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Protection of Brand Rights According to Law in Indonesia and Regulations of International Brands

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Abstract

A brand is an image or name that can be used to identify a product or company on the market. In Indonesia, the Trademark Law is regulated by Law Number 20 Year 2016 concerning Trademarks and Geographical Indications. In addition to national regulations, Indonesia is also bound by international brand regulations. The regulation on Intellectual Property Rights (IPR) in international agreements is inseparable from the role of two international organizations namely the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO). WIPO is one of the special agencies of the United Nations that was formed in 1967 with the aim of encouraging creativity and introducing IPR protection throughout the world. Legal issues that will be examined in this study are how to protect trademark rights according to Indonesian law and international brand regulations. The research method used is normative juridical, using secondary data in the form of qualitative data, which is then analyzed analytically descriptive. Secondary data consists of primary legal materials, secondary legal materials and tertiary legal materials. The specific target of this research is to find the extent to which the State protects the rights of brand holders in Indonesia and holders of international brands.

Keywords: Protection of Brand Rights, Brand Regulations, International Brands

1. Introduction

In the framework of global trade in the international world, in connection with international conventions related to intellectual property that has been ratified by the Indonesia. Therefore, the role of intellectual property is very important, including brands and geographical indications, especially to maintain of fair business competition in global trade, in order to create a fair and prosperous trade. Thus, it is necessary to have legal certainty for the business world in conducting global trade. This is also to attract investment both locally and internationally in order to develop the economy in Indonesia. Moreover, facing business competition which is very fast developing in the growth of trade at local, regional and international levels as well as with the development of technology and information, it is necessary to have adequate regulations related to brands and geographical indications.

The new trademark law now in force in Indonesia is law Number 20 of 2016 concerning Marks and Geographical Indications (Trade Mark Law, 2016). In addition, national regulations concerning marks, Indonesia is also

regulated by international regulations on marks such as the Paris Convention. The new trademark law is based on entirely new principles. The new principles is the used of the "active constitutive system" of registration. Therefore, the registration creates or constitutes the right on the trademark. Without registration, no protection is rendered to a Mark. The right to a mark is an exclusive right granted by the state to a trademark owner who is registered for a certain period by using the mark himself or granting permission to another party to use it. Meanwhile, According to article 3 of Trade Mark Law regulates that the right to a mark is obtained after the mark is registered. So, The right on mark is the exclusive right, granted by the state to the owner of a mark, registered in the general register of marks. Without registration, no right on a mark. First to register gives entitlement to protection of the marks.(Sudargo Gautama ; 1995, 20)

Based on the above provisions, the mark is an identification and becomes a very important thing in the business world. A mark is the soul of a product or service, especially if the mark has become a famous mark. Thus, there are many other companies will be happy to make the same product and will even use a brand that is similar in name to the well-known mark, which will create an unfair business relationship. It is not even possible that a brand that has been widely known by consumers for its quality and price will always be followed, imitated, "hijacked", maybe even counterfeited by other manufacturers who are doing underhanded competition. Therefore, marks are very important in the business world for national, regional and international trade. Marks are closely related to the world of trade in the form of trade in goods and services. The function of mark in the world of trade is so that consumers can distinguish the results of a particular product from other products for similar goods or services so that consumers will know about similar products and can choose according to the brand that consumers choose.

At present, there are many cases of trademarks in Indonesia where from year to year the cases of these marks are increasing. In 1970 there were approximately 20 cases. Then based on data from the Trademark Office, in 1987 there was a rapid increase, namely with the number of cases 236, and reached its peak in 1991 with the number of 283 cases. Meanwhile, in 2019 there were more than 400 cases. The most common cases are trademark cancellation lawsuits filed by trademark owners from within the country and abroad, including foreign well-known brands. (Hadi Purwandoko Prasetyo ; 2020, 2)

