

Fighting Fake Fashion: Legal Protection Of Brand Owners Towards Counterfeit Branded Fashion Goods In The Lens Of Intellectual Property Law

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Abstract

The development of intellectual property rights is influenced by information and transportation technology development. Since intellectual property rights cover trademarks, the production of goods has been affected as well, especially luxury goods. This is evident in the increase of the production of counterfeit goods, due to an increase in demand for counterfeit goods. Apart from causing losses to both the producers and the consumers, the increase in the production of counterfeit goods has also caused an economic loss to the country. In response to this, the Government of Indonesia has made efforts in hopes of discontinuing the illegal conduct, preventing those activities from existing in the future, and providing legal protection as well as legal certainty for both the producers and the consumers, by enacting laws and regulations in relation to trademark, such as Law No. 20 of 2016 on Trademarks. This paper is aimed to observe the importance of the enactment of the Trademark Law pertinent to the production of counterfeit goods and the factors that hinder the implementation of Intellectual Property Rights.

Keywords: Trademark, Intellectual Property Rights, Counterfeit Goods

A. Introduction

The globalization of intellectual property rights has also been fueled by the quick development of information and transportation technology. A good or service that is currently produced in one nation may be produced easily in another nation. The existence of items or services that, throughout the course of production, made use of intellectual property rights, thereby also exhibiting those rights when the aforementioned goods or services are marketed. Thus, as the demand to safeguard goods or services as trade commodities develops, so does the necessity to protect intellectual property rights.

The evolution of the modern trading system necessitates modifications to the laws governing brand protection for traded goods. Given this reality, discussing brands must start with an examination of economic rationale and legal reason. In other words, rather than limiting oneself to an administrative perspective, such as trademark registration, trademark cancellation, and the like, it is necessary to examine the philosophy around the mark. Despite the fact that several trademark laws have been issued, many infractions still occur. Instances of imitation, piracy, reputation-passing, and other violations of intellectual property rights. In the world of business and industry, branding is crucial.

In addition to the fact that well-known brands don't have to worry about registering their numbers with the Director General of Intellectual Property Rights or shell out millions of rupiahs to develop their product image, one of the many reasons why many

industries use well known brands for their products is to make them easier to sell. The only thing they have to do is copy other people's products, and for marketing they typically use "dealers" who are willing to accept these copied products, so they don't even need to bother with creating a research and development division to be able to produce products that are always up to date. Utilizing well known brands economically results in significant earnings, as demonstrated by the reality. In addition, it is backed by the mediocre but fashionable spending power of customers¹.

Since brands play a crucial role in maintaining fair business competition in the age of global trade and in accordance with international conventions that Indonesia has ratified, Indonesia revised Law No. 14/1997 concerning Trademarks to Law No. 20/2016 concerning Trademarks, also known as the Trademark Law. It is hoped that when marks are set forth in statutory regulations, especially when one of them deals with the mark's definition, there will be agreement on how to apply them. Mark according to the Trademark Law Article 1 Number 1 is *"a sign that can be displayed graphically 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, sounds, holograms, or a combination of 2 (two) or more of these elements to differentiate goods and/or services produced by persons or legal entities in trading activities of goods and/or services"*. Based on the definition above, the most important elements of a brand can be drawn: A brand used as a sign; A brand must have the ability to differentiate itself from competitors; Brands are employed in the trade of goods and/or services.

¹ Maria Oktoviani Jayapurwanti, "Perlindungan Hukum Terhadap Pemegang Merek Dagang Asing Yang Ada Di Indonesia," *Lex privatum*, no. 3 (2013): 141

