



Legal Protection of Collective Trademark Holder in Business Competition Perspective

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Abstract

This study examines 2 (two) main issues, namely how is the regulation of collective brands in the legal system in Indonesia, and can collective brands be used as alternatives to brand protection to reduce business competition? The method used is a normative method with a legislative approach and a case approach. The results of the research prove that the regulation of the collective mark has been regulated in the Brand Law No.20 of 2016 concerning Brands. However, people's understanding of the Trademark law is still lacking so that people do not register their brands individually or collectively.

Keywords: *Collective Brand; Business Competition*

Introduction

Intellectual Property Rights are rights that arise because of the results of one's intellectual creativity, with tangible forms having physical dimensions, having creativity, so that they are not just ideas, ideas, concepts, facts that do not have physical dimensions. Other terms of Intellectual Property Rights are usually abbreviated as IPR. If observed in the Civil law system in Indonesia, IPR is included in the property law which consists of two parts, namely binding law (Article 1233 of the Civil Code and property law) Article 499 of the Civil Code).¹ In the concept of property, every object always has an owner, every owner of an object has an right to his property, which is usually called "Property" so that the owner has the right to enjoy and control the object fully.²

In the world of trade, the brand as a form of IPR has been used hundreds of years ago and has an important role because the brand is used to differentiate the origin of products and services. Brands are also used in the world of advertising and marketing because the public often associates an image, quality

¹ H.OK Saidin, *Aspek Hukum Kekayaan Intelektual*, PT Raja GrafindoPersada, Jakarta 2004, p. 11

² R Soebekti dan R Tjitrosudibyo, *Kitab Undang – Undang Hukum Perdata*, Pradya Paramita, Jakarta, 1986

and reputation of goods and services with certain brands. A brand can be a commercially asset and often the brand is what makes the price of a product expensive even more valuable than the company.

In Indonesia itself, by changing and adding to the Trademark Law in such a way since Law Number 21 of 1961 was later amended by Law Number 12 of 1992, and then amended again by Law Number 15 of 2001, and finally by Law No. 20 of 2016 concerning Brands and Geographical Indications proves that the role of brands is very important.

The variety of product brands offered by producers to consumers makes consumers faced with a variety of choices, depending on the purchasing power or ability of consumers. Middle class people who don't want to be left behind using famous brand goods buy fake goods. Even if the goods are fake, imitation and low quality, it doesn't matter as long as they can be bought.

The occurrence of counterfeiting of brands, trade certainly will not develop properly and will further worsen the image of Indonesia as a violator of IPR. Therefore, the issue of legal protection of brands becomes interesting to discuss, bearing in mind that the world will continue to develop, and within them brands have a sufficiently calculated role especially in the process of trading goods and services in the global era.

By understanding and understanding Law Number 20 Year 2016 concerning Trademarks and Geographical Indications, trademark owners are aware of the importance of brand protection for legal certainty and fair competition among entrepreneurs so that it can benefit the surrounding community. As an alternative to brand protection, that is by using collective brands to be used together in reducing the level of business competition among owners, given the number of sokka tile industries managed by the home industry so that they are more effective and efficient.

Result and Discussion

1. Brand Protection in Indonesia

The issue of brand protection is not new for Indonesia. In the history of brand legislation, during the Dutch colonial period the Eigendom Industriële Regulations (RIE) were enacted in Staatblad 1912 Number 545 jo Staatblad 1913 Number 214. During the Japanese occupation, a trademark regulation, called Osamu Seire Number 30 concerning Registration of trademarks which took effect on the 1st month of 9 Syowa (Japanese year 2603. After Indonesian Independence (August 17, 1945), the regulation is still in force based on Article II of the Transitional Rules for the 1945 Basic Law. Furthermore, since the era of open economic policy in 1961 was enacted Law Number 21 of 1961 concerning Company Trademarks and Trademarks which replaced Dutch colonial legacy regulations which were deemed inadequate, even though the Law basically had many similarities with the Dutch colonial legal product.

Further development, the Trademark Law has undergone changes, both replaced and revised because the value is not in accordance with the development of circumstances and needs. Finally, in 2001 Law No. 20 of 2016 concerning Geographical Indications and Indications was enacted. This Trademark Law is a law governing trademark protection in Indonesia. The law is the latest legal product in the field of trademark in response to adjusting brand protection in Indonesia with international standards contained in Article 15 of the TRIPs Agreement as a substitute for the previous law namely Law Number 14 of 1997 concerning Amendment to Law Number 19 of the year 1992 concerning Trademarks and Law Number 15 Year 2001.

