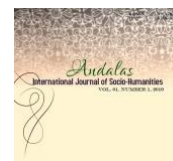




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Article

The Development of Economic Right Principle Implementation of Trademark Right in The Covid-19 Pandemic Era

Najmi¹, Delfiyanti²

^{1,2}Faculty of Law, Universitas Andalas, Indonesia

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CORRESPONDENCE

E-mail: najmi@law.unand.ac.id

A B S T R A C T

The pandemic of Covid-19 that struck since beginning of 2020 had an enormous impact to the whole states in the world including Indonesia. The pandemic was bring worst influences to the economic and trading. The deadly disease automatically was paralyze an economy and trading. It is caused by restriction of people to drive and influences the product movement. Temporarily, export-import activities delayed as restriction of transportation entry among the states. Finally, Indonesia forced close for in and out flight of territory. The situation influence to the implementation of Economic Right of trademark right attach to the import and export products in Indonesia. By the reasons, the study categorized by, first, the development of Economic Right principle implementation of trademark right in the pandemic era. Secondly, the challenge and effort an implementation of Economic Right principle of trademark right in trading at pandemic era. The study uses normative law method by literature study of related material and the data analysis uses qualitative. According of Act No. 20 of 2016, involves Trademarks and Geographical Indications, the trademark right is an exclusive one granted by the state to the owner for a registered brand for a certain period by using the mark or giving permission to other parties for it. However, it is difficult in current conditions to introduce a new trademark to society amid a weak economic situation so that most recognized trademark will be better able to survive amid the economic downturn in the covid-19 pandemic era. The situation result in violation of trademark ownership when a product is given a label from a previously brand so that a lawsuit can be filed. An interested party may file a lawsuit for the cancellation of a registered trademark and the cancellation submitted to the Commercial Court against the owner of the registered trademark.

INTRODUCTION

As an intellectual product, trademark play an important role for continuity and increases good and service transaction of trading and investment. Trademark with the image can accomplish the customer demand for the important sign or distinguish and guarantee for good and service qualities in the competition atmosphere. Therefore, trademark is an economic asset to the owner, individual or collective (corporation) that will bring a huge benefit. For importance, it is attached legal protection to the brand, an object in correlation with individual or corporation rights. The decision based trademark protection including protection against piracy has become a concern in both countries and the world. Initially, this case viewed by counterfeiting-based problems.

Currently, The use of recognized trademark has flourish, this is because promising benefits when using it rather than own brands. Especially, in extended economic crisis such as present, many producers have come up by combining an original branded product with pirated ones, as physically it similar to the original. There are many reasons why industries use recognized brands for the products—easy to sell, besides it don't have to registration at the Director General of Intellectual Property Rights or spend a lot of money to build the image of products. They don't have to establish a research and development division to produce an up to date product, just copies other products and in marketing the “dealers” ready to accept for it.

Economically, use the famous brands brings considerable profits and it proven, moreover it also supported by the purchasing power of mediocre consumers who want to appear trendy. By the legal aspect, it is unacceptable as Indonesia has ratified the International Convention on TRIPs and the WTO which was promulgated in Act No.7 of 1994 in accordance with the international agreement that on January 1st 2000 Indonesia had to implement all the agreements in TRIPs (Trade Related Aspects of Intellectual Property Right, Including Trade in Counterfeit Good), as the implementation of all the provisions is a consequence of the member of the WTO (World Trade Organization). It is irrefutable that in current trading, trademark is a human intellectual property form which has decisive role due to the use in organization, however, it is also comprises any legal aspects for owner, brand holder or public as user of goods or services of certain brands.

Trademark plays an important role for continuity and increases good and service transaction of trading and investment. Trademark with the image can accomplish the customer demand for the important sign or distinguish and guarantee for good and service qualities as it a kind of “initial seller” of product for consumers. In the competition era, the products entry from abroad to Indonesia cannot be restricted because the phenomenon has been predicted by Kanichi Ohmae, “that in the future the world cannot be restricted by anything” and it is to be true. As the asset trademark will be able to generate large profits when utilized by considering a business aspects and good management. By increasing importance of role of trademark, it is necessary to put the legal protection on a trademark, namely as an object related to the rights of individuals or legal entities.

Actually, the top brand preceded by a reputation and good will as usual that is attached to the fame. The high “good will” brand be able to provide extraordinary benefits to the company, even though is actually intangible. It will be transformed into a capital asset based solely on good will; according to Lendsford, it is stated that a company with high reputation brand will have extraordinary wealth assets based solely on the good will of brand.

