



## COPYRIGHT LEGAL PROTECTION FOR PORTRAIT ON TRADEMARK (ANALYSIS ON CASSATION DECISION NUMBER 52K/PDT.SUS-HKI/2021)

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### ABSTRACT

Legal Protection within the scope of Copyright includes the protection of 2 (two) basic rights, Moral Rights and Economic Rights. The goal is that there are restrictions so anyone cannot use other's Copyrights commercially without permission from the Creator or His Heirs. In the case of the use Mrs. Meneer's Portrait in Trademark without written permission of the Heirs, it becomes debate whether the legal protection of the Portrait remains under the Copyright Law, or its Exclusive Rights have been lost because it falls within the scope of the Trademark Law. The research method used is normative juridical, by reviewing related laws and regulations, and conducting literature studies. The approach is carried out with Cassation Verdict No. 52 K / Pdt.Sus-HKI / 2022. The research concludes that the legal protection of Portraits in Trademarks remains based on the Copyright Law which adheres to the principle of Automatic Protection, so that the Exclusive Rights of the Creators remain. However, the Judge in His consideration determined the plaintiff's legal standing was not based on copyright principles. Based on this case, it is necessary to review the Copyright Law related to the principle of Automatic Protection of the Heirs in order to create justice and legal certainty.

**Keywords:** legal protection; copyright; portrait; trademark

### INTROUCTION

#### Background

The rapid development of technology in the last two decades has made the existence of intellectual works, especially in the field of art, not only useful as mere objects of entertainment, but also provides economic value to the creator or owner.<sup>1</sup> In the practice,

internet media users who load various intellectual works, often misuse their function which leads to legal violations, especially copyright infringement.<sup>2</sup> The data for the last 5 years by the Directory of Decisions of the Supreme Court related to Intellectual Property Rights (IPR) disputes that occurred in Indonesia are as follows:

1 Antonio Rajoli Ginting, "Perlindungan Hak Moral Dan Hak Ekonomi Terhadap Konten Youtube Yang Dijadikan Sumber Berita (Protection of Moral Rights and Economic Rights on The Youtube Content As The Source of News)," *Jurnal Ilmiah Kebijakan Hukum* 10, no. 2 (2020): 580.

2 Hawin dan Budi Agus Riswandi, *Isu-Isu Penting Hak Kekayaan Intelektual Di Indonesia* (Yogyakarta: Gadjah Mada University Press, 2020). p. 124

**Table 1. Data on Supreme Court Decisions related to IPR Disputes**

	2017	2018	2019	2020	2021
Copyright	11	17	19	15	10
Trademark	24	36	39	40	46
Industrial Design	6	9	9	7	3
Patents	4	5	4	2	3

Source [www.putusan3.mahkamahagung.go.id](http://www.putusan3.mahkamahagung.go.id)

From the table above, it appears that for the last five years, problems related to Copyright and Trademarks require more resolution through the judiciary because of the existence of the copyright and trademarks themselves. Now, all copyrighted works can be considered as a fairly large contributor to the economy of a country and provide many benefits for the implementation of the nation’s economic development.<sup>3</sup> This then encourages countries, especially developed countries to pay serious attention to the protection of these works through a provision of laws and regulations.

Intellectual Property Rights have become part of positive law in Indonesia as a consequence of the ratification towards international conventions, including the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. From the two types of conventions, it is known that intellectual property consists of two parts, namely Industrial Property Rights and Copyrights.<sup>4</sup> Industrial Property Rights include Patents, Trademarks, Industrial Designs, Geographical Indications, Trade Secrets, Protection of Plant Varieties, and Layout Designs of Integrated Circuits. While Copyright includes all types of creations in the field of Art such as Photography and/or

Portrait works.

A portrait is a creative work in the field of art that has a unique beauty and appeal because it contains a human face. For this reason, the state provides legal protection for it, namely by granting copyright in the form of exclusive rights consisting of moral rights and economic rights to the Creator.<sup>5</sup> On one hand, the existence of portrait works in the digital world provides economic benefits to its creator, but on the other hand problems can arise regarding the use of creations by other parties without the permission of the creator. Although there is already protection related to portraits copyright in Law Number 28 of 2014 on Copyright (UUHC), problems related to the illegal use of Portraits still often occur, such as the use of other people’s portraits in music video clips without the permission of the creator or the person in it and using it for commercial purposes. However, currently, there is a new polemic regarding the legal protection of using Portraits on a registered trademark.

In the world of trade, a trademark is a form of protected Intellectual Property Rights/ IPR and has an important role in distinguishing a product or service. According to Suyud Margono, if a portrait is part of a registered mark, the application for registration of the trademark should not be accepted because the portrait is more specific. This expert opinion refers to the trademark protection system in America which is regulated in the “Lanham Act 1946”, where a trademark only contains a name, a symbol, a word or all three. It means America clearly separates the protection of copyrighted portraits and trademarks,<sup>6</sup> which is different from the system in Indonesia which allows brands to contain images and logos

3 Nizar Apriansyah, “Analisis Layanan Publik Permohonan Pendaftaran Kekayaan Intelektual,” *Jurnal Ilmiah Kebijakan Hukum* 14, no. 1 (2020): 127.

4 Duwi Handoko, *Hukum Positif Mengenai Hak Kekayaan Intelektual Di Indonesia (Jilid II)* (Pekanbaru: Hawa dan Ahwa, 2015), p.1.

5 See Article 4 Law Number 28 of 2014 on Copyright (UUHC)

6 Interview with Suyud Margono, Chairperson of Association of Indonesian Intellectual Property Rights Consultants (Asosiasi Konsultan Hak Kekayaan Intelektual Indonesia/AKHKI).

in addition to names, words, or symbols.<sup>7</sup> In Indonesia, business doers are required to register their trademarks to obtain trademark rights for goods and/or services and protect their creations. It is because brand imitations often occur, especially for the well-known and reputable ones.

