

LEGAL PROTECTION OF UNREGISTERED MARKS IN INDONESIA

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Abstract

In accordance with Law No. 20 of 2016 pertaining to Marks and Geographical Indications, trademark protection in Indonesia is only granted following registration under a constitutive system. This study aims to examine the pseudo-legal protection afforded to unregistered trademark owners in Indonesia. This study employs a normative legal research methodology because its focus departs from the ambiguity of norms, employing a statute approach and a conceptual approach. The technique for tracing legal materials involves document analysis techniques and qualitative study analysis. The findings of this study indicate that Mark Protection in Indonesia is granted only after registration in accordance with the constitutive registration system adopted by Law No. 20 of 2016 regarding Marks and Geographical Indications. Unregistered trademarks are not protected by law. Meanwhile, if an unregistered mark is used or imitated without permission or rights, the owner of the mark cannot file a lawsuit against the violator.

Keywords: Dispute Resolution, Legal Protection, Trademark Protection, Unregistered Mark

1. INTRODUCTION

In the current era of global trade, one of the important aspects to increase economic growth in Indonesia. Business actors are required to continue to innovate in every way in marketing products and services, so that the products and services traded continue to survive and remain known in a market where the competition is increasingly fierce. With the increase in business competition in the current era of global trade, both in the national and international sectors, Intellectual Property Rights (IPR) play a crucial role in preserving fair business competition in order to avoid unfair competition such as copying, piracy, and unauthorized use of IPR (Harsono, 1990).

The brand is an element of intellectual property rights that must be protected. According to the type, brands are classified into a variety of categories, including trademarks, service marks, and collective marks, all of which are intellectual forms with economic value that can be increased in products and technologies. The need for trademark protection is heightened by the fact that a brand as a unique identifier of goods and services is the "soul" of a business and thus extremely valuable (Purwandoko, 2009). The importance of a brand to have an influence on the development of a business of goods or services, can be seen from the desire of the community as consumers or buyers in the use of goods or services that have well-known brands (Muthiah, 2016).

The phenomenon that has occurred recently is that there are trademarks that are registered without the permission of the brand owner who first used the mark. Which causes a dispute between the first user of the mark and others who registered the mark. There are also brands that are used by other parties who are not responsible and use these marks. As a result, it is detrimental to the real brand owner or the inventor of the brand.

There are also well-known brands that are already well-known but are still accepted for registration which causes the cancellation of the mark. This happened in the court decision of WD-40 Company and WD-40 Manufacturing Company against Benny Bong with Case Number: 39/Pdt.SusMerek/2018/PN.Niaga. Jkt.Pst and MORRIS Co.,Ltd against Meliana with Case Number: 5/Pdt.Sus-Merek/2019/PN.Niaga.Pst, There are also incidents of conflict between the two brand owners where there are similarities in principle or in whole where there is an acknowledgment from each party claiming that the mark is the property of one of the parties. For example what happened in the case of MS GLOW against PS GLOW with Case Register Number: 2/Pdt.Sus.HKI/Merek/2022/PN.Niaga.Sby, where there are similarities in the brands and products they produce. Both parties report to each other about who actually has more rights over the trademark (Idris, 2022). This is a result of the constitutive system adopted by Indonesia.

By looking at the facts above, the author is interested in discussing the legal protection of unregistered trademark owners in Indonesia which is a pseudo-protection, where legal certainty is only achieved after trademark registration is not used in trade. Therefore, legal protection for trademarks in Indonesia is very important, both registered and unregistered trademarks, in order to create a fair industrial and economic climate for business actors in Indonesia. Further, regarding legal consequences or sanctions for violators of Mark Rights in Indonesia, strict sanctions must also be given that can provide a deterrent effect in order to provide legal certainty for all parties.

2. RESEARCH METHODS

This study employs a normative legal research method because the focus of the study moves away from the ambiguity of norms, using statute approach and conceptual approach. The reason for this shift in focus is due to the fact that norms can be interpreted in a variety of ways. Tracing legal materials is accomplished through the use of document study strategies and qualitative research analysis for the examination of studies.

3. RESULTS AND DISCUSSION

3.1. Legal Protection of Brands in Indonesia

Indonesia employs a constitutive system for trademark registration, i.e., the registration procedure necessary to obtain Trademark Rights that can provide legal protection for a brand. Therefore, if a trademark has not been registered with the Ministry of Law and Human Rights from the Directorate General of Intellectual Property, the state has been unable to offer trademark rights and ensure legal protection for the brand to the holder of trademark rights. Article 21, paragraphs (1), (2), and (3) of Law No. 20 of 2016 on Trademarks and Geographical Indications prohibits the acceptance or rejection of the following registration rights:

- 1) The application is denied if the Mark resembles, in concept or in whole, any of the following:
 - a. A registered mark that is the property of another party or that was previously sought by another party for comparable products and/or services; A well-known trademark of another person or corporation for a certain type of services and goods,

