
RESEARCH ARTICLE

Legal Protection for the Public against the Circulation of Counterfeit Goods

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ABSTRACT

The purpose of this study is to analyze the legal protection for the community against the circulation of counterfeit goods. The research used a normative juridical method. The results showed that; 1) legal protection against the circulation of counterfeit goods can be carried out based on criminal, civil and administrative law. Trademark infringement in the form of brand counterfeiting is further regulated in Law Number 20 of 2016 concerning Trademarks and Geographical Indications. In more detail, the act violates the Criminal Provisions of Article 100, Article 101 and Article 102. While the use of a trademark is without rights, it can be sued based on an act of violating the law in accordance with Article 1365 of the Civil Code. Administratively, it can be reviewed based on related laws, for example, in online transactions referring to Law Number 11 of 2008 concerning Electronic Information and Transactions. 2) Obstacles in legal protection against counterfeit goods dealers are a) Violation of counterfeiting goods constitutes a complaint offense so that it requires an active role from the brand owner, b) limited information to the public (consumers) on the existence of a trademark registration application. c) Difficulties of trademark rights holders to find the perpetrators of trademark infringement. d) The existence of a lawsuit from the owner of the brand rights will worsen the reputation of the product, e) Awareness of the law and legal culture of the community.

KEYWORDS

Legal protection, counterfeiting of goods, copyright, brand, society

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1. Introduction

Indonesia is a developing country and has the largest archipelago in the world with abundant natural wealth potential, and until now still continues to carry out improvements to the country's economic development. An actual development gaining attention in recent years is the increasingly widespread currents of globalization in the social, economic, cultural and other spheres of life. This development occurs due to the factors of changes in society that continue to develop rapidly with the times. The cause of changes in society is the development of technology and information, which has made the activities of the trade sector increase rapidly and has even placed the world as a common single market. Brands have an important role in the development of trade. A brand is a representation of a product of goods and services so that a brand has a value that depicts the goods and services. The role of brands in the Indonesian economy can create healthy business competition.

The brand is part of the intellectual property protected by the state. One form of protection is contained in the existence of No. 20 of 2016 concerning Brands. A brand, as defined in the Trademark Law, is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more of these elements to distinguish goods and or services produced by people or legal entities in the activities of trading goods and/or services.

The brand, as an identifying mark of a product, consists of a name, term, emblem, symbol, color, motion or combination of such things. A brand is an identity picture that distinguishes a product from other products. The brand is used as a means of promotion,

guaranteeing the quality of goods and showing the origin of goods and services. A good and well-known brand is a valuable asset for brand owners. The industry of goods and services, with the development of advertising, makes the brand even higher in value. Brands that are supported by advertising media give brand owners the ability to stimulate consumer demand while maintaining consumer loyalty to the products produced.¹

The brand is one of the Intellectual Property Rights, which is basically a sign to identify the origin of goods and services (*an indication of origin*) of a company with the goods and services of other companies. Through brands, entrepreneurs can maintain and provide *guarantees of equality of* goods and services that produce and mediate competitive actions from other bad-faith companies that want to tarnish their reputation. The brand is one of the elements of Intellectual Property Rights. Intellectual Property Rights is a private legal right that rewards intangible human contributions that will be used to produce a technology of a special nature.²

Trademark law adheres to complaints where reports and complaints from the brand owner are required to law enforcement officials to take legal action on brand budgeting. One of the forms of violations in the brand is the forgery of goods. This counterfeiting activity is increasingly rampant in the community because of the increasing demand, so brand owners feel overwhelmed by this item counterfeiting activity. The brand owner must be active in controlling brand infringement; this is because the brand owner is the only party who can make reports, so it is considered less effective and maximum to guarantee the goods in circulation.