The polemic about how to protect portraits on a registered trademark became an interesting study to be investigated after a lawsuit emerged over the case of using the portrait of Lauw Ping Nio, known as Ny. Meneer on the registered trademark "Nyonya meneer" owned by PT. Bumi Empon Mustiko (PT. BEM) without permission from the heirs. The problem arose when the plaintiff found a *Telon* Oil product circulating under a brand using the portrait of Mrs Meneer without any permission from the heirs. Therefore, the plaintiff also dragged the Food and Drug Supervisory Agency (BPOM) as Co-Defendant I for granting a distribution permit for the product without considering the permission to use the portrait on the product. Charles F. Saerang as one of the heirs sued PT. BEM with a lawsuit against the law and violating the provisions of Article 12 of 2014 Copyright Law. The plaintiff considers that the use of the portraits on the trademark must have written permission from all the heirs of Ny. Meneer because portraits and trademarks are two different things where both are regulated in different laws. When PT. Industry Njonja Meneer/PT. Njonja Meneer was declared bankrupt in 2017, and 72 (seventy two) of his trademarks became bankrupt assets and then transferred to PT. BEM, actually the only thing that has changed is the trademark, without the portrait of Mrs. Meneer.<sup>8</sup>

Until now, there has been no study discussing the protection of the Portrait embedded in the trademark. However, as a reference, previously there have been several studies discussing similar cases regarding the intersection of copyright and trademarks in Indonesia, but with a different object of dispute, namely the Logo. The first study concludes that it is possible to get double protection against copyright products that are used as trademarks, but its implementation must be based on the real interests behind the claims submitted by the plaintiffs. If the claim aims to protect the works both morally and economically, then copyright protection is used. Otherwise, if what the plaintiffs want to protect is the product (goods or service) from counterfeiting by other parties which results in the reputation of the product, then the trademark protection is used.<sup>9</sup>

However, another study stated that even though the logo is recognized as a protected creation, based on Article 65 of the 2014 Copyright Law, the logo used as a trademark in the trade in goods/services cannot be registered as a creation, which means that the logo has become an integral part of the trademark.<sup>10</sup>

Although logos and portraits are both copyrighted products, based on Article 1 Point (1) of Law No. 20 of 2016 on Trademarks and Geographical Indications, it is permissible for a trademark to contain elements of a logo, while not for portraits. The Law No. 20 of 2016 on Trademarks and Geographical Indications only mentions an image as an

7 See General Provision Article 1 Law No 20 of 2016 on Trademark and Geographical Indication (UU MIG)

8 Riska Farasonalia, "Polemik Potret Nyonya Meneer Di Kemasan Minyak Telon, Ini Kata Saksi Ahli Dalam Sidang," *Regional Semarang, Kompas.Com*, last modified 2020, [https://regional.kompas.com/read/2020/08/12/06351101/polemik-potret-](https://regional.kompas.com/read/2020/08/12/06351101/polemik-potret-nyonya-meneer-di-kemasan-minyak-telon-ini-kata-saksi-ahli?page=all)

[nyonya-meneer-di-kemasan-minyak-telon-ini-kata-saksi-ahli?page=all](https://regional.kompas.com/read/2020/08/12/06351101/polemik-potret-nyonya-meneer-di-kemasan-minyak-telon-ini-kata-saksi-ahli?page=all).

9 Ika Citra Dewi, Miranda Risang Ayu Palar, and Muhamad Amirulloh, "Harmonisasi Pengaturan Perlindungan Logo Menurut Hukum Merek Dan Hak Cipta Dalam Perspektif Perbandingan Di Indonesia Dan Thailand," *Jurnal Rechtidee*, Vol. 15 No.2 Desember (2020): 1–9.

10 Yunus Marlon Lopulalan, Rory Jeff Akyuwen, and Marselo Valentino Geovani Pariela, "Hak Cipta Logo Yang Didaftarkan Sebagai Merek," *TATOHI: Jurnal Ilmu Hukum* 1, no. 1 (2021): 17–30, <https://fhukum.unpatti.ac.id/jurnal/tatohi/article/view/494>.

element in a trademark, but it is not clear whether the image in question is a portrait or an image, as described in the explanation of Article 40 Letter F 2014 Copyright Law. In the researcher opinion, what is more appropriate to consider as an object of work in the issue of Copyright and trademark rights is a portrait, and not a logo. This is because the logo affixed to the trademark has provisions that are clearly regulated in the Copyright Law, in contrast to portraits in which the settings are still vague or unclear.

Therefore, this study would like to put more emphasis on the need for positive legal reforms related to copyright for portraits which are used as an element of the trademark. Although portraits and trademarks are under the same legal basis, they are regulated by different laws. In terms of the purpose of legal protection, it is also different. Trademarks are protected so that other people cannot sell goods using other people's marks that have already been registered, while portraits are protected so that someone cannot use other people's portraits without the consent of the person in the portrait or its creator with the aim of benefit. Based on the description above, the researcher wants to see whether the portrait contained in the registered trademark still has exclusive rights for the heirs or does the protection fall within the scope of the trademark rights? This is intended as a form of justice for the heirs.

### Research Problem

Based on the background of the problem as described above, the research question for this study were:

1. How is the legal protection for portraits attached to a registered trademark?
2. How was the judge's consideration in the Cassation Decision 52 K/Pdt. Sus-HKI/2021 regarding the use of the portrait of (the late) Lauw Ping Nio on the Trademark of Ny. Meneer without permission from the creator/copyright owner in the perspective of justice?

### Aims

This research aims to:

1. Know how the legal protection for portraits which is attached to registered trademarks.
2. Knowing and analyzing the judge's consideration of the Cassation Decision 52 K/Pdt.Sus-HKI/2021 regarding the use of the portrait of (the late) Lauw Ping Nio on the Mrs Meneer Trademark without the permission of the author/copyright owner.

### Research Method

1. Approach

This study employed a normative juridical research method, which is a research done by examining existing problems and juxtaposing it with the legislation, the verdict of the court with permanent legal force, legal theories, as well as the legal foundation and principles as the basis of this research.<sup>11</sup> The approach implemented in this qualitative research is a legislation approach, which analyzes the provisions regarding Portraits and Marks in Copyright Law and Trademarks and Geographical Indications Law, along with the conceptual approach taken from the views of the experts regarding the application of the theories of legal protection of an invention (*inkracht*). In addition, case study approach was also utilized to amplify the conclusions of this research by analyzing and investigating the perspective of the justice of the judge's verdict regarding the polemic of Copyrights of Portraits in a registered trademark post-verdict of the decision of The Court Number 2/Pdt.Sus-HKI/Cipta/2020/PN Niaga Smg jo. The *inkracht* decision of The Supreme Court Number 52 K/Pdt.Sus-HKI/2021.

