

Application of the First-to-File System in Preventing Passing Off Actions against Registered Mark Holder

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Submitted: May 31, 2023

Revised: July 22, 2023

Published: August 09, 2023

Abstract

Applying the "First-to-File" principle impacts the first trademark user and the owner who has not yet registered. Another party previously registered the Mark can replace the true trademark owner. It will harm the brand owner who has previously run a business using that brand name. On the other hand, the first-to-file principle means the state should not provide registration for a mark that has similarities with the Mark submitted earlier of similar goods/services, but in this case, the Ministry of Law and Human Rights cannot cancel a registered mark. So passing off actions against registered Mark could occur. This research examines and analyzes the legal protection for registered trademark owners regarding applying the first-to-file principles for those who pass off a registered mark. The research uses a normative juridical research method. The approach is the statutory and case approach, and it uses qualitative analysis methods based on data and substance from various literature such as books, journals, scientific papers, laws, and regulations. This research shows that the form of legal protection for registered trademark owners is related to applying the First-to-File principles to the passing of other parties. It is based on the case analysis of the Supreme Court decision, which stated that the Plaintiff (holder of the Iwan Tirta mark) is the sole legal owner and rights holder of brands that have a dominant element using the word "Iwan Tirta" in all Classes registered, and cancels or declares null and void with all legal consequences the registration of the registered "Pusaka Iwan Tirta & Logo" Mark, as well as punishes the Defendant (PT Pustaka Iwan Tirta) to pay court costs. It means legal action in the form of a lawsuit to the Commercial Court, based on the new Decision, can be used to cancel the registered Mark.

Keywords: *First-to-File principle; protection of registered mark holders; passing off.*

Introduction

The history of the beginning of international intellectual property rights protection is since its form – the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886. Namely, at the end of the 19th century, when the industrial revolution peaked and international trade began to develop, European industrial countries began to insist on the need for the protection of copyrights, patents, and marks outside their home countries. So at that time, the antagonism between industrialized and developing countries over protecting intellectual property rights began to emerge. The issue of antagonism in the context here is that industrialists claim that without intellectual property protection, there are no incentives for those who create. Therefore, developing an artistic or scientific industry based on intellectual property is impossible.¹

One part of the form of intellectual work that has an essential role in the smooth running and improvement of trade and investment is a brand. With a brand, similar products or services can distinguish from their origin, quality, and assurance that the product is original (authentic).² However, many goods and/or service products are still on the market without using a brand that has difficulty competing because consumers cannot easily distinguish or remember the goods and/or services used. So there are no consumers who want to use goods and/or services without the brand because consumers are doubtful because of the reputation and safety of these goods and/or services.³

A mark (trademark) as an Intellectual Property Right is a sign to identify the origin of goods and services (an indication of origin) from one company with another company's goods and/or services. A brand is the spearhead of trade in goods and services. Through the brand, entrepreneurs can maintain and provide a quality guarantee of goods and/or services produced and prevent unfair competition (concurrency) from other entrepreneurs with bad intentions who intend to piggyback on their reputation. Brand as a means of marketing and advertising (a marketing and advertising device) provides consumers with certain information regarding

¹Hendra Tanu Atmadja, “Dampak Konvensi Internasional terhadap Perkembangan Hukum Hak Cipta di Indonesia”, dalam *Indonesian Journal of International Law*, Vol. 1, No. 1, 2004, p. 553. <http://journal.ui.ac.id/index.php/IJIL/article/view/2734>, Look Rendy Alexander, “Penerapan Prinsip First to File pada Konsep Pendaftaran Merek di Indonesia”, dalam *Jurnal Kertha Semaya* Vol. 10 No. 9 Tahun 2022, p. 211, Program Studi Magister Ilmu Hukum, Fakultas Hukum Universitas Indonesia, Tahun 2022. doi : <https://doi.org/10.24843/KS.2022.v10.i09.p12>

²Adrian Sutedi, *Hak atas Kekayaan Intelektual*, (Jakarta: Sinar Grafia, 2009), p. 91.