Branded good or services are advertised and sold beforehand with each other, albeit the good or service is not available physically in particular market. Modern dissemination and advertising media are becoming increasingly unrestricted by boundaries given the sophistication of communication technology and the frequency when the people travel across the globe. The owner of a branded good or service takes advantage of various events that many people watching it to trade the product to make them put an interest for products or using the advertised services.

By the legal aspect, trademark becomes an important matter, in connection with legal protection requirement and legal certainty for trademark owners or holders and public as consumers of goods or services that use the brand in avoid a misleading by other brands; it cannot be denied that using of well-known brand matter by unauthorized parties is familiar in Indonesia and it is recognized by the government, but many obstacles in practice.

As we known that main purpose of business is profit; but the industries do not understand the importance of the relationship between entrepreneurs, consumers and society consider the “profit oriented” without respect to other aspects and again concerned only to their own interests regardless the interests of other parties and what encourages them to do more the availability of consumers who use their products.

The different perceptions in society on brands leads to various interpretations, however it does not means that people who produce an item by using the fame of others be justified, because allowing irresponsible actions indirectly produces and justifying someone to cheat and enrich themselves dishonestly. Using a recognized brand of another, comprehensively, is not only detriment to the owner or brand holder and consumers, but the national economy and also harms international economic relations.

By the reasons, the most important problem is related to the implementation of the economic rights principle in the trademark rights attached to the trading products. The great economic value of the brands has made companies try to maintain the quality of these goods. Especially to the export and imported goods, the quality is very much taken into account to get the economic value. However, the Corona-19 virus pandemic which has plagued almost all countries since the beginning of 2020 has had a considerable impact on countries in the world, including Indonesia. The pandemic has a depth impact on economy and trading. During the situation, the economy was automatically paralyzed and trade did not proceed as usual. It is caused by restricted space for people moving and influence to the goods movement. Export-import are delayed due to restriction of transportation enter to the region. Indonesia, eventually closed the flights from any countries into the territory. It also results in the implementation of the Economic Rights principles on trademark rights that attached to export and imported goods in Indonesia.

RESULT AND DISCUSSION

Legal Aspects of Trademark Arrangement

The development of intellectual property rights in Indonesia—the legal system of Intellectual Property Rights (IPR) was first translated into intellectual property rights then intellectual property one. The recently term used is intellectual property rights (IPR). It is consistent with issue of the Decree of the Minister of Law and Legislation of the Republic of Indonesia No.M.03.PR.07.10 of 2000 and the approval document of the State Minister for Administrative Reform, No.:24 /M/PAN/1/2000, the term of Intellectual Property Rights (without “on”) be abbreviated as IPR or the acronym has been officially used. Thus, it is not the Intellectual

Property Right (with “On”). The Decree of the Minister of Law and Legislation is also based on the Presidential Decree of the Republic of Indonesia No:144 of 1998 dated 15 September 1998 on exchange the name of the Directorate General of Copyright, Patents and Trademarks to the Directorate General of Intellectual Property Rights and by the Presidential Decree No. 177 of 2000 the changed to Directorate General of IPR.

Trademark as the intellectual property plays important role to the continuity and increasing trade of goods or services and investment. It is can accomplish the consumer’s demand for identification or distinction which is important and guarantee to the quality of goods or services in free competition atmosphere. Therefore, trademark is an economic asset for owner, both individuals and companies (legal entities) that can generate large benefit. Such is the importance, the legal protection is attached to the mark, as the object related to the rights of individuals or legal entities. The background decision of policy to the protection of trademark including protection against piracy has become a concern for the states and the world. First of all, related-counterfeiting problems to be consider in this case.

There are always any exchanges on the regulation of trademark law in Indonesia, in colonial era, it was “*Reglement Industriële Eigendom*” (Reglemen owned by industry) which was promulgated by *Staatsblad* 1912 No.545 (abbreviated as Stb.1912/545) a duplicate of the Trademark Law Netherlands (*Merkenwet*). The regulation, known as the Industry Property regulation 1912. It consists of 27 articles only thus many matters are unclear in its regulation, for example, it is do not regulating service marks, counterfeiting, compensation and the transfer. The adopted system is “declarative”, providing protection for those who use the trademark for the first time. After independence era, trademark protection began to be regulated in Act No.21 of 1961 on Company Trademarks and Commercial Brand which was enacted on October 11, 1961.