From the understanding of the brand that has been described previously it can be concluded that there are several elements of the brand, namely:

- a) The main requirement for a mark is a mark that has distinguishing features and is used in the trade of goods or services.
- b) Signs that can be brand symbols consist of elements, images, names, words, letters, numbers, color arrangements or combinations of these elements. In connection with the definition of the brand, in Australia and the United Kingdom, the definition of the brand has expanded widely to include the shape and appearance of the products in it. In the UK, the Coca Cola Company has registered the shape of the bottle as a trademark. This development indicates the difficulty of distinguishing brand protection and industrial design. In some countries, sounds, smells, and colors can be registered as trademarks.

In trademarks, there are known exclusive rights as stated in Article 3 of Law Number 20 Year 2016 concerning Trademarks, namely exclusive rights granted by the state to brand owners. In general, exclusive rights can be defined as 'rights that guarantee legal protection to brand owners and are the only owners who have the right to use and use and prohibit anyone from owning and using it'. Thus, exclusive rights contain two things, first, using the trademark itself, and second, giving permission to other parties to use the mark. An exclusive right is not a monopoly that is prohibited as unfair competition as referred to in Law Number 5 of 1999 concerning Monopoly and Unfair Competition, but rather it is a special right in the context of giving respect and incentives for developing intellectual power for a healthy competition and welfare Public.

In brand law there is a doctrine or doctrine of equality that arises relating to the function of the brand, which is to distinguish between goods or services from one another. There are two teachings of equality in a brand, namely the Doctrine of Overall Equation, and the Doctrine of Identical Equations.

According to the doctrine of overall equality, brand equality is established on the principle of similar entreties which means that one brand with another has an overall equation that includes all relevant factors that are optimally related to the equation. The doctrine of identical equality has a broader and more flexible understanding, that to determine whether there is a brand equation there is no need for all elements to be cumulatively the same, but that only a number of relevant elements or factors are the same so that they are seen between two brands that are compared identical or very similar. So according to this doctrine between one brand and another there are still differences, but the difference is not prominent and does not have a strong distinguishing force so that one with the other is similar then it can already be said to be identical.

The equality doctrine adhered to in Law Number 20 Year 2016 can be seen in Article 6 Paragraph (1) which states: An Application must be rejected by the Directorate General if the Mark:

- a) have similarity in principle or in whole with Trademarks owned by other parties that have been previously registered for similar goods / services;
- b) have similarities in principle or in whole with other well-known Trademarks owned by other parties for similar goods and / or services;
- c) have similarities in principle or in whole with known geographical indications;

Furthermore, Article 6 paragraph (3) states: The Application must also be rejected by the Directorate General if the Mark:

- a) constitutes or resembles the name of a famous person, photograph, or the name of a legal entity owned by another person, except with the written consent of the entitled person;
- b) is an imitation or resembles the name or abbreviation of the name, flag, symbol or symbol or emblem of the state or national or international institution, except with the written approval of the authorized party;
- c) is an imitation or resembles an official mark or seal or stamp used by the state or Government institution, except with the written approval of the competent authority.

The teachings of equality in the Law as mentioned above are presented in words or sentences 'equality in essence', 'equality in its entirety', 'is', 'is imitation' and 'resembles'. The Trademark Law does not provide meaning and understanding to distinguish these words, but provides several factors as elements that can give the appearance of equality as described in the explanation of Article 6 of the Trademark Law, namely:

- 1) Equation of forms
- 2) Equation of composition or placement
- 3) Research equation
- 4) Sound equation
- 5) Equation of speech
- 6) Equation of a combination of elements

By looking at the formulation of the Act, the intention of the Lawmakers is that the Law adheres to the doctrine of identical equality, namely that the existence of similarities in whole or in essence is interpreted to be identical (the same).

In Article 3 of Law Number 20 Year 2016 it is stated that trademark rights are granted to registered trademark owners, thus it is clear that the trademark system used in Indonesia is a constitutive (active) system so that registered trademark owners are holders of trademark rights. The trademark owner is registered as the trademark holder using the mark itself or giving permission to other parties to use it. Furthermore, in articles 40 and 41 of the Trademark Law No. 20 of 2016 it is stated that trademark rights can be transferred according to the provisions of the Act.

