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LEGAL PROTECTION FOR WELL-KNOWN TRADEMARKS THAT IS NOT YET REGISTERED IN INDONESIA IN PROVIDING LEGAL CERTAINTY

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Abstract :

In order to obtain legal protection and legal certainty, trademarks owners must register so that their trademarkss are recognized and obtain rights to the trademarks. However, for well-known trademarks, even though they have not been registered in Indonesia, they still have the right to the same protection and legal certainty if they can prove that their trademarks is a well-known trademarks. This is regulated in the TRIPs agreement and the Paris Convention, where Indonesia has ratified both regulations. However, owners of well-known trademarks that have not been registered in Indonesia still have difficulty in obtaining protection that provides legal certainty both during the registration process in Indonesia and during the court decision process, because the rules on trademarks criteria have not been explained in detail and in detail so that they still cause multiple interpretations that are detrimental to well-known trademarks that have not been registered in Indonesia. This study will discuss whether the well-known trademarks criteria that apply in Indonesia have provided legal protection that guarantees legal certainty for owners of well-known trademarks that have not been registered in Indonesia. The research method used is normative legal research conducted with primary legal materials and secondary legal materials that are analyzed qualitatively and legally with a Law approach and a case approach and then concluded with a deductive reasoning method. The results of this study indicate that the criteria for well-known trademarks regulated in Law Number 20 of 2016 and Permenkumham No. 67 of 2016 are a barrier for well-known trademark owners not to receive legal protection and legal certainty, because they have not been clearly and in detail regulated regarding the limits on how much evidence must be attached and the minimum number of countries that have registered the trademark, as seen from the different interpretations of judges regarding well-known trademarks in the same case, resulting in multiple interpretations that are detrimental to owners of well-known trademarks that have not been registered in Indonesia.

Keywords: ***Trademarks, Well-known Trademarks, Legal Protection, Legal Certainty, Well-known Trademarks That is Not Yet Registered***

INTRODUCTION

Trademarkss play an important role in the smooth trade of goods and services which differentiates one product from another. The current development of trademarkss makes the role of trademarkss not only as a differentiator between one product and another, but also plays an important role in the development of the economy, especially in the field of trade. The importance of the role of this trademarks is certainly followed by the attachment of legal protection, namely as an object to it regarding the rights of individuals or legal entities.[1] Trademarks owners can file lawsuits against other parties who violate their trademarks rights.[2] In the list of Intellectual Property Rights cases at the Central Jakarta District Court, the latest data for which was

[1] Adrian Sutedi, *Hak Atas Kekayaan Intelektual*, Edisi 1. Cet. 2, Sinar Grafika, Jakarta, 2013, hal. 91.

[2] Budi Agus Riswandi dan M. Syamsudin, *Hak Kekayaan Intelektual dan Budaya Hukum*, Raja Grafindo Persada, Jakarta, 2005, hal. 86.

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accessed on July 16, 2024, of the total 1,113 cases concerning Intellectual Property Rights violations, 961 of them were cases against trademarks.[3] It can be seen that 86.34% of IPR disputes are trademark disputes, both disputes against local trademarkss and disputes against trademarkss from other countries. From the list of Intellectual Property Rights cases above, trademark cases are the most common cases. The trademark cases that dominate the list of IPR violations when viewed from the development of globalization certainly cannot be separated from trademark cases from other countries. For well-known trademarkss that have not been registered, legal protection is also provided where Indonesia has ratified the TRIPs Agreement and the Paris Convention with the obligation to comply with and ratify the Law in Indonesia with these regulations. With the ratification of these regulations, the intellectual property rights system has been recognized and become part of the norms of behavior in international trade.

In article 6 bis of the Paris Convention, there is a point explaining that member countries must reject or cancel trademark registration and prohibit the use of trademarks that are imitations or translations of well-known trademarks. Article 8 of the Paris Convention explains that legal protection is given to well-known trademarks from member countries, both registered and unregistered, as regulated in Article 8 of the Paris Conversion, namely:

"A trade name shall be protected in all countries of the union without the obligation of filing or registration, whether or not it forms part of a trademark". For well-known trademarks that have not been registered in Indonesia, to obtain legal protection, they must prove that their trademark is a well-known trademark.

