

Legal Analysis of Ambiguity of Trademark Registration in Indonesia

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Abstract: *The purpose of this research is to overcome dual identities or brands that have similarities in principle or in whole for similar and/or dissimilar goods or services that go side by side where the ownership rights are obtained through trademark registration or through a decision from the Supreme Court which is protected by law. as the identity of the goods and/or services being traded. The research method used is normative juridical. The formulation of the problems in this study are: 1. How is the regulation of trademarks that are rejected for registration that have similarities in principle or as a whole; 2. How to set a registered mark with a second identity. The findings of this research are based on Law Number 20 of 2016 concerning Trademarks and Geographical Indications (MIG) where trademarks are denied registration on the grounds of equality in principle and/or in whole for similar goods or not similar to other marks registered in bad faith belonging to other parties and the need for a second identity of a registered mark and/or a well-known mark in dealing with marks that are similar in principle and/or in whole that run side by side and required legal protection for registered marks to obtain legal certainty and there needs to be a scientific study of the proposed identities of the two brands.*

Introduction

Trademarks according to Article 1 Paragraph (1) Law Number 20 of 2016 concerning Trademarks and Geographical Indications(MIG) which determines that a mark is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, in 2 (two) dimensions and/or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more of these elements to differentiate the goods and/or services produced by a person or entity law in trading activities of goods and/or services (Government of the Republic of Indonesia, 2016).

Brand is one of the important attributes of a product, where the brand of a product can provide added value to the product. Brand is not only a name

for a product, but more than that it is an identity to differentiate from products produced by other companies. With a special identity, certain products will be more easily recognized by consumers and in turn will certainly make it easier to repurchase the product (Kotler & Keller, 2009). A brand is an identification mark that distinguishes one person's property from another, such as the use of a stamp and other signs that have differentiating power so that they can distinguish one person's goods or property from those of others who have something in common (Adisumarto, 1989). Brand is essentially an identity for traded goods or services that differentiates one product/service from another.

Why is the brand important? As mentioned above, a mark is an identity for the goods/services being traded so that people who buy it are easy to distinguish one identity from another. Therefore, the mark must obtain legal protection in its trade and this legal protection is obtained by way of registration. The principle of legal protection for brands is first to file where the first registrant is protected and this applies to registered marks and exemptions for well-known brands. (Government of the Republic of Indonesia, 2016). The superiority of well-known brands is very dominant with their recognition in world trade (WTO and world agreements regarding brands).

The brand is very important because it is the identity of a product/service that is traded and even becomes a very valuable asset and can be valued for the total amount of assets, even more than a company. (Djati, 2005). Brands can also be used as collateral in banks (Government of the Republic of Indonesia, 2022).

Previously, the Indonesian trademark law adhered to the first-to-use principle, namely the trademark law, Law No. 21 of 1961. In the declarative system itself focuses on the first user (first to use). On this principle, the party that first uses the mark is entitled to legal protection (same as the rights attached to copyright) and registration is only a formal legal form for the mark of goods or services being traded and ownership of the mark used is entitled until there is evidence. on the other hand (Gautama & I, 1997).

Quoting Saidin's opinion, in a declarative system, the person entitled to a mark is not the person who has formally registered the mark, but must be the person who actually uses or uses the mark. People who really use and use the mark cannot be stopped by other people just like that, even if the latter person registers the mark. In the declarative system itself, a person who does not register his trademark is still legally protected (Saidin, 2014).

The first-to-use trademark protection system or declarative system is a protection system that gives exclusive rights to the first commercial user of a mark in a certain area, even though the user of the mark has not submitted an application for registration to use the mark commercially.

The United States and Canada are countries that adhere to a first-to-use system where trademark applications in the United States can be submitted based on the use of the mark for the first time commercially or the intention to use the mark in the future. and for applicants who apply for a mark with 'intention to use the mark' in the first-to-use system, they must show proof of the use of the mark on the market (Statement of Use) within a predetermined period of time, namely:

1. Before the trademark application is approved for publication;
2. Within a period of six months after the trademark application is notified to be registered (Notice of Allowance); And
3. During the extension period for submitting a Statement of Use, if within a period of six months it is not fulfilled.

Thus, the first-to-use system creates an assumption that trademark protection does not need to wait for the proposed trademark to be registered at the local trademark office, by proving declaratively that the party is the first party to use the related mark, then the party is recognized as the entitled party. on the brand(Kusumah, 2022).

Why basic *first to use* used because many registered marks register brands for goods or services (first to file) which include all goods of the same kind even though they are not used or traded so that other people wish to use a mark that has similarities in principle or in its entirety for goods or services of the same type or not rejected for registration at the Director General of Intellectual Property Rights and this is very detrimental to those who wish to use the mark.