When trademark infringements are discovered throughout the course of commerce in goods or services, harming not only the legitimate brand owners but also consumers as users of goods or services, it becomes imperative to safeguard trademark rights, even those of well known companies. Facts demonstrate that trademark rights are still violated in Indonesian trading practices, such as copying and counterfeiting of well-known trademarks, particularly well-known foreign brands. When visiting Indonesia, well-known designer Piere Cardin expressed his displeasure that many of the products manufactured there were merely imitations of the trademarks he held. According to him, a well-known trademark cannot be used randomly for a variety of goods without the owner's prior consent. Genuine yet counterfeit branded (luxury goods) items like shirts, pants, jackets, and various other accessories are fairly simple to find in large cities, and their distribution ranges from street vendors to upscale shopping malls. The extremely low pricing of branded counterfeit goods is one of their appeals. Due to their great economic value, well-known international brands are frequently imitated (or, at the very least, business actors frequently capitalize on the fame of these well-known trademarks). A study from Masyarakat Indonesia Anti Pemalsuan (MIAP) showed that the circulation of counterfeit goods is likely to result in an economic loss amounting over Rp 294 Trillion². Not only does it harm the country's economic climate, the circulation of counterfeit goods may inflict losses to both the producers and the consumers. As a result,

² Liputan6.com, "Hasil Studi: Peredaran Barang Palsu Rugikan Ekonomi Rp 291 Triliun", Liputan 6, March 04, 2022, <https://www.liputan6.com/read/4903131/peredaran-barang-palsu-rugikan-ekonomirp-291-triliun>

the real brand owners of well-known trademarks suffer losses in market share, goodwill, or a reputation for their products that have been meticulously and profitably developed. However, consumers are also injured since they purchase goods that do not live up to their expectations as a consequence of payments that have been made. This harms both customers and the interests of well-known brand owners.³

It is infamously known that a large number of products on the Indonesian market are blatant counterfeit of well-known brands. The phenomenon that is currently occurring in the market is related to the circulation of numerous well-known foreign branded goods (luxury goods), but the goods circulating are counterfeit versions of those luxury goods. Examples of these counterfeit goods include clothing (Zara, Hermes, Polo), bags (Chanel, Furla, Gucci, Louis Vuitton, Zara), sandals/shoes (Nike, Adidas, Converse), watches (Nike, G-Shock, Rolex, Alba, Rip Curl. As opposed to the original price, which is between Rp. 4,000,000 to Rp. 20,000,000, the large number of enthusiasts for knockoff branded goods are indeed found at much lower prices, between Rp. 50,000 to Rp. 350,000. From each of these sales, the trader earns a profit of roughly 50% of the issued capital.

Brand infringements, such as copying and counterfeiting of brands, are actually driven by unfair or dishonest rivalry between business players who trade goods or services, using tactics that are against good faith and disregarding the importance of honesty in commercial operations. Legal protection for legitimate trademark

³ Moh. Nafri, "Perlindungan Hukum Terhadap Pemalsuan Merek Dagang Terkenal Asing Di Indonesia," *Maleo Law Journal*, no. 1 (2018): 56.

owners is to give them exclusive rights so that other parties cannot use their marks or marks that are similar to them for the same or nearly identical goods or services. These exclusive rights are frequently monopolies, meaning that only brand owners may exercise them. Thus, based on the background of the problems stated aforementioned, the main issues in this paper are: How is Indonesian law protecting against the imitation of well-known international trademarks, and what are the elements that are impeding the application of brand protection against such imitation?

B. Discussion

B. 1. Legal Protection Against Counterfeiting Branded Foreign Fashion Goods

Trademarks can be in the form of pictures, words, numbers, letters, names or colors that are combined into something attractive and a differentiating tool in business activities to trade goods or services. A trademark is a logo that identifies a particular good as belonging to a particular company, and it preserves the goods' provenance while guaranteeing their high quality in order to compete with other businesses and make it easy to tell one product from another⁴. A trademark serves a number of purposes inside an organization, including product identification to set manufacturing results apart from those of rival companies, marketing support, assurance of product quality, and indication of country of origin. Because it is a privilege earned by the owner of the rights to the registered mark, other parties that use a registered mark without the

