

Justice in Trademark Protection for MSMEs: A Legal Evaluation of Barriers and Solutions in Intellectual Property Registration

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HIGHLIGHTS

- MSMEs struggle with low legal awareness and complex trademark registration
- The Indonesia's first-to-file system risks brand hijacking for unregistered marks
- Policy reform and stronger support are key to better IP protection

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ABSTRACT

The rapid growth of the Information Technology (IT) industry has provided significant opportunities for expansion of Micro Small Medium Enterprises (MSME) without exception to Indonesia business industry especially in the recent years following the world economic recovery from a global pandemic. However, this growth has also brought forth a myriad of challenges, particularly in the realm of trademark protection and registration. This literature review aims to explore the formal legal challenges faced by MSME owners in the process of trademark registration and its protection, it begins by emphasizing the importance of trademarks competitiveness for MSME and their role in fostering healthy business competition, and to enhance their legal literacy and awareness. Subsequently, this study delves into the procedural aspects of trademark registration and its protection in Indonesia, shedding light on the challenges encountered by MSME owners during this process. These challenges encompass issues such as lack of awareness and insufficient information on intellectual property, budget constraints, and the slow enforcement of intellectual property laws. Furthermore, this study examine the implications of said legal challenges on the development of Indonesian MSME and proposes strategies to address these obstacles by providing a comprehensive analysis that offer valuable insights for policymakers, legal practitioners and Indonesian MSME owners, that could contribute to a deeper understanding of the subject.

A. INTRODUCTION

For over a year, the COVID-19 pandemic brought global economic activity to an abrupt halt, significantly impacting various sectors, particularly the economy and trade industries, including Indonesia's national economy. The enforced stagnation of economic activities compelled business actors, both local and multinational enterprises, to implement drastic cost-cutting measures, such as reducing production expenses, limiting product output, modifying operational regulations, and, in many cases, resorting to employee layoffs (PHK). Some businesses were even forced into bankruptcy or closure. This economic disruption placed society in a survival mode, compelling individuals to exhaust all available means to sustain their livelihoods. Among the most affected were Micro, Small, and Medium Enterprises (MSMEs), which struggled to maintain their operations. Additionally, many individuals who lost their jobs were forced to seek alternative sources of income, often by establishing small businesses to meet daily necessities throughout the pandemic and lockdown periods.

Referring to data released by the Indonesian Ministry of Cooperatives and MSMEs, the number of Micro, Small, and Medium Enterprises (MSMEs) in Indonesia has reached 64.2 million units. In 2020, the MSME sector contributed significantly to Indonesia's Gross Domestic Product (GDP), generating over 8,000 trillion rupiah, equivalent to 61.07% of the total GDP. Moreover, MSMEs accounted for approximately 97% of total employment absorption and contributed up to 60.4% of the country's overall investment value.¹ As one of the major contributors to employment absorption and national foreign exchange earnings, the government has inevitably played an active role in enhancing the utility and capacity of MSMEs as part of broader efforts to support post-pandemic economic recovery.

Through the APEC Workshop organized by the Ministry of Cooperatives and MSMEs in 2022, the Indonesian government reaffirmed its

¹ Siaran Pers HM.4.6/103/SET.M.EKON.3/05/2021. Kementerian Koordinator Bidang Perekonomian Republik Indonesia, <https://ekon.go.id/publikasi/detail/2969/umkm-menjadi-pilar-penting-dalam-perekonomian-indonesia> accessed on December 16, 2024.

commitment to supporting MSME development, particularly in the areas of digitalization, financial access, and the promotion of women's participation in entrepreneurship. In addition, programs such as the Productive Micro Business Assistance (BPUM) initiative have been introduced as a means of facilitating the digital transformation of MSMEs.² However, it is rather unfortunate that discussions concerning the importance of trademark registration have not yet received significant attention.

MSMEs have a positive impact on Indonesia's economy, not only in monetary terms but also in relation to human resources (HR) development. The increasing number of MSMEs correlates with the expansion of employment opportunities for the public, while also creating new job prospects for individuals affected by the pandemic.³ The rise in new business ventures has naturally led to greater diversity across various economic sectors. Business actors are increasingly confronted with the challenge of enhancing creativity to ensure their products remain competitive in the marketplace. As the number of entrepreneurs grows, the level of competition among businesses inevitably becomes more intense.