- b. Other parties' well-known marks for comparable goods and/or services;
 - c. Well-known marks that belong to other parties and are used for goods and/or services of a different sort by those parties that satisfy specific requirements; or
 - d. Indications of Geographic Origin that Have Been Registered.
- 2) The application is denied if any of the following conditions are met:
- a) Except with express permission from the party entitled, represents or resembles the name or abbreviation of the name of a famous person, photograph, or the name of a legal entity controlled by a third party.
 - b) Is an imitation or resemblance of the name or abbreviation of the name, flag, symbol, sign, or emblem of a country, national or international institution, unless approved in writing by the responsible authorities; or
 - c) Except with the express agreement of the competent authorities, is an imitation that resembles an official sign, stamp, or seal used by a state or government entity.
- 3) If an applicant submits a request with bad intentions, the request is denied.

According to trademark law theory, the aforementioned description of a mark that cannot be registered as a trademark is known as an absolute rejection grounds. If a sign fits the fundamental requirements for absolute rejection, it cannot act as a mark. At the stage of substantive examination, rejection on an absolute basis may be implemented either ex officio by the Directorate General of Intellectual Property or in response to complaints from third parties. The grounds for absolute rejection can also be used to invalidate a registered trademark through a court action.

Mark registration will give rise to legal protection in the event of a trademark infringement committed by another person. Protection of Registered Marks is very important because there is legal certainty over Registered Marks, whether to be used or extended or as evidence in the event of a dispute over the implementation of Registered Marks (Sutedi, 2009). Legal protection of Mark Rights is needed for 3 (three) things:

- 1) To provide legal certainty for brand creators, brand owners, and trademark owners;
- 2) To prevent abuses and offenses against the Rights to Marks so that justice can be provided to the parties who are entitled;
- 3) To provide community benefits so that community members are more motivated to create and manage the registration of their business marks (Hariyani, 2010).

The procedure of registering a trademark in accordance with Law No. 20 of 2016 on Trademarks and Geographical Indications can offer exclusive rights to the owner of the mark, so that the mark cannot be used by other individuals or businesses in whole or in concept. and irresponsible. Consequently, this registration process also aims to prevent unaffiliated individuals or organizations from using registered trademarks, such as other registered trademarks owned by unaffiliated individuals or organizations. In order to prevent conflicts between registered trademark holders and non-registered trademark holders, this registration procedure is conducted. The application process for the registration of a mark must be completed by all holders of trademark rights, which means that the mark to be registered must contain the mark and color label to be used on the mark as well as a description of the services and goods in the registration process.

The Law No. 20 of 2016 on Trademarks and Geographical Indications governs two methods for registering a trademark: registration with priority rights and registration in the conventional manner. Articles 9 and 10 of Law No. 20 of 2016 pertaining to

Trademarks and Geographical Indications govern the priority application for rights. Priority right is defined in Article 1 number 17 as the right of the applicant to submit an application originating from a country that is a member of the Paris Convention for the Protection of Industrial Property or the Agreement Establishing the World Trade Organization, with the approval period being a maximum of six months, beginning with the date of receipt of the first application for trademark registration received in another country which is a member of the Paris Convention for the Protection of Industrial Property.

As according to Article 3 of Law No. 20 of 2016 on Marks and Geographical Indications, it is stated that the right to a mark is granted upon registration. What is intended by registration follows the application. The application for registration of a mark is followed by a formal examination consisting of an inspection of the completion of the registration requirements. In the event that the conditions for registration of a mark are incomplete, the Applicant will be notified within a maximum of 30 (thirty) days from the date of receipt, with a deadline of no later than 2 (two) months from the date of mailing the notification letter. The Minister publishes the application in the Official Gazette of Marks via electronic and/or non-electronic methods within a maximum time of 15 (fifteen) days from the date of receipt of the application for two (two) months. In the case of a substantive examination, the Job Creation Law No. 11 of 2020 amends the Marks and Geographical Indications Law No. 20 of 2016, specifically Article 23 establishing the substantive examination that must be completed within a maximum of 90 (ninety) days. If the examiner determines that the application can be registered, the Minister registers the mark, notifies the applicant or his proxy of the registration, issues a trademark certificate, and publishes an announcement of the registration in the Official Gazette of Marks. Certification concludes the process.

