

Trademark Registration Law as an Effort to face the Growth of the Digital Economy

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Abstract

The progress of today's digital economy can be put to the best use for the creation of a work that produces the greatest economic benefits for the creator. The new work created by one's creativity must be legally protected through Copyright protection. The research method used in this study is normative juridical legal research, namely legal materials, besides that primary legal materials are also used as support for secondary legal materials and for the analysis of legal materials carried out with qualitative juridical analysis methods. The results of the research and discussion reached several conclusions, namely First, the legal concept of Brands has been known since the Dutch East Indies era, first known as a brand in Law Number 21 of 1961 concerning Trademarks and Business Marks, then experienced various dynamics until finally the current trademark regulation is Law Number 20 of 2016 concerning Brands and Geographical Indications. Secondly, Indonesia adheres to a Trademark registration system with a constitutive system, registration is a must in order to obtain Trademark rights, in the absence of state registration will not give rights to the Mark to the owner of the Mark and the First-to-file system means that the registration of a mark will only be given to the party who first submits a registration request for a mark. Third, a mark will only receive legal protection if it has been registered with the Directorate of Trademarks. In Indonesia, in carrying out and providing legal protection there are two means of legal protection, namely Preventive and Repressive Legal Protection Facilities.

Keywords: Registration of Brands; Brands; Digital Economy.

Introduction

The digital economy was first introduced by Tapscott.¹ According to him, the digital economy is a social phenomenon that affects the economic system, where the phenomenon has characteristics as an intelligence space, including information, various accesses to information instruments, information capacity and information processing. The components of the digital economy that have been successfully identified for the first time are the information technology and computerization industry, e-commerce activities, digital distribution of goods and services.

¹ Don Tapscott, *The Digital Economy : Promise and Peril in the Age of Networked Intelligence* (McGraw-Hill 1997).

The digital economy was born and developed along with the use of Information and Communication Technology which is also increasingly globalized in the world. According to Dalle (2016) world economic history has gone through four eras in human life, namely the era of agricultural society, the era of machines after the industrial revolution, the era of oil hunting, and the era of multinational corporate capitalism. The previous four economic waves were of exclusive character and could only be reached by a certain group of elites. The wave of the digital economy comes with a topogra that is sloping, inclusive, and stretches the equality of opportunity. This characteristic has a competitive concept that becomes the spirit of the industry which is easily lifted by startup players who prioritize collaboration and synergy. Therefore, the digital economy is a 'sharing economy' that elevates many small and medium-sized businesses to enter the world's business.²

Indonesia is one of the countries that has great potential for the development of the digital economy. Indonesia is experiencing an increase in the digital economy as a whole, it has an effect on the increasing national economy. The digital economy is believed to be able to answer the challenges of unstable economic development.³ The Indonesian government is committed to community-based economic development as business actors. The number of entrepreneurs will expand in driving the economy and creating new jobs. So the use of digital technology is expected to increase the competitiveness of the Indonesian economy.

The digital age has disrupted how to build brand equity. Brand awareness as one of the important elements of a brand can be done with a faster process through digital platforms.⁴ With these conditions, a brand which has been quite well known for decades in the offline realm, perhaps becoming unknown in the online realm or at least losing competition with new ones but first existing in the digital realm.⁵ Branding in the digital

² Yan Andriariza Ambhita Sukma, *Perkembangan Ekonomi Digital Di Indonesia Strategi Dan Sektor Potensial* (Pusat Penelitian dan Pengembangan Aplikasi Informatika dan Informasi dan Komunikasi Publik Badan Penelitian dan Pengembangan SDM Kementerian Komunikasi dan Informatika 2019).

³ Sindy Lita Kumala, "Perkembangan Ekonomi Berbasis Digital Di Indonesia," (2021) 1 *Journal of Economics and Regional Science*.

⁴ Suyud Margono and Longginus Hadi, *Pembaharuan Perlindungan Hukum Merek* (CV. Novindo Pustaka Mandiri 2002).