11 Muhaimin, *Metode Penelitian Hukum*, 1st ed. (Mataram: Mataram University Press, 2020), p. 45.

## 2. Data Collection Method

The data collection method was done with literature review on secondary data which includes the primary legal materials and the secondary legal materials as the basic materials to be analyzed, along with browsing and collecting primary data regarding The Court's verdict to amplify the conclusions of this research. The primary legal materials applied in this study are the 1945 Constitution of The Republic of Indonesia (UUD RI 1945), Law Number 28 of 2014 on Copyrights, Law Number 20 of 2016 on Trademarks and Geographical Indications, and The Berne Convention regarding the Protection of Literary and Artistic Works, along with Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payments (also known as The Bankruptcy Law). As for the secondary legal materials, they are taken from journals, books, and modules regarding Copyright and Trademark.

## 3. Analysis method

The analysis employed in this study is a qualitative analysis method. Some interpretation (exegesis) was done on the legal materials used in this study.<sup>12</sup> In this study, the researcher interpreted the law related to the copyright of Portraits attached to the brands: have the provisions protected it comprehensively, or are the existing provisions still vague and unclear? In addition, the provisions in Trademark and Geographical Indications Law was examined to interpret the conditions for the inclusion of Portraits on Brands. Then, in order to amplify the result an analysis related to the research questions using The Court's verdict of legal protection of an invention (*inkracht*) case approach was done to see the decision of the judge in the perspective of justice.

<sup>12</sup> Rahmi Jened, "Hukum Hak Cipta (Copyright's Law)", (2014), p. 58.

## DISCUSSION

On December 4, 2017, PT. Industry Njonja Meneer or shortened as PT. Njonja Meneer was declared bankrupt by the Panel of Judges of the Court of Cassation through The Commercial Court's verdict in Semarang Number 11/Pdt.Sus-PKPU/2015/PN Niaga Smg dated August 3, 2017 *juncto* Cassation's Verdict Number 1397 K/Pdt.Sus-Pailit/2017, examined PT. Njonja Meneer as The Debtor has defaulted in fulfilling the obligations of the peace agreement (Homologation Agreement). PT. Njonja Meneer was considered negligent in paying debts to The Creditors because it failed to complete payments to The Applicant in monthly installments, and the amount of installments that have been paid since July 2015 until The Case is submitted (July, 2017) which was Rp412.094.000 (four hundred, twelve million, and ninety four thousand Rupiah), was considered not comparable (not significant) with the obligation to pay its remaining debt of Rp7,040,970,500 (seven billion, forty million, nine hundred, seventy thousand, and five hundred Rupiah).<sup>13</sup> Therefore, according to the Panel of Judges, the Petitioner's claim demanding the cancellation of the ratified Peace Agreement (Homologation Agreement) has sufficient reasons to be accepted (Article 170 paragraph (1) The Act of Law Number 37 of 2004 regarding Bankruptcy and Suspension of Debt Payments (The Bankruptcy Law). As a consequence of the cancellation of the ratified peace agreement, PT. Njonja Meneer is declared bankrupt based on the provisions of Article 291 of Bankruptcy Law and PKPU. The Panel of Judges determined The Curator as the party entitled to administer and to settle the bankruptcy estate of PT. Njonja Meneer.

<sup>13</sup> Agustina Melani, "Kronologi Putusan Pailit Produsen Jamu Legendaris Nyonya Meneer," *Liputan6.Com*, last modified 2017, accessed January 21, 2022, <https://www.liputan6.com/bisnis/read/3049608/kronologi-putusan-pailit-produsen-jamu-legendaris-nyonya-meneer>.

Upon the bankruptcy verdict, the Curator conducted an auction of the bankruptcy estate in the form of 72 trademarks where most of the trademarks contained the portrait of Ny. Meneer, which then won by PT. Aryasatya Bayanaka Nuswapada, as stated in the Notarial Deed Number 804 by Notary Public Leksamana Wisnu Hartono, S.Kom, S.H., M.KN dated April 15, 2019, and then PT. Aryasatya Bayanaka Nuswapada sold these 72 trademarks to PT. BEM as stated in the Notarial Deed Number 1118 regarding The Sale and Purchase Binding Agreement and The Extrinsication of Rights to Intangible Assets in the Form of Trademarks of Limited Liability Companies PT. Perindustrian Njonja Meneer (In bankruptcy), Notary Public Leksamana Wisnu Hartono, S.Kom, S.H., M.KN dated May 13, 2019.<sup>14</sup>

Since the change of ownership, PT. BEM as the legal owner wanted to re-register some expired Nyonya Meneer trademarks to the Directorate General of Intellectual Property Rights. The inclusion of a portrait of Ny. Meneer was also included in the re-registration of this trademark. This caused a debate because The Heirs of Lauw Ping Nio (deceased) feel that the use of her Portrait is against the law because there is no permit application to use the Portrait submitted from the rightful owner of the trademark to The Heirs.<sup>15</sup> On the other hand, PT. BEM as the rightful owner of the trademark claimed that the re-registration of the Trademark does not need to have permission from The Heirs since the Portrait included is a part of the trademark.

### **Legal Protection of Copyright for Portraits on Registered Trademarks**

In general, Copyrights is a right consisting of moral rights and economic rights, where according to the doctrine of Labor by John

Locke, this right is given to The Creators as a form of appreciation for the results of his or their efforts in making a works or an invention.<sup>16</sup> Portrait is one of the copyrighted works in the form of photographic works with human objects whose existence is protected as stated in the provisions of Article 40 paragraph (1) point (i) UUHC. There is a slight difference from other types of copyrighted works; in Portraits, in addition to The Creators, protection is also given to The Person in The Portrait. This is done so that if The Author would like to use the Portrait commercially, he or she must still have permission from the Person in The Portrait or The Heirs, in case that The Author and the object of The Portrait are two different figures.<sup>17</sup> It can be analyzed from the provisions in Article 12 of Copyright Law; Laws provide limitations regarding the use of Portraits even to The Creator. This means that even The Creator of The Portrait must ask for permission from The Person in The Portrait or The Heirs to use this copyrighted work commercially.