⁴ Ni Made Dwi Ari Cahyani, Anak Agung Sagung Laksmi Dewi, Ni Made Sukaryati Karma, "Perlindungan Hukum bagi Pemegang Merek terhadap Pemalsuan Merek Fashion," *Jurnal Konstruksi Hukum*, no. 1 (2021): 177, <https://doi.org/10.22225/jkh.2.1.2990.175-179>.

owner's consent will be unable to do so. To utilize a well-known brand's mark, one must first enter into a formal agreement with the brand owner through a meeting, after which the agreement must be registered with the local mark office (kantur merk setempat). Because the party engaging in the forgery did not request authorization to engage into an official agreement with the owner of the brand, the kind of trademark infringement that takes the form of imitation or other phrases like brand counterfeiting is specified.⁵ When business players compete unfairly or dishonestly in the exchange of products or services, they use practices that are against good faith and disregard the need of honesty in conducting commercial operations. This results in trademark breaches such as copying and counterfeiting of brands.

Some creators imitate trademarks in an effort to establish market control while maximizing their profit. The general public, consumers, and the real brand owner will all be harmed by the dishonest conduct of copying this trademark. This occurs because some places or regions in a nation can have a positive influence on an item since they are regarded as producing high-quality goods. If an entrepreneur uses false information regarding the nature and origin of their products in order to mislead customers and give the impression that the products are of high quality because they are produced in high-quality regions, such as England, they are engaging in dishonest competition. A counterfeit object is one that is a copy or copycat of the original, according to the Kamus Besar Bahasa Indonesia. Therefore, if it is related to counterfeit goods, it refers to anything that is produced, whether it be an object or a

⁵ Ibid.

substance, by copying or doubling its characteristics or shape so that the sum exceeds the original.

By attempting to duplicate or falsify brands that are already well-known in the community, mark violations seek to make quick personal gains without giving consideration to the rights of other individuals whose rights have previously been safeguarded. Such events will undoubtedly seriously impair both the national and local economies. A solid reputation will inspire consumer trust, which is another factor that is equally vital. Building a brand's reputation takes a lot of money and time. Companies frequently work to stop other individuals or businesses from using the trademark on their goods. The brand owner suffers a great deal as a result of all these acts. Because dishonest competition will result in lower sales turnover and lower predicted revenues from more well-known brands due to copying and imitation of such trademarks. Because customers perceive that brands once thought to have high quality have actually started to degrade in quality, it may even cause them to have less trust in the brand.

The Trademark Law No. 21 of 1961, the Trademark Law No. 19 of 1992, the Trademark Law No. 14 of 1997, the Trademark Law No. 15 of 2001, and the Law of the Republic of Indonesia No. 20 of 2016 concerning Trademarks and Geographical Indications are the laws that regulate trademarks and are currently in effect. The idea of legal protection for trademark rights refers to the distinctive nature of those rights (exclusive). The special right is monopolistic, which means that only the owner of the brand may use it. Other persons are not permitted to use the unique rights without the brand owner's consent. It is a violation that may result in penalties if another party makes use of this unique right without first receiving

consent from the owner of the trademark right⁶. The Paris convention for the Protection of Industrial Property was the first convention on IPR in 1883 in Paris, where trademark protection began to be regulated internationally. This convention is an international agreement in the area of intellectual property rights, which is particularly significant since it establishes the framework for IPR protection and offers a roadmap for the range of IPR concerns for nations throughout the world.⁷

It is imperative that registered trademarks have legal protection, especially for well known brands. Commonly chosen as targets for imitation and counterfeiting are well-known brands, which are anticipated to see a boost in sales from careless brand infringers. A form of legal protection that is preventive and repressive in nature and is concentrated on measures to stop trademarks from being duplicated or counterfeited by others is required if a trademark has acquired a well-known title. Preventive measures are taken to stop or lessen the likelihood of violations, with the goal of lowering the number of trademark infringements. The objective is to reduce the likelihood of trademark infringement. This endeavor focuses more on keeping tabs on how the mark is being used, defending the exclusive rights of the trademark owners on well-known foreign trademarks, and encouraging brand owners to register their trademarks to ensure the protection of their rights.