In line with technological advancements, MSME actors have begun utilizing digital platforms to market their products and enhance competitiveness. However, many MSME entrepreneurs still lack a comprehensive understanding of the concepts of 'branding' and intellectual property associated with product trademarks. Their focus tends to center on boosting sales figures and expanding customer reach through online branding, particularly via social media platforms, while neglecting the legal aspects of brand protection. Consequently, they often overlook the long-term importance of trademark registration, either due to concerns that their promoted products might already be registered under someone else's name or

² Kominfo. Berita Pemerintahan. <https://www.kominfo.go.id/content/detail/45201/digitalisasi-jadi-salah-satu-strategi-pemulihan-umkm-pascapandemi/0/berita> accessed on December 16, 2024.

³ Alfin, A. Analisis Strategi UMKM dalam Menghadapi Krisis di Era Pandemi COVID-19. Jurnal Inovasi Penelitian. 2021

due to a reluctance to engage in procedures perceived as complicated and burdensome.⁴

Such concerns are further fueled by the rapid advancement of technology and the growing complexity of the business industry, which have introduced new challenges for MSMEs particularly regarding trademark registration, an issue that has become increasingly prominent in the modern era.⁵ The formal legal challenges faced by MSME owners in the process of trademark registration include a lack of legal literacy and awareness, limited access to information regarding conflict resolution and trademark registration procedures, as well as financial constraints. At the same time, incidents of brand counterfeiting or unauthorized duplication by irresponsible parties have become increasingly prevalent, fueled by the intensifying competition across business sectors. Consequently, the legal implications surrounding trademark protection and registration, as an integral part of MSME development, must be given serious consideration.

However, there are still business actors, particularly within the traditional MSME sector, who perceive the trademark registration process as excessively complicated, time consuming, and financially burdensome.⁶ The lack of information, legal literacy, and awareness regarding legal procedures, coupled with the imperfect implementation of existing regulations, often triggers apprehension, indifference, and mistrust among MSME actors. On the other hand, intellectual property rights are an inseparable and essential component of the business world.

A trademark itself is a form of intellectual creation that constitutes a right requiring legal protection. Intellectual property is defined as a right one that is inherently personal and from this notion arises the fundamental rationale for its protection. Every human creation deserves to be respected

⁴ Subianta, Kepala Divisi Pelayanan Hukum dan HAM Kanwil Kemenkumham Jawa Timur. <https://jatim.kemenkumham.go.id/pusat-informasi/artikel/10602-pendaftaran-merek-dari-umkm-di-jatim-meningkat> accessed on December 16, 2024.

⁵ Patricio Sáiz, Rafael Castro. Trademarks in Branding: Legal Issues and Commercial Practices. *Business History* 60. 2018

⁶ Suryansyah, S. Junaeda, I. Tinjauan Hukum Pendaftaran Hak Merek Terhadap Produk Pangan Lokal dalam Meningkatkan Ekonomi Kreatif di Kabupaten Mamuju. *Sang Pencerah: Jurnal Ilmiah Universitas Muhammadiyah Buton*. 2021

and recognized as a rightful entitlement, which can be conceptually grounded in the broader principle of ownership rights as part of fundamental human rights.⁷ Since a trademark constitutes intellectual property, it must be protected in the same manner as other proprietary rights. A trademark is a form of property, and the legal framework is established to serve the fundamental purpose of protecting individuals and the assets they own.⁸ The use of trademarks by rightful parties in commercial goods and service industries has direct economic implications, as consumers tend to associate trademarks with specific products or services, influencing their purchasing decisions.⁹

Intellectual property is a collection of legally recognized rights granted when an idea or invention is protected.¹⁰ Meanwhile, a trademark is a form of intellectual property protected by the state. Its regulation is stipulated under Law Number 20 of 2016 concerning Trademarks and Geographical Indications (Trademark and GI Law). Trademark protection by the state is granted once the mark is officially registered with the Directorate General of Intellectual Property. A registered trademark serves as legal evidence for its holder and grants the right to authorize other parties to market goods using that mark. Furthermore, products bearing registered trademarks must obtain consent if they intend to use a mark that has already been registered by another party for similar goods before being distributed in the market. Field observations reveal that many MSME actors engaged in home-based food production operate without registered trademarks. These home industry entrepreneurs tend to develop brand names merely as a marketing strategy to attract consumers and increase sales. However, few exhibit a protectionist

⁷ Hasibuan, Otto. *Perlindungan Hak Ekonomi Pencipta Lagu dan Pemegang Hak Terkait di Indonesia*. Desertasi. Yogyakarta: UGM. 2006

⁸ Kurnia, Titon Slamet. *Perlindungan Hukum Terhadap Merek Terkenal di Indonesia Pasca Perjanjian TRIPs*. Bandung: PT. Alumni. 2011