Basically, the legal protection of Copyright on Portraits is automatic based on declarative principles after the Portrait is manifested in real form<sup>18</sup>, this means The Creator needs to recognize this legal protection even before or without registering The Portrait as his or her Works. This declarative principle cannot be separated from the idea that The Works is closely related to its Creator, consequently every individual has the natural right to own the fruits of their labor.<sup>19</sup> The entitlement of Moral Rights to the protection of Copyrights on Portraits is regulated in the provisions

14 See Supreme Court Decision No 1397 K/Pdt.Sus-Pailit/2017

15 Interview with Oswald Febby Lawalata, Plaintiff's Advocate.

16 Khwarizmi Maulana Simatupang, "Tinjauan Yuridis Perlindungan Hak Cipta Dalam Ranah Digital," *Jurnal Ilmiah Kebijakan Hukum* 15, no. 1 (2021): 71.

17 See Article 12 paragraph (1) and (2) 2014 Copyright Law

18 Freddy Haris et al., "Modul Kekayaan Intelektual Tingkat Dasar Bidang Hak Cipta," *Modul Kekayaan Intelektual* (2020): 9.

19 Rahmi Jened, *op.cit*, h. 4

of Article 5 of Copyright Law, where the protected moral rights of The Author are not limited to the granting of credit in the form of The Creator's name for the use of a Copyright, but also regarding matters that are detrimental to The Creator's honor or reputation. In the provisions of Article 5 paragraph 1 of Copyright Law, it is explained that moral rights are eternally inherent to the Creator to:

- a) Continue to include or to exclude their name on the copy with respect to the public use of their Works;
- b) Use an alias or pseudonym;
- c) Change their Works to comply with appropriateness in society;
- d) Change the title and subtitle of their Works; and
- e) Defend their rights in the event of a distortion of Works, mutilation of Works, modification of Works, or other acts which will be prejudicial to their honor or reputation.

The provisions in this Article are in accordance with the provisions of Article 27 paragraph (2) regarding The Universal Declaration of Human Right which reads "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is The Author". As it happens, moral rights are given to The Author as a form of acknowledgment of his or her creative Works and the existence of the Author themselves, as well as a means of control for the use of the copyrighted Works, therefore, this right is eternally attached to the Creator.

On the other hand, economic rights as one of the elements of the exclusive rights of The Creator is also given as a form of appreciation for making the time and the effort in making the Portrait Works, and also the relation with the reward theory, which means the entitlement of economic rights aims as a limited monopoly that is intended to prevent

others from freely taking and using other people's creativity for commercial purposes.<sup>20</sup> In contrast to the entitlement of moral rights which is valid for the lifetime of The Creator, the protection for economic rights is limited to a period of 50 (fifty years) since the Portrait was first announced<sup>21</sup>. In other words, after that time period has passed, The Portrait will become a public domain.

In addition to the differences regarding the length of legal protection explained above, there are also differences regarding the transitional provisions, where moral rights cannot be transferred/switched as long as The Creator is alive except by testament/will, while economic rights can be transferred/switched while The Creator is alive either through a license or an agreement. This imply that economic rights can be taken into account to be used by other parties with the permission of The Author in profitable industrial or commercial activities. The transfer/switch-over of economic rights of The Portrait is similar to the case of The Portrait of Ny. Meneer attached to the registered Trademark of "Jamu Cap Potret Nyonya Meneer", where the trademark was first registered in the name of PT. Perindustrian Njonja Meneer.

In Indonesia, a trademark on goods or services is allowed to contain an image element based on the provisions in Article 1 Point (1) of Law on the Trademarks and Geographical Indications, departing from the idea that a trademark should have a unique shape so that it has distinguishing power (distinctiveness)<sup>22</sup> from other trademarks. A

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20 Taufik H Simatupang, "Revitalisasi Kesadaran Hukum Masyarakat Dalam Rangka Mendukung Perlindungan KI Di Indonesia (Revitalization of Society Legal Awareness in Order to Protect Intellectual Property In Indonesia)," *Jurnal Ilmiah Kebijakan Hukum* 10, no. 1 (2016): 9.

21 See Article 59 point (1) 2014 Copyright Law

22 Hery Firmansyah, *Perlindungan Hukum Terhadap Merek (Panduan Memahami Dasar Hukum Penggunaan Dan Perlindungan Merek)* (Yogyakarta: Pustaka Yustia, 2011), p.37.

portrait itself can be interpreted as an image as stated in Article 1 point (1) of Trademarks and Geographical Indications Law, hence there is no policy in that provisions that prohibits the embedding of a portrait into a mark as long as it meets the criteria as stated in Article 21 paragraph (2) of the law. This policy does have its pros and cons, some parties agree with the idea, considering that Trademarks should be distinct, but not a few are against this, because they consider that the essence of legal protection of Copyright on Portraits and Trademark is different. Exclusive right for portraits are in the form of moral rights and economic rights, while in Trademarks the Exclusive Rights are in the form of the right for the Trademark Owner to prevent others from getting the benefits of using the Trademark without permission. Therefore, it is feared that it will become ambiguous regarding the legal protection of the Portrait if it is embedded in a registered Trademark.

One of the opposing parties said that a portrait is a display of a human face, and not an 'image' as intended by Article 1 paragraph (1) of the Trademark and Geographical Indication Law. In Copyright Law, there is actually a difference between the definition of portrait and image,<sup>23</sup> Portraits are the result of photographic work with human as the objects,<sup>24</sup> meanwhile, what is meant by images are, among others, motifs, diagrams, sketches, logos, and elements of color and beautiful letter shapes.<sup>25</sup> Therefore, according to Suyud Margono, a portrait cannot be submitted as a trademark because it contains a human face.

However, if a portrait is found in a trademark, the utilization should have permission from the person in frame or his heirs, including the publication of a

portrait or reproduction activity. This Suyud Margono's opinion refers to the provision in article 12 paragraph (1) of the Copyright Law which states that *"Every person is prohibited in making commercial use, reproduction, announcement, distribution, and/or communication of the portrait made for the purposes of commercial advertisement without the permission of the person in the frame or his heirs"*, furthermore, in chapter (2) mentioned that *commercial use, reproduction, announcement, distribution, and/or communication portrait as said in chapter (1) that includes two or more person, are required to ask permission of the person in frame or his heirs*. In his point of view, this article clearly asserts that basically portrait utilization should be through the person's written permission in frame. In other words, it is not just to the creator's permission, but also from the person in frame or his heirs.