³O.K. Saidin, *Aspek Hukum Hak Kekayaan Intelektual (Intellectual Property Rights)*, (Jakarta: PT Raja Grafindo Persada, 2006), p. 329.

goods and/or services entrepreneurs produce. In developing national and international advertising, the distribution of goods and/or services increases the brand value. Brands supported by advertising media allow entrepreneurs to stimulate consumer demand while maintaining consumer loyalty for the goods and/or services they produce. It gives a brand an ownership advantage to compete in the global market.⁴

The concept of brand ownership in Indonesia contains the First-to-File principle,⁵ which means that brand protection will arise if the brand owner has registered it in advance with the Directorate General of Intellectual Property at the Ministry of Law and Human Rights (Ditjen IP Kemenkumham). Laws and regulations regarding Marks in Indonesia require trademark owners to obtain legal protection to prevent other parties from using a registered mark illegally.⁶ Based on the concept of trademark registration, the trademark owner gets legal protection when the Mark is declared registered by the Directorate General of Intellectual Property Rights, Ministry of Law, and Human Rights. Therefore, other parties who try to copy registered brand names will be subject to criminal sanctions or fines following Law No. 20 of 2016 concerning Marks and Geographical Indications.⁷

Based on the "First-to-File" principle, when reviewed comprehensively, the concept of trademark registration in Indonesia creates a legal vacuum. Applying the "First-to-File" principle, which gives exclusive rights to the first registrant of a mark, also impacts the first trademark user and the owner who has not yet registered in Indonesia. Another party previously registered the Mark can replace the true trademark owner. It has the effect that when the actual trademark owner intends to register his trademark, the registered trademark belonging to the party that registered the brand name first will hinder. Ultimately, this will be detrimental to the brand owner who has previously run a business using that brand name.⁸

Mark registration is essential because the law requires the Mark to be registered. Apart from being useful as legal evidence of a registered mark,

⁴ Rahmi Jened, *Hukum Merek dalam Era Global & Integrasi Ekonomi*, (Jakarta: Kencana, 2015), p. 3-4.

⁵ China also apply the First-to-File principle, Deng Ming, Patent examination: A general outline, *Patent Law in Greater China*, Edward Elgar Publishing Ltd. (2014), pp. 143-173 <https://doi.org/10.4337/9781781954843.00021>, Japan also apply this principle very detail to determine who the holder of the right, Miyaoka, Kei Akakura, Takako., Construction of a Prediction Model for Pharmaceutical Patentability Using Nonlinear SVM.(2019) *Lecture Notes in Computer Science (including subseries Lecture Notes in Artificial Intelligence and Lecture Notes in Bioinformatics)*, 11570 LNCS, pp. 244-253. https://doi.org/10.1007/978-3-030-22649-7_20

⁶Rendy Alexander, "Penerapan Prinsip First to File", p. 211.

⁷ *Ibid.*

⁸ *Ibid.*

trademark registration is also useful as a basis for rejecting a brand that is the same in whole or the same in principle being applied for by another person for similar goods or services as well as being useful as a basis for preventing other people from using the same Mark in principle, or as a whole in the circulation of goods or services.⁹ Registering this Mark does not escape the possibility of certain parties having bad intentions. Bad faith trademark registration is often accompanied by a lawsuit filing in the form of cancellation of trademark registration by the owner of the original trademark rights.

Trademark registration in Indonesia adheres to the Constitutive System. Namely, the party that registers a mark in advance is the only party entitled to the Mark, and third parties must respect the rights of the trademark registrant as an absolute right in registering a mark. This Constitutive Stelsel adheres to the first-to-file principle, which means that the registration of a mark will only be given to the party that first submits a request for registration for a mark. The state does not provide registration for a mark that has similarities with the Mark submitted earlier to other parties for registration of similar goods/services. The party registering a mark is the only party entitled to the Mark, and third parties must respect the rights of the trademark registrant as absolute rights.¹⁰

Responding to this, the Directorate General of Intellectual Property Rights, the Ministry of Law and Human Rights, in this case, cannot cancel a registered mark unless the Mark is registered based on bad faith or accompanies other well-known marks.¹¹ It must also be taken legal action in the form of a lawsuit to the Commercial Court first; on that basis, the new Decision can be used to cancel the registered Mark. As in the Dispute Case of the famous Iwan Tirta batik brand, which was passed off by PT Pusaka Iwan Tirta, in the Decision of the Commercial Court at the Central Jakarta District Court Number: 51/Pdt.Sus-Merek/2017/PN.NIAGA.JKT.PST. February 5, 2018. PT Iwan Tirta registered its trademark in May 2006, while PT Pusaka Iwan Tirta only registered the disputed Mark in July 2009. In the Decision of the Commercial Court, PT Pusaka Iwan Tirta lost to the owner of the Iwan Tirta batik brand. So PT Pusaka Iwan Tirta filed an appeal at the Supreme Court, and in the Decision at the cassation level at the Supreme Court, PT Pusaka Iwan Tirta was also defeated based on the Supreme Court Cassation decision Number: 535 K/Pdt.Sus-HKI/2018.

⁹ Bambang Kesowo, "Perlindungan Merek Terkenal di Indonesia", Paper presented at the address at the National Seminar on Protection of Famous Marks in Indonesia, Faculty of Law, Parahyangan University, Indonesian Intellectual Property Association and the United States Information Service, in Bandung on September 26, 1998.