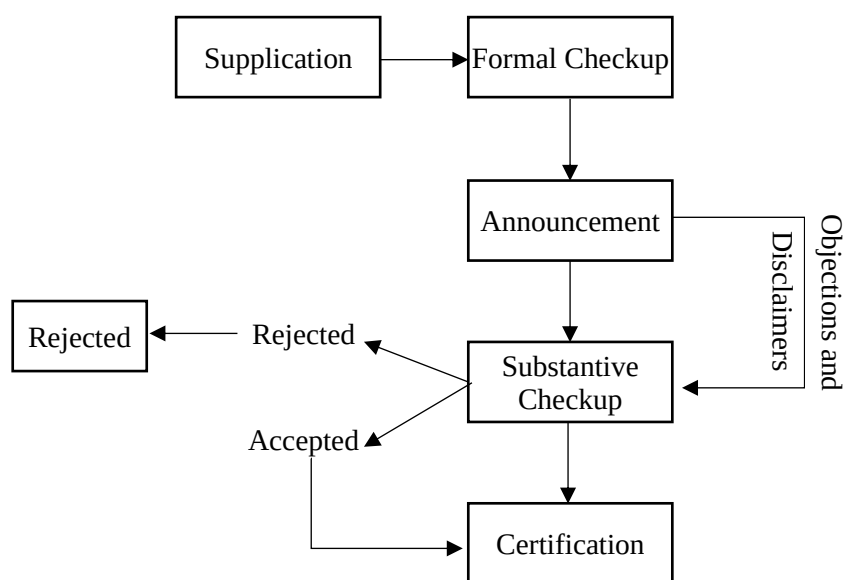


Figure 1. Mark Registration Stages

Based on Law Number 20 of 2016 pertaining to Trademarks and Geographical Indications, Indonesia has established a constitutive registration procedure. This approach can only provide legal protection guarantees to first-time trademark registration applicants and applicants for trademark registration who are acting in good faith. In the event of trademark registration based on bad faith, as outlined in Law No. 20 of 2016 concerning Marks and Geographical Indications, at least a few conditions must be met for the activity to be classified as trademark registration in bad faith. According to the law and court decisions in trademark cases, there must be at least two criteria for someone to be deemed to have acted in bad faith: (Abdillah, 2019)

- 1) There are advantages, either directly or indirectly, for the registration of the mark;
- 2) The existence of losses received by other parties as a result of the registration of a mark by these two elements must at least be present in a trademark case that is based on bad faith.

In accordance with the definition of bad faith, which is any activity that is opposed to the concept of good faith, the act of registering a mark used by another party without their permission falls within the category of trademark registration in bad faith. This classification disregards the brand's notoriety so long as the behavior fits the criteria for an act of bad faith. This is because there is a purpose to use the mark for the personal profit of the trademark registrar. The Law Number 20 of 2016 about Geographical Indication Marks to safeguard the aggrieved party from a trademark registration allows the aggrieved party to file a lawsuit. In accordance with the provisions of Articles 20 and 21 of Law No. 20 of 2016 respecting Geographical Indication Marks, this law provides a framework for legal action against unregistered trademark owners. The legal effort consists of bringing a lawsuit for the cancellation of a registered mark that infringes on the rights of the owner of an unregistered mark, provided that the owner of the unregistered mark submits an application for registration to the minister. The limitation period for filing a case is five years from the date of registration of the mark, or indefinitely if there is evidence of bad faith and/or the mark in question is contradictory to state ideology, laws and regulations, morals, religion, decency, and public order. Hence, the owner of an unregistered mark, who in this case is the first user of a mark or a party that should be protected, can file an attempt to cancel the mark despite the fact that 5 years have passed since the registration of the mark under the pretext that the registered mark was registered in bad faith on an application.

The cancellation of a mark is a procedure taken by one of the parties to seek and eliminate the existence of a registration of a mark from the General Register of Marks "DUM" or to cancel the validity of rights based on a trademark certificate. A registered mark can still be cancelled, if based on sufficient evidence the mark is registered without meeting absolute or relative grounds (Rahmi, 2015). Based on the existence or occurrence of losses due to these actions, it can be categorized that registration actions based on bad faith are a form of unlawful act so that the party who is harmed, namely the owner of the mark, should be able to file a claim for compensation on the pretext of violating the law. as article 1365 BW.

The right to a mark is an exclusive right provided by the state to the owner of a registered mark for a specific amount of time in exchange for the owner's use of the mark or authorization to allow others to use it. In the absence of trademark registration, unregistered Marks likewise lack legal protection, as stated in Article 35 paragraph (1) of Law Number 20 of 2016 respecting Geographical Indication Marks, which states:

"Registered marks get legal protection for a term of ten (ten) years. (ten) years beginning on the date of receipt. Meanwhile, the duration of protection is extendable." If an unregistered Mark is used or imitated by a third party without rights or authorization, then the owner of the mark cannot launch a claim against the person who abuses the mark. The owner of an unregistered mark cannot thereafter take actions or legal recourses to file a lawsuit with the Commercial Court, whether civil or criminal. Unregistered marks have led to this result. In accordance with Article 83, paragraphs (1) and (2) of Law No. 20 of 2016 on Marks and Geographical Indications, there is legal protection for the rights to a mark, as follows:

- 1) The owner of a registered Mark and/or the holder of a registered Mark License may initiate a lawsuit against a third party who unlawfully uses a Mark that is similar in concept or in its whole for similar goods and/or services in the following ways:
 - a) compensation claim; and/or
 - b) cessation of all actions involving the usage of the Mark.
- 2) The litigation referred to in clause (1) may also be brought by the owner of a well-known mark based on a court ruling.