⁹ Rongiyati, Sulasi. *Perlindungan Hukum Kekayaan Intelektual Pada Produk Ekonomi Kreatif*. Jurnal Negara Hukum. 2018

¹⁰ Mohd Noo, N. A. *Intellectual Property Rights and Agro-based Natural Product: Malaysian Legal Perspective*. Journal of Politics and Law.

approach or willingness to formally register their product names voluntarily.¹¹

Intellectual Property (IP) should be regarded as a tool that empowers economic growth rather than being perceived as an abstract or ambiguous legal concept. The protection of IP rights plays a vital role in driving technological innovation and facilitating economic advancement. However, the value of IP is often underestimated, particularly among MSMEs, who frequently overlook its potential to generate future profits. Nevertheless, when IP is legally protected and there is market demand for products and/or services covered by IP rights, it can transform into a highly valuable business asset.¹²

Based on the aforementioned background, several key issues can be identified and formulated as the central research questions for this scientific analysis. First, what is the legal basis for trademark registration for MSMEs in ensuring the legality and smooth operation of their businesses? Second, how is the legal protection framework for intellectual property rights, specifically in the form of trademarks, structured within MSME business activities?

Grounded in these questions, this article aims to promote legal literacy and raise public awareness regarding the protection of intellectual property rights in trademarks, with particular emphasis on MSME actors. Furthermore, this study seeks to provide a comprehensive overview and strategic recommendations for addressing legal obstacles in the protection and enforcement of trademark related intellectual property rights, with a specific focus on guiding stakeholders and policymakers in the formulation of effective regulations.

¹¹ Fibrianti, Nurul. Trademarks and The Protection for Business Actors in Indonesia: Some Contemporary Issues and Problems. *Indonesian Journal of Advocacy and Legal Services*.

¹² Sukamirjan, Sati-Salmah. Sapong, Olivia De Vega. The Importance of Intellectual Property for SEMs; Challenges and Moving Forward. *UMK Procedia. International Agribusiness Marketing Conference (IAMC) 2013*.

B. RESEARCH METHOD

This research employs a juridical-normative legal approach with a descriptive character, by examining relevant legal theories, concepts, principles, and statutory regulations. Soerjono Soekanto defines juridical-normative legal research as a study conducted primarily through the analysis of secondary sources, such as literature, legal doctrines, and primary sources in the form of statutory provisions.¹³ The juridical approach involves examining legal events through the analysis of laws, legal norms, principles, doctrines, and statutory regulations. Meanwhile, normative legal research focuses on analyzing the legal system in a systematic manner, with the primary objective of identifying definitions, foundations, and the underlying rationale within existing laws and regulations that are applicable and relevant to the topic under discussion.¹⁴

The research method applied in this study is a descriptive-analytical approach, which aims to explain the relationship between existing statutory regulations, relevant legal theories, and the practical implementation of the applicable legal provisions in addressing the identified issues.¹⁵ Through the research method applied, this study is expected to systematically identify and analyze the legal obstacles faced by MSME actors in the process of trademark registration and protection. The analysis will be based on Law Number 20 of 2016 concerning Trademarks and Geographical Indications, relevant international conventions, other applicable statutory regulations, as well as supporting legal theories.

C. RESULTS AND DISCUSSION

¹³ Soekanto, Soerjono. Mamudji, Sri. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Jakarta: Raja Grafindo Persada. 1994

¹⁴ Sunggono, Bambang. *Metodologi Penelitian Hukum*. Jakarta: Raja Grafindo Persada. 2016

¹⁵ Soekanto, Soerjono. *Pengantar Penelitian Hukum*. Jakarta: UI Press. 2010

Trademark Registration in Indonesia

Trademark issues in Indonesia were first regulated under Law Number 21 of 1961 concerning Company Marks and Trademarks, which was enacted on October 11, 1961, hereinafter referred to as the 1961 Trademark Law. This legislation replaced the Dutch colonial legacy of 1912 concerning Industrial Property Rights. Referring to Law Number 21 of 1961, trademark owners seeking legal protection for their marks were not required to register them. Trademark rights were determined based on the principle of first use, while registration merely served as presumptive evidence that the registrant was the first user, unless proven otherwise. This system is commonly referred to as a declarative registration system or the "first to use" principle.¹⁶ There are two primary systems for trademark registration: the Declarative System and the Constitutive System. The Declarative System, also known as the passive system, operates under the assumption that the party registered is the rightful owner of the trademark based on being the first actual user of the mark.¹⁷