¹⁰ Sudaryat, *Hak Kekayaan Intelektual*, (Bandung: Oase Media, 2010), p. 68-69.

¹¹ Rendy Alexander, "Penerapan Prinsip First to File", p. 211.

Moreover, a previous study criticized the first-to-file principle. Waspiah, W., et.al. wrote it entitled Indonesian Patent Law Reform for Simple Patent Innovations on Achieving Welfare State Objectives. The study analyzes the provisions of Law No. 13 of 2016, commonly known as the Patent Law. The existing first-to-file registration system, resembling that of regular patents, has resulted in low rates of acquisition and registration for simple patents.¹² Therefore, this paper will look at its practice in Court by focusing on the study of the Supreme Court Cassation decision Number: 535 K/Pdt.Sus-HKI/2018.

Based on the description of the background of the problem, the formulation of the problem is how the form of legal protection for registered mark owners is related to applying the first-to-file principle to parties passing off the registered Mark. This research examines and analyzes the legal protection for registered trademark owners regarding applying the first-to-file principle for those passing off registered marks.

The approach method used in this paper is normative juridical.¹³ This approach is meant for the type of dogmatic research (doctrinal)¹⁴ and the form of prescriptive research¹⁵ concerning laws. Furthermore, the specification of this research is analytical descriptive, namely by providing an overview of the issues raised and providing an analysis of the problem to answer these problems.

The approach in this legal research¹⁶ is the statutory approach¹⁷ and case approach related to applying the First-to-File principle¹⁸ for registered

¹² Waspiah, W., Santoso, B., Prananingtyas, P., Baiquni, M. I., & Saputra, D. E. (2023). Indonesian Patent Law Reform for Simple Patent Innovations on Achieving Welfare State Objectives. *Journal of Indonesian Legal Studies*, 8(1), 199-242. <https://doi.org/10.15294/jils.v8i2.69214>

¹³ Mukti Fajar & Yulianto Achmad, *Dualisme Penelitian Hukum*, Yogyakarta: Fakultas Hukum Universitas Muhammadiyah Yogyakarta, 2007), p. 25. Normative Legal Research, namely legal research that places law as a building system of norms (principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings).

¹⁴ Dyah O. Susanti & A'an Efendi, *Penelitian Hukum (Legal Research)*, (Jakarta: Sinar Grafika, 2015), p.15. Doctrinal research is literature-based research, the focus of which is the analysis of primary legal materials and secondary legal materials.

¹⁵ Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI-Press, 2007), p.10. Prescriptive research is a research aimed at getting suggestions about what to do to overcome certain problems.

¹⁶ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: Rajawali Pers, 2003), p. 38. Legal research is scientific research that studies a particular legal phenomenon by analyzing it or conducting an in-depth examination of legal facts to then seek a solution to the problems arising from the phenomenon in question.

¹⁷ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Prenada Media Group, 2016), p. 136. Whereas in the statute approach, it is carried out by examining all regulatory laws that are related to the legal issues raised.

mark owners against parties passing off the registered Mark. In the case of registered batik brands, as in the Supreme Court cassation decision Number: 535K/Pdt.Sus-HKI/2018).

The data collection method in this study used the library research method to examine documents and library materials used. As well as with a qualitative analysis method, built based on data and substance originating or sourced from various literature such as books, journals, and scientific papers, as well as laws and regulations.

Discussion

First-to-File Principle in Indonesian Trademark Law (Patent Law)

The registration system in the context of obtaining rights, based on Law Number 20 of 2016 concerning Trademarks and Geographical Indications (UUMIG) adopted, is a constitutive system or First-to-File system in which trademark rights are obtained through registration, meaning that exclusive rights to a mark are granted by the state because of registration, in other words, in this constitutive system, mark registration is an absolute thing to do. Trademarks that are not registered will not receive legal protection.

The registered trademark rights holder is the only one with the right, and third parties must respect this right. It is in Article 1 number 5 UUMIG which states that "Brand rights are exclusive rights granted by the state to registered Mark owners for a certain period by using the Mark himself or giving permission to other parties to use it" and connected with the provisions of Article 3, that the Rights to the Mark are obtained after the Mark is registered. Thus, in a constitutive or first-to-file system, the party that first registers gets legal protection. In other words, he gets legal certainty over the Mark he registers. In other words, the registration creates rights to a mark. So that with registration, a mark will be born, and the state will give that right to the first registrant in the form of an exclusive right.¹⁹

Another system is the declarative or first-to-use system. Trademark registration is not a requirement, so registration is only for proving that

¹⁸ Jonaedi Efendi dan Johny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris* (Jakarta: Prenada Media Group, 2016), p. 145-146. Peter Mahmud Marzuki, *Penelitian Hukum*, p. 158-159. The case approach is an approach that refers to the ratio decidendi, namely the legal reasons used by judges to reach their decision.