In contrast to the first-to-use principle, the first-to-file brand protection principle is also called the constitutive system, namely the trademark protection (rights) system for the party that first registers the mark. The first-to-file principle provides legal certainty for trademark owners and makes it easier to prove ownership for the first time that is entitled to a registered mark.

Indonesia adhering to the first to file system in the legal protection of trademark ownership which can be seen in the MIG Law No. 20 of 2016 in Article 1 number 5 can also be seen in Article 3 where the rights to the trademark are obtained after the mark is registered, where the right is an exclusive right granted by country, MIG Law Article 1 (5)(Government of the Republic of Indonesia, 2016). The rights to the mark granted by the state are monopoly, meaning that only the brand holder can use it and prohibits other parties from using the mark without the permission of the brand owner.(Government of the Republic of Indonesia, 2016).

Article 21 of the MIG Law states that an application is rejected if the Mark has similarities in principle or in its entirety with: a registered mark belonging to another party or was applied for in advance by another party for similar goods and/or services, a well-known mark belonging to another party for goods and/or services similar, well-known mark owned by another party for goods and/or services that are not of the same type that meet certain requirements(Government of the Republic of Indonesia, 2016).

Even though the rules in the law are clear, in reality many registered brands have similarities in essence or the whole if traced in the brand database owned by more than one party for well-known brands or registered brands, such as the brands Aple, BMW, Mercy, IKEA, Monster, Essensia, Baby, Indo, Aqua and many other brands that run side by side with each other with different ownership(Directorate General of Intellectual Property, 2022a).

Another problem about the base *first to filesis* by first to use but does not register the brand such as the Citayam Fashion Week brand which is a controversy where there are parties who filed for cancellation besides that there are parties who submitted applications such as the artist Baim Wong through PT Tiger Wong Entertainment, Indigo Aditya Nugroho, Daniel Handoko Santoso and PT Textile Palek Industry with the Citayam brand only. Of the four applicants, Baim Wong and Indigo Aditya Nugroho have filed for withdrawal (Indraini, 2022).

Based on the description above, there are interesting main issues to study, namely how regulation of marks whose registration is refused which are similar in principle or in whole; and how to set a registered mark with a second identity.

Research Methods

Research method is a scientific way to obtain data with the aim of being able to describe, prove, develop and discover knowledge, theory, to understand, solve and anticipate problems in human life which is a scientific activity carried out using careful and systematic techniques (Sugiono, 2012; Surakhmad, 1997).

The research method used in this research is qualitative where a way or research method that emphasizes analysis or descriptive. In a qualitative research process things that are subject perspectives are emphasized and the theoretical basis is used by researchers as guides, so that the research process is in accordance with the facts encountered in the field when conducting research with the aim of explaining a phenomenon in depth and is carried out by collecting as deep data as possible. inside.

Whereas Normative legal research in this study is a legal research method with a statutory approach by examining and understanding laws and regulations and understanding the implications for the legal protection of a brand and the approach used is a conceptual approach, namely looking for principles -principles, principles and doctrines related to this research.

Result and Discussion

Intellectual property rights

Much-cited theory in books and research on Intellectual Property Rights (IPR) is the Natural Rights Theory. The theory of natural rights originates from the theory of natural law. Adherents of natural law theory include Thomas Aquinas, John Locke, Hugo Grotius. According to John Locke stated that: "by nature humans are moral agents. Humans are mental substances and rights, the human body itself is actually the human wealth concerned. (Irawan, 2011).

The main thing that is attached to humans is the freedom they have. Humans with the freedom they have are free to take action. Even so, freedom is not as free as it could be, but it is still tied to aspects of morality and freedom that other people also have. Freedom makes humans more creative in processing their lives, utilizing their minds to make or create something that is useful for themselves and for many people. The effort to utilize the

work of the brain is what produces a new creation, design or invention and then naturally and automatically becomes the property of the creator, designer or inventor. At the same time, they also have the right to take advantage of it, both economically, socially and culturally. On the other hand, other people are obliged to respect the rights that arise (Irawan, 2011).

One of Locke's critics was George Berkeley, a bishop from Ireland. For Berkeley Locke's material substance is out of mind, a myth in Berkeley's view, although Berkeley does not reject Locke's view of ideas and even emphasizes it. For Berkeley, what we know directly, color, sound, taste, resistance, pain, pleasure, joy, loneliness, distress, the vastness of all this is the content of consciousness which is an idea. (Hadi, 1994). Berkeley actually questioned Locke's secondary and primary qualities by asking Locke a question, when does a person experience primary qualities without secondary qualities? Because they are experienced equally and experienced differently they are all ideas. For Berkeley there is no basis in Locke's experience for giving any special objectivity to the idea of primary qualities. How can we discover which ideas are good imitations of reality. Berkeley posed a fundamental question that Locke found difficult to answer: how can we compare our ideas with the original if we have never grasped the original but only the idea. However Locke was a representationalist realist (Hadi, 1994).