Trademark registration under the Declarative System in Indonesia was eventually deemed incompatible with the country's legal and economic developments. Consequently, Law Number 19 of 1992 concerning Trademarks, hereinafter referred to as the 1992 Trademark Law, was enacted to replace the 1961 Trademark Law. The 1992 legislation introduced the "first to file" system, shifting from the previous Declarative System "first to use", whereby legal ownership and protection of trademarks are granted to the party who first files for registration, regardless of prior use.¹⁸ Subsequently, Law Number 19 of 1992 was amended by Law Number 14 of 1997 concerning Amendments to Law Number 19 of 1992 on Trademarks, and later replaced by Law Number 15

¹⁶ Abdurrahman, Humaedi. Asas First to File Principal dalam Kasus Hak Merek Nama Terkenal BENSU. Jurnal Aktualita. 2020

¹⁷ Purwaningsih, Endang. Perkembangan Hukum Intellectual Property Rights Kajian Hukum Terhadap Hak Atas Kekayaan Intelektual dan Kajian Komparatif Hukum Paten. Bogor: Ghalia Indonesia. 2005

of 2001, which was ultimately superseded by Law Number 20 of 2016 concerning Trademarks and Geographical Indications. Since the enactment of the 1992 Trademark Law and its subsequent amendments, culminating in the current 2016 Trademark and Geographical Indications Law, Indonesia has consistently adopted the Constitutive System, also known as the "first to file" system. Under this system, trademark owners are required to register their marks in order to obtain legal protection as stipulated in the Trademark Law.

Several regulatory developments in the field of Intellectual Property (IP), particularly concerning trademarks, have been influenced by Indonesia's participation in various international conventions. Among the most notable is The Paris Convention for the Protection of Industrial Property of 1883, which was ratified by Indonesia through Presidential Decree Number 24 of 1979. Furthermore, Indonesia also ratified the Agreement Establishing the World Trade Organization (WTO) through Law Number 7 of 1994, which contains provisions on intellectual property protection as part of international trade commitments.¹⁹ One of the annexed documents within the Agreement Establishing the WTO contains provisions related to trade aspects involving intellectual property rights, including measures against the trade of counterfeit goods, known as the Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods (TRIPs). In Indonesia, since the enactment of the 1992 Trademark Law, later replaced by the 2001 Trademark Law, trademark registration has served as the legal basis for trademark rights, reflecting the adoption of the Constitutive System. This approach has also been influenced by principles set forth in the Paris Convention. Specifically, Article 6 bis of the Paris Convention, which addresses the protection of well-known marks, is reinforced by Article 16(3) of the TRIPs Agreement,

¹⁸ Abdurrahman, *Op. Cit.*

underscoring the obligation of member states to provide enhanced protection for registered and well-known trademarks.

Article 6 bis of the Paris Convention states:

"Article 6 bis of the Paris Convention (1967) shall apply, mutatis mutandis, to services. In determining whether a trademark is wellknown, account shall be taken of the knowledge of the trademark in the relevant sector of the public, including knowledge in that Member obtained as a result of the promotion of the trademark."

Article 16(3) of the TRIPs Agreement states:

"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 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."

Based on these provisions, Article 6 bis of the Paris Convention applies *mutatis mutandis*, meaning "with the necessary adjustments," to trademark protection. Member states are therefore permitted to establish specific regulatory requirements, particularly when the use of a trademark results in harm or potential loss to the rightful trademark owner. Furthermore, Article 16(3) of the TRIPs Agreement explicitly affirms that, even when the use of a trademark is not identical but similar to an already registered mark, and such use has the potential to cause harm to the registered trademark owner, the principles enshrined in Article 6 bis of the Paris Convention shall be applied within the framework of trademark protection.

Under the provisions stipulated in Article 4 of the 2001 Trademark Law, the individual who first registers a trademark (first to file) in good faith is recognized as the legitimate owner of the mark. Consequently, this individual possesses the legal right to oppose or request the cancellation of a trademark registration that is identical, an imitation, or a translation of

¹⁹ Purwandoko, Prasetyo. Implementasi Agreement on Trade Related Aspects of

the registered mark, in accordance with the principles established in Article 6 bis of the Paris Convention as outlined above.²⁰

Under the first to file registration system, trademark rights are determined based on official registration. This system grants the trademark owner the exclusive right to register their trademark for the first time, thereby establishing legal ownership and protection over the mark.²¹ In other words, trademark rights are granted to the first applicant, provided that the trademark registration is formally documented in the trademark certificate, which serves as strong legal evidence for the rightful trademark owner. The issuance of a trademark certificate functions as conclusive proof of ownership, with its evidentiary value equivalent to that of an official deed. This classification aligns with the types of legal evidence recognized under Article 1868 of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata), as the certificate's format and issuance are regulated by law.²² This mechanism undoubtedly ensures legal certainty in the protection of trademark registrations in Indonesia.