Legal protection based on the first to file principle system is given to holders of registered trademark rights that are in good faith preventive and repressive. Preventive legal protection is carried out through trademark registration, and repressive legal protection is provided if trademark violations occur through civil lawsuits and criminal charges by reducing the possibility of resolving alternatives outside the court.

2. Alternative Collective Brand Legal Protection To Reduce Business Competition

A brand is a sign in the form of a picture, name, word, letters, numbers, color arrangement, or a combination of these elements which has the power of differentiation and is used in trading or service activities. In this case, trademarks can be divided into two types, namely trademarks used on traded goods, and service marks used on traded services.

From the consumer's point of view, a brand can be a marker of a product that shows the origin of the producer, so that he can choose certain products from that producer, among other similar products. The selection of products based on the brand can be done because of the successful marketing of the product, reputation owned by the manufacturer (good will), quality assurance of the product, or even based on consideration that the product meets consumer tastes. So, sometimes it can attach a certain image in the eyes of consumers to a brand of a product.³ The image is related to the reputation of the product or manufacturer, and consumers can be loyal to continue to buy or use products with the brand because of the reputation or image that is built.

Meanwhile, with regard to Collective Marks, the Trademark Law states that Collective Marks are Marks that are used on goods and / or services with the same characteristics that are traded by several people or legal entities together to distinguish them from other similar goods and / or services. The Collective Brand Classification does not make any of the three types of brands. There are only two types of Marks, namely Trademarks and Service Marks. The difference in Collective Trademarks lies in the subjects of the trademark users, that is, may be collectively, while Trademarks or Services are usually used by individuals. Collective Marks may be used by several people (a combination of people) or may also be a legal entity (a joint corporation).

According to the WIPO IP Handbook, Collective Trademarks are usually owned by an association or company, whose members can use the Collective Trademark to market their products. Usually the association establishes a set of criteria for entrepreneurs who want to use the Collective Mark (for example quality standards), which makes it possible for individual entrepreneurs to fulfill them. Collective Brands are an effective way to jointly market products produced by a group of entrepreneurs who may find it difficult to get consumer recognition and / or the confidence of the major distributors of their products when using their own brands.⁴

By registering Trademarks with the Directorate General of Intellectual Property Rights (“DJHKI”), employers can obtain Trademark rights. Trademark rights are exclusive rights for a certain period for trademark rights holders to be able to use the mark themselves or give permission to other parties to use it. The Trademark Law adopts a constitutive system, whereby the protection of trademark rights is given to the party who first registers. In this case, the exclusive right to use the Mark is granted because of registration (required by registration). The Trademark Law stipulates that the registration must also be based on good faith. This arrangement is intended to protect the trademark owner who is not registered, if there are other parties who register a trademark that is similar or the same as the trademark of the first owner. Under the provisions of the Trademark Law, registration can give exclusive rights to trademark owners to prevent other parties from marketing products that are identical or similar to products from the employer concerned by using the same trademark as the entrepreneur, or which can confuse consumers because of a similarity or similarity to the Mark.

The application for registration of a collective mark is generally the same as the registration of an ordinary mark. It's just that in the application for registration of a Collective Mark, there must be a statement containing confirmation that the Mark will be used as a Collective Mark. In addition, the application for registration must also include a copy of the rules on the use of the Mark as a Collective

³ Ihsan Budi Maulana, Ridwan Khairandy and Nurjihad, *Kapita Selekta Hak Kekayaan Intelektual I* (Yogyakarta: Pusat Studi Hukum UII, 2000), p. 114-115

⁴“Intellectual Property for Business Series Number 1:Mem buat Sebuah Merek”,

http://www.wipo.int/export/sites/www/sme/en/documents/guides/translation/making_a_mark_indo.pdf, July 4, 2013.

Mark signed by all trademark owners concerned.⁵ Such matter is regulated in Article 50 paragraph (2) of the 2016 Trademark Law, which reads:

“In addition to the affirmation regarding the use of the Collective Mark as referred to in paragraph (1) the Application must be accompanied by a copy of the terms of use of the Mark as a Collective Mark, signed by all trademark owners concerned.”