⁵ Burhan Bungin, *Konstruksi Sosial Media Massa* (Kencana Prenada Media Group 2008).

age is inevitable, especially during the COVID-19 pandemic, because everyone tends to access the internet and shop through marketplaces. That condition is what now underlies consumers to judge a person to be an option. Branding activities are very important to increase the value of a brand. Meanwhile, branding in the digital era has now experienced disruption, because internet users in Indonesia have touched more than 70% of the Indonesian population.

The brand is a symbol of the quality assurance attached to the products. The implementation of brand law has many problems, whether in the registration process which is expected to be completed within a week or two, in fact taking a year or even more⁸. Regulations on this brand are now regulated in Law Number 20 of 2016 concerning Brands and Geographical Indications.

Registration of a mark used to identify goods and services produced or distributed by a particular company gives the company the right to use exclusively the mark. Although the various phenomena present show the huge potential of the creative economy, it turns out that not many startups consider Intellectual Property to be important. The problem is that those entrepreneurs are not aware of Intellectual Property.

In reality, there are still many startup companies that do not follow the existing rules. This is indicated by the fact that not many startups have registered their intellectual property. In fact, the existence of an Intellectual Property Rights certificate is considered important enough to protect its business from piracy, impersonation or other problems and when there are investors who are interested in cooperating. Where Intellectual Property Rights in general or copyrights, brands and patents are specifically the foundation of a digital startup company.

Based on the description above, the formulation of the problem in this study is: What is the legal concept of trademark registration as an effort to deal with the growth of the digital economy in Indonesia's positive legal studies? How is the trademark registration system an effort to deal with the growth of the digital economy in Indonesia's positive legal studies? How is the legal protection of trademark rights in companies engaged in the digital economy that do not register trademarks in positive legal studies in Indonesia?

Based on the problems posed, in this study the author uses a type of sociological juridical research, namely research that emphasizes legal aspects (laws and regulations) related to the subject matter to be discussed, associated with the reality in the field.⁶ This research is an analytical descriptive research, namely research that describes and describes existing circumstances or facts about the legal concept of trademark registration, the legal system of registration of the mark, as well as the protection of the rights of the mark itself.

In addition, there are three approaches used in this study, namely the statute approach, the case approach and the conceptual approach. The first approach, which is the approach to legislation. The conceptual approach moves from the views and doctrines that developed in the legal science. In addition, the conceptual approach refers to concepts about general terms, public property, trademark registration, and trademark cancellation. This concept can be found in the scientific literature, scientific opinions, and legal doctrines. The case approach is used by looking at cases that occur in relation to brands and the digital economy.⁷

The legal materials used are primary and secondary legal materials. Primary legal materials consist of the 1945 Constitution of the Republic of Indonesia, the Civil Code, Law Number 20 of 2016 concerning Brands and Geographical Indications, and Presidential Regulation of the Republic of Indonesia Number 6 of 2015 concerning the Creative Economy Agency. Meanwhile, secondary legal materials⁸ in the form of books, journals, articles, magazines, and so on that can support this research. Data collection techniques using literature studies, are data collection techniques by studying, studying and analyzing library literature that has a correlation with the problem being studied.

Discussions

⁶ Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Raja Grafindo Persada 2012).

⁷ Elisabeth Nurhaini Butarbutar, *Metode Penelitian Hukum, Langkah-Langkah Untuk Menemukan Kebenaran Dalam Ilmu Hukum* (Refika Aditama 2018).

⁸ Bambang Sunggono, *Metodologi Penelitian Hukum* (Rajawali Pers, 2015).