According to Sudargo Gautama, Act No.21 of 1961 could be the transfer of the Provisions of the 1912 Industrial Property Regulations consisting of 24 articles so that it is contains many shortcomings. Act No.21 of 1961 on Company Brand and Trademarks recognizes the 35 classification of goods in line with the international classification based on the trademark registration agreement in Nice, France in 1957 which was amended in Stockholm in 1961 to adapt the conditions in Indonesia. In August 28, 1992, Act No. 19 of 1992 concerning marks was enacted which became effective on April 1, 1993. The Act on marks replaced Act No. 21 of 1961 on Company and Commercial Brand. In connection with the interests of reforming the trademark law, Indonesia has participated in ratifying an international agreement on trademarks, the World Intellectual Property Organization (WIPO).

In 1997, Act No. 19 of 1992 on Trademarks was amended by Act No. 14 of 1997 on Amendment to Act No. 19 of 1992 concerning Trademarks. This Law stipulates that the first trademark user in Indonesia can register his brand; the latest trademark regulation in Indonesia is Act No. 15 of 2001 as a substitute for the previous law—Act No. 14 of 1997, so that there is a comprehensive change on the previous regulations. The objective is to anticipate the developments in information technology and transportation that have supported activities in the trade sector increasing rapidly, maintain a healthy business competition climate, and accommodate several aspects of unification the Agreement on Trader-related Aspects of Intellectual Property Rights (TRIP’s) and then everything on trademarks are regulated in Act No. 15 of 2001 on Trademark .

Additionally, definition of trademark regulated in Article 15 of the TRIP’s approval are : “Any sign, or any combination of signs, capable of distinguishing the goods or services of one

undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.”

Hence, the trademark must be a mark that can be affixed to the goods or the packaging. When the product of the business does not have distinctive power, it is not a trademark. Thus, when the marks do not fulfill a distinctive power, it can be registered as a trademark. In the good or services trading, trademark as a form of intellectual property has an important role to continue and increase of good or services trading. It has strategic and important value to the producer and consumer. In producers, it is not only to differentiate the products from other similar companies' products, it is intended to build a company's image in marketing. For consumers, besides for identification easier, trademark also a symbols of self-esteem. People who are already accustomed to the choice of goods from a certain trademark tend to use the goods with that trademark and in any reasons such as because they have long been acquainted with, trusted product quality, etc. so that the function of the trademark as a guarantee of quality is increasingly apparent. Bearing in mind that trademark have an important role in the good or services trading, the regulation of trademark in the legal system of Indonesian has been going on for a long time compared to other types of IPR, the enactment of *Auteurswet* 1912, *Staatsblad* No. 600 of 1912 and declared invalid based on Act No. 21 of 1961. The Law also contains two Government Regulations—Government Regulation No. 19 of 1992 which came into effect on April 1, 1993. Subsequently amended by Act No. 14 of 1997 in May 17th, 1997.

The Act No. 15 of 2001 on Trademarks is an amendment of Act No. 14 of 1997 on the Brand. The right to the mark is an exclusive right as granted by the state to the owner as registered in the General Register of Marks for a certain period by using of own brand or giving to another party for using it. Practically, the application of trademark rights is often not in accordance with the stipulated by law. Thus it is result in losses for the owner. Actions that causing harm are violations of the brand. The state has responsibility to protect the implementation of the rights to the mark.

Issuing of the new Act No. 29 of 2016 on Trademark and Geographic Indications is based on the following considerations:

- a. Due to in the global trading era, in line with international conventions that have been ratified by Indonesia, the role of Trademark and Geographical Indications is important, especially to maintain the rational, fair business competition, protecting consumers, as well as protecting for Micro, Small and Medium Enterprises and domestic industries;
- b. Due to the improve of services and provides legal certainty for industry, trade and investment in encounter local, national, regional and international economic developments as well as developments in information and communication technology, it is necessary to be supported by a adequate statutory regulation in the Trademark and Geographical Indications;
- c. Due to the Act No. 15 Year 2001 on Trademark has many deficiencies and cannot accommodate the development of social demand on Trademark and Geographical

Indications and insufficient to guarantee protection of local and national economic potentials, it is needs to be replaced;