The development of the brand case itself can be followed from the case of PT Tancho Indonesia against Wong A Kiong regarding the Tancho brand. Also, there is case of PT Nabisco Foods against PT Ceres Trade and Industry Company regarding the Ritz brand (Ridwan Khairandy, 1999: 1). The case of counterfeiting fertilizer brand "ATONIK" with "ANTONIK" (Murawi Effendi, 1999: 7).Furthermore, the Case between Societe des Produits Nestle S.A. and PT Danone Biskuits Indonesia regarding the wafer Kit-Kat and Chit-Chat brands (Read. Legal Review, November 2003: 34-35), To date, 168 Marks have been canceled based on court decisions which have permanent legal force. Examples : The brands that were canceled were: WASKITE REIKI (Supreme court Decision No. 040 K / N / HAKI / 2004) and ARMANI (Supreme Court Decision No.15 PK / N / HAKI / 2004). ((Hadi Purwandoko Prasetyo ; 2020, 25)

With its rise of mark cases above, it is necessary to study how the protection of well-known marks and marks in Indonesia follows the law on trademarks and geographic indications and also how to protect marks according to International marks.

2. Research Method

This research methodology uses empirical normative juridical methods. Through a normative juridical research method, this study explores an array the legal materials. This research method examines the law as a basis for guiding various fields of life that regulate order and justice. (Sri Mamudji ; 2005, 15) The research typology used is descriptive in nature, and therefore, it accurately describes a particular individual, symptom or group to determine the frequency of a symptom. ((Sri Mamudji ; 2005, 17) The main data is in the form of secondary data and in turns the data are analyzed qualitatively to figure out the depth of data. Judging from its form, this study is an evaluative study because it can spur further research. (Soerjono Soekanto ; 2012, 32)

In normative legal research, the secondary data are employed. It consists of primary legal material, secondary material, and tertiary material.

a. Primary legal materials

Primary legal materials used include Law Number 15 of 2001 concerning Marks; Law Number 20 Year 2016 concerning Marks and Geographical Indications; Law Number 37 of 2004 concerning Bankruptcy Law.

b. Secondary legal materials

Secondary legal material is legal material that can provide an explanation of primary legal material.¹¹ Secondary legal materials include research results, books, literature, scientific articles, and journals that discuss Intellectual Property Rights, especially regarding Trademarks, and Civil Procedure Law.

c. Tertiary legal materials

Tertiary legal materials are materials that provide instructions and explanations for primary and secondary legal materials. The tertiary legal material used consists of the Large Indonesian Dictionary, and *Black's Law Dictionary*. ((Sri Mamudji ; 2005, 23)

However, in relation to empirical legal research is a research method that uses empirical facts taken from the field in Directorate general of intellectual property rights in Indonesia, both obtained from interviews and direct observations of brand matters. The three data collection techniques in empirical legal research were used individually, separately and together at the same time.

3. Discussion

3.1. Protection of Mark Rights through Mark Disputes According to the Law concerning Mark

Mark rights explicitly according to Law Number 20 Year 2016 concerning Trademarks and Geographical Indications are referred to as immaterial objects. This is because with the brand, product of a product or service can be distinguished from its origin, quality and guarantee that the product is original. A mark is something that is affixed or attached to a product, thus mark is not the product. Sometimes, what makes a product expensive is not the goods or services but the mark or brand, because after the product is purchased, the brand cannot be enjoyed by the buyer. Therefore, a brand is an immaterial object that does not provide anything physically, because what is enjoyed by the buyer is the product, whereas the brand only provides inner satisfaction for the buyer. (OK Saidin ; 2015, 47)

In the consideration of Law Number 20 Year 2016 concerning Trademark and Geographical Indications in the section considering item a it is mentioned that in the era of global trade, in line with international conventions that have been ratified by Indonesia, Marks and geographical indications play essential roles particularly in sustaining fair and equitable business competition. Marks and Geographical Indications play essential roles particularly in sustaining fair, equitable business competition, consumer protection, as well as protection for domestic Micro Small Medium Enterprises and Industries.