The Legal Concept of Trademark Registration as an Effort to Face the Growth of the Digital Economy in Indonesian Positive Law Studies

One part of intellectual property rights (IPR) is the brand. Where the brand has a very important role because the use of the brand for the goods or products produced can be a differentiator about the origin of the product of the goods or services.⁹ The brand is also closely related to the world of advertising and marketing of a product or service, because the public often associates the image, quality and reputation that a company has with the brand it creates. This causes the brand to become a commercially valuable wealth and makes the prices of a product more valuable in the eyes of the public.¹⁰

Article 1 paragraph 1 of Law Number 20 of 2016 concerning Brands and Geographical Indications explains that a brand is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more elements to distinguish goods funds/ or services produced by persons or legal entities in the activities of trading goods and/or services.

Furthermore, the Brand according to Muchtar Anshary Hamid Labetubun that the Brand is part of one of the important IPR laws, because the Brand as an industrial wealth is very important in the business world because the brand includes: it can be a name, word, logo, symbol, design, color, image, or a combination of these two or more elements, which is a differentiator and is characterized by the quality of a good or service.¹¹ Therefore, Brands are one of the things that need to get legal protection. Legal protection is a form of protection given to legal subjects with their legal tools, both preventive and repressive, both written and unwritten with the aim of providing a form of justice, order, expediency and peace for all parties who contribute to it. According

⁹ Nanda Salsabilla Latukau, Teng Berlianty, and Muchtar Anshary Hamif Labetubun, "Perlindungan Hukum Merek Produk Jus Pala Di Negeri Morella Kecamatan Leihitu," (2021) 1 *TATOHI Jurnal Ilmu Hukum*.

¹⁰ Tim Lindsey, *Hak Kekayaan Intelektual : Suatu Pengantar* (Bandung: Alumni, 2006).

¹¹ Muchtar Anshary Hamid Labetubun, Rory Jeff Akyuwen, and Marselo Valentino Geovani Pariela, "Perlindungan Pengetahuan Tradisional Secara Sui Generis Untuk Menyongsong Masyarakat Ekonomi Asean," (2018) 24 *SASI* .

to Rahardjo,¹² legal protection is the provision of respect for human rights harmed by others, where such protection is given to the community in order to enjoy all the rights granted by law.

Since the days of the Dutch East Indies government, Indonesia has had a Law on Intellectual Property Rights (IPR) which is actually the enactment of the laws and regulations of the Dutch East Indies government in force in the Netherlands, enforced in Indonesia as a Dutch colony based on the principle of concordance.¹³ After Indonesia became independent, based on Article 2 (two) of the Transitional Rules of the 1945 Constitution (UUD 1945) and Government Regulation Number 2 of 1945, the provisions of the IPR laws and regulations of the Dutch colonial era, for the sake of law continued their applicability, until they were repealed and replaced with new laws resulting from the products of Indonesian legislation.

Prior to 1961, the Colonial Trademarks Act of 1912 remained in force as a result of the application of transitional provisions in the Act The 1945 Constitution and the Law of the Republic of the United States of Indonesia of 1949 as well as the Provisional Law of 1950.¹⁴ In Indonesia Trademarks were first regulated in Law Number 21 of 1961 concerning Trademarks and Commercial Trademarks which replaced the Colonial Law. The main principle stipulated in this Act is the right of the Mark obtained through first to use system or declarative stelsel. Furthermore, Law 21 of 1961 was amended by Law Number 19 of 1992 concerning Brands with some basic changes.

Some of these changes are as follows:

1. The chosen title is "Brand Law", so it is simple, but includes extensive settings. This is to include both Trademarks and Service Marks, and may even include the definition of Collective Marks.
2. The change concerns the rights acquisition system that was originally a first to use system to a first registration system (first to file system or constitutive stelsel).
3. The use of a constitutive system is intended to better ensure legal certainty.

¹² Satjipto Rahardjo, *Ilmu Hukum* (Citra Aditya Bakti, 1991).

¹³ Labetubun, Akyuwen, and Pariela, "Perlindungan Pengetahuan Tradisional Secara Sui Generis Untuk Menyongsong Masyarakat Ekonomi Asean."

¹⁴ Djaja Ermansyah, *Hukum Hak Kekayaan Intelektual* (Sinar Grafika, 2009).