Article 83, paragraph 1, of Law No. 20 of 2016 regarding Marks and Geographical Indications specifies that the owner of a registered trademark may initiate a lawsuit against a person that unlawfully uses a mark that is similar in principle or in its whole for similar products or services of monetary compensation and/or the cessation of all activity including the use of the mark. Therefore, the violation of a registered trademark can result in a demand for compensation or the cessation of the mark's use. In addition to filing a civil case, the holder of the trademark right may also file a criminal lawsuit for the infringement of the trademark right that has happened. As specified in Articles 100, 101, and 102 of Law No. 20 of 2016 pertaining to Trademarks and Geographical Indications provide the legal foundation for launching a criminal complaint.

In accordance with Law Number 21 of 1961 governing Trademarks and Company Trademarks, Indonesia uses a declarative registration method. Article 2 paragraph 1 of Law Number 21 of 1961 governs the initial use of a trademark for the purpose of distinguishing various commercial items with various firm products from various products produced by a person or company using the trademark for trading operations in Indonesia. Therefore, this approach can only give legal protection assurances for users of trade-used brands. In accordance with the law, it is not the application registration procedure that can give rise to trademark rights, but rather the first use process. It is stated in the general explanation of Law Number 19 of 1992 concerning Marks that, special considerations regarding the change in the Mark registration system from the Declarative System (First to Use) to the Constitutive System (First to File), the shift from the declarative system to the constitutive system is because the constitutive system provides legal certainty more than the declarative system does. In other words, the transition from the declarative system to the constitutive system was made because the constitutive system guarantees legal certainty (Djubaedillah & Djumhana, 2003). In addition to not ensuring legal certainty, the declarative system, which is based on legal protection for the first user of a mark, generates challenges and barriers in the economic sector. As stated, the government provides total protection for registered trademarks to the owners and users of trademark rights to ensure commercial stability for manufacturers (Hery, 2011).

The use of the Constitutive System is intended to ensure legal certainty as well as provisions that safeguard aspects of justice. In actuality, the lack of knowledge regarding

trademark protection has a significant impact on the low rate of trademark registration, particularly among brand owners in Micro, Small, and Medium-sized Enterprises (MSMEs). According to the data described previously, namely the registration statistics of the Directorate General of Intellectual Property (hereinafter referred to as Dirjen KI), registration of Non-SME Brands dominated between 2016 and April 2018 at 91.45%, while registration of MSME Brands was only 8.5%. The purpose of trademark registration is to establish legal certainty. However, there are also business actors who are familiar with this function but are unaware of how to obtain trademark protection due to a lack of government socialization. Despite the fact that the majority of entrepreneurs are aware of the significance of brands for business growth, micro and small business owners are still unaware of this fact. Micro and small entrepreneurs are less aware of the significance of brands because they continue to believe that managing a brand is a difficult and costly process. The benefits of a brand are also felt indirectly in the short term, so micro and small business owners are less motivated to register their trademarks (Hariyani et al., 2018).

In addition to assistance in acquiring Intellectual Property Rights and numerous production, technical, and management trainings, the government must pay special attention to obstacles posed by a lack of legal knowledge and incentives as well as legality facilities. Taking into account the inhibiting and supporting factors of MSME legal awareness, it is necessary to solve the problem by revitalizing the roles of both the government and related agencies, as well as MSMEs themselves, in order to be effective. The protection of intellectual property requires the empowerment of the community, which refers to the government's empowerment program. In a matter of fact, the failure of a person to register a mark may result in the mark being claimed or preceded by another party who is more knowledgeable about the mark in registering the same or similar mark for similar goods or services, thereby causing the person to lose the right to use his or her own mark that was actually used first (Sukmadewi, 2017). The creation of a brand requires time, money, and ideas. Trademarks are protected because they contain a wealth of economic value and benefits, which must be respected; therefore, all brands must be protected.

In Indonesia, Law Number 20 of 2016 governing Marks and Geographical Indications does not mention MSME Brands in great detail. MSME Marks are mentioned in the preamble to letter an of Law Number 20 of 2016 concerning Marks and Geographical Indications, which states: "that in the era of global trade, in accordance with international conventions that Indonesia has ratified, the role of Marks and Geographical Indications is very important, particularly in maintaining fair and just business competition, consumer protection, and protection for Micro, Small, and Medium Entities." On the basis of these factors, it is clear that the primary objective of Law No. 20 of 2016 on Trademarks and Geographical Indications is to give legal clarity and protection, particularly to consumers and domestic business actors, and to promote healthy economic competition. However, good business competition can only exist if major industries do not use their dominating position to restrict the MSME industry, but they must be able to work together to manage the economy without monopolizing it.