¹⁹ Cucu Sumiati & Yoyo Arifardhani, "Perlindungan Hukum kepada Pemilik Merek Terkenal terhadap Pendaftar Pertama yang Beriktikad Baik Berdasarkan Sistem Pendaftaran Konstitutif (*First to File*) pada Barang Sejenis Menurut UU No. 20 Tahun 2016", dalam *Jurnal Imanot*, Vol. 1, No. 1, Desember 2021, <https://journal.univpancasila.ac.id/index.php/imanot/article/view/2823>, p. 38.

trademark registration is the first user of the Mark in question. Registration does not issue rights but only provides a legal allegation or presumption juris that the party whose trademark is registered is the party that actually uses the Mark. In this system, people who do not register their trademarks are still protected so that at any time, they can admit to being the first user of the Mark, so legal certainty is less guaranteed. In a declarative system or first-to-use system, on the other hand, it is the first use that applies to determine the creation of a right to a mark and not its registration. In other words, the right to a mark is created because of its first use. In the MIG Law, the registration system provides a certain right, namely that the person who registers is considered according to the law as the person who is the first user of the Mark and therefore has the right. But if another person can prove that he used the Mark in question before the person who registered it, then the registration in question can be abolished. In other words, this registration "loses" to the first use. So that registration does not create a right to the Mark, but rather this registration only confirms or explains that the person carrying out this registration according to the law is considered as if he really was the person who had previously used this Mark in Indonesia and therefore is entitled to the Mark. It (Presumption juris), but it can always be proven otherwise.²⁰

In accordance with the mandate of the current MIG Law, the registration system adopted to obtain rights to a trademark is a constitutive/attribution system or First-to-File system so that the Defendant is the party entitled to obtain the rights to the Mark.²¹ However, it turns out that in the current MIG Law, there is still room for efforts to cancel trademark rights that have been obtained by the first registrant who has been granted exclusive rights by the state, which can be carried out by third parties who feel aggrieved, but by first meet the requirements as stipulated in Article 77 paragraph (2), namely a lawsuit without a time limit if one of them is bad faith.

Bad faith is in the Elucidation of Article 21 paragraph (3) UU MIG, which reads: "Applicant with bad intentions" is an Applicant who should be suspected in registering his Mark of having the intention to imitate, plagiarize, or follow other parties for the sake of his business causing conditions of unfair business competition, outwit or mislead consumers.²²

With regard to well-known brands, there is a fundamental principle/rule in the context of protecting well-known brands that apply universally, namely that always, and is self-evident, there is or contains an

²⁰ *Ibid.*, p. 38-39.

²¹ *Ibid.*

²² *Ibid.*, p. 40.

element of bad faith if there is a similarity in substance or in its entirety between a brand and a well-known brand (presumption of bad faith). Those who do that must have bad intentions to piggyback on the fame of a well-known brand. So therefore, the act of hitchhiking or hijacking is basically always in bad faith, so hitchhikers or hijackers do not get legal protection. The results of his actions should not be owned. This principle was used by the Supreme Court in Decision Number 424 PK/Pdt/1994 (Giordano Case), in its considerations as follows: "A pirate, however, cannot be a legal owner because there has never been a pirate with good intentions."²³

Based on observing that matter, the existence of a sign with differentiating power to be protected as a mark can theoretically be categorized as:²⁴

- a. Inherently distinctive: eligible for immediate protection upon use.
- b. Capable of becoming distinctive: eligible for protection only after the development of consumer association (secondary meaning).
- c. Incapable of becoming distinctive: not eligible for trademark protection regardless of length of use.

Signs that inherently have distinctiveness and can immediately obtain protection. It is a very good sign to be registered as a trademark because every consumer generally has sufficient knowledge about the sign. Consumers understand the function of the brand to differentiate, so this involves a direct reaction from consumers to the sign.²⁵ The doctrine that develops around the problem of equality is variable in nature, which may still contain differences or disparities between one another. No harmonization can foster a uniform legal framework (unified legal framework). The differential or variable nature is evident in judicial decisions in Indonesia and developed countries, such as the United States.²⁶

Legal Protection for Registered Mark Owners

The importance and legal protection is the existence of rights protected by law. These rights give enjoyment and freedom to individuals in implementing them even though there are still restrictions on acting. It is also emphasized in the Indonesian state constitution in Article 28G of the 1945

²³ Sudargo Gautama dan Rizawanto Winata, *Pembabaruan Hukum Merek Indonesia*, (Bandung: Citra Aditya Bakti, 1997), p. 293.