4. In this Act is provided for the registration of a Mark with priority rights. The 1992 Trademark Law also regulates criminal sanctions, both for criminal acts with criminal qualifications and violations.¹⁵

Furthermore, in order to adjust the provisions of Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods (TRIPs), improvements were made to the provisions of the 1992 Trademark Law through Law Number 14 of 1997 concerning Changes to the Trademark Law (hereinafter referred to as the Trademark Law of 1997). Furthermore, for its improvement and practicality, a single text was made through the 2001 Trademark Law. As for the consideration, it is in line with international conventions that have been ratified by Indonesia, it is felt that the role of the Brand is very important, especially to maintain healthy business competition in the era of free trade.

Trademark Registration System as an Effort to Face the Growth of the Digital Economy in Indonesia's Positive Law Study

Intellectual Property for digital economy players is very important, especially in this day and age. It can be seen with many companies or individuals that have produced a work of both goods and services that are very beneficial to society by using the sophistication of the technology used.¹⁶ For creative economy players, a brand (trademark) is a very important thing. Because the brand is a characteristic, characteristic.

Trademark Registration is known to have two types of registration. First, the Declarative Brand leveling system. What is considered a Declarative system is that the first user is entitled to the Trademark, until proven otherwise. Secondly, the Constitutive Trademark registration system. As for what is considered a Constitutive system, namely the first to register the Trademark with the Director General of IPR as the person who owns the rights to the Trademark, until proven otherwise.

¹⁵ Ok Saidin, *Aspek Hukum Hak Kekayaan Intelektual* (PT. Raja Grafindo Persada, 2007).

¹⁶ Rizka Aprilia, "Perlindungan Hukum Terhadap Hak Atas Merek Pada Perusahaan Startup Digital Yang Tidak Mendaftarkan Merek Dagang Di Bandung," (2019) VI *JOM Fakultas Hukum Universitas Riau*.

Initially, Indonesia adhered to a declarative or first-to-use system, where this system adhered that the owner of the mark was not required to register his mark when he wanted to obtain the rights to the mark legally (the first user was not due to registration), so that anyone who owns the mark as the first owner even if it is not registered will still get legal protection.¹⁷ The declarative system always bases legal protection on those who use a mark First, this does not guarantee legal certainty and will also cause problems and obstacles in the scope of the business world.

However, since the enactment of Law Number 21 of 1961 concerning Company Brands and Business Brands then there has been a shift in the system to a constitutive system, due to the consideration that the enactment of the declarative system in Law Number 21 of 1961 is still considered to lack legal certainty and protection, it can be seen from the existence of several cases of trademark cancellation which are actually won by parties who do not register their marks.¹⁸ Systems that are lacking Providing legal certainty and legal protection to brand owners will certainly cause unwillingness of brand owners to register their trademarks.

The constitutive system adheres that the person entitled to the right to a mark is the person or organization or company that registered the mark for the first time, so that the party registering the mark is the only person entitled to a mark and the other party must respect the right of the registrant as an absolute right.¹⁹ Special considerations regarding the change of the trademark rights system from a declarative system to a constitutive system are generally explained in the 1992 Trademark Act that there is a shift of the declarative system to a constitutive system because the system is considered to guarantee more legal certainty than the previous system.

Indonesia adheres to a Trademark registration system with a constitutive system, registration is a must in order to obtain Trademark rights, without state registration will not give the rights to the Mark to the owner of the Mark. Trademark Registration in this case is to give the status that the registration is considered the first

¹⁷ R Mujriyanto, “Konsep Kepemilikan Hak Atas Merek Di Indonesia (Studi Pergeseran Sistem Deklaratif Ke Dalam Sistem Konstitutif,” (2017) 24 *Jurnal Hukum IUS QUIA IUSTUM*.