Different opinion was uttered by Achmad Iqbal Taufiq who agreed with the policy of to allow portraits to be a part of the brand element. He stated that the registered brand portrait utilization obliges a written permission from the person in frame along with the agreement between the parties since the beginning. Related to the law protection, it just follows the regulation of the Copyright Law, where the creator or his heirs have right to get moral protection as long as they live, and also get economic right protection as described before in the article 9 paragraph (1) of the Copyright Law that the creator has right economic right to:

- a. Publish the work;
- b. Reproduce the work in any kind of form;
- c. Translate the work;
- d. Adapt, Arrange, and Transform the work,
- e. Distribute the work or the copies;
- f. Show the work;
- g. Announce the work;
- h. Communicate the work; and
- i. Lease the work.

Furthermore, for the particular portrait

23 Suyud Margono, loc.cit.

24 Freddy Haris et al., op.cit, p. 41.

25 Article 40 paragraph (1) letter f juncto Elucidation of Article 40 paragraph (1) letter f 2014 Copyright Law



that is pinned in the registered trademark under a corporation, the creator only acquires moral protection, except if there is written agreement in the beginning between the creator and the person who requests the trademark registration about profit sharing from the portrait utilization on trademark.<sup>26</sup> Essentially, the economic right of the portrait in the trademark should be based on the agreement of both parties.<sup>27</sup>

In the case of the creator or the person who requests the trademark registration is a Corporate Director, if the registration of the trademark does not attach the written agreement about the portrait utilization compensation, the creator is considered diverting all of the economic right to the corporation voluntarily. For this condition, the creator does not have law protection concerning his economic right again, and left with only moral right protection. Since the moral right related to ethics, a portrait utilization in a trademark, though the economic right have been owned by another party (in this case is a corporation) or public domain, creator or his heirs written or oral permission is still required.<sup>28</sup> Philipus M. Hadjon states that law protection is about concerning the human's honor and dignity, and there is human rights acknowledgement,<sup>29</sup> therefore, creator moral right protection should be there as long as he or his heirs live.

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26 Interview with Achmad Iqbal Taufiq, Head of Legal Consideration and Litigation Section, Sub-Directorate of Legal Services and Collective Management Institutions, Directorate General Intellectual Property Rights.

27 Dewi Analis Indriyani, "Pelanggaran Hak Cipta Oleh Lembaga Pemerintah (Studi Kasus Penayangan Film "Sejauh Kumelangkah" Pada Program Belajar Dari Rumah Oleh Kementerian Pendidikan Dan Kebudayaan)," *Jurnal Ilmiah Kebijakan Hukum* 15, no. 1 (2021): 99.

28 Ibid.

29 Eko Sulistono, "Perlindungan Hukum Atas Hak-Hak Tersangka Pada Proses Penyidikan Perkara Pidana Dalam Perspektif Hak Asasi Manusia," *MIZAN, Jurnal Ilmu Hukum* 8, no. 2 (2019): 96.

Admittedly, a portrait copyright law protection is different from trademark law protection. Copyright law protection tends to be automatic, but not for a trademark law protection which tends to be attributive, means that the party who gets brand protection right is the party who registers the trademark first. Principally, the purpose of trademark registration is based on the "good intention" principle in order to limit someone from selling anything as if is from other company, in other word to prevent plagiarism, and to make the product easily recognized by consumers.<sup>30</sup> Thus, legal protection on trademark does not adhere to declarative principles to ensure legal certainty and ease verification using inventory list.<sup>31</sup>

The portrait and the trademark are under the same law, Intellectual Property Law, but both of them are regulated in the different law provision, and follow different principles. Consequently, a portrait that is found in a trademark would never lose the exclusive rights. Copyright law legal protection on the portrait utilized on the registered trademark covers moral rights and economic rights. The creator legal protection is related to the permission of portrait utilization as said in the article 5 paragraph (1) and (2) the Copyright Law, and economic protection is related to compensation of the portrait utilization in commercial activity to the creator as stated in the article (9) paragraph (1) up to (3) of the Copyright Law. Given the creator and the person in the portrait are different people, the protection is given to the person as the object in that portrait or his heirs. This protection is based on the article 12 paragraph (1) of the Copyright Law, if this article is violated the person in the portrait or his heirs can submit a compensation lawsuit or cancellation of the trademark. The amount of compensation can refer to the provision in article 15 Copyright

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30 Agung Indriyanto and Irmie Mela Yusnita, loc.cit.

31 Hery Firmansyah, loc.cit.

Law which states “Every person who does not have the permission of the people in the portrait did violation in it as stated in article 12 for commercial benefit, can be punished with maximum fine of IDR 500.000.000,-“.

Although the damage to the violation of moral rights is not as obvious and as real as the loss to economic rights, the provisions Copyright Law clearly state the existence of a form of protection for these moral rights concerning human values that must be respected and upheld. Accordingly, moral rights of portrait as a part of human profile should strongly related with humanity principle. Regarding this moral right, apart from Indonesia, the United States also sees that the humanity side of a Portrait is strong, thus the United States places a limit that a Portrait is not allowed to be registered as one of the elements of a trademark. In the perversion *section 2 of Trademark Act of 1946*, 15 U.S.C 1052 related to trademark that can be registered, mentioned that:

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

*(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow.”<sup>32</sup>*

The provision above firmly refuses trademark registration if there is a portrait, unless there is written permission of that person in the portrait. That provision is indeed

similar with the provision in the article 21 Poin (2) Letter (a) of Trademarks and Geographical Indications Law that states “Request is refused if that trademark is resembling a name or an abbreviation of famous people; photo or corporation name owned by other people except with approval or permission from the rightful owner”, but in practice, a trademark request which uses portrait as one of the elements can be accepted as long as there is agreement and permission (does not have to be written permission) from the person in portrait.