According to the Article 1 of Act No. 20 of 2016 on Trademark , the meaning of trademark is a mark that can be displayed graphically in the form of image, logo, name, word, letter, number, color arrangement, in 2 (two) dimensional and/or 3 (three) dimensional, sound, hologram, or a combination of 2 (two) or more of elements to distinguish goods and/or services produced by persons or legal entities in trading activities of goods and/or services. Furthermore, the trademark are divided into:

1. Trademark is a brand used on trading by individual or collective or a legal entity to differentiate from other similar product.
2. Service trademark is a mark used by individual or collective or a legal entity to differentiate from other similar service.
3. Collective trademark is a mark used on goods and/or services with the similar characteristics regarding the nature, general characteristics, and quality of good or services as well as their supervision which will be traded by several persons or legal entities collectively to differentiate from the similar services.

The trademark right is an exclusive one granted by the state to the owner for a registered brand for a certain period by using the mark or giving permission to other parties for it. The scope of Act No. 20 of 2016, involves Trademarks and Geographical Indications where the Mark includes Good and serviceBrand. Whereas a protected brand consists of a sign in the form of an image, logo, name, word, letter, number, color arrangement, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more of these elements to distinguish goods and/or services produced by people or 3/56 legal entities in trading activities. The trademark cannot be registered if :

- a. Contrary to the ideology, regulations, morality, religion, morals, or public order;
- b. Similar with, relating to, or simply mentioning the goods and/or services being applied for registration;
- c. Contains the misleading elements for public regarding the origin, quality, type, size, model, purpose of use being applied for registration or constituting the names of protected plant varieties to the similar goods and/or services;
- d. Contains inconsistent information to the quality, benefit or efficacy to produced good and/or services;
- e. Has no distinguishing power; and/or
- f. Common name and/or symbol of public property.

Implementation of Economic Rights Principles on Trademark in Trading of Product in The Pandemic Covid-19 Era

Based on Article 2 paragraph (2) the Act of Trademark No.20 of 2016, brands are divided into good and servicebrands. A good brand used on goods traded by a individual or persons collectively or a legal entity to distinguish it from other similar one. Furthermore, the brand

right are attained since the mark registered. A registered trademark will have a trademark certificate that is officially issued by the Ministry of Law and Human Rights thus it is legally protected.

Moreover, the trademark is registered, the owner will receive economic rights on it. The economic rights for the a trademark related to the commercialization when it is traded both nationally and internationally so that the owner or the holder has the exclusive right to use the trademark in the market and prohibits other parties for using it. Also, trademark relates to the reputation of the goods being traded thus there is no mistaking on well-known and high-reputation brand that usually has high quality and price. Generally, society as a consumer will choose a product by identifying the label of the product.

It also will bring atight competition between products in market place. Manufacturers attempt to improve of sales of goods, by making a good and attractive reputation for product. However, also there are manufacturers against the law by imitating other products or claiming ownership of the trademark from the other. It is becomes an interesting challenge in attempt to maintain the identity and ownership of the trademark.

The Covid-19 pandemic era in early 2020 globally has changes the international community, including Indonesia in relation to the economy and trading. The Restriction in movement of both people and goods has bring worst impact to the buying and selling power in society. Especially for export and imported goods; before the Covid-19 pandemic trade in goods in and out of a country was running rapidly, but currently it all decline. At present, trade has had a wide impact as reduced purchasing power of the people both international and nationally.

Similarly, the impact of the Covid-19 on the world economy was devastating. In the first quarter of 2020 economic rate in trading partner of Indonesia grew negatively: Singapore -2.2, Hong Kong -8.9, European Union -2.7 and China decline to minus 6.8. Several countries still grew positively but decreased compared to the previous quarter. The United States fell from 2.3 to 0.3, South Korea from 2.3 to 1.3 and Vietnam from 6.8 to 3.8. Indonesia experienced a deep contraction from 4.97 in the fourth quarter of 2019 to only 2.97 in the first quarter of 2020. Then, the report of the Central Statistics Agency (BPS) in August stated that Indonesia's economic growth in the second quarter of 2020 was minus 5.32 percent. Previously, in the first quarter of 2020, BPS reported that Indonesia's economic growth only grew by 2.97 percent, down considerably from the growth of 5.02 percent in the same period in 2019.

The weakening economic situation evenly throughout all countries has affected global trade in goods. However, there are other parties who take advantage personally. They are goods brand with good reputation and will always exist and are bought by the public. It is encourages certain parties to produce goods by imitating well-known and established trademark so that the goods are sold and bought. However, it is difficult in current conditions to introduce a new trademark to society amid a weak economic situation so that most recognized trademark will be better able to survive amid the economic downturn of pandemic era.