By law, in fact, the owner of a registered mark has exclusive rights relating to his mark, which gives him the right to use the mark and prevent unauthorized third parties from using the mark, using the mark, or a confusingly similar mark, as well as preventing consumers and the public in general from being confused. At this time, claims for brand disputes are made³ based on complaints. In this case, it means that the original brand holder must make a complaint about the imitation product if the dispute is to be processed legally. This brings its own problems considering the massive industry of trading in imitation products that does not allow for genuine brands to report them one by one, so it is quite difficult to minimize or stop the circulation of these counterfeit products.⁴

2. Discussion

2.1 Legal Protection for the Public against the Circulation of Counterfeit Goods

Economically, utilizing well-known brands brings considerable profits, and the facts in the field prove this; besides that, it is also supported by the purchasing power of consumers who are mediocre but want to look trendy. There are many ways to meet lifestyle needs. One of them is to buy branded goods. Goods with this brand are, of course, always priced at a high price. Finally, people often cut corners by buying fake versions of the brand to keep it looking stylish.⁵

Genuine but fake *luxury goods* products such as hanphones, clothes, pants, jackets and various other accessories are very easy to get and are found in big cities; their circulation also extends from street vendors to prestigious shopping centers. One of the attractions of counterfeit branded products does lie in their very low prices. The circulation of asphalt goods is also accompanied by the use of these goods by consumers. Consumers who put forward a lifestyle never look at the goods used as genuine or fake, but what is seen is goods of the same brand, and the price is affordable.⁶

Counterfeiting of goods is a violation in the field of trademarks regulated in Law Number 20 of 2016 concerning Brands and Geographical Indications. Criminal offenses on a brand are complaints, so reports from the brand owner and licensee are needed to be able to enforce the law. Law enforcement officials in counterfeiting goods will not enforce the law if the owner of the brand does not report it. Counterfeiting a brand is also considered to violate the creator's human rights. Because in the Universal Declaration of Human Rights, article 27 reads that "*everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*" All people deserve the right of moral and material protection for the profit from what they create because they are the creators."

¹ Rahmi Janed, *Brand Law* (Jakarta: Prenada Media Group, 2015).Pp. 4

² Andrian Krisnawati and Gazalba Sakeh, *Protection of New Plant Variety Rights In The Perspective Of Patent Rights And Plant Breeding Rights* (Jakarta: PT. Raja Grafindo Persada, 2004).Pp. 14

³ WIPO, *WIPO Intellectual Property Handbook* (WIPO Publication, 2008).Pp. 14

⁴ Abi Jam'an Kurnia, "Can Brand Infringement Be Processed Without Complaints?," 2021, <https://www.hukumonline.com/klinik/detail/ulasan/cl7063/apakah-pelanggaran-merek-bisa-diproses-tanpa-pengaduan/>.

⁵ Meltalia Panjaitan, "A Juridical Analysis of Law Enforcement on the Use of Goods Wearing Imitation Marks (A Review of the Legal Cultural Aspects of The User Society)," *UNTAN Law Journal* 1, no. 1 (2014).

⁶ Firmansyah Hery, *Legal Protection of Trademarks. Mold L.* (Yogyakarta: Pustaka Yustisia, 2011).Pp. 29

Law Number 20 of 2016 concerning Brands and Geographical Indications. In more detail, the acts are subject to the Criminal Provisions of Article 100, Article 101 and Article 102. Article 103 regulates criminal acts as referred to in Articles 100 to 102 are complaints. The complaints contained in Article 100, Article 101 and Article 102 are relative complaints. Relative complaints mean that the crimes committed, which are not actually complaint crimes, but specifically for certain things, are actually needed as complaints and can only be processed if there is a complaint or report from the person who is the victim of a criminal act.⁷

The concept of the legal protection of brand rights refers to the nature of brand rights that are *exclusive*. Such special rights are monopolies meaning that they can only be exercised by the owner of the mark. Without the permission of the brand owner, others may not exercise special rights. If there is another party who uses this special right without the permission of the owner of the trademark rights, then there has been a violation that can be subject to certain sanctions.⁸ The *Paris Convention for the Protection of Industrial Property* was the first convention on IPR in 1883 in Paris, where brand protection began to be regulated internationally. This convention is a very important international convention in the field of IPR because it lays the foundations for the protection of IPR and provides a guideline for the scope of IPR issues for states in the world.⁹

Related to criminal legal protection, namely by providing punishment to whoever has committed crimes and trademark violations as regulated in Article 100 of the Trademark and Geographical Indication Law. Article 100 of the Trademark Law basically provides a maximum prison sentence of five years and/or a maximum fine of one billion rupiahs to whoever intentionally and without the right to use the same mark in its entirety as the registered mark of another party for a similar goods and/or services produced and/or traded.