The act of registering a mark used by another person but not yet registered if it is withdrawn is the result of the application of the first to file registration system adopted by Indonesia. If a line is drawn to find the root of the problem, registration is an absolute condition for the protection of trademark rights. As it is known that the criteria for rejection of applications for trademark registration are limited to comparisons to

registered marks or unregistered marks, but the marks are well-known marks. This is understandable because the Director General of IP itself may not have data on unregistered trademarks (Abdillah, 2019)

Brand protection has 2 kinds of protection, namely by preventive and repressive. The preventive way is to focus on efforts to prevent the famous brand from being used and imitated by others wrongly. There are several preventive measures in question, namely through rejection by the trademark office if there is a registration made by someone else by imitating an existing well-known mark. The second way of protection is repressive legal protection against the Mark in the event of a dispute. Repressive protection can be in the form of dispute resolution efforts as regulated in the provisions of Law Number 20 of 2016 concerning Marks and Geographical Indications, so that it can be taken by litigation (court) or through non-litigation channels which are regulated in Article 93 regarding arbitration or alternative dispute resolution (Septarina & Salamiah, 2020). Mark protection through registration is essentially intended for legal certainty over registered marks, whether to be used, extended, transferred or deleted as evidence in the event of a registered trademark infringement.

In line with Article 6 paragraph 2 of the Paris Convention, the statute of limitations for launching a case against a trademark registered in bad faith is not limited by Law Number 20 of 2016 governing Geographical Indication Marks, specifically Article 77. Article 4 of Law No. 15 of 2001 Governing Marks contains the concept of good faith, which states that “marks cannot be registered on the basis of an application made in ill faith.” This article guarantees the existence of well-known marks by requiring the Director General of Intellectual Property Rights to reject any trademark that bears similarities in concept. “According to the Theory of Legal Protection, the rejection of a mark that is not in good faith is a type of prevention, whereas bringing a lawsuit and removing a mark is a kind of repression” (Aliska & Kansil, 2022)

Preventive actions in the application itself include inaccuracies in determining whether a Mark can be accepted or rejected for registration, some Marks that are actually easy to recognize share similarities with well-known marks already owned by other parties, the registration is accepted despite these similarities, and finally, a dispute arises and the registration is canceled. As in the case of WD-40 Company and WD-40 Manufacturing Company against Benny Bong with Case Number: 39/Pdt.SusMerek/2018/PN.Niaga.Jkt.Pst and MORRIS Co.,Ltd against Meliana with Case Number: 5/Pdt .Sus-Merk/2019/PN.Niaga.Pst, in which both decisions received a decision to cancel the mark while the mark has been registered and has passed the formality, substantive and announcement stages of examination and is officially registered, should be in the registration of a Mark, a Mark can be accepted the registration is carried out more carefully and carefully, if a Mark is clearly owned by another party, let alone contains a well-known element, then according to Article 6 paragraph (1) of Law Number 20 of 2016 concerning Marks of Geographical Indications, it must be rejected, so as not to cause disputes in the future (Murjiyanto, 2016). In order to evaluate whether a Mark submitted for registration is identical to a Mark owned by another party, it is important to develop a system that can facilitate and offer clarity in deciding whether a Mark can be accepted for registration or refused.

There is also a case that happened to MS GLOW against PS GLOW with Case Register Number: 2/Pdt.Sus.HKI/Merek/2022/PN.Niaga. The first PS GLOW was established in 2021 and immediately registered the brand with the beauty product class.

In this case, PS Glow won the trademark contest at the Surabaya Commercial Court (PN). The PS Glow lawsuit was registered on April 12, 2022 with case number 2/Pdt.Sus-HKI/Merek/2022/PN Niaga Surabaya. The panel of judges, led by Slamet Suropto, partially granted PT PStore Glow Bersinar Indonesia's lawsuit on July 12, 2022. In his decision, the Surabaya District Court judge ordered MS Glow to pay compensation of Rp. 37,9 billion to PS Glow. In addition to compensation, MS Glow is also asked to stop production, trade, and withdraw all MS Glow products that have been circulating in Indonesia. The panel of judges also disclosed the MS Glow brand. It turned out that the defendant was not the holder of the MS Glow brand certificate in class 3 for cosmetics. Meanwhile, the MS GLOW brand is for product class 32, namely for products in the form of tea powder drinks that are not suitable for use as a brand of cosmetic products. MS Glow claims that the MS Glow brand has been registered in advance at the Directorate General of Intellectual Property, precisely MS Glow registered the mark in 2016, while PS Glow was only registered in 2021. It can be seen that based on this case, those who have recognized the rights to the mark are those who have registered the mark. it corresponds to the existing class, even though the brand of MS Glow has already been used in trade (MTB, 2022).

Protection of unregistered trademark owners and MSME actors In order to provide protection by applying for trademark registration used by other parties but registration has not yet been carried out, there are suggestions from several trademark law experts, namely by prioritizing "combined protection principles" or "combined legal protection". The combined protection system is a protection system based on a declarative system and a constitutive system. Mr. EA Van Nieuwenhoven Helbach gave an opinion when the Benelux Brandenwet was implemented in the Netherlands, namely: (Adisumarto, 1990)

"In general, the trademark law of various countries recognizes two ways to obtain rights to a mark, namely the first user and the first registrant. Each protection system has its own advantages and disadvantages. Therefore, it is not surprising that a combined system will be implemented, namely a system that has legal consequences for both use (*gebruik*) and registration (*inschrijving*). , or a role as evidence for the requirements for the implementation of these special rights. Or if viewed from the side of the party who adheres to the registration system that creates rights, then the use (*gebruik*) can take on the role as a condition for the continuity of the rights obtained through registration, or as a form of clear purpose, namely use as an additional element for the creation of rights. It all depends on whether or not registration creates rights, which is the difference between a constitutive system or a declarative one."