This is due to the increasingly competitive business competition due to the emergence of globalization, thus businesses must protect their marks through trademark registration, thus their marks have legal protection against trademark violations that can harm business actors. (Khoirul Hidayah ; 2017, 58)

Trademark according to Law Number 15 of 2001 is a sign in the form of a picture, name, word, letters, numbers, color arrangement, or a combination of these elements that have distinguishing features and are used in baranag and service trading activities. In the new Law, Law Number 20 Year 2016 concerning Brands and Geographical Indications, the understanding of brands has changed and provides a more complete explanation of the signs that can be displayed graphically in the form of images, logos, names, words, letters, numbers, arrangements color, in the form of two or three dimensions, sound, hologram, or a combination of two or more of these elements to distinguish goods and or services produced by persons or legal entities in trading activities of goods and or services. (Khoirul Hidayah ; 2017, 63)

According to some experts there are notions about the brand, among others:

1. H.M.N. Purwo Sutjipto gives the formula that the mark is any sign, with which a particular object is personalized, thus it can be distinguished from other similar objects.(H.M.N. Purwo Sutjipto ; 1984, 3)
2. R. Soekardono delivers his opinion, that a mark is any sign with which a particular item is made, which also needs to be a personal origin or guarantee the quality of the goods in comparison with similar goods made or traded by people or other corporate bodies.(R. Soekardono ; 1983, 5)
3. Mr Tirtaamidjaya citing Prof Vollmar's opinion provides the formula that a company's mark or trade mark is a sign affixed on the goods or he is on the packaging, the point is to distinguish the goods from other similar goods. (Tirtaamidjaya ; 1962, 35)
4. Ius Soryatin expresses his opinion that a mark is used to distinguish the goods concerned from other similar goods, therefore, the goods concerned with the said mark have: origin, name, guarantee for their quality.(Soryatin ; 1980, 12)

Based on the opinions of the experts as well as from the law regarding the mark, it can be concluded that the understanding of the mark is a sign to distinguish similar goods or services that are produced or traded by persons or legal entities with goods or services produced by others, which has a distinguishing power or as a guarantee of its quality and is used in trading or service activities. Thus, the absolute requirement that must be fulfilled by every person or legal entity wishing to use a mark, and therefore the mark can be accepted and used as a trade mark, is that the mark must have sufficient distinguishing power, so as to distinguish the goods produced by a company from goods or services produced by other companies.

In the history of the law concerning mark in Indonesia, it was noted that during the Dutch colonial period the Regulatory Industriële Eigendom (RIE) was published in Stb. 1912 No. 545 Jo. Stb. 1913 No. 214. This provision continued to apply until finally in 1961 the provision was replaced with Law no. 21 of 1961 concerning Company Marks and Trade Marks. After surviving for almost 31 years, the Trademark Law of 1961 was revoked and replaced with Law Number 19 of 1992 concerning Marks. Subsequently in 1997, the 1992 Trademark Law was renewed by Law Number 14 of 1997. After the ratification of WTO membership in 1994, the trademark settings were then adjusted to TRIPs, then Law No. 14 of 1997 was declared invalid and replaced with Law Number 15 Year 2001. And finally, it was revoked with Law Number 20 Year 2016 concerning Mark and Geographical Indications (hereinafter referred to as Trade Mark Law). (Soryatin ; 1980, 17) According to Article 11 of the Trade Mark law, the right to a mark is an exclusive right granted by the state to the owner of the mark which is registered in the public register of the mark for a certain period of time by using the mark itself or giving permission to other parties to use it. According to Article 35 of the Trade Mark Law, registered marks receive legal protection for a period of 10 (ten) years from the date of receipt and that period can be extended.

As one of human intellectual works, the brand is closely related to economic and trade activities. Therefore, brand protection is very important in addition to being an asset that can generate profits for the brand owner, as well as a tool to protect consumers from fraud on the quality of certain goods. And consumers will feel disadvantaged if the brand that they think is quality, was produced by other parties with low quality so that it can reduce the company's reputation.