Generally, Portrait as part of Copyright has *automatic protection*, so that the Portrait contained in a registered Trademark cannot be considered to be an integral part of the Trademark, because the Portrait still has Exclusive Rights granted by Copyright Law. Unless the portrait has been registered previously as a copy of the creation “Image/Portrait” on behalf of the Company which is also the Trademark Owner, then the Portrait will lose some of its exclusive rights, namely economic rights either partially or completely because the rights are transferred to the Company, so that only moral rights remain, as specified in Article 5 paragraph (2) Copyright Law that moral rights are attached to the lifetime of the Creator and his heirs.

### **Analysis of Judges’ Considerations on the Use of Portraits in Registered Trademarks through Cassation Decision Number 52 K/Pdt.Sus-HKI/2021 in the Perspective of Justice**

On May 8, 2020, the Heirs of Ny. Meneer represented by Dr. Charles F. Saerang sued PT BEM for the use of the Portrait of Ny. Meneer in the registered trademark “Nyonya Meneer” with the argument that the use of the Portrait is without rights and against the law, because there is no written permission from the Plaintiff or all Heirs of Nyonya Meneer based on the provisions in Article 12 Copyright Law. The Plaintiff also

32 United States Patent and Trademark Office, “Trademark Modernization Act (Federal Statutes),” *Uspto.Gov*, last modified 2013, accessed January 4, 2022, [https://www.uspto.gov/sites/default/files/trademarks/law/Trademark\\_Statutes.pdf](https://www.uspto.gov/sites/default/files/trademarks/law/Trademark_Statutes.pdf).

attracted other parties as Co-Defendants, namely the Indonesian Food and Drug Administration (BPOM) as Co-Defendant I, and the Directorate of Copyright and Industrial Design of the Directorate General Intellectual Property as Co-Defendant II. The reason for the withdrawal of Defendant I is because Defendant I issued a distribution license for the telon oil produced by the Defendant. And, the reason for the withdrawal of Defendant II is because Defendant II issued registration permits and extensions for several Ny. Meneer trademarks using the Portrait of the late Lauw Ping Nio.<sup>33</sup>

In his petition, the Plaintiff requested the Panel of Judges to declare according to the law that the Defendant's act of using the Portrait of the late Lauw Ping Nio on the Ny. Meneer Trademark without permission is an unlawful act and violates Copyright. Furthermore, the Plaintiff requests the Judge to punish the Defendant not to produce, not to market or withdraw all products that it produces and that have been marketed which contain the Portrait of Ny. Meneer on the label or package. In addition, the Plaintiff also requested material loss of Rp 43,200,000,000, - (forty-three billion two hundred million Rupiah), as well as immaterial loss of Rp 500,000,000, - (five hundred million Rupiah). The value of this immaterial loss was determined because of the shame, reputation of the family, and the reputation of Ny. Meneer which has become part of Indonesian history and culture to be tarnished and despicable.

Then the Plaintiff requested the Judge to order the Defendant I not to process any distribution license in any product submitted by the Defendant as long as it uses the Portrait of Ny. Meneer without the written consent of the Plaintiff or all Heirs. As well as requesting the Judge to order the Defendant II not to grant any Copyright or Trademark

license process submitted by the Defendant if it uses the Portrait of Ny. Meneer without any proof of written consent from the Plaintiff or all the heirs.

On this lawsuit, in its Exception, the Defendant states that the Plaintiff's claim is *Error in Persona*, which means that the Plaintiff does not have *legal standing* to file a lawsuit, or the Plaintiff is not entitled to sue the disputed case because the Plaintiff is incapable of performing legal acts. This exception from the Defendant is based on the provisions in Article 24 of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations which states that one of the consequences of bankruptcy is: "*The debtor by law loses his right to control and manage his assets included in the bankruptcy estate from the date the bankruptcy declaration is pronounced.*"<sup>34</sup>

The Panel of Judges of the Commercial Court at the Semarang District Court in their decision granted the exception of the Defendant and declared the lawsuit *Error in Persona*, therefore the Plaintiff's lawsuit was declared inadmissible (*Niet Onvankelijkeverklaard*). And against this Commercial Court Decision, the Plaintiff filed an appeal in cassation<sup>35</sup>, where the contents of the cassation memory explained that the Plaintiff in filing a copyright lawsuit for the use of Mrs. Meneer's portrait in his capacity as a person, namely the Heirs of Nyonya Meneer or the grandson of the late Lauw Ping Nio. The following is a summary of the decision of the Panel of Judges from the District Court and the, namely:

1. **In the Decision of the Semarang District Commercial Court Number 2/Pdt.Sus- HKI/Cipta/2020/PN Niaga Smg**, the Judge accepted the Defendant's exception, and in the main case stated that the Plaintiff's claim could not be

33 See Semarang Commercial Court Decision, op.cit, p. 15.

34 *ibid*, p. 59.

35 Article 102 paragraph (1) Copyright Law of 2014

accepted (*Niet Onvankelijkeverklaard*), and ordered the Plaintiff to pay court costs set at Rp 881,000.00 (eight hundred eighty-one thousand Rupiah);<sup>36</sup>

**2. In the Cassation Decision Number 52 K/Pdt.Sus-HKI/2021**, the Cassation Judge rejected the Cassation request from the Cassation Petitioner (Plaintiff).<sup>37</sup>

Regarding that Decision, the Judge considered the object of the case, namely the Portrait of “Ny. Meneer” as the bankruptcy estate of PT Njonja Meneer. Therefore, although the lawsuit concerns Copyright, the Judge’s decision touches the realm of Bankruptcy and Trademark law. Through that decision, it appears that the Panel of Judges did not take into account the Plaintiff’s position as the Heirs of Nyonya Meneer, but the Judge saw the Plaintiff’s position as the President Director of the company that had been declared bankrupt by the Commercial Court. Therefore, the Judge’s consideration refers to the Bankruptcy and Suspension of Debt Payment Obligations Law. The following are the legal bases and reasons underlying the Judges’ deliberations:

1. The provisions in Article 24 of the Bankruptcy and Suspension of Debt Payments Law state that “*Debtors by law lose their right to control and manage their assets included in the bankruptcy property, from the date the bankruptcy decision is stated*”, for this reason, according to the panel of Judges the Plaintiff no longer has the right to manage and control bankruptcy assets in the form of the “Nyonya Meneer” trademark.
2. The provisions in Article 1 point 1 Trademarks and Geographical Indications Law which states that a Trademark can contain elements of

images, so according to the Judge that portraits can be part of a registered Trademark.