On the other hand, repressive efforts are made to prevent or stop transgressions from happening again. Repressive actions are

⁶ Kadek Yoni Vemberia Wijaya, I Gusti Ngurah Wairocana, "Upaya Perlindungan Hukum Terhadap Pelanggaran Hak Merek," *Kertha Semaya: Jurnal Ilmu Hukum*, no. 10 (2018): 3.

⁷ Moh. Nafri, "Perlindungan Hukum Terhadap Pemalsuan Merek Dagang Terkenal Asing Di Indonesia," *Maleo Law Journal*, no. 1 (2018): 61.

taken as proof of legal protection following a trademark infringement. If trademark rights have been violated, this oppressive legal protection is offered. Legal defense against trademark infringement is available to owners of well-known foreign trademarks in the form of criminal prosecution or litigation for cancellation. Furthermore, the provisions of trademark law's fines must be severely and precisely imposed in order to have a deterrent impact on offenders who are anticipated to be able to repress similar offenses in the future.

If the trademark has been registered, it will be given both civil and criminal legal protection. In regards to criminal legal protection, specifically by enforcing fines against offenders who violate trademarks in accordance with Article 100 of the Law on Trademarks and Geographical Indications. Anyone who intentionally and without authorization uses a mark that is identical in its entirety to a registered mark belonging to another party for goods and/or services of a kind produced and/or traded is subject to a maximum prison sentence of five years and/or a maximum fine of one billion rupiahs. Legal trademark owners also receive civil legal protection. According to the Indonesian IPR legal system, the brand holder will receive legal protection if the trademark rights have been maintained. This means that if trademark rights are violated, the brand owner may bring a lawsuit to hold the offending parties accountable. The goals of this case are financial compensation and the end of all actions involving the use of the mark.⁸

⁸ Rizka Aprilia, "Perlindungan Hukum Terhadap Hak Atas Merek Pada Perusahaan Startup Digital Yang Tidak Mendaftarkan Merek Dagang Di Bandung," *JOM Fakultas Hukum Universitas Riau*, no. 2 (2019): 9.

According to Civil Code Article 1365, "*Any unlawful act, which causes harm to other persons, obliges the person who, by mistake, issues the loss, compensates for the loss,*" the use of a mark without rights may give rise to legal action. As the plaintiff must demonstrate that he experienced a loss as a result of the defendant's illegal activities. Producers or business owners who possess the rights to well-known brands will undoubtedly suffer losses as a result of trademark breaches done by parties who have negative motives and are not accountable for the well-known marks they infringe. Of course, the owner of the rights to a well-known brand will file a lawsuit to address situations of trademark infringement as the aggrieved party. This is done in an effort to deter trademark infringers from using a brand that is conceptually similar to or identical to a well-known brand, or even from stopping its manufacturing. Acts of trademark infringement can result in punishments that can be examined from criminal, civil, and administrative law in addition to being governed by the Trademark Law.⁹

B. 2. Factors Inhibiting the Implementation of Intellectual Property Rights Against Counterfeiting Branded Foreign Fashion Trademarks

Infrastructure and auxiliary services will undoubtedly make the legal protection process easier to complete, which will reduce or eliminate instances of trademark infringement. The lack of a technology to make it simpler to tell if a product is real or fake has become a barrier in the law enforcement procedure for cases

⁹ Moh. Nafri, "Perlindungan Hukum Terhadap Pemalsuan Merek Dagang Terkenal Asing Di Indonesia," *Maleo Law Journal*, no. 1 (2018): 63.

involving trademark infringement. At the moment, only trader/seller acknowledgements can make it simpler to determine whether an item is real or fake, and sometimes sellers are still evasive whether the products they are selling are phony. The availability of educational facilities is crucial for enhancing knowledge and understanding of brand instances. The procedure of teaching merchants and business actors is hampered by the shortage of brand experts. The process of obtaining legal goals undoubtedly plays a crucial part in society as a legal subject. It is undoubtedly a difficult task to bring out the nature of a community that is conscious of the law. Here, the general public, particularly customers, play a significant role in the exchange of counterfeit goods on the market.¹⁰