The criteria for well-known trademarks have been regulated in Law Number 20 of 2016 concerning Trademarks and Geographical Indications and Regulation of the Minister of Law and Human Rights No. 67 of 2016. The regulation regarding the criteria for well-known trademarks is a very important issue to discuss because legal protection and certainty can only be obtained by well-known trademarks that have not been registered in Indonesia if the trademark is recognized as a well-known trademark, while the regulation regarding the criteria for well-known trademarks still does not have clear specific limitations and gives rise to multiple interpretations that are detrimental to trademark owners from other countries who have difficulty obtaining legal certainty from the registration process to the time of dispute resolution.

In the registration process, a well-known trademarks that has not been registered cannot register its trademarks because there is a similar trademarks that has been registered, whereas the trademarks should have been rejected for registration because it resembles a well-known trademarks. However, because the determination of a well-known trademarks is still unclear before the decision is made, it becomes a loophole for other business actors in registering their trademarkss that resemble well-known trademarkss. In addition, in disputes over well-known international trademarkss that have not been registered in Indonesia, what often happens is that the results of different decisions in the same case between the first-level decision and the decision in the next level of legal efforts. In the first-level decision, the judge rejects the lawsuit of the owner of the well-known trademarks because it is considered not a well-known trademarks, but in the cassation level decision, the judge accepts the lawsuit because the trademarks is recognized as a well-known trademarks. Several cases that occur are between the first-level decision and the decision at the next level resulting in different

[3] Pengadilan Negeri Jakarta Pusat, *Daftar Perkara Hak Kekayaan Intelektual*, terdapat dalam http://sipp.pn-jakartapusat.go.id/list_perkara/page/1/eThZQUxhMXFXY0NVdUFYTVFLVE5tTktBQ2Y1b3l2K3piazFYb21pNVJzOTk0UHZNaDNQNHdYMWZETkhXb0dqeCtGS3FpYms0ZWhvM2VBdVdab3lpc2c9PQ==/key/col/2

decisions because the judge stated that the judex facti had made a mistake or error in understanding the criteria for a well-known trademarks. In addition, in Article 18 paragraph (3) letter h, it is explained that the well-known trademarks is also seen from the level of success of law enforcement in the field of Trademarkss, especially regarding the recognition of the Trademarks as a well-known trademarks by the authorized institution. The track record of the existence of a well-known trademarks through court decisions is the most legally determining criterion for determining the existence of a trademarks as a well-known trademarks.[4]

The regulation regarding the criteria for well-known trademarks is a very important issue to discuss because legal protection and certainty can only be obtained by well-known trademarks that have not been registered in Indonesia if the trademark is recognized as a well-known trademark, while the regulation regarding the criteria for well-known trademarks is still unclear, thus giving rise to multiple interpretations that are detrimental to trademark owners from other countries, so the author is interested in conducting this research.

DISCUSSION

Legal Protection for Well-known Trademarks That is Not Registered in Indonesia

The growing development of Intellectual Property Rights has raised awareness among countries around the world that Intellectual Property Rights are important to protect.[5] Legal protection of a trademarks is a legal force that protects the trademarks owner in relation to everything related to the interests of a trademarks. Adequate legal protection in the field of trademarkss will greatly affect the sustainability of a company and at the same time increase competitiveness in the global and national markets.[6] According to Satjipto Rahardjo, legal protection is by providing protection for human rights that are harmed by other people and this protection is given to the community so that they can enjoy all the rights granted by law.[7] In the list of Intellectual Property Rights cases at the Central Jakarta District Court, trademark disputes are the most common disputes. Disputes over trademarks that occur are not only from trademarks originating from Indonesia but also from foreign trademarks, considering the development of globalization in the economic sector certainly reaches various countries.

In order to develop the Indonesian economy in the field of international trade, Indonesia is a member of several organizations and associations, especially in relation to trademarks. Indonesia is a member of the WTO (World Trade Organization), where Indonesia's membership in the WTO reflects a commitment to be involved in orderly and rule-based global trade, as well as developing a national economy that can be obtained from participation in a larger international market. In addition, Indonesia is also a member of the Paris Union which is part of the World Intellectual Property Organization (WIPO) which was founded in 1883, aiming to facilitate international cooperation in terms of protecting intellectual property rights.[8] Indonesia's membership in the WTO and the Paris Union is followed by the obligation to comply with and ratify the Law in Indonesia with the applicable rules, namely the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights) and the Paris Convention (The Paris Convention for the Protection

[4] Kholis Roisah, Joko Setiyono, "Penerapan Trademark Dilution Pada Penegakan Perlindungan Hukum Hak Merek Terkenal di Indonesia", dalam *Law Reform*, Volume 15, 2, (2019), 309.