The combined system here is very good to observe, in essence a trademark registration system which, apart from being based on a declarative system, also gets priority for the protection of their rights to trademarks, as long as they can prove that they are the first users and the first registrants are aware of their existence on the mark as long as it can prove that there is no bad faith on the part of his party towards the registration of the mark. The basis for decisions on disputes in the field of trademarks can be in the form of not prohibiting the marketing of several local products that have not been registered but in a limited area. Each protection system has advantages and disadvantages. if only the constitutive system applies in Indonesia, then unregistered Marks will not get legal protection. Therefore, it is not surprising if a combined protection system is to be implemented, namely a protection that provides legal consequences for the use or registration of various kinds, if the first use can result in rights to the mark, and

registration is a form of use, or as a role as evidence of the requirements for obtaining that special right.

The use of the "first to file" principle is the application of Article 3 of Law Number 20 of 2016 concerning Geographical Indication Marks which states "the right to a mark is obtained after the mark is registered". The first registrant who is entitled to the rights of a mark will be considered as the legal mark holder, regardless of whether that party uses the mark for which the registration is made or not. Under the "First to file" principle, anyone who registers first will receive his registration with the mark for the benefit of his business, but must be based on good faith. According to Hartono Prodjonomardjo, "the advantage of the constitutive system is that people whose trademarks have been registered cannot be interfered with by users of trademarks that they did not know when they registered them.

Marks that have been registered will have legal protection as of the date the registration was received. This, however, affords no protection to unregistered marks, as registration is necessary to obtain legal protection from the state. In reality, however, the execution of this basic system will only result in bad faith; this runs entirely counter to the objective of the law, which is to provide order, balance, and an ordered society. Through the establishment of social order, it is intended that human interests will be safeguarded. In order to accomplish this, the law is tasked with allocating rights and responsibilities among community members, dispersing authority, and establishing procedures for resolving legal issues and preserving legal clarity (Mertokusumo, 2010).

The concept of justice according to John Rawls suggests "there are two initial principles based on the situation, namely: (Rawls, 2004)

1. Each individual has equal rights with the most extensive basic liberties equal to the same liberties for others. The first principle is known as the greatest equal liberty principle.
2. Social and economic inequalities must be handled in such a way that they are anticipated to benefit all individuals, and they are intrinsic to positions and offices open to all. The second concept is described as "the principle of diversity and the principle of equal opportunity."

Whiteman and Mamen argue that "fairness is the granting of rights to people in all aspects of life without unreasonable compromise" and according to Huang and Lin who argue that "fairness is an evaluation of opinions about the appropriateness of one's treatment of others." If the constitutive system is associated with the opinion of experts on the concept of justice, this constitutive system does not provide equality as John Rawls said, "every individual has rights equal to the broadest basic freedoms that are equal to the same freedoms for others," because in the constitutive system only provides protection for trademark owners who register. And as Whiteman and Mamen state that "justice is the granting of rights to people in all aspects of life without unreasonable compromise." However, the constitutive system does not give rights to all people and aspects of life, such as there are no exclusive rights for unregistered trademarks.

3.2. Dispute Settlement Process

The chapter XV of the Law No. 20 of 2016 on Trademarks and Geographical Indications addresses dispute settlement. Articles 83 to 93 of Law No. 20 of 2016 on Trademarks and Geographical Indications outline the dispute settlement provisions.

Involving chapter XV of Law Number 20 of 2016 on Marks and Geographical Indications, there are provisions regarding trademark infringement claims, commercial court litigation procedures, cassation, judgment implementation procedures, and alternative conflict remedies. Article 83, paragraph 1, of Law No. 20 of 2016 concerning Marks and Geographical Indications states that the owner of a registered Mark or a licensee of a registered Mark may file a lawsuit against a third party that uses the mark, which may take the form of a claim for compensation or the cessation of the activity in question. In accordance with the wording of Article 83 of Law nmero 20 de 2016 sobre Marcas y Indicaciones Geográficas, a case may be filed with the Commercial Court.