Related the sale of counterfeit branded goods online is associated with Articles 46, 47, and 49 of Government Regulation No. 82 of 2012 concerning the Implementation of Electronic Systems and Transactions, which states as follows: In article 46 of Government Regulation No. 82 of 2012 concerning the Implementation of Electronic Systems and Transactions states that electronic transactions carried out by the parties provide legal consequences to the parties and subsequently which is the implementation of Such electronic transactions are carried out must have a good faith, transparency, the principle of prudence, accountability, and fairness.

Article 47, paragraph (1) of Government Regulation No.82 of 2012 concerning the Implementation of Electronic Systems and Transactions states that electronic transactions can use electronic contract references or other contractual forms as a form of agreement carried out by the parties. Furthermore, In paragraph (2), there is a contract between the parties that is deemed valid if: a) there is an agreement between the parties; b) carried out by a capable legal subject or who is authorized to represent in accordance with the provisions of laws and regulations; c) there are certain matters; and d. the object of the transaction must not conflict with laws and regulations, decency, and public order.¹⁰

Article 49, paragraph (1) of Government Regulation No. 82 of 2012 concerning the Implementation of Electronic Systems and Transactions confirms that business actors who offer products through electronic systems are required to provide complete and correct information related to the terms of the contract, manufacturer, and product offered. Furthermore, in paragraph (2), it is further emphasized that business actors are required to provide clarity of information about contract offers or advertisements. If the goods received are not in accordance with the promised, then Article 49 paragraph (3) regulates that business actors are required to give a time limit to consumers to return the goods sent if they are not in accordance with the agreement or there are hidden defects. In addition, consumers can file a civil lawsuit under the pretext of default on the sale and purchase of the goods to business actors if the goods received are not in accordance with what was agreed at the beginning and in the provisions in the photo.¹¹

Civil legal protection is also provided to the rightful holder of the mark. If the trademark rights have been held, then according to the Indonesian brand legal system, the holder of the brand will get legal protection. This means that if there is a violation of the rights to the mark, the brand holder can file a lawsuit against the other party who violates the rights to the mark. This lawsuit is aimed at obtaining damages and termination of all acts relating to the use of the mark.

⁷ Janed, *Brand Law*.Pp. 4

⁸ Agung Sudjatmiko, "Legal Protection of Trademark Rights," *Yuridika* 15, no. 5 (2000).Pp. 349

⁹ Oka Saidin, *Legal Aspects of Intellectual Property Rights* (Jakarta: PT. Raja Grafindo Persada, 1995).Pp. 7

¹⁰ Suwari Akhmaddhian, "Legal Protection of Consumers in Indonesian Electronic Buying and Selling Transactions," *Journal* 3, no. 2 (2016).Pp. 46

¹¹ I Made Mahartayasa Belly Riawan, "Consumer Protection in Online Buying and Selling Transaction Activities in Indonesia," *Kertha Semaya* 3, no. 1 (2015).Pp. 3

The use of a mark without rights can be sued based on unlawful acts (Article 1365 of the Civil Code), namely "Any unlawful act, which brings harm to another person, obliges the person who for his fault published the loss, to compensate for the loss". As a party, the plaintiff must prove that he, due to the unlawful acts of the defendant, suffered losses felt by the manufacturer or entrepreneur of the right holder to the well-known brand. As an aggrieved party, of course, the rights holders of well-known brands will take legal action to resolve cases of trademark infringement. This is so that brand infringers will no longer use a brand that resembles the point or the whole of a well-known brand or even stop their production activities. Trademark infringement, in addition to being regulated in the Trademark Law, can also be subject to sanctions that can be reviewed by criminal, civil, and administrative laws.¹²

Brand owners have a very important role in the circulation of counterfeit goods to the community. This is due to the nature of complaints on the brand, which results in the need for a complaint or report from the brand owner to be able to act on violations of this brand. In case of trademark infringement, law enforcement cannot conduct an investigation if there is no complaint. Complaints from brand owners can be included with reports from the public as consumers to the authorities. From the report, law enforcement officials will conduct an investigation into whether there is a brand violation to check between real goods and counterfeit goods; law enforcement officials will be assisted by PPNS IPR in terms of testing.¹³