Against the provisions of Article 1 number 1 Trademarks and Geographical Indications Law above, the view of the Panel of Judges is also based on the statement of the Expert which states that “a trademark may use a portrait element, provided that at the time of registration as a trademark, the trademark owner who uses the photograph must obtain permission from the related person”<sup>38</sup>. Then, because from the beginning Ny. Meneer has given permission to PT Industri Njonja Meneer to use her portrait in the trademark “Nyonya Meneer”, then according to the Judges Ny. Meneer has automatically and consciously relinquished ownership rights over the creation (portrait) to the Company. Consequently, the Panel of Judges considered that the Portrait has become an integral part of the Trademark “Nyonya Meneer”, so that the Judges also considered whether the Portrait included in a Trademark still has “Exclusive Rights” as a protected Creation, or its protection has entered the scope of the Trademark.

Consideration of the Judges above is not in line with the view of Suyud Margono who said that the portrait is a display of human features so that the strong human element. And, indeed, the problem is that the portrait used to be a trademark, but actually the portrait is only included in the trademark, and does not become an integral part of the trademark, so that the trademark is actually only the writing “Nyonya Meneer”. Therefore, when the Trademark changes ownership, then according to him, what is transferred is only the Trademark with the writing “Nyonya Meneer” only (the Portrait is not transferred). Therefore, the portrait actually cannot be filed as a trademark according to the applicable

<sup>36</sup> Semarang Commercial Court Decision, loc.cit, h. 71.

<sup>37</sup> See Supreme Court Decision Number 52 K/Pdt. Sus-HKI/2021, p. 15.

<sup>38</sup> Semarang District Commercial Court Decision, op.cit, p. 15.

law<sup>39</sup> because there must be permission from the person portrayed or his heirs. Thus, the application for renewal of the Trademark made by the Defendant should be rejected because the Copyright Act prohibits the commercial use of the Portrait without the written permission of the person portrayed or his heirs.<sup>40</sup>

If the portrait a trademark is said to be a single entity and lose its exclusive rights, then in addition to copyright infringement, there will be a violation of human rights (HAM) as well. This is because in the exclusive rights as described in Article 4 Copyright Law, there are moral rights that contain human rights values, which in Article 1 of Law Number 39 of 1999 on Human Rights states that this right is a basic right that is inherent in the nature and existence of human beings that must be respected, upheld, and protected, not only by law but also by the state, the Government, and everyone, in order to achieve legal protection of human dignity.<sup>41</sup> Therefore, the Judge's Decision that does not see any violation of Copyright on morals against the Heirs is contrary to the theory of legal protection expressed by Satjipto Raharjo, where the Decision should be able to protect the human rights of the Plaintiff<sup>42</sup> who has been harmed by the Defendant. According to Satjipto Raharjo, so that people can enjoy the rights granted by law and there is protection for their human rights that have been harmed by others, then, when the Heirs feel that their rights have been harmed due to moral violations committed by the Defendant, the Heirs have the right to file a lawsuit.

In the perspective legal matter, the judge's decision which does not provide

legal protection shows the protection of Copyright products is still weak due to a lack of understanding regarding the basic principles of Copyright and Trademark Rights in Indonesia. An expert John Rawls said that the principle of justice actually provided equal rights and opportunities for everyone, so between copyright holders and brand owners should be equal treatment.<sup>43</sup> However, the Judge's decision actually kills the Heir's sense of justice as the copyright holder because it ignore one of his/her rights, namely the Moral Right. In fact, Judges can ignore laws that do not provide a sense of justice, but are still guided by formal-procedural laws that have given a sense of justice while guaranteeing legal certainty.<sup>44</sup>

After reviewing the Intellectual Property Database, it is showed that the portrait is still registered with registration number C00199201278 as an art of Logo/Image Creation of "Nyonya Meneer" belonging to PT. Njonja Meneer, since July 04, 1992. Although Copyright is obtained not because of recording and the Recording of Works is only a legal assumption of a work<sup>45</sup>, because in the provisions of Article 31 Copyright Law it states:

1. Otherwise, unless proven the person who is considered as the Creator is the Person whose name:
  - a. mentioned in the Works;
  - b. declared as the Author of Work;
  - c. mentioned in the letter of registration of the Work; and/or

39 Article 12 paragraph (1) and (2) Copyright Law

40 Suyud Margono, op.cit.

41 Philipus M. Hadjon, loc.cit.

42 Willy Wibowo, "Progresivitas Perlindungan Terhadap Pencipta Dalam Mendorong Ekonomi Kreatif Di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 189.

43 Tri Minarti, "Larangan Penyediaan Tempat Bagi Penjual Barang Hasil Pelanggaran Hak Cipta Guna Mewujudkan Nilai Keadilan," *Perahu (Penerangan Hukum): Jurnal Ilmu Hukum* 7, no. 2 (2019).

44 Dwi Handayani, "Kajian Filosofis Prinsip Audi Et Alteram Partem Dalam Perkara Perdata," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 393.

45 Freddy Haris et al., "Modul Kekayaan Intelektual Tingkat Dasar Bidang Hak Cipta." Kementerian Hukum dan Hak Asasi Manusia Direktorat Jenderal Kekayaan Intelektual, p. 48.

- d. listed in the general register of Work as the Author.
2. In otherwise, unless proven a person who conducts a lecture that she/he does not use written materials and there is no notification of who is the author of the lecture is considered the author.
3. In the Work consists of several separate parts created by 2 (two) or more Persons, who is considered the Creator, namely the Person who leads and supervises the completion of the entire Work.
4. In the Person who leads and supervises the completion of the entire Works as referred to in the paragraph (1), there is no, the one who is considered as the Author is the Person who collects the Works without prejudice to the respective Copyrights for their part of the Works.
5. In the work of designed by someone and it is realized and carried out by another person under the leadership and supervision of the person who designed it, the one who is considered the creator is the person who designed the work.
6. Unless agreed, the Copyright Holder for Works made by the Author in an official relationship, who is considered as the Author is a government agency.
7. Unless agreed in otherwise, the Author and the Copyright Holder of the Work made in a working relationship or based on an order are the party who created the Work.
8. Unless proven in otherwise, the legal entity makes an Announcement, Distribution, or Communication of Works originating from such legal entities, without naming a person as the Author, the one who is considered as the Author is a legal entity.