However, in practice, the expectation of achieving full legal certainty in trademark protection has not been entirely realized. This is evidenced by several cases involving the cancellation of registered trademarks, either initiated by the individuals who originally registered the marks or by parties who claim to be the rightful owners of the trademarks, despite not having formally registered them.

Intellectual Property Rights oleh Pemerintah Indonesia. Jurnal Yustisia. 2006

²⁰ Hasibuan, Efendy. *Perlindungan Merek Studi Mengenai Putusan Pengadilan Indonesia dan Amerika Serikat*. Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia. 2001

²¹ Purwaningsih, Op.Cit.

²² Sembiring, Sentosa. *Prosedur dan Tata Cara Memperoleh Hak Kekayaan Intelektual*. Bandung: CV Yrama Widya. 2002

Legal Barriers to Trademark Registration for MSMEs Amidst the Growing Industry in Indonesia

Alongside rapid technological advancements and the digital era, product marketing has become significantly more accessible, primarily through the use of technology and the accelerated flow of information via social media and the internet activities that can now be carried out using only a smartphone. From culinary recipes, financial tips, fashion trends, educational content, banking services, entertainment, to politics, individuals from various professional backgrounds utilize these platforms for their respective interests, including MSME owners who use them to market products and engage with consumers or business partners. As marketing and branding techniques continue to diversify, coupled with the ease of information access, business competition has grown increasingly intense. MSME actors are expected to create brands that are attractive, unique, and unprecedented (i.e., not previously used). This trend has led to the emergence of a wide variety of brands derived from the creativity of entrepreneurs. These creations, possessing economic value, can be categorized as Intellectual Property (IP).

The lack of understanding regarding the relevance of Intellectual Property Rights (IPR) in daily business operations, combined with the high costs associated with acquiring and enforcing those rights, remains a significant barrier preventing MSMEs from protecting their IPR assets. The perception that the IPR system is highly technical, complicated, and time-consuming further exacerbates this issue. In reality, considering that MSMEs account for approximately 90% of all business entities worldwide and contribute to more than 70% of the production of goods and services, the optimal utilization of IPR by MSMEs is not only essential to enhancing their competitiveness but also serves as a fundamental element in fostering sustainable economic growth and stimulating innovation.²³

²³ Gee, H. L., Azmi, A. G., et al. Reforms Towards Intellectual Property-Based Economic Development in Malaysia. *The Journal of World Intellectual Property* Vol. 12 (4). p. 317-337. 2009

Developing countries, including Indonesia, face distinctive challenges in implementing and enforcing effective Intellectual Property Rights (IPR) protection. These obstacles are rooted in weak legal infrastructure, limited resources for law enforcement, and cultural factors that influence the application of IPR regulations. In the Indonesian context, regulations governing the transfer and management of IPR remain complex and lack coherent integration, ultimately hindering both efficiency and legal certainty within these processes.²⁴ Efforts to build a robust innovation ecosystem, supported by strategic investments in education and technology, can create an enabling environment for effective IPR protection. In this context, Intellectual Property Rights are not merely legal instruments but also function as key drivers of sustainable economic growth.²⁵

The current IPR protection system in Indonesia faces increasingly complex challenges, particularly within the creative industry sector. The rapid development of digital creative industries and artificial intelligence (AI) has marked a turning point, exposing significant vulnerabilities such as the widespread prevalence of piracy, weak law enforcement mechanisms, and the urgent need for regulatory frameworks that are more adaptive and effective. These issues have become major obstacles to ensuring legal certainty in the field of intellectual property protection.²⁶ The lack of bureaucratic alignment and inefficiency in the process of transferring intellectual property rights within Indonesia's legal system

²⁴ Herryani, MRTR. Enhancing Legal Protection for Digital Transactions: Addressing Fraudulent QRIS System in Indonesia. *Rechtsidee* Vol. 11 (1) p. 1-12. 2023

²⁵ Muchira, J. M. Digital Media and Creative Economy Potential on Youth Employment in Kenya: A Grounded Theory Perspective. *Information and Learning Sciences* Vol. 124 (5/6) p. 168-193. 2023