The situation result in violation of trademark ownership when a product is given a label from a previously brand so that a lawsuit can be filed. An interested party may file a lawsuit for the cancellation of a registered trademark and the cancellation submitted to the Commercial Court against the owner of the registered trademark. This is regulated in Article 83 of the Trademark Law; that the owner of a registered brand and/or licensee of a registered trademark can file a lawsuit against other parties who unlawfully use the trademark that has the same substantially or in its entirety for similar goods and/or services in the form of: a. claim for damages; and/or

b. termination of all actions related to the use of the trademark . A lawsuit as referred to in may also be filed by a well-known brand owner based on a court decision that was submitted to the Commercial Court.

Moreover, violation of the trademark may also be subject to criminal sanctions as depicted on Article 100 paragraph (1) of the Trademark Law, that any person without the right to use a trademark that is the same as a registered trademark owned by another party for goods and or similar services produced and/or being traded, shall be punished with imprisonment of up to 5 (five) years from/or a maximum fine of Rp.2,000,000,000.00 (two billion rupiah). Article 100 paragraph (2) adds that every person without the right to use a trademark which is similar in essence to a registered trademark belonging to another party for similar goods and/or services produced and/or traded, shall be punished with imprisonment of a maximum of 4 (four) years and/or a maximum fine of IDR 2,000,000,000.00 (two billion rupiah).

By these legal provisions, users of goods brands must really understand of their action consequence. The existence of exclusive economic rights to trademark owners and trademark rights holders in order to respect and protect the goods they have produced and to work hard so that their trademark can be accepted by the community. By the existence of legal provisions to encourage the economy and trade running fairly and transparently so that it will further improve the global economy.

CONCLUSIONS

A trademark is a human intellectual property with decisive role as the use of trademark in a company and also contains comprehensive legal aspects, both for the owner or holder of brand as well as to the consumer. The Covid-19 pandemic era at the beginning of 2020 has changes the international community globally including Indonesia in relation to the economy and trading. The restriction on movement of both people and goods has affected the buying and selling power. Especially, to the export and imported goods; before pandemic it is running in proper and in-out trading was rapidly but currently it is experiencing a decline. The existence of weakening economic conditions evenly throughout all countries was influences the global trading. However, there are other parties who take advantage of the situation personally. There are goods that have a brand with good reputation and will always exist and are bought by the public. It is encourages certain parties to produce goods by imitating well-known and established brands so that the goods are sold and bought. Therefore, the existence of various international and national arrangements is very important. Indonesia has made arrangements related to trademarks through Act No. 20 of 2016. The law provides regulation and protection related to trademarks.

REFERENCES

- Adrian Sutedi, *Intellectual Property Rights* , Sinar Grafika, Jakarta, 2009.
- Buku Panduan Hak Kekayaan Intelektual, Ditjen Hak Kekayaan Intelektual, 2006 Sophar Maru Hutagulung, 1956, *Hak Cipta Kedudukan dan Peranannya di dalam Pembangunan*, Sinar Grafika, Jakarta.
- Cheng, Chia Jui (ed), *Clive Schmitthof's Select Essay on International Trade Law*, Martinus Nijhoff Publication, 1988.
- Cunan, *Economic Development and Prosperity*, Boston, Massachussets, USA : Harvard University Published, 1999.

- C.W. van der Pot , bewerkt door A.M. Donner, *Handboek van het Nederlandse Staatsrecht*, 11e druk, Tjeenk Willink, Zwolle, 1983.
- Muhamad Djumhana, *Doctrine Development and Intellectual Property Rights Theory*, PT Citra Aditya Bakti, Bandung, 2006.
- Muhammad Djumhana dan R. Djubaedillah, *Intellectual Property Rights : History, Theory dan Implementation in Indonesia*, Bandung, PT Citra Aditya Bakti, 1997.
- Rahmi Janed, *Intellectual Property Rights (Abuse of Eksklusif Rights)*, Faculty of Law in Unair, Surabaya, 2006.
- Suyud Margono, *Legal Aspects of Intellectual Aset Comercial*, Nuansa Aulia, Bandung, 2010.
- Yahya Harahap, *General Review fo Trademark and Trademark Law in Indonesia Based on Act No.19 of 1992*, Citra Asitya Bakti, 1996.