This requirement constitutes the Regulations on the use of the collective mark applicable to each party participating in using the Collective Mark concerned. It is intended that the quality and reputation of the products and / or services offered by the Mark concerned can be maintained. Regulations on the use of collective marks must contain: (a) the nature, general characteristics or quality of the goods or services to be produced and traded; (b) arrangements for the owner of the Collective Mark to exercise effective control over the use of the Mark; and (c) Sanctions for violations of regulations regarding the use of Collective Marks.

As with the requirements, procedures for submitting applications for registration, examination of completeness and substantive examination as well as registration of Collective Marks, are fully compliant with the provisions on registration of ordinary Marks. If the Trademark Inspector concludes that the application for registration as a Collective Mark can be approved, the Trademark Office will record the Mark in the General Register of Marks by attaching a copy of the rules for the use of the Collective Mark. Then, the registration of the Collective Trademark along with a copy of the rules of use will be announced in the Official Gazette of the Trademark. The difference between recording the registration in the General Register of Marks and announcements in the Official Gazette of Marks between an ordinary Mark and a Collective Mark lies only in the “attachment”. In Collective Marks, registration records and announcements must attach to the copy of the rules of use of the Collective Mark. The period of legal protection or the period of protection for ordinary trademark rights and Collective Trademark rights is the same, which is 10 years, and can be extended. Then, in the Collective Trademark certificate, the agenda number code and certificate number are basically the same as ordinary Trademark. However, in the column the name of the registered owner is written all the owners of the Collective Mark that are listed in the application for the Mark registration.

Basically, ordinary Marks or Collective Marks are not required to be registered. However, if the owner of the Mark wants to get protection of the “mark” used in his trading activities, the mark as the Mark must be registered. As stated earlier, registered Marks obtain exclusive rights to prevent the use of Marks by other unauthorized parties. In accordance with the provisions that the trademark rights are given recognition by the state, then the registration of the Mark is a must if he wants to be legally seen as a party entitled to the Mark. Trademark registration will provide stronger protection especially when dealing with identical or similar trademarks. For the party registering the Mark, there is a legal certainty that he is entitled to own and use the Mark. On the other hand, for other parties who try to register the same or similar trademark as a registered mark for similar goods or services, DJHKI will reject the registration.⁶

From the description above, if it is associated with business competition, then by registering its trademarks together and used collectively, the collective brand holders will have a shared responsibility to always maintain the quality and brand name of the brand. Because if one of the collective brand

⁵ WIPO menyebut peraturan penggunaan Merek Kolektif sebagai “*The Regulation Concerning the Use of Collective Mark*”.

⁶ Drs. Muhammad Djumhana dan R. Djubaedillah, *Hak Milik Intelektual: Sejarah, Teori dan Prakteknya di Indonesia* (Bandung: Citra Aditya Bakti, 2003), p. 175.

owners does not maintain the quality of the goods, they will jointly bear the risk, that is, the good name of the brand will be tainted and damaged.

In addition, efforts to drop the price of each other will not occur because they have agreed to sell at the same price, so that it will prevent unhealthy competition by mutually dropping prices of goods.

Conclusion and Recommendation

Conclusion

1. Collective Brand Regulation has been regulated in Brand Law No.20 of 2016 concerning Trademarks. However, people's understanding of the Trademark law is still lacking so that people do not register their brands individually or collectively.
2. Collective Brand Registration can be used as an alternative legal protection for trademarks for handicraft industry in NTB, but the fact is that the majority of small scale industry craftsmen in NTB have not received legal protection because they have not been registered at the Directorate General of Intellectual Property Rights as regulated in Law Number 20 Year 2016 Concerning Brand. So the use of a collective mark can be used as an alternative to legal protection for the collective brand of the woven fabric industry. Using collective brands and joint marketing can reduce the level of unfair business competition among the fabric industry owners in NTB.

Recommendations

1. In order to increase understanding of the importance of protecting Intellectual Property Rights, especially legal protection for brands, more information dissemination and legal counseling, especially for the tourism industry business owners, by the Regency Government or related parties such as the Department of Industry and Trade so that craft business owners in NTB are more understanding and realizing the importance of legal protection of trademarks so that they can register their trademarks.
2. The need for strict law enforcement and criminal sanctions and civil sanctions for trademark violators so that the perpetrators feel deterrent and do not reoccur so that they realize the importance of legal protection for their trademarks and Intellectual Property Rights in general. legal protection of Intellectual Property Rights in the area by allocating the Regional Revenue Expenditure Budget for the management of Intellectual Property Rights to be protected by law.

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