²⁶ Situmeang, A. Silviani, N. Z. Tan, David. The Solving Indonesian Intellectual Property Rights Transfer Issue. *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan*, Vol. 23 (1) p. 59-74. 2023

remains a major obstacle to the development of more progressive and adaptive IPR regulations that align with the evolving needs of industry.²⁷

In recent years, Indonesia's IPR system has undergone several reforms, particularly through amendments to laws governing specific aspects of intellectual property, including trademarks, industrial designs, patents, copyrights, and trade secrets. Nevertheless, the 2020 European Union Commission Report on the Protection and Enforcement of IPR in Third Countries placed Indonesia in Priority 2 status due to the persistently high levels of trademark counterfeiting and copyright piracy, weak IPR enforcement by customs authorities, and the lack of coordination within civil and criminal law enforcement systems dedicated to addressing IPR violations.

Additionally, Indonesia remains on the Priority Watch List published by the United States Trade Representative (USTR) in its 2020 Special 301 Report. The report highlights several critical issues regarding trademark and copyright protection, including weak inter-agency coordination in law enforcement, the rampant occurrence of copyright piracy and trademark counterfeiting, the absence of an integrated enforcement approach, and legal sanctions that fail to provide a sufficient deterrent effect against IPR violations in both physical and online markets. Notably, the majority of counterfeit goods circulating in Indonesia are imported products, with China identified as the primary source.²⁸

Although a portion of counterfeit goods are produced domestically, research conducted by the Institute for Economic and Social Research, University of Indonesia (LPEM UI) in 2014, initiated by the Indonesian Anti-Counterfeiting Society (MIAP), estimated that economic losses resulting from IPR violations in Indonesia amounted to approximately Rp 65.09 trillion (equivalent to US\$5 billion). These violations have had a

²⁷ Marabessy, Fachrul. Analisis Fatwa MUI tentang Perlindungan Hak Kekayaan Intelektual. *I-BEST: Islamic Banking & Economic Law Studies* Vol. 2 (1) p. 33-50. 2023

²⁸ UK Intellectual Property Office. Foreign & Commonwealth Office. *China-Southeast Asia Anti-Counterfeiting Project Summary Report*. 2015

significant impact on five key sectors: the fashion industry, food and beverage, pharmaceuticals, cosmetics, and software.²⁹

Strategies and Solutions to Overcome Legal Barriers in Intellectual Property Protection in Indonesia

According to the theory proposed by Robert M. Sherwood, a trademark, as part of Intellectual Property, must be recognized and rewarded by the state as an acknowledgment of the creator's efforts in developing or inventing such intellectual works. Sherwood further asserts that the rightful owner, who has invested time, financial resources, and energy in producing their creation, is entitled to recover the value of those expenditures through legal protection and exclusive rights over the intellectual property.³⁰

With the advancement of technology and information, a trademark represents a form of human intellectual creation that plays a highly significant role. Beyond its primary function of enabling the owner to distinguish specific goods or services from similar products, a trademark also carries broad legal implications, both for the rights holder and for the public as consumers who utilize or benefit from those goods or services.

For this reason, individuals and corporate entities alike place great importance on the selection of names and symbols used in conducting business and marketing products or services. These symbols serve to indicate the origin of a product and identify the commercial entity involved in its production. In the business world, these names and symbols are collectively known as trademarks.³¹

According to theories put forward by leading experts in the field of trademarks, such as George Akerlof and Landes & Posner, trademarks possess significant informational value for both consumers and market

²⁹ Mardanugraha, E. Wardhani, S. et al. Economic Impact of Counterfeiting in Indonesia. MAKARA MAS: Holding Company Universitas Indonesia. 2014.

³⁰ Mahardhita, Yoga. Sukro, Ahmad Yakub. Perlindungan Hukum Hak Kekayaan Intelektual Melalui Mekanisme 'Cross Border Measure'. Jurnal Ilmiah Hukum QISTIE. 2018

participants. Trademarks function as indicators of product origin, quality, and reputation, thereby reducing information asymmetry in the marketplace. Consequently, the legal framework governing trademarks contributes to economic efficiency by lowering search costs for consumers, fostering market transparency, and encouraging fair competition. Through such mechanisms, trademark protection not only safeguards intellectual property rights but also supports a more efficient and trustworthy economic environment.³²