Meanwhile Stebbing, Lean and Wittgstein highlight the issue of primary and secondary qualities of Locke which is actually a linguistic mess due to the encouragement of scientists who impose the primacy of scientific language. For Stebbing, many parties today tend to agree with the solution presented by analytic philosophers who see the whole problem primarily as a linguistic mess. Their approach bears a resemblance to Ayer's. But Stebbing considers the importance of common opinion and the various opinions talk about the data of experience that coexist rather than argue that their opinions can be translated into other languages (Hadi, 1994).

There are so many people in this world from ancient times to the present where the past did not leave records so how to determine whether a person's idea is not the same as one another just because it is registered one way or another. According to this research, the identity of the two brands is needed to differentiate one brand from another, even though the brands have similarities in essence. This idea is new and needs further attention and study.

The reasons for brands having similarities in essence or overall

In addition to the reason for the purity of the idea that was first owned by someone whose truth is difficult to verify due to weaknesses in documentation between different eras as well as between places that stretch far apart, there are the use of a brand that is a family name, a person's name especially an abbreviation, such as: BMW, ABC, KFC, SMS, Tajima, Gunawan, Ayu, Joko, Bensus, Tiara and many others. Thus what is registered as a brand is a description of goods or services such as: baby, coffee, shop, Aqua, Eat and many others (Directorate General of Intellectual Property, 2022b).

Another reason for a commercial court lawsuit that was filed by a well-known mark against a registered mark was won by the registered mark on the basis of a legal agreement. The development of the Panel of Judges of the Supreme Court is:

1. Well-known brands that have not been used for 5 (five) consecutive years, such as the IKEA brand
2. Expiration of the lawsuit filed, such as the Monster Energy brand (Pengadilan Negeri Jakarta Pusat, 2015)
3. Goods/services of different types, such as the BMW brand (Mahkamah Agung Republik Indonesia, 2016a)
4. Not a well-known brand or name, such as Van, Cinnamon, Samgong Gear brands (Mahkamah Agung Republik Indonesia, 2013, 2016b; Pengadilan Negeri Jakarta Pusat, 2019)

In principle *first to file* there are several weaknesses in its implementation, among others in the case of well-known marks that no longer apply this principle in their registration in a country so that there are many well-known trademark lawsuits against registered marks. Another drawback in cases *squatting* happened in China when a technology company from the United States Apple iPhone brand registration was rejected on the grounds that it had been done in advance by a local Chinese company. A similar case was also experienced by a company from the United States which is well-known for its coffee products and its Starbucks Corporation outlets cannot use the trademark in Russia. (Aidi & Justitia, 2016).

From the various cases above, did the starch of these brands which have similarities in principle or are wholly owned by more than one party or can coexist in trade in the community and of course there is confusion which is the original quality brand that is produced or traded either by individuals or legal entities.

Proposed second identity of a brand

In various discussions, it has never been discussed in resolving trademark disputes between registered brands or with well-known brands, it has never been proposed that a second identity for a mark is needed with the aim of being clearer about the goods purchased or services used by the public.

It needs to be thought about, discussed the existence of a second identity for a brand in its trade so that people are not confused as well as so that there are not many promotions of an item, while the second identity of a brand can be in the form of the name of the manufacturer/company that trades the goods or services or the second identity can be in the form of a description of the product.

If the proposed identity of the two brands is needed and considered important then it needs to be prepared implementing regulations, namely changes in the law on marks so that legal certainty and legal protection of trademark ownership can be implemented.

Conclusion

From the discussion of this research, it can be concluded that the regulation of trademarks that are rejected for registration is if the marks have similarities in principle or as a whole, but in practice it is found that many brands that have similarities in principle or as a whole run together and side by side so that there is a feeling of irregularities between the regulations and their implementation.

To overcome the above and overcome confusion in the community because there are brands that have similarities in principle or in whole for similar or dissimilar goods/services, it is necessary to identify the two brands, which can be in the form of the name of the manufacturer or company that trades the goods or services or can be in the form of the name description of the product or service.

Recommended for Trademark observers, Intellectual Property Rights consultants, academics and the Director General of Intellectual Property Rights to be able to review the above proposals in scientific studies in dealing with brands that have similarities in principle or in its entirety.

This initial research needs further research and study so that it is beneficial for the advancement of the Indonesian people's economy by expanding the protection and legal certainty of trademark rights.

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