However, the Registration of the Portrait of *Ny. Meneer* serves as proof that there has been a transfer of Copyright on the Portrait of *Ny. Meneer* and their heirs to the company, however, the transfer is only in the form of economic rights. However, even

though the Heirs have lost their economic rights as a consequence of the transfer of portraits to the company, the heirs still have moral rights attached to it.<sup>46</sup> Therefore, the Judge's decision is not correct which says the Plaintiff's Lawsuit is Error In Persona because the Copyright protection for the portrait of *Ny. Meneer* is automatic, so the first one who has the Exclusive Rights of the Creator is *Ny. Meneer* and their heirs. However, since the Portrait was registered in the name of the Company, that the economic rights were transferred to the Company, only the moral rights remained. Therefore, the position of the Plaintiff in its capacity to sue is clear as the heir of *Ny. Meneer*, who still has moral rights. And based on these findings, it is proven that the status of the Portrait is still the property of Bankruptcy, *PT. Njonja Meneer*, therefore, it would be unfair for the Judge to consider that the Portrait has become an integral part of the trademark "*Nyonya Meneer*" which has now been transferred to the Defendant's property. Actually, the economic rights to Portraits belong to the Creditors of *PT. Njonja Meneer*, and not the right of the Defendant as the Trademark Owner.

In fact, the Judges in the Decision did not realize that there had been a violation of moral rights so that they did not see the Plaintiff as the Heir of the Person in the Portrait who still has rights that should also be protected.<sup>47</sup> Although the damage to moral rights is not as real as the loss to economic rights, in these rights there are human rights which also need legal protection, as Article 69 of the Human Rights Law states that everyone is obliged to respect the human rights of others, morals, ethics, and the way of life in society, nation and state. This means that there are moral rights as described in Article 5 paragraphs 1 and 2

46 Nevey Varida Ariani, "Enforcement of Law of Copyright Infringement and Forgery Abstract," *Jurnal Penelitian Hukum De Jure* 21, no. 2 (2021): 225–226.

47 See Article 5 section (1) letter (e) Copyright Law.

of the Copyright Law which cover the dignity of the Creator, and should also receive legal protection and not be ignored. Furthermore for the violation of moral rights, accountability can be held because the elements of unlawful acts from the actions of the Defendant have caused the Plaintiff to suffer losses.<sup>48</sup> Referring to the provisions in Article 98 paragraphs (1) Copyright Law, which states that the transfer of Copyright in part or in the whole of the work, does not reduce the right of the Creator or his heirs to sue any Person who intentionally and without rights and without the consent of the Author violates the moral rights as stated in Article 5 paragraph (1) Copyright Law, the heirs still have the legal position to file a claim for compensation or the cancellation of the trademark to the Commercial Court.

## **CONCLUSION AND RECOMMENDATION**

### **Conclusion**

According to the Copyright principle where the legal protection is based on the Automatic Protection principle, the researcher can conclude the following: First, Legal protection for Portraits in Trademarks includes 2 (two) main rights, namely the Moral Rights and the Economic Rights, to ensure protection for Authors and heirs. The protection of moral rights is based on the provisions in Article 5 Copyright Law, and the protection of economic rights is based on Article 9 paragraphs (1). If the Author and the Person in the Portrait are different people, the Person in the Portrait shall also be given protection regarding their Economic Rights based on the provisions of Article 12 paragraphs (1) Copyright Law. The period of legal protection related to Moral Rights is given for the lifetime of the Creator and their Heirs, while related to Economic

Rights the period of protection is limited to 50 (fifty) years since the Portrait was first realized in a tangible form.

In principle, the Portrait contained in a Registered Trademark cannot be said to be an integral part of the Trademark, because the Portrait still contains the Exclusive Rights granted by Copyright Law. However, portraits contained in registered trademarks may also lose one of their exclusive rights, namely in the form of economic rights, either in part or in the whole. This can happen if the Portrait has become a public domain, or the Portrait has already been registered as a Copy of the Work on behalf of the Company/Legal Entity. In such case, the Creator will lose his/her economic rights to the Portrait but can still retain his/her moral rights.

Secondly, the judge's consideration in the Cassation Verdict 52 K/Pdt.Sus-HKI/2021 related to the use portrait of (the late) *Lauw Ping Nio* on the Trademark of *Ny. Mener* without the permission of the Author/Copyright Owner, has not provided comprehensive legal protection because it refers to the realm of legal protection of the Trademark. Therefore, in the perspective of justice, the decision has killed the sense justice of the heirs as copyright holders because of the neglect of one of the rights for the heirs, namely the moral rights. Moreover, it shows that there is still a lack of legal protection for Portraits as Works that are embedded in Trademarks in Indonesia due to a lack of understanding regarding the principle of automatic protection provided by Copyright.

### **Recommendation**

Portraits contain a human face so that the moral values of the Works are very strong, as well as for Portraits that are embedded in registered Trademark, moreover to moral values there are also noble family values of Person in the Portrait, and in fact of the Portrait is intended as a symbol of family which should not be as public consumption. For this reason,

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<sup>48</sup> Henry Donald, "Penyelesaian Sengketa Hak Kekayaan Intelektual Melalui Acara Cepat," *Jurnal Penelitian Hukum De Jure* 17, no. 1 (2017): 80.

the legal protection of Portraits embedded in registered Marks must be absolutely based on the principle of automatic protection provided by Copyright. Thus, neither the Creator nor the Heirs lose their entire Exclusive Rights. In the Copyright of the Portrait is transferred in the whole or in part, it is always necessary to keep in mind that this transfer only concerns economic rights and not moral rights, because these rights continue to be attached to the Creator and their Heirs.

The suggestion regarding the consideration of the panel judges in the decision of the case above is the judge must fully understand the essence of copyright protection, so that they does not neglect one of the main rights in copyright. Although the damage to the violation of moral rights is not as clear and real as material loss, the legal protection of the moral rights of the Creator and the Heirs must remain as long as the Portrait is loaded on the Mark. This should be done like a form of respect for the Creator, the Person in the Portrait and their Heirs.

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