However, from the perspective of traditional economic theory, trademarks have often been regarded as the "ugly duckling" within the realm of intellectual property. Several economic viewpoints tend to classify trademarks as private goods or idiosyncratic investments and quality indicators, rather than associating them directly with processes of innovation or creation. In this view, trademarks are perceived primarily as tools for signaling product consistency and reputation to consumers, rather than as intellectual outputs that embody inventive or creative contributions, as is the case with patents or copyrights. Consequently, their role in fostering innovation has often been underestimated in conventional economic analyses.³³

Limited theoretical development has occurred since 1987, with most discussions remaining within the same conceptual framework. Even revisionist economists who critically examine the role of Intellectual Property Rights (IPR), such as Michele Boldrin and David Levine, tend to exclude trademarks from their critiques. This is primarily due to the inherently different nature and value essence of trademarks compared to patents and copyrights. Boldrin and Levine, for example, argue that while patents and copyrights are more directly linked to innovation and the

³¹ Jened, Rahmi. *Hukum Merek (Trademark Law) dalam Era Global & Integrasi Ekonomi*. Jakarta: Prenadamedia Group. 2015

³² Akerlof, George A. *The Market for Lemons: Quality Uncertainty and the Market Mechanism*. *The Quarterly Journal of Economics*. 1970

³³ Landes, William M. Posner, Richard A. *Trademark Law: An Economic Perspective*. *The Journal of Law & Economics*. 1987

creation of new knowledge, trademarks primarily function as market tools for signaling quality, building consumer trust, and facilitating product differentiation. As such, trademarks occupy a distinct position within the broader IPR regime, often perceived more as economic identifiers than as products of inventive or creative processes in the strict sense.³⁴

According to Article 1 point (1) of Law Number 20 of 2016 concerning Trademarks and Geographical Indications, a trademark is defined as a sign that can be represented graphically, in the form of images, logos, names, words, letters, numbers, color arrangements, in two-dimensional and/or three-dimensional forms, sounds, holograms, or any combination of two or more of these elements, used to distinguish goods and/or services produced by an individual or legal entity in the trade of goods and/or services. Furthermore, point (5) of the same article stipulates that trademark rights are exclusive rights granted by the state to the registered owner of a trademark for a specific period, allowing the owner to use the trademark personally or to authorize other parties to use it.

It is undeniable that the primary function of a trademark is to serve as a sign or identity that enables the recognition and differentiation of one product from another. MSME actors are increasingly aware of the importance of this function. By leveraging advancements in information and communication technology, they are now able to market their trademarks online, thereby facilitating easier transactions with consumers and enhancing their reach in the digital marketplace.

On the other hand, the rapid proliferation of MSMEs through online marketing has also led to a surge in threats posed by irresponsible parties who exploit legal loopholes to commit violations involving trademark misuse. These include acts such as trademark counterfeiting, piracy, and unauthorized use of registered trademarks for personal gain facilitated by the ease with which the general public can access product trademarks via

³⁴ Boldrin, Michele. Levine, David K. *Against Intellectual Monopoly*. Cambridge: Cambridge University Press. 2008

the internet. Such violations inevitably result in significant harm to the legitimate trademark owners. They contribute to unfair competition, distort market share, undermine consumer trust, and can lead to drastic declines in sales turnover. These consequences highlight the urgent need for stronger legal protection and enforcement mechanisms in the digital era.³⁵ This reality has made legal protection in the digital era increasingly complex, as the ease of access to creative works significantly raises the risk of copyright infringement. According to Law Number 28 of 2014 concerning Copyright, copyright protection in Indonesia encompasses three key aspects: preventive measures to deter acts of piracy; criminal sanctions, as outlined in Article 113 paragraph (4); and repressive mechanisms through dispute resolution processes for registered works. Although registration is not mandatory under the law, the formal recording of a work remains crucial in reinforcing legal protection, providing stronger evidence of ownership and supporting enforcement actions in the event of a dispute.

The landscape of Intellectual Property Rights (IPR) in Indonesia reveals a range of challenges and opportunities, particularly in line with the growth of the industrial sector driven by advancements in technology, digitalization, and the expansion of the creative industry. The Copyright Law governs the protection of literary, artistic, and scientific works by establishing the rights and limitations applicable to creators. Meanwhile, the Trademark Law regulates the registration and protection of trademarks, which are essential to brand identity and market competitiveness.³⁶ Meanwhile, the Patent Law focuses on the protection of innovations and technological advancements. Together, these three legal frameworks Copyright, Trademark, and Patent Laws form the core

³⁵ Wicaksana, Dimas Ilham N. Urgensi Pendaftaran Merek Dagang Bagi Pelaku UMKM. Kantor Wilayah Kementerian Hukum dan HAM Daerah Istimewa Yogyakarta. <https://jogja.kemenkumham.go.id/pusat-informasi/artikel/urgensi-pendaftaran-merek-dagang-bagi-pelaku-umkm> accessed on December 18, 2024.