¹⁸ *Ibid.*,

¹⁹ Muhammad Djumhana and R. Djubaedillah, *Hak Milik Intelektual, Sejarah, Teori Dan Prakteknya Di Indonesia* (Citra Aditya Bakti 2009).

wearer until there is someone else who proves otherwise. The right to a Mark does not exist without registration. This is what brings certainty. This is because if a person can prove that he has registered a Mark and he is granted a Certificate of Mark which is evidence of his or her title to a Mark, then another person cannot use it and the other person is not entitled to use the same Mark for similar items as well.²⁰

In the Law on Trademarks and Geographical Indications of 2016, the period of substantive examination becomes shorter, namely 150 days or at least only 5 months. With the shortening of the substantive examination period by the Trademarks and Geographical Indications Act of 2016 the applicant for registration of a Mark will acquire exclusive rights to the Mark more quickly.

The Trademark and Geographical Indications Act 2016 provides stages regarding how the trademark registration process based on applicable laws and regulations is as follows:

1. The applicant or his attorney fills out and signs the registration application form, attaches, at least, proof of payment documents, affidavits of ownership of the mark, and trademark labels and submits them to the Minister of Law and Human Rights;
2. The application for registration of the mark that has been received by the Minister of Law and then checked the formalities of completeness;
3. If there is a lack of completeness of the requirements, then within 30 working days from the date of receipt of the application, the applicant or his attorney is given time to complete it within a period of 2 months from the date of sending the notification letter to complete the requirements;
4. If it is not completed until the time period expires, the application is considered to be withdrawn;
5. Applications that have met the minimum requirements are given a date of acceptance and within a maximum of 15 working days from the date of receipt, the trademark application will enter the announcement stage in the official brand news;

²⁰ Insan Budi Maulana, *Sukses Bisnis Melalui Merek, Paten, Dan Hak Cipta* (PT Citra Aditya Bakti 1997).

6. The trademark application enters the announcement stage for 2 months, and each party can submit an objection/opposition in writing to the Minister of Law and Human Rights for the application accompanied by the reasons;
7. The reason is that the mark for which registration is requested is a mark that according to the Law on Trademarks and Geographical Indications cannot be registered or must be rejected. Within 14 working days from the date acceptance of objections, copies of objections are sent to the applicant or his attorney;
8. If there is an objection/opposition, then the applicant or his attorney has the right to file a rebuttal to the objection no later than 2 months from the date of sending a copy of the objection from the Minister of Law.

Brand law in Indonesia adheres to a first-to-file system in providing registration of a mark. The First-to-file system means that the registration of a mark will only be granted to the party who first submits a registration request for a mark, and the State does not provide registration for a mark that has similarities with the first submitted mark to the other party for similar goods/services.

Legal Protection of Trademark Rights in Digital Economy Companies That Do Not Register Trademarks in Positive Legal Studies in Indonesia

As explained in the constitutive system, the purpose of the system is to provide guarantees of legal certainty accompanied by various provisions in order to create guarantees in terms of justice to all parties who have been officially registered.²¹ Although in trademark registration in Indonesia there is no obligation for business people to register their trademarks, but if they want to get legal protection based on trademark law, then it must first be registered. So in this case, the power of registration can be requested for cancellation by the profiting party with proof that it is the party who is the first user of the mark.

A mark will only receive legal protection if it has been registered with the Directorate of Trademarks, Directorate General of Intellectual Property Rights (IPR),

²¹ Hery Firmansyah, *Perlindungan Hukum Terhadap Merek: Panduan Memahami Dasar-Dasar Hukum Penggunaan Dan Perlindungan Merek* (Medpress Digital 2013).

Ministry of Law and Human Rights R.I. (Directorate General of IPR). Trademark registration gives birth to exclusive rights to the owner of the mark for a certain period of time (for 10 years, and can be renewed once every ten years use the mark yourself or give permission to other parties to use the mark through an agreement. In addition to obtaining the exclusive rights mentioned above, why a brand really needs to be registered in Indonesia, the reasons are as follows:

1. The owner of the trademark registration may prohibit or take legal action either civilly or criminally against other parties who use, circulate, trade or produce the same mark for similar products/services without the permission of the owner of the trademark registration;
2. Without trademark registration, the owner cannot carry out such reprimands or legal actions in point 1.