2.2 Obstacles in Legal Protection for the Community against the Circulation of Counterfeit Goods

Society, as a subject of law, certainly has a very important role in the process of achieving legal goals. Bringing out the nature of a law-conscious society is certainly a process that is not easy. Here the public, especially consumers, has a very important role in the process of circulating counterfeit goods traded in the market.¹⁴ As many as 17 out of 20 people claimed to benefit from the presence of counterfeit goods/goods from brand violations that were traded in the market. Those who are mostly consumers who have a lower middle economy feel that with the existence of counterfeit goods that certainly have a lower price than genuine goods, they can still follow the lifestyle of today's people who tend to be oriented towards well-known brands without worrying about the quality of these goods.¹⁵

The role of society as a consumer is certainly very important with regard to law enforcement in cases of brand infringement. Based on the facts in the field, there are various responses regarding brand infringement cases, both in the form of positive responses and negative responses, which are certainly influenced by the level of education, level of welfare/socioeconomics, environment and knowledge in the field of brands. A positive response or supportive nature from the community is the attitude of the community that the sale of counterfeit goods is a violation of the law that must be strictly acted upon and suppressed in circulation. While the negative responses or attitudes that hinder the community are, among others: the view of the public that considers brand infringement is a common thing, brand violations do not always harm consumers; sometimes, brand violations even benefit consumers where consumers can use well-known branded goods at low prices.¹⁶

Several factors can hinder the implementation of law enforcement against the circulation of counterfeit goods, namely:

1. Limited information to the public (consumers) on the application for trademark registration. Where the announcement of the registration of the mark is only lasting for 3 months, which is not known to everyone even though the announcement has been published, and other difficulties determine when the grace period is calculated. As a result, the rights holders of famous foreign brands were surprised when registering their marks because the marks had already been registered by other parties.
2. Difficulties of the rights holders of well-known brands to find the perpetrators of brand infringement Where products from violations of famous foreign brands are traded on the market and do not list the identity of the creator.
3. This internal weakness is due to the limited ability of the directorate general of trademarks from socio-economic and intellectual so that the brands that are registered later with the trademarks that have been registered can be accepted for registration.

¹² Muhammad Djumhana and R Djubaedillah, "Intellectual Property Rights of History, Theory and Practice in Indonesia Revised Edition," *Third Printing, Bandung: Pt Citra Aditya Bakti*, 2003.Pp. 93

¹³ Rachmadi Usman, *Intellectual Property Rights Law* (Bandung: PT. Alumni, 2003).Pp. 377

¹⁴ Djumhana and Djubaedillah, "Intellectual Property Rights of History, Theory and Practice in Indonesia Revised Edition."Pp. 93

¹⁵ Faith Sjahputra, *Indonesia's New Brand Law Ins and Outs Of Brand Questions Theory And Practice* (Jakarta: Harvarindo, 1997).Pp. 34

¹⁶ Moh. Nafri, "Legal Protection Against Counterfeiting Of Famous Foreign Trademarks In Indonesia," *Journal of Unismuh Palu* 3, no. 1 (2018).Pp. 65

4. The existence of a lawsuit from a well-known trademark holder, in some ways, will worsen the reputation of the product because it is considered a product that is in trouble which will ultimately reduce the sales turnover of the product.¹⁷

Law enforcement against the circulation of counterfeit goods is closely related to people's legal awareness, Where high legal awareness will be a supporting factor while low legal awareness will be an obstacle in law enforcement. Indicator-indicator of legal consciousness is actually a relatively concrete guide to the extent of legal consciousness, as follows:¹⁸

1. The first indicator is legal knowledge. A person knows that certain behaviors have been regulated by law. The legal regulations referred to herein are both written and unwritten laws. Such behavior concerns behavior prohibited by law as well as conduct permitted by law.
2. The second indicator is legal understanding. A citizen of the community has knowledge and understanding of certain rules, for example, the existence of correct knowledge and understanding from the community about the nature and importance of Law Number 20 of 2016 concerning Brands and Geographical Indications.
3. The third indicator is the legal attitude. A person has a tendency to hold a certain assessment of the law.
4. The fourth indicator is legal behavior, which is where a person or a society of citizens complies with applicable regulations.