There are several principles contained in the Trade Mark Law, as follows: (M. Yahya Harahap ; 1996, 33)

- 1) First to file principle means that the first registrant who applies for a mark is a party recognized as the trademark holder;
- 2) Marks to be registered may not cause confusion and mislead with a mark that is generally well known and owned by another party;
- 3) The principle of speedy resolution of trademark case law is the settlement of cases through a commercial court, and there is no appeal, thus the appeal is immediate;

According to Article 2 paragraph (2) of the Law, The Marks as referred to in section (1) point a comprises:

- a. Trademark is a brand used on goods traded by a person or legal entity to differentiate from similar goods, For example Mc Donalds, Honda Motor, Aqua and others;

- b. A service mark is a brand that is used for services traded by persons or legal entities to distinguish them from similar services, for example JNE, RCTI, Pasteur Travel and others.

Regarding trademark registration, a mark cannot be registered if the mark contains elements as regulated in Article 20 of the Trade Mark Law. Whereas the application for a mark which is submitted, the application must be rejected by the Directorate General if the mark meets the provisions of Article 21 of the Trade Mark Law. But even though at first a brand has no similar goods, if a brand is used continuously by the consumer, then the customer can distinguish the brand from other brands. So these brands can be registered. (Eddy Damian ; 2002, 78)

Brand protection according to Trade Mark Law adheres to the constitutive principle and the first to file principle. The principle of being conservative means that the protection of trademark rights is only given if a person or legal entity has registered the mark, while the first to file principle means whoever registers the trademark for the first time is considered as the owner of the mark. However, trademark registration can be canceled if the mark has similarities with another person's famous trademark, the same as another person's trademark that has been previously registered or is filed in bad faith.

Regulations regarding cancellation of trademarks are regulated in Article 76 Trade Mark Law. Claims for trademark cancellations are filed by interested parties for reasons of trademark cancellation specified in Article 20 and/or 21 Trade Mark Law. An unregistered trademark owner can file the lawsuit after submitting an application to the Directorate General of Intellectual Property Rights. The cancellation claim was filed with the Commercial Court. And a trademark cancellation claim can only be filed within five years from the date of trademark registration. A lawsuit can be filed indefinitely if the mark is contrary to morality, decency and public order.

Revocation of the mark is carried out by the Directorate General of Intellectual Property Rights by crossing out the mark concerned from the general register of trademarks by providing notes on the reasons and date of the cancellation. The crossing out of the registration of a mark from the general Register of Marks shall be announced in the official News of the Mark Cancellation and deletion of trademark registration results in the termination of legal protection for the mark concerned.

In resolving trademark rights disputes, there are several legal settlement options regulated in Trade Mark Law. The trademark infringement lawsuit can be in the form of: (Soryatin ; 1980, 31)

1) Civil claims.

Settlement of trademark disputes through civil law is regulated in Article 83 of the Trade Mark Law, namely that the trademark rights holder has the right to file a claim for compensation to the Commercial Court for losses suffered and to request the Commercial Court to order the termination of all acts related to the use of the mark.;

2) Criminal indictment

Criminal provisions for trademark infringement are regulated in Article 100-103 of the Law. Filing a civil claim can still be filed together with the civil registry. The civil process does not invalidate the right of the state to make criminal charges;

3) Settlement of dispute through alternative dispute resolution / ADR (alternative Dispute Resolution) in the form of negotiation, mediation, conciliation, and other means chosen by the parties in accordance with the applicable laws stipulated in Article 93 of the Trade Mark Law.