17 out of 20 people claim to profit from the sale of goods that are either counterfeit or produced as a result of trademark infringement. Consumers with middle-class or lower incomes believe that the availability of fake goods, which are of course less expensive than the real thing, allows them to continue living the way of today's society, which is frequently centered around well-known brands, without having to worry about the quality of those goods. Additionally, they believe that by sporting well-known brands, they will feel more at ease socializing without worrying about whether the items are real or not. From this, it can be inferred that buyers, in order to keep up with current lifestyle trends, are more concerned with a product's price than its quality.¹¹

¹⁰ Lukman Kardiasa, "Pelaksanaan Perlindungan Hukum terhadap Merek Terkenal dari Tindakan Pelanggaran terhadap Merek Terkenal (Studi Implementasi Pasal 94 Undang-undang No. 15 Tahun 2001 Tentang Merek Studi di Pasar Besar Malang)," *Kumpulan Jurnal Mahasiswa: Universitas Brawijaya*, (2013).

¹¹ Ibid

Furthermore, the following are a number of issues that can prevent law enforcement from being used against trademark right holders, in addition to a brief explanation of the criteria that prevent the application of trademark rights protection above, including¹²:

1. Limited disclosure of information about a trademark registration application to the general public (consumers). When the grace period is determined depends on factors such as the notification of mark registration only lasting three months, the public may not be aware of the news despite it having been made, and other challenges. Because the trademarks have previously been registered by other parties, the rights holders to well-known international marks are often taken aback when they register their brands;
2. The challenge in identifying trademark infringers for the owners of well-known overseas brands. This typically occurs when goods produced as a result of trademark infringement by well-known foreign brands are sold on the open market without notice to the creator;
3. This inherent vulnerability is brought on by the apparatus of the Directorate General of Marks' socioeconomic and intellectual limitations, which prevent the registration of marks registered later with registered marks from being accepted;
4. The presence of lawsuits from owners of well-known foreign trademarks may impair the product's reputation

¹² Moh. Nafri, "Perlindungan Hukum Terhadap Pemalsuan Merek Dagang Terkenal Asing Di Indonesia," *Maleo Law Journal*, no. 1 (2018): 64.

because it is seen as a difficult product, which would ultimately lower the product's sales turnover.

It goes without saying that society's participation as customers is crucial for law enforcement in cases of trademark infringement. Based on the actual facts, there have been a variety of responses to trademark infringement cases, both positive and negative, which are, of course, influenced by education level, welfare/social economic level, environment, and mark related knowledge. The community's viewpoint that the selling of counterfeit goods is illegal and must be dealt with severely in order to be repressed in circulation is the positive response or supporting attitude. In contrast, the public's negative reactions or deterring attitudes include: the public's perception that brand violations are a common occurrence; the idea that brand violations do not always harm consumers; and the idea that occasionally, brand violations actually benefit consumers by enabling them to use well-known branded goods at lower prices.

C. Conclusion

Legal protection is required to prevent imitation or counterfeiting of a brand that has acquired a well-known predicate by third parties. a form of legal protection that is both preventive and punitive that aims to stop others from using a well-known mark improperly. Preventive measures are taken to stop violations from happening and lessen their chances, which are expected to lower the frequency of trademark infractions wherein its objective is to reduce the likelihood of trademark infringement. Repressive efforts are

made to prevent or stop transgressions from happening again and are taken as proof of legal protection following a trademark infringement. The public's (i.e. consumers specifically) lack of access to information about trademark registration applications, the difficulty for owners of foreign well known brand rights to identify trademark infringers, and, in some cases, legal action brought by owners of well-known foreign trademarks are the major factors that hinder the implementation of trademark protection will damage the product's reputation because it is viewed as a problematic product.

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