[5] Abdul Latif Mahfuz, "Problematik Hukum Hak atas Kekayaan Intelektual (HAKI) di Indonesia", dalam Jurnal Kepastian Hukum dan Keadilan, Volume 1, No.2, 2020, hal. 54.

[6] Tomi Suryo Utomo, *Hak Kekayaan Intelektual di Era Global*, Graha Ilmu, Yogyakarta, 2010, hal. 209.

[7] Satjipto Rahardjo, *Ilmu hukum,* Citra Aditya, Bandung, 2014, hal. 93.

[8] *"The Paris Convention for the Protection of Industrial Property (1883)"*, WIPO, terdapat dalam https://www.wipo.int/treaties/en/ip/paris/index.html

of Industrial Property). Indonesia ratified the Paris Convention (Paris Convention for the Protection of Industrial Property, Stockholm Revision 1967) on May 10, 1979 based on Presidential Decree No. 24 of 1979,[9] which to date has been signed by 180 member countries [10] which Indonesia has ratified both rules. With the ratification of these rules, the intellectual property rights system has been recognized and become part of the norms of behavior in international trade. M. Zulfa Aulia in his journal wrote his opinion that the participation and involvement of most countries in this agreement is mandatory, so that it must be implemented whether they like it or not.[11] Protection of Intellectual Property Rights, one of which includes trademarks, is regulated in the Paris Convention, as can be seen from the provisions of Article 1 of the Paris Convention for Protection of Industrial Property, namely:

(1) The countries to which this Convention applies constitute a Union for the protection of industrial property.
(2) The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.
(3) Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.
(4) Patents shall include the various kinds of industrial patents recognized by the laws of the countries of the Union, such as patents of importation, patents of improvement, patents and certificates of addition, etc.

The Paris Convention also provides protection for well-known trademarkss as regulated in Article 6 bis of the Paris Convention, which explains that:[12]

"The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith."

The provisions in Article 6 bis of the Paris Convention apply with the explanation contained in the provisions in Article 16 numbers 2 and 3 of the TRIPs Agreement on Rights Coffered, namely:

1. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

2. Article 6bis of the Paris Convention (1967) shall apply, mutatis mutandis, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that

[9] *Sejarah DJKI,* terdapat dalam *https://dgip.go.id/tentang-djki/sejarah-djki*

[10] World Intellectual Property Organization (WIPO), *Contracting Parties Contracting Parties, Contracting Parties > Paris Convention (Total Contracting Parties: 180)*

[11] M. Zulfa Aulia, "Perlindungan Hukum Ekspresi Kreatif Manusia: Telaah terhadap Perlindungan Hak Kekayaan Intelektual dan Ekspresi Budaya Tradisional", dalam *Jurnal Hukum*, Volume 14, No. 3, 2007, hal. 360-361.

[12] Pasal 6 *bis* Paris Convention.

trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

Legal protection for Trademarks in Indonesia is obtained by the owner of the trademark if the trademark has been registered. This is because Indonesia adopts the first to file system, which requires the first registration for a trademark to obtain protection so that the legal consequences of trademark rights are based on registration.[13] This is also explained in Article 3 of the Trademark and Geographical Indications Law which states that the right to a trademark is obtained after the trademark is registered. Thus, if another party submits an application for registration of the same trademark in principle/entirely, it will not be approved.[14] so that it becomes a loophole for lawsuits from well-known trademarks owners to be rejected, however Article 8 of the Paris Conversion states that:

A trade name shall be protected in all the countries of the union without the obligation of filing or registration, whether or not it forms part of a trademark, so it can be seen that protection of trademarkss is not only given to registered trademarkss but also trademarkss that have not been registered if the trademarks is a well-known trademarks. Determining a well-known trademarks is also an important point whether legal protection and certainty can be given or not.

According to Philipus M. Hadjon, legal protection for the people includes two things, namely:[15]

a. Preventive Legal Protection
   Preventive legal protection is a form of legal protection where the people are given the opportunity to submit objections or opinions before a government decision takes definitive form.
b. Repressive Legal Protection
   Repressive Legal Protection is a form of legal protection which is more aimed at resolving disputes.