²⁴ Rendy Alexander, "Penerapan Prinsip First to File", p. 211.

²⁵ Eric Gastinel dan Mark Milford, "The Legal aspects of Community Trade Mark", dalam Rahmi Jened, *Hukum Merek Dalam Era Global & Integrasi Ekonomi*, (Jakarta: Kencana, 2015), p. 64-65.

²⁶ M. Yahya Harahap, *Tinjauan Merek Secara Umum dan Hukum Merek di Indonesia Berdasarkan Undang-Undang No. 19 Tahun 1992*, (Bandung: Citra Aditya Bakti, 1996), p. 288.

Constitution, namely that everyone has the right to legal protection and to feel safe and protected from threats by anyone.²⁷

Abdulkadir stated that legal protection as an effort regulated by law to prevent violations by people who are not entitled to intellectual property is a legal system consisting of elements including: (1) The subject of protection, the intended subject is the owner or rights holders, law enforcement officials, registration officials, and law violations; (2) Objects of protection, all types of intellectual property rights regulated by law; and (3) Protection registration, protected intellectual property rights are only those that have been registered and proven by a registration certificate unless other provisions such as copyright without being registered have received legal protection.²⁸

Legal protection for brands is aimed at two interests, namely the interests of brand owners (manufacturers/traders) and the interests of consumers or the general public, where both interests are protected in a balanced and impartial manner. Overall, the interests to be protected by trademark law can be separated into the following four groups:²⁹

- a. The interests of the brand owner are not disturbed in establishing good relations with consumers through the use of a certain brand and obtaining permanent customers in the future, which will be guaranteed by public recognition of the brand, which shows that the brand owner is a producer of the goods in question.
- b. The interests of producers who compete freely market their goods using public signs that can be used by anyone, which will hinder the freedom to sell their goods in fair and legitimate competition.
- c. The interests of consumers to be protected against practices that tend to create impressions that can mislead, deceive and confuse the consumer public by influencing their minds that a company also originates from that other company.
- d. It is in the general interest to promote fair trade in the markets and prevent dishonest practices contrary to the norms of fair trading.

²⁷ Inayah, "Perlindungan Produk Batik dalam Hak Kekayaan Intelektual", *Jurnal Legal Standing*, Vol. 4, No. 2, September 2020, <http://dx.doi.org/10.24269/ls.v4i2.3099>, p. 124. Udiyo Basuki, "HAM, Islam dan Konstitusi: Mengkaji Nilai-nilai Hak Asasi Manusia Islam dalam UUD 1945", dalam *Tanjungpura Law Journal*, Vol. 2, Issue 1, January 2018, <http://dx.doi.org/10.26418/tj.v2i1.32677> p. 86. Udiyo Basuki, "Perlindungan Hak Asasi Manusia di Indonesia (Ulasan terhadap Beberapa Ketentuan UUD 1945)", dalam *Jurnal Ayyir'ah*, No. 8 Tahun 2001, p. 108.

²⁸ Maria Alfons, "Kekayaan Intelektual dan Konsep Negara Kesejahteraan", dalam *Majalah Hukum Nasional*, Nomor 1 Tahun 2016, p. 86.

²⁹ Suyud Margono, *Hak Milik Industri: Pengaturan dan Praktik di Indonesia*, (Bandung: Ghalia Indonesia, 2011), p. 48-49.

IPR protection can be carried out with two systems: the declarative protection system and the constitutive protection system. The explanation of the two systems is as follows:³⁰

- 1) Declarative protection system. The declarative protection system is a system in which those who receive legal protection are the first users of the Mark concerned.
- 2) Protection system. The system of constitutive protection, namely registration, is a must to obtain rights to a mark. Without a state, registration will not give rights to the Mark to the brand owner. It means that without registering a mark, a person will not be given legal protection by the state if his Mark is copied by someone else.³¹

The concept of legal protection for trademark rights refers to the nature of trademark rights that are special (exclusive). The special right is a monopoly, meaning the right can only be exercised by the brand owner. Without permission from the brand owner, other people may not use the special rights. If another party uses this special right without permission from the owner of the trademark right, then a violation has occurred, which can be subject to certain sanctions.³² The legal protection given to registered marks is basically aimed at obtaining a value of certainty, a value of justice, and the value of the benefits of legal protection regarding trademark rights.³³