Based on the four indicators, it shows the levels of consciousness of a particular law in its embodiment. If someone knows the law, then it can be said that the level of legal awareness is still low. However, if a person or a society has behaved according to the law, then the level of legal awareness has been high. Law is a concretization of values formed from the culture of a society. Every society certainly produces a culture, so the law always exists in every society and appears with its solemnity. Seeing this basis, Wolfgang Friedman stated that the law has no universal force.¹⁹

The legal culture is also decisive in law enforcement against the circulation of counterfeit goods. Culture includes a system and a certain purpose and value, meaning that culture is a *blue print of behavior* that provides guidelines on what to do, what to do and what is prohibited. Social and cultural values play a role as guidelines and drivers for human behavior in the process of social interaction. More concretely, culture functions as a system of behaviour. Thus the prevailing methods are actually rooted in the social and cultural values of the society concerned. All human behavior is actually guided by abstract conceptions of what is good and what is bad.²⁰

The next weakness is that violations of the brand are complaints. The use of unlicensed brands carried out by business actors/producers requires the owner of the mark to register his mark with the correct rules in accordance with the existing rules so that there are no problems with the use of the unlicensed brand that has been rampant recently. In the event of unauthorized use of the mark, then the owner of the mark can file a lawsuit against the party without the permission of the brand owner to use the mark that has equality in essence or in its entirety for similar goods and services.²¹

3. Conclusion

The brand is one of the Intellectual Property Rights, which is basically a sign to identify the origin of goods and services (*an indication of origin*) of a company with the goods and services of other companies. Through brands, entrepreneurs can maintain and provide *guarantees of equality of goods and services* that produce and mediate competitive actions from other bad-faith companies that want to tarnish their reputation. The brand is one of the elements of Intellectual Property Rights. Intellectual Property Rights is a private legal right that rewards intangible human contributions that will be used to produce a technology of a special nature.

Trademark law adheres to complaints where reports and complaints from the brand owner are required to law enforcement officials to take legal action on brand budgeting. One of the forms of violations in the brand is the forgery of goods. This counterfeiting activity is increasingly rampant in the community because of the increasing demand, so brand owners feel overwhelmed by this item counterfeiting activity.

¹⁷ *Ibid*, Pp. 64

¹⁸ Soerjono Soekanto, *The Usefulness of Legal Sociology for Legal Circles* (Bandung: Citra Aditya Bakti, 1989).Pp. 67

¹⁹ Wolfgang Friedman, *Legal Theory, Third Edition*, (London: Stevens & Sons Limited, 1953).

²⁰ Soerjono Soekanto, *Some Legal Issues in the Framework of Development in Indonesia* (Jakarta: University of Indonesia Publishers Foundation, 1967).Pp. 24

²¹ Ni Ketut Supasti Dharmawan, *Harmonization of Indonesian Intellectual Property Law* (Denpasar: Swasta Nulus, 2018).Pp. 52

The brand owner must be active in controlling brand infringement; this is because the brand owner is the only party who can make reports, so it is considered less effective and maximum to guarantee the goods in circulation. The Brand Owner, in mediating the circulation of counterfeit goods, is to act actively to make reports or complaints to law enforcement officials without considering that it will be beneficial for the brand owner and for his goods products. The brand owner conducts a report with the main purpose, namely for the safety and security of the community as consumers of a product or item.

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Trademark infringement, in addition to being regulated in the Trademark Law, can also be subject to sanctions that can be reviewed by criminal, civil, and administrative laws.

Civil legal protection is also provided to the rightful holder of the mark. If the trademark rights have been held, then according to the Indonesian brand legal system, the holder of the brand will get legal protection. This means that if there is a violation of the rights to the mark, the brand holder can file a lawsuit against the other party who violates the rights to the mark. This lawsuit is aimed at obtaining damages and termination of all acts relating to the use of the mark.

The use of a mark without rights can be sued based on unlawful acts (Article 1365 of the Civil Code), namely "Any unlawful act, which brings harm to another person, obliges the person who for his fault published the loss, to compensate for the loss". As a party, the plaintiff must prove that he, due to the unlawful acts of the defendant, suffered losses felt by the manufacturer or entrepreneur of the right holder to the well-known brand. As an aggrieved party, of course, the rights holders of well-known brands will take legal action to resolve cases of trademark infringement. This is so that brand infringers will no longer use a brand that resembles the point or the whole of a well-known brand or even stop their production activities.

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