The one of the ADR is Mediation, it is the third party technique that is closest to negotiation. The process is also sometimes described as conciliation. Essentially, mediation is a process of negotiation, but structured and influenced by the intervention of a neutral third party who seeks to assist the parties to reach an agreement and mediator does not make an award. (Karl Mackie and David Miles ; 1995, 55)

Several formulaed examples of cases of famous brands that have received a ruling from the Supreme Court, among others : (Supreme Court Decree No. 02K/N/HAKI/2004, 2004 : 6).

a. The Benetton brand case (No. 02K/N/HAKI/2004)

The plaintiff is the owner of the brand and the holder of the well-known BENETTON brand that has been known in many countries including Indonesia. This brand is known in Italy since 1983 for clothing and

the like. The Defendant was a company that registered the BENETTON trademark in 1994 for class 34 namely cigarettes, cigars, gunshot, cigarette pipes, matches. The Supreme Court has won the BENETTON brand from Italy because it has fulfilled the elements of a well-known brand, even though in a different class of goods.

b. The VERSACE brand case (No. 06K/N/HAKI/2004)

The plaintiff is the owner of the brands VERSUS (classes 09 and 18) and VERSUS GIANI VERSACE (classes 08, 18, and 25) which are well-known brands in Italy. The Defendant is the owner of the VERSUS mark which was registered in 1996 in classes 24, 25 and 42. The Supreme Court granted the plaintiff's request to cancel the defendant's trademark because it was deemed to have committed bad intentions in registering the mark.

c. The Cap Kaki Tiga brand case (No. 85PK/Pdt.Sus-HKI/2015)

The plaintiff is a British citizen named Russel Vince and the defendant is the owner of the Cap Kaki Tiga brand (named Wen Ken Drug) which is already registered in Indonesia. The Supreme Court finally canceled the Cap Kaki Tiga brand because it had something in common with the Isle of Man state symbol.

3.2. Protection against International Marks

The regulation on Intellectual Property Rights (IPR) in international agreements is inseparable from the role of two international organizations namely WIPO and WTO. WIPO is a special UN body formed in 1967 with the aim of encouraging creativity and introducing IPR protection throughout the world. WIPO was formed based on the WIPO convention signed in Stockholm on July 14, 1967. WIPO houses two classic IPR conventions namely the Bern Convention on the Protection of Art and Literature (Switzerland, 1886) and the Paris Convention on the Protection of the Rights of Industrial Property (1883). Meanwhile, the history of the establishment of the WTO is related to the beginning of the emergence of the International Trade Organization (ITO) and GATT. (Khoirul Hidayah ; 2017, 82).

Protection of Intellectual Property Rights became a necessity after the birth of the GATT agreement (General Agreement on Tariff and Trade) in 1947. The main mission of GATT is to reduce barriers to trade in the form of import duties and other non-tariff barriers. Then, after the conference in Marrakech in 1994, it was agreed that the GATT framework would be replaced with a world trade system known as the WTO (World Trade Organization). In terms of organization, there is no legal relationship between WIPO and WTO, but the regulation regarding IPRs governed in TRIPs under the auspices of the WTO is more complete than those stipulated by WIPO

Under the auspices of the WTO, various negotiations have taken place in various rounds of trade meetings in several member countries known as the Uruguay Round. The final results of the Uruguay Round were agreed upon by TRIPs on April 15, 1994. The TRIPs Agreement was one of the Final Act Embodying The Uruguay Round of Multilateral Trade Negotiation signed in Marrakech in April 1994 by 124 countries and 1 representative of the European Economic Community. Indonesia is one of the countries that signed it and has ratified it through Law No. 7 of 1997 concerning the Ratification of the Agreement on the Establishment of the World Trade Organization (WTO). The enactment of TRIPs for Indonesia was a juridical consequence of the inclusion of Indonesia as a WTO member country in 1994 in Marrakech, Morocco. The scope of IPR protection in TRIPs includes copyrights, trademarks, patents, industrial designs, geographical indications, integrated electrical circuit designs, confidential information. For international protection, the TRIPs suggest that member states adapt their national regulations to some of their derivative conventions namely the Paris Convention (1967); Bern Convention (1971), Rome Convention (1961) and Treaty on Intellectual Property in Respect of Integrated Circuits (1989). (. (OK Saidin ; 2015, 35)