In Law Number 20 of 2016 concerning Trademarks and Geographical Indications, preventive legal protection for well-known trademarks is provided in the trademark registration process, where the contents of Article 21 are:

(1) An application is rejected if the trademark is essentially or wholly similar to:
   a. A registered trademark owned by another party or previously applied for by another party for similar goods and/or services;
   b. A well-known trademark owned by another party for similar goods and/or services;
   c. A well-known trademark owned by another party for dissimilar goods and/or services that meet certain requirements; or
   d. A registered Geographical Indication.
(2) An application is rejected if the trademark:
   a. is or resembles the name or abbreviation of a well-known person, photo, or name of a legal entity
   b. owned by another person, except with the written consent of the entitled party;
   c. is an imitation or resembles the name or abbreviation of a name, flag, symbol or emblem of a country, or national or international institution, except with written approval from the authorized party; or
   d. is an imitation or resembles an official sign or stamp or seal used by a country or

[13] Raden Murjianto, "Konsep Kepemilikan Hak Atas Merek di Indonesia (Studi Pergeseran Sistem "Deklaratif" ke dalam Sistem "Konstitutif)", dalam Jurnal Hukum IUS QUIA IUSTUM, Volume 24, 1, 2017, hal. 56.

[14] Nadira Ramadhanty, I Wayan Wiryawan, "Akibat Hukum Tidak Didaftarkannya Merek Dagang Produk Kue Kering Toko 'Madame Patisserie'", *Jurnal Harian Regional*, Volume 7, No. 6, 2019, hal. 2-15.

[15] *Ibid,* hal. 4.

government institution, except with written approval from the authorized party.

(3) An application shall be rejected if it is submitted by an applicant who acts in bad faith.

(4) Further provisions regarding the rejection of a Trademark Application as referred to in paragraph (1) letters a to c shall be regulated by a Ministerial Regulation.

Repressive legal protection is also regulated in the Trademark and Geographical Indications Law, namely that the owner of a well-known trademark, whether registered or unregistered, can file a lawsuit for cancellation in court, as regulated in Article 76, namely:

(1) A lawsuit for cancellation of a registered trademark can be filed by an interested party based on the reasons referred to in Article 20 and/or Article 21.

(2) The owner of an unregistered trademark can file a lawsuit as referred to in paragraph (1) after submitting an Application to the Minister.

(3) A lawsuit for cancellation is filed with the Commercial Court against the owner of a registered trademark.

These provisions indirectly provide repressive legal protection for owners of well-known trademarks that have not been registered in Indonesia. A lawsuit for cancellation can be filed without a time limit if there is an element of bad faith and/or the trademark in question is contrary to state ideology, laws and regulations, morality, religion, decency, and public order as regulated in Article 77.

Protection of well-known trademarkss that have not been registered in Indonesia has been regulated in Law Number 20 of 2016 concerning Trademarks and Geographical Indications, although not explicitly stated, in which Indonesia has ratified the TRIPs Agreement and the Paris Convention which also regulates the protection of well-known trademarkss, both registered and unregistered. The legal protection that has been regulated can only be obtained if the trademarks is recognized as a well-known trademarks.

Criteria for Well-known Trademarks in Providing Legal Certainty for Well-known Trademarks That is Not Yet Registered in Indonesia

The criteria for a well-known trademark are very important in determining whether the owner of an well-known trademark that has not been registered in Indonesia gets legal protection and legal certainty because the trademark must be recognized as a well-known trademark first before it can get legal protection and legal certainty.

The criteria for a well-known trademark according to WIPO are as follows:

a) The degree of knowledge or recognition of the mark in the relevant sector of the public.

b) The duration, extent and geographical area of any use of the mark.

c) The duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, of fairs or exhibitions, of the goods an/or services to which the mark applies.

d) The duration and geographical area of any registration, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark.

e) The record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by competent authorities.

f) The value associated with the mark.

As a member country of WIPO, Indonesia has also regulated the criteria for well-known trademarks, namely in Law Number 20 of 2016 concerning Trademarks and Geographical Indications and Regulation of the Minister of Law and Human Rights Number 67 of 2016. Article 21 paragraph (1) letter b of Law Number 20 of 2016 concerning Trademarks and Geographical Indications explains that determining the well-knownness of a Trademark must

be done by considering the general knowledge of the public regarding the trademark in the relevant business sector, and also paying attention to its reputation as a well-known Trademark obtained due to large-scale promotion, investment in several countries in the world made by its owner, and accompanied by proof of registration of the Trademark in several countries in the world. Regulation of the Minister of Law and Human Rights No. 67 of 2016 in Article 18, namely:

(1) The criteria for determining a well-known Trademark as referred to in Article 16 paragraph (2) letters b and c are carried out by paying attention to the general knowledge of the public regarding the trademark in the relevant business sector.