The advantage of a registered mark compared to an unregistered mark in a dispute is that it will be easier to prove because it has authentic evidence in the form of a certificate issued by the Directorate General. KI, and with the existence of the certificate, are considered the first user of the Mark. In contrast, in an unregistered mark, the user will have difficulty proving himself as the first user because no documents are submitted as authentic evidence in court examinations.³⁴

Trademark legal protection given to either foreign or local, well-known or unknown brands is only given to registered marks. Such legal protection

³⁰ Andre Asmara, Sri Wanly Rahayu, Sanusi Bintang, “Studi Kasus Penerapan Prinsip Pendaftaran First to File pada Pembatik Merek Cap Mawar (Putusan MARI No. 512K/Pdt.Sus-HKI/2016)”, *Syah Kuala Law Journal*, Vol. 3, No. 2, Agustus 2019, <https://doi.org/10.24815/sklj.v3i2.11899> p. 192.

³¹ *Ibid.* In this Constitutive system, legal protection is based on the first applicant who has good faith.

³² Sujatmiko, A. (2019). Perlindungan Hukum Hak Atas Merek. *Yuridika*, 15(4), 347–359. <https://doi.org/10.20473/ydk.v15i4.14405>, p. 349.

³³ *Ibid.* Referring to Article 1 number 5 which states that trademark rights are exclusive rights granted by the state to registered trademark owners for a certain period of time.

³⁴ Andre Asmara, Sri Wanly Rahayu, Sanusi Bintang, “Studi Kasus Penerapan”, p. 196-197.

can be in the form of preventive or repressive protection. Preventive legal protection is carried out through trademark registration. Meanwhile, repressive legal protection is carried out in the event of trademark violation through civil lawsuits and or criminal charges.³⁵

Trademark protection is only given to the first registrant in good faith, according to the principle of a first-to-file system or Constitutive Stelsel. Referring to the word "First Registrant" in relation to the filing date, the filing date is very important in the field of IPR, where the acquisition of rights is based on a first-to-file system. Filing Date determines the protection's start date, which is retroactive from the Filing Date.³⁶

Passing Off of Registered Marks as a Form of Bad Faith

This trademark registration does not escape the possibility of unauthorized registration by certain parties with bad intentions. Registration without rights often occurs in well-known marks because a well-known mark usually attaches a reputation which makes certain parties with bad intentions try to gain profits by piggybacking or piggybacking on the reputation of a well-known mark. This reputation, although intangible, is a valuable asset for brand owners and also for the law, so it needs protection.³⁷

A company's success and high reputation with its products and brands often tempt other parties with bad intentions to take advantage of it in ways that violate business ethics, moral norms, or the law.³⁸ Actions that try to gain profit by piggybacking on reputation so as to cause deception or misdirection are known as passing off.

The term passing off is not well known in the Indonesian legal literature. However, pillaging a reputation is considered an unlawful act (action for the tort of passing off) known in Anglo-American law countries (common law system) such as Australia, England, Malaysia, the United States, and others.³⁹ In these countries, passing off develops as a form of unfair competition in trade or commerce. In Australia, for example, Article 52 of

³⁵Erma,Wahyuni, dkk, *Kebijakan dan Manajemen Hukum Merek*, (Yogyakarta: YPAPI, 2011), p.3-4.

³⁶ Rahmi Jened, *Hukum Merek dalam Era*, p.16.

³⁷Tim Lindsey, *Hak Kekayaan Intelektual (Suatu Pengantar)*, (Bandung: Alumni, 2006), p. 152.

³⁸ Muhamad Djumhana & R. Djubaedilah, *Hak Milik Intelektual Sejarah, Teori dan Prakteknya di Indonesia*, (Bandung: PT Citra Aditya Bakti, 2003), p. 266.

³⁹Soedjono Dirdjosisworo, *Antisipasi terhadap Bisnis Curang (Pengalaman Negara Maju dalam Perlindungan Hak Kekayaan Intelektual dan Pengaturan E-Commerce serta Penyesuaian Undang-Undang HKI Indonesia*, (Bandung: CV Utomo, 2005), p. 5..

³⁹ Muhamad Djumhana & R.Djubaedilah, *Hak Milik Intelektual Sejarah*, p. 266.

³⁹ *Ibid.*, p. 267.

the Australian Trade Practices Act 1974 is used as a basis for owners of registered and unregistered marks to sue based on passing off.⁴⁰

The view in countries that adhere to the common law system is that a person is said to have committed an act of passing off if a person benefits by carrying out an action that harms another person's reputation or piggybacks or piggybacks on another person's reputation. According to Djumhana and Djubaedillah, the definition of passing off is:⁴¹

"Actions that try to gain profits through shortcuts by all means and pretexts by violating business ethics, moral norms and the law. This action can occur by copying or resembling another person's property with a good reputation. This way of piggybacking on reputation (goodwill) can occur in brands, patents, industrial designs, and copyrights.