There are 6 (six) conventions that have been endorsed by the Indonesian government, so that Indonesia must adjust the legislation regarding IPRs with international agreements. Some international conventions or treaties have been ratified by Indonesia, as follows: (. (OK Saidin ; 2015, 37)

1. Paris Convention ratified through Presidential Decree No. 15 of 1997;
2. Patent Cooperation Treaty ratified through Presidential Decree Number 16 of 1997;
3. Trade Mark Law Treaty ratified through Presidential Decree Number 17 of 1997;

4. The Bern Convention which was ratified through Presidential Decree Number 18 of 1997;
5. WIPO Copyrights Treaty which was ratified through Presidential Decree Number 19 of 1997.
6. WIPO Performance and Phonograms Treaty (WPPT) with Presidential Decree Number 74 of 2004.

In addition, there are several international bilateral agreements, as follows : (. (OK Saidin ; 2015, 38)

1. Presidential Decree Number 17 Year 1988 about Ratification of the Agreement on Reciprocal Legal Protection of Copyright between the Republic of Indonesia and the European Community;
2. Presidential Decree Number 25 Year 1989 concerning Ratification of the Agreement on Reciprocal Legal Protection of Copyright between the Republic of Indonesia and the United States;
3. Presidential Decree Number 38 Year 1993 concerning Ratification of the Agreement on Reciprocal Legal Protection of Copyright between the Republic of Indonesia and Australia;
4. Presidential Decree Number 56 Year 1994 concerning Ratification of the Agreement on Reciprocal Legal Protection of Copyright between the Republic of Indonesia and the United Kingdom;

Because Indonesia has ratified TRIPs, Indonesia shall provide protection for IPRs. There are 3 (three) basic principles for the protection of IPR, as follows: ((Khoirul Hidayah ; 2017, 49)

- a. National Treatment Principle as the principle that the state will provide IPR protection and equal treatment both to its own citizens and to foreign nationals;
- b. Most Favoured Nation Principle as the principle of enforcing waivers, privileges and the right to take precedence or exemption granted by one member country will be granted directly and without conditions to other member countries; dan
- c. Minimal standart Principle as the principle that applies the minimum standards that must be obeyed in the regulation of IPR in the national law of each member country.

The TRIPs Agreement provides guarantees for developing and underdeveloped countries to meet their needs and interests, so that member countries are allowed to adjust and change their laws and regulations to meet the needs of each country. The Trade Mark Law explanation stated that international treaties that had been ratified created an obligation for Indonesia to adapt national law to the provisions in the international agreement, one of which was the regulation of trademarks. With developments occurring in the field of brands, there is protection for new types of marks called non-traditional marks, and therefore in Trade Mark Law protection of marks does not only include sound marks, three-dimensional marks and hologram marks, but also includes non-traditional marks. Some improvements in the arrangement of the mark in order to provide better service, especially for the applicant of the marks. Among them, providing legal protection for registered trademark owners from trademark violations committed by other parties by increasing criminal sanctions, especially for trademark violations that threaten human health, the environment, and can cause death.

4. Conclusion

The development of information and communication technology is very rapid in the current era of global trade, making it easier for people to get information and then imitate other people's products and use marks that are similar to famous marks in their business activities. Thus, it is necessary to have brand regulations in Indonesia and in the international world that can provide protection for these famous marks. In Indonesia, trademark regulation is regulated by Law No. 20 of 2016 concerning brands and geographic indications, brand protection provided by Law No. 20 of 2016 is very adequate, this has been proven that many cases of famous brands that were imitated were canceled by Courts in Indonesia. Therefore, the legal protection of famous marks and marks provided by the Trademark Law as stipulated in Article 6 paragraphs (3) and (4) is in line with the provisions of TRIPs. Also other international brand regulations such as those regulated by the Paris Convention ratified through Presidential Decree No. 15 of 1997, Trade Mark Law Treaty ratified through Presidential Decree Number 17 of 1997 and WIPO Copyrights Treaty which was ratified through Presidential Decree Number 19 of 1997.

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