The dispute resolution process is in the applicable legal provisions as regulated in Law Number 20 of 2016 concerning Marks and Geographical Indications, Article 83 and Article 84, so there are several important things that need to be known, namely:

- 1) The registered Mark Owner and/or the recipient of the registered Mark License may file a lawsuit in the commercial court against other parties who illegally use the mark, with evidence that the other party has used a mark that is similar in principle or in its entirety for goods and/or services similar to those of the other party. registered trademark owner and/or registered trademark licensee;
- 2) The complaint seeks compensation and/or the cessation of all actions associated with the use of the Mark.
- 3) The owner of a well-known mark may potentially file a lawsuit based on a court ruling.
- 4) The complaint was brought before the Commercial Court.
- 5) The Mark owner and/or Licensee as the plaintiff may submit an application to the judge to halt the manufacture, distribution, and/or exchange of products and/or services using the Mark without authorization and to prevent further losses while the matter is still under investigation.
- 6) The judge may direct the delivery of the items or the valuation of the products to be carried out after the decision of the court has attained permanent legal standing. In the event that the defendant is obliged to return items that improperly use the Mark.

The Procedure for Lawsuits at the Commercial Court is governed by the Law of the Republic of Indonesia No. 20 of 2016 on Trademarks and Geographical Indications, as stated in Article 85 paragraph:

- 1) The case referred to in Article 30 paragraph (3), Article 68, Article 74, and Article 76 is filed with the head of the Commercial Court in the defendant's domicile or place of residence.
- 2) If one of the parties resides beyond the area of the Unitary State of the Republic of Indonesia, the case is presented to the Chief of the Central Jakarta Commercial Court.
- 3) The court clerk registers the case on the date it is filed, and the plaintiff receives a written receipt signed by the clerk on the same date.
- 4) The Registrar transmits the lawsuit to the head of the Commercial Court within a maximum of two (two) days of the lawsuit's registration date.
- 5) The chairman of the Commercial Court reviews the case and designates a panel of judges to set the date of the trial within a maximum of 3 (three) days from the date the lawsuit is filed, as specified in paragraph (4).

- 6) The bailiff serves the summons to the parties no later than 7 (seven) days after the lawsuit is filed.
- 7) The examination hearing until the decision on the lawsuit referred to in subsection (1) must be concluded within ninety (90) days of the panel evaluating the case receiving the case and may be prolonged for up to thirty (30) days with the agreement of the Chief Justice of the Supreme Court.
- 8) The decision on the litigation referred to in subsection (1), which includes all of the legal factors supporting the decision, must be rendered in a public trial.
- 9) The bailiff must provide the parties with the substance of the Commercial Court's decision referred to in paragraph (8) no later than 14 (fourteen) days following the decision on the litigation referred to in paragraph (1).

Provisions regarding the terms and procedures for a trademark lawsuit are included in Article 86 of Law Number 20 of 2016, which is referred to in Article 85. These provisions apply *mutatis mutandis* to the terms and procedures for a claim for Geographical Indications, so it is important to read both articles carefully. In other words, keeping in mind the differences that have already been taken into account which will be proceed *mutatis mutandis* (Sudarsono, 2013). Article 87 of the Law of the Republic of Indonesia Number 20 of 2016 on Marks and Geographical Indications governs Cassation. The Commercial Court's decision referred to in Article 85, paragraph 8, may only be appealed according to the procedure outlined in Article 88:

- 1) The cassation application referred to in Article 87 must be filed no later than fourteen (14) days after the day on which the judgment for which cassation is sought is announced or informed to the parties, by registering it with the clerk of the Commercial Court who determined the case.
- 2) The clerk of the court registers the request for cassation on the date it is filed, and the cassation applicant receives a paper receipt signed by the clerk with the same date as the date of registration.
- 3) The clerk of the court is required to notify the respondent of the cassation within 7 (seven) days following the registration of the application for cassation.
- 4) The applicant for cassation must submit the memorandum of cassation to the clerk within fourteen (14) days of the date of registration of the request for cassation, as specified in paragraph 1. (1).
- 5) The clerk of the court is required to deliver the memorandum of cassation to the respondent of the cassation no later than 2 (two) days after receiving the memorandum of cassation.
- 6) The defendant of the cassation may file a counter memorandum of cassation with the clerk of the court no later than fourteen (14) days after receiving the memorandum of cassation referred to in paragraph (5), and the clerk is required to submit the counter memorandum of cassation to the applicant of the cassation no later than seven (7) days after receiving the counter memorandum of cassation.
- 7) The Registrar is required to send the dossier of the relevant cassation case to the Supreme Court no later than 7 (seven) days after the expiration of the term specified in paragraph 1. (6).
- 8) The cassation application hearing and determination must be completed within ninety (90) days of the date the cassation panel receives the cassation application.

- 9) The decision on the appeal referred to in subsection (8), which incorporates the complete legal considerations supporting the decision, must be rendered in a public trial.
- 10) The Registrar of the Supreme Court is required to send the cassation judgment to the registrar no later than 7 (seven) days after the cassation application decision is rendered.
- 11) The bailiff is required to provide the cassation applicant and cassation respondent with a copy of the cassation decision referred to in subsection (10) within two days of receiving the cassation decision.
- 12) Legal efforts to review the cassation decision, as mentioned in paragraph (8), are conducted in accordance with the law.