(2) The community as referred to in paragraph (1) is the consumer community or the community in general who have good relations at the level of production, promotion, distribution, or sales of goods and/or services protected by the well-known Trademark in question.

(3) In determining the criteria for a Trademark as a well-known Trademark as referred to in paragraph (1), the following considerations are taken into account:

a. the level of public knowledge or recognition of the Trademark in the relevant business sector as a well-known Trademark.

b. the volume of sales of goods and/or services and the profits obtained from the use of the trademark by its owner.

c. the market share controlled by the Trademark in relation to the circulation of goods and/or services in the community.

d. the scope of the area of use of the Trademark.

e. the period of use of the Trademark.

f. the intensity and promotion of the Trademark, including the investment value used for the promotion.

g. registration of the Trademark or application for registration of the Trademark in another country

h. the level of success of law enforcement in the Trademark field, especially regarding the recognition of the Trademark as a well-known Trademark by the authorized institution, or

i. the value attached to the Trademark obtained due to the reputation and quality assurance of the goods and/or services protected by the Trademark.

Article 18 paragraph (3) letter h of Permenkum HAM No. 67 of 2016 explains that trademarks recognition is also seen from the level of success of law enforcement in the field of trademarkss, especially regarding the recognition of the trademarks as a well-known trademarks by the authorized institution. The track record of the existence of a well-known trademarks through a court decision is the most legally determining criterion for determining the existence of a trademarks as a well-known trademarks. In the registration process, a well-known trademarks that has not been registered cannot register its trademarks because there is a similar trademarks that has been registered, whereas the trademarks should have been rejected for registration because it resembles a well-known trademarks. However, because the determination of a well-known trademarks before a decision only relies on general knowledge to assess the trademarks's recognition, which of course becomes a loophole for disputes to occur, legal certainty is only obtained by the owner of an well-known trademarks that has not been registered in Indonesia if a dispute has occurred. In addition, the criteria for well-known trademarks that are regulated do not yet provide clear regulations where there are no limits on how much evidence must be attached and the minimum number of countries that have registered the trademark, as seen from the differences in the judge's interpretation of well-known trademarks in the same case, examples of cases include SAMGONG VS SAMGONG GEAR, where the judge considered the SAMGONG trademark not to be a well-known trademark because it was registered in less than 11 countries, but in the next level decision the judge stated that the judex facti had made a mistake or error in understanding the criteria for a well-known trademark and recognized the SAMGONG trademark as a well-known trademark

because it had been registered in several countries. Similar to the SAMOGONG case, the dispute between Caberg VS Caberg SpA in the first level decision the judge considered that the Caberg trademark was not a well-known trademark because it had only been registered in 15 countries, while in the next level decision the judge stated that the judex facti had made a mistake or error in understanding the criteria for a well-known trademark because the plaintiff's Caberg trademark had been registered in no less than 15 countries. It can be seen that the criteria for a well-known trademark are very important for owners of well-known trademarks that have not been registered in Indonesia who have only received legal protection and legal certainty if the trademark is recognized as a well-known trademark, but owners of well-known trademarks that have not been registered in Indonesia still have difficulty in obtaining protection and legal certainty because the rules for the criteria for well-known trademarks do not yet provide clear rules where there are no limits on how much evidence must be attached and the minimum number of countries that have registered the trademark which still gives rise to multiple interpretations that are detrimental to owners of well-known trademarks that have not been registered in Indonesia.

CONCLUSION

Law Number 20 of 2016 concerning Trademarks and Geographical Indications has provided legal protection for owners of well-known trademarks that have not been registered in Indonesia, but legal protection is obtained if the trademark owner is proven to be a well-known trademark. The criteria for well-known trademarks are regulated in WIPO and Indonesia as a member country has regulated the criteria for well-known trademarks in Law Number 20 of 2016 concerning Trademarks and Geographical Indications and Regulation of the Minister of Law and Human Rights Number 67 of 2016, but the existing regulations still have loopholes that cause problems for owners of well-known trademarks that have not been registered in Indonesia because the trademark is recognized as a well-known trademark in writing through a court decision so that recognition is obtained after a dispute occurs and has not provided clear and detailed rules regarding the limitations on how much evidence must be attached and the minimum number of countries that have registered the trademark, as seen from the different interpretations of judges regarding well-known trademarks in the same case, so that owners of well-known trademarks that have not been registered in Indonesia have difficulty in obtaining protection and legal certainty.

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