comparison is not fulfilled by trade secrets as property rights, where only legal rights in trade secrets can authorize legal subjects to be recognized as owners of trade secrets. In order to provide legal protection and legal certainty for holders of trade secret rights as property rights, the legal protection of trade secrets can only be accommodated if the trade secret law regulates the registration of trade secrets. The regulation of trade secret registration is not to disclose confidential information owned by the owner, but only administrative registration so that it can give rise to a deed or certificate of trade secret. The secret deed or certificate will provide legal protection to the name of the registered legal subject and the institution authorized to receive the registration can publish the deed or certificate in the Official Gazette of Trade Secrets.

IV. CONCLUSION

Trade secrets are property in the form of information. Although there is no explicit provision in determining that trade secrets are legal rights, one article in the general provisions of Article 1 point 2 of the trade secret law is sufficient to determine the basis that trade secrets are legal rights, because the birth of trade secret rights is based on the trade secret law. The characteristics of property rights in the principle of publicity cannot be fulfilled by trade secrets, so trade secrets do not fulfill the elements of property rights. There is an incompleteness of the trade secret law in regulating the form of external legal protection, resulting in a vacuum of positive legal norms, namely trade secret registration. Legal protection of trade secrets can only provide protection and legal certainty for holders of trade secret rights, if registration is regulated in the trade secret law and the form of registration is not the substance of the confidential information, but the administration of the legal subject as the holder. The authorized institution can issue a deed or certificate of ownership of trade secret rights and can publish it in the Official Gazette of Trade Secrets, so that the principle of publicity of property rights can be fulfilled by trade secrets as property rights in the Indonesian property law system.

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