Article 89 of Law No. 20 of 2016 of the Republic of Indonesia on Marks and Geographical Indications The decision of the Commercial Court that has permanent legal effect may be reviewed. Article 90 Articles 88 and 89 apply *mutatis mutandis* to the filing of a Geographical Indication lawsuit. The Procedure for Implementing Decisions is governed by Law No. 20 of 2016 concerning Marks and Geographical Indications. according to Article 91, paragraph:

- 1) The cancellation based on a court ruling is implemented after the Minister gets a formal copy of the decision that has permanent legal effect and is published in the Official Gazette of Marks.
- 2) Additional rules relating the implementation of the cancellation referred to in paragraph (1) and the abolition by the Minister referred to in Articles 72 through 75 shall be governed by a Government Regulation. Article 92, paragraph 1: (1) Cancellation or deletion of a Mark registration is accomplished by the Minister by crossing out the relevant Mark and noting the grounds and date of cancellation or deletion.; (2) The cancellation or deletion of the registration referred to in paragraph (1) shall be notified in writing to the Mark owner or his representatives, stating the grounds for the cancellation or deletion and confirming that, as of the date of deletion, the relevant Mark certificate shall be declared invalid.
- 3) The deletion of a registered Mark in accordance with paragraph (1) shall be announced in the Official Gazette of Marks.

Registered Mark Removal. A registered mark may be cancelled for four reasons: on the initiative of the DJHKI, a request from the owner of the mark in question, a court order based on a lawsuit for cancellation, or if the registration period of the mark is not extended. The grounds for the elimination of trademark registration are as follows:

- 1) Marks have not been used for three years in a row in the trade of goods and/or services from the date of registration or last use, unless there are reasons acceptable to the DJHKI, such as: import bans, prohibitions related to permits for the circulation of goods using the same mark concerned or a decision from the competent authority that is temporary, or other similar prohibitions stipulated by government regulations; Marks have not been used in the trade of goods and/or services for three years from the date of registration or
- 2) Marks are used for products or services that do not fall under the category of those for which registration was requested. This includes the use of marks that are not in line with the registration requirements (Lasut, 2019).

Law of the Republic of Indonesia Number 20 of 2016 Concerning Marks and Geographical Indications has rules about how to settle lawsuits for infringement of registered marks in commercial courts and how to file claims for infringement of registered marks in commercial courts. These rules are meant to provide legal certainty for the parties involved in dispute to be able to resolve the case in court, through arbitration, or through alternative dispute resolution. The Intellectual Property Arbitration and Mediation Board "BAM KI" can be used to settle intellectual property disputes through arbitration and mediation. This board has a number of benefits, such as being closed to the public, limiting the time it takes to settle to 180 (one hundred and eighty) days, making the process easy, keeping costs low, and making the decision of the arbitral tribunal final and binding on the disputing parties (Sudjana, 2018). Article 93 of Law No. 20 of 2016 on Trademarks and Geographical Indications references Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, which includes consultation, negotiation, mediation, conciliation, arbitration, and expert evaluation.

4. CONCLUSION

4.1. Conclusion

Based on the descriptions and discussions that have been stated previously, this chapter will present some conclusions and suggestions that are expected to be useful for the parties concerned. Mark protection in Indonesia is only granted after registration in accordance with the constitutive registration system as adopted by Law Number 20 of 2016 regarding Marks and Geographical Indications. Unregistered trademarks do not get legal protection. If an unregistered mark is used or imitated by another party without rights or permission, the owner of the mark cannot file a claim against the party who abuses the mark. Then the owner of the unregistered mark cannot take legal steps or remedies. However, Unregistered Marks can make efforts to cancel the mark on the condition that the owner of the mark submits an application for registration in bad faith, namely a well-known mark that has not been registered. Trademarks used by small business actors (MSMEs) do not get protection if they are registered by irresponsible parties and in the end the state here has given rights that the registrant should not have obtained. Brand protection has 2 kinds of protection, namely by preventive and repressive. The chapter XV of the Law No. 20 of 2016 on Trademarks and Geographical Indications addresses dispute resolution. Articles 83 through 93 of Law No. 20 of 2016 on Trademarks and Geographical Indications contain provisions for dispute resolution. It regulates provisions regarding trademark infringement claims, litigation procedures in commercial courts, cassation, decision implementation procedures, and alternative dispute resolution.

4.2. Suggestions

- 1) The government should provide socialization related to the Trademark Law and educate the public and entrepreneurs about the importance of trademark registration.
- 2) To the public, before starting a business, it is better for the brand owner to know in advance the regulations governing the Mark so that the business built in the future goes well and follows the procedures so that there will be no losses incurred in the future.

- 3) The trademark protection system in Indonesia should utilize a legal protection model that combines the principles of protection for the first registrant (first file) and the first user (first to use). Where the party using the trademark has priority in protecting his rights to the mark if he can demonstrate that he is the first user and the first registrant has acknowledged its existence, the first registrant also has priority in protecting his rights to the mark if he can demonstrate that he did not act in bad faith when registering the mark. Because the act of registering a mark that has been used by another party but has not been registered is one of the implications or legal loopholes of Indonesia's "first to file" protection principle.

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