Coppinger in Djumhana and Djubaedillah states:⁴² "The action for passing off lies where Defendant has represented to the public that his goods or business are the goods or business of Plaintiff. A defendant may make himself liable to this action by publishing a work under the same title as the Plaintiff's or by publishing a work where 'get up' so resembles that of the Plaintiff's work as to deceive the public into the belief that it is the Plaintiff's work, or is associated with or connected with the plaintiff".

The meaning passing off is an attempt, action, or deed carried out by a person or several persons, which leads to the existence of unfair competition or violation in the field of IPR, which carries out the reputation and image of a brand that is already and or is more well-known.⁴³ Passing off is often interpreted as piggybacking a reputation on a well-known brand, or judges usually interpret passing off as simulating or imitating a brand.

The act of passing off implies the criteria in Article 21, paragraph (3) of the MIG Law because, in that article, it is emphasized that there are actions to outwit or mislead consumers based on unfair competition.⁴⁴ Adi Supanto (Head of Sub Directorate of Legal Services and Mark Appeal Commission, Kemenkumham, Jakarta) in Anwar Fauzi stated that several

⁴⁰Aurora Quintina, Syafarudin & Elvi Zahara, "Pemboncengan Reputasi (*Passing Off*) terhadap Pemilik Merek Terdaftar di Indonesia Ditinjau dari Segi Perlindungan Hukum, *Jurnal Hukum Mercatoria*, Vol. 2, No. 1, Tahun 2009, p. 11. <https://doi.org/10.31289/mercatoria.v2i1.668>

⁴¹Muhamad Djumhana & R.Djubaedilah, *Hak Milik Intelektual Sejarah*, p. 266.

⁴²*Ibid.*, p. 267. *Passing off* i.e. actions against piggybacking reputation are carried out when the defendant has shown to the public that the goods or business are the goods or business of the plaintiff.

⁴³[passing off - Legal Cliniconline \(Hukumonline.com\)](https://www.hukumonline.com/berita/id/1031289/mercatoria.v2i1.668), access 14 April 2023. *Passing off* is not recognized in trademark regulation in Indonesia, because *passing off* is better known in countries adhering to the *Common Law System* as part of unfair competition law.

⁴⁴*Ibid.* On that basis, the provision of Article 21 Paragraph (3) actually allows it to be used as a reason for the right to file a lawsuit in the event of a *passing off*.

factors or reasons caused certain parties to infringe on other people's marks, including:⁴⁵

- a. Obtain profits quickly and surely, because the brands used or imitated are usually brands that are best-selling in the market;
- b. Do not bear the risk of loss in terms of having to make a new brand famous because the advertising and promotion costs are usually very high;
- c. The difference in profits obtained from selling goods with counterfeit brands is far greater when compared to the profits obtained from selling genuine goods because counterfeiters do not need to pay for their own research and development, advertising and promotion costs, and taxes so that they can provide significant discounts bigger for traders.

Registration of a mark is a must for the trademark owner, but the right to the Mark will only be granted by the Directorate General of Intellectual Property if the application for trademark registration by the trademark applicant is made in good faith. The element of good faith in a request for trademark registration is a very important element.⁴⁶ An applicant in good faith is an applicant who registers their trademark honestly and properly without any intention to piggyback, imitate, or plagiarize another party's brand fame.⁴⁷ The Directorate General of Intellectual Property can reject an application for registration of a mark if it is done with an element of bad faith.⁴⁸

One of the reasons a trademark can be refused registration by the Directorate General of Intellectual Property is because the application for trademark registration is made dishonestly to imitate, plagiarize or piggyback on a well-known mark for the sake of business interests and can harm other parties who have registered the Mark.⁴⁹ Bad faith in a trademark registration can be interpreted as an act that another party deliberately carries out by imitating another person's trademark that has been previously registered.⁵⁰ In

⁴⁵ Anwar Fauzi, *Perlindungan Hukum Pemilik Merek Terdaftar dari Perbuatan Passing Off dan Akibat Hukumnya*, (Jakarta: FSH UIN Syarif Hidayatullah), p. 38.

⁴⁶ A. Mardianto, "Penghapusan Pendaftaran Merek Berdasarkan Gugatan Pihak Ketiga". Vol 10, No. 01. *Jurnal Dinamika Hukum*, p. 44. <http://dx.doi.org/10.20884/1.jdh.2010.10.1.137>

⁴⁷ Far-Far, C. Y. (2014). "Tinjauan Yuridis Pembatalan Merek Dagang Terdaftar Terkait Prinsip Itikad Baik (Good Faith) dalam Sistem Pendaftaran Merek (Studi Putusan Nomor 356 K/Pdt. Sus-HaKI/2013)", *Kumpulan Jurnal Mahasiswa Fakultas Hukum*, p. 5. URL: <http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/716>.