³⁶ Martinelli, I. Sugiawan, F. A. et al. Copyrights Protection of Songwriters in Indonesia. AURELIA: Jurnal Penelitian & Pengabdian Masyarakat Indonesia Vol. 2 (2) p. 1162-1166. 2023

foundation of Indonesia's Intellectual Property Rights system. A thorough understanding of their substantive provisions, enforcement mechanisms, and the shortcomings in their implementation is essential for business actors in the creative sector. Such understanding enables them to ensure effective legal protection for their intellectual assets and to address potential regulatory gaps that may hinder innovation and fair competition.³⁷

Indonesia's trademark protection system adopts the first-to-file principle, under which rights to a trademark are granted to the party that first registers it with the Directorate General of Intellectual Property (DGIP), as stipulated in Article 3 of the Law on Trademarks and Geographical Indications. In cases of trademark disputes, an unregistered trademark owner must prove that the registration by another party violates the provisions of Article 20 or 21, which can serve as grounds for cancellation as outlined in Article 76(2). However, the burden of proof in such cases is substantial particularly when the trademark has already been registered by another party rendering the legal standing of the unregistered trademark owner significantly weak.³⁸ Therefore, trademark registration serves as a crucial preventive measure to safeguard the rights over a business's identity and to avert potential disputes in the future. It provides legal certainty, strengthens the position of the rightful owner, and ensures that the brand is protected against unauthorized use or infringement in both physical and digital marketplaces.

Raising legal awareness among MSME actors regarding the importance of trademarks as intellectual property assets must be actively promoted through outreach initiatives and assistance with trademark registration. The Copyright Law not only provides legal protection for intellectual works but also fosters a more competitive business ecosystem,

³⁷ Aurellia, N. Roisah, K. Legal Protection against Uregistered Marks and Unfair Competition Practices (Comparative Study of Indonesia and the United States). International Journal of Social Science and Human Research Vol. 06 (06) p. 3818-3821. 2023

free from unfair competition. Local governments play a strategic role in facilitating intellectual property protection regulations by implementing programs that encourage MSMEs to register their trademarks. Additionally, collaboration between the Directorate General of Intellectual Property (DGIP) under the Ministry of Law and Human Rights and the Ministry of Cooperatives and MSMEs as mandated by Decree No. M-10-UM.06.07.TH.2006 aims to enhance awareness and utilization of the IPR system among MSME stakeholders.³⁹

Financial incentives for trademark registration, as stipulated in the Decree of the Director General of Intellectual Property No. HKI-09.OT.03.01 of 2013, have also been introduced to enhance accessibility for MSMEs. Transparency in the IPR certification process must be maintained to prevent extortion and gratuities, ensuring that business actors can obtain their rights fairly, reliably, and without discrimination. These measures are expected to strengthen legal awareness and improve the competitiveness of MSMEs on both national and global scales, fostering a more equitable and innovation driven business environment.

D. CONCLUSION

Alongside the rapid advancement of technology and information, the diversification of economic industries has also accelerated—highlighting the urgent need for a robust and reliable legal framework that can accommodate and protect business actors, particularly Micro, Small, and Medium Enterprises (MSMEs), in the realm of trademark protection in Indonesia. Fundamentally, Law No. 20 of 2016 on Trademarks and Geographical Indications provides a relatively clear legal foundation. However, its implementation remains a significant challenge. Moreover, the fast-paced

³⁸ *Ibid*

³⁹ Fahrurnnisa. et al. Strategi Pengamanan Hukum Terhadap Merek Produk Hasil Industri UMKM di Indonesia Ditinjau dari Undang-Undang Hak Cipta. ALADALAH: Jurnal Politik, Sosial, Hukum dan Humaniora Vol. 01 (02) p. 270-282. 2023

development of digital industries has placed MSMEs in a vulnerable position when it comes to legal exploitation. Indonesia's first-to-file system exposes MSMEs that have not registered their trademarks to considerable risks, including brand hijacking. To bridge this legal gap in parallel with industrial technological progress, the government must develop a more holistic and inclusive strategy. This includes enhancing legal literacy and awareness among MSMEs, simplifying the trademark registration process, and optimizing governmental roles by reducing bureaucratic inefficiencies and increasing institutional support for MSMEs.

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