It is stated in the TRIPs agreement and in article 1 number 5 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications that the owner of a registered mark will get the exclusive right to use the mark himself or give permission to other parties to use it. The purpose of granting exclusive rights to a mark is to make it easier to provide guarantees of legal protection to the owner of the mark.²² The specific rights granted by the state to the registered owner of the mark include:

1. Creating a single right (sole or single right), that is, the law or law gives separate rights to the owners of the brand, where the rights intended are separate and stand alone as a whole without interference from other parties.
2. Realizing monopoly right, that is, anyone is prohibited from imitating, using and using a mark in trading goods or services without the permission of the owner of the mark.
3. Granting superior rights, that is, the rights granted by the doctrine of the most superior rights to the first producer, so that the holder of special rights to a brand will become superior to someone else's brand for protection.

Protection of brand rights should ideally obtain objective protection in accordance with the characteristics of the mark that is part of intellectual property

²² Sudargo Gautama, *Hak Merek Dagang Menurut Perjanjian TRIPs-GATT Dan Undang-Undang Merek Republik Indonesia* (Citra Aditya Bakti 2016).

rights.²³ Protection of brand rights can only be done by enforcing the law of the mark itself, both brand protection in the administrative aspect, brand protection in the civil aspect and protection of trademark rights in the criminal aspect. In Indonesia, in carrying out and providing legal protection there are two means of legal protection, namely the Preventive Legal Protection Facility, where legal subjects are given the opportunity to submit their objections or opinions before a government decision gets a definitive form. In addition, there are Repressive Legal Protection Facilities aimed at resolving disputes.²⁴

Conclusion

Since the days of the Dutch East Indies government, Indonesia has had a Law on Intellectual Property Rights (IPR) which is actually the enactment of the laws and regulations of the Dutch East Indies government in force in the Netherlands. Furthermore, in order to adjust the provisions of Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods (TRIPs), improvements were made to the provisions of the 1992 Trademark Law through Law Number 14 of 1997 concerning Changes to the Trademark Law. Furthermore, for its improvement and practicality, a single text was made through the 2001 Trademark Law. until finally the current brand regulation is Law Number 20 of 2016 concerning Brands and Geographical Indications.

Trademark Registration is known to have two types of registration. First, the Declarative Brand leveling system. Indonesia adheres to the system registration of a Mark with a constitutive system, registration is a must in order to obtain the rights of the Mark , in the absence of state registration will not give the right to the Mark to the owner of the Mark. Trademark law in Indonesia adheres to a first-to-file system in providing registration of a mark. The First-to-file system means that the registration of a mark will only be granted to the party who first submits a registration request for a mark.

²³ Yahya Harahap, *Tinjauan Merek Secara Umum Dan Hukum Merek Di Indonesia Berdasarkan Undang-Undang No. 19 Tahun 1992* (Citra Aditya Bakti 1996).

²⁴ Yusuf Gunwan, “Penyelesaian Sengketa Merek Terdaftar Dan Merek Terkenal Dalam Mewujudkan Perlindungan Hukum,” (2022) 2 *IBLAM Law Review*.

A mark will only obtain legal protection if it has been registered with the Directorate of Marks. Registration of a mark gives birth to exclusive rights to the owner of the mark for a certain period of time. Protection of trademark rights should ideally obtain objective protection in accordance with the characteristics of the mark that is part of the Intellectual Property Rights. In Indonesia, in carrying out and providing legal protection there are two means of legal protection, namely the Preventive Legal Protection Facility, where legal subjects are given the opportunity to submit their objections or opinions before a government decision gets a definitive form. In addition, there is a Repressive Legal Protection Facility that aims to resolve disputes.

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