⁴⁸ Putri, H. Y, 2014, Pengaturan Passing off dalam Penggunaan Domain Name Terkait Merek, Vol 05, No 03, *Jurnal Magister Hukum Udayana*, h. 472-473, URL: <https://ojs.unud.ac.id/index.php/jmhu/article/view/24218>.

⁴⁹ Ida Ayu Made Rezky Dewinta & Ni Luh Gede Astariyani, *Pengaturan Penolakan Pendaftaran Merek dengan Iktikad Tidak Baik*, (Bali: Fakultas Hukum Universitas Udayana), p. 7.

⁵⁰ *Ibid.*, p. 8.

Indonesia's principles of mark registration, it is not justified to commit a fraudulent act using another person's Mark in bad faith.⁵¹

In particular, in the study of marks, any act of imitation, reproduction, copying, piracy, or piggybacking on the fame of another person's Mark is considered an act of counterfeiting, misdirection, or using another person's Mark without rights (authorized use) which in harmony with brand protection is qualified as unfair competition (unfair competition) and stated as an act of seeking wealth dishonestly (unjust enrichment).⁵² As mandated by the MIG Law, bad faith in registering a mark can be used to cancel a mark. The reasons are based on similarities in principle as those proven in good faith in a lawsuit for cancellation of trademark registration.⁵³

Case Analysis Supreme Court Decision Number: 535K/Pdt.Khusus-HKI/2018 concerning the Passing Off Dispute of the Famous Batik Brand Iwan Tirta

a. The Parties to the Cassation of the Supreme Court

PT. PUSAKA IWAN TIRTA, domiciled at Jalan Dewi Sartika, Number 14, Cawang II, RT 003/012, Cawang Village, East Jakarta, represented by Lidya Kusuma Hendra, as Main Director, based on a Special Power of Attorney dated February 6, 2018, as Appellant for Cassation; **Against**, PT. IWAN TIRTA, domiciled at Jalan Panglima Polim III, Number 3 A, Melawai Village, Kebayoran Baru District, South Jakarta, represented by Anak Agung GA Widharmika, based on a Special Power of Attorney dated March 16, 2018, as the Cassation Respondent **and**, the Government of the Republic of Indonesia Cq. Ministry of Law and Human Rights Cq. Directorate General of Intellectual Property Cq. Directorate of Marks and Geographical Indications domiciled at Jalan HR. Rasuna Said, Kav 8-9, Jakarta, as Co-Respondent of Cassation.

Based on these letters, the Supreme Court considers that the Plaintiff, in his lawsuit, requested the Court to give a decision as follows, namely in the Provisions, First, Ordering the Defendant to close the Defendant's shops/stores using the disputed Iwan Tirta Mark (in case Iwan Tirta Pusaka Mark) in all Indonesian Territories; Second, Ordering the Defendant to stop

⁵¹ Mukti Fajar ND, Yati Nurhayati dan Ifrani, "Iktikad Tidak Baik dalam Pendaftaran dan Model Penegakan Hukum Merek di Indonesia", dalam *Jurnal Ins Quina Iustum*, Vol. 25, Issue 2, Mei 2018, p. 226. <https://doi.org/10.20885/iustum.vol25.iss2.art1> The definition of bad faith includes acts of "fraud" , "misleading" other people, as well as behavior that is not consciously justified to achieve a dishonest *purpose* .

⁵² Bryan A. Garner, *Black's Law Dictionary* , Eighth Edition, (United State Of America, 2004).

⁵³Mukti Fajar et.al, "Iktikad Tidak Baik", p. 228.

trading activities using the disputed Iwan Tirta Mark (in case Iwan Tirta Heritage Mark) throughout Indonesia).

b. Main Case in Supreme Court Cassation

- 1) Granted the Plaintiff's lawsuit in its entirety;
- 2) Declare the Plaintiff as the only legal owner and rights holder of the brands which have the dominant element or elements using the word "IWAN TIRTA" in all Classes registered at the Directorate General of Intellectual Property Rights, Ministry of Law and Human Rights of the Republic of Indonesia;
- 3) Declare the registration of the mark "PUSAKA IWAN TIRTA + LOGO" which was registered with the Co-Defendant on behalf of the Defendant in Class 35 with the Registration Number IDM000209085 on the registration date of July 2, 2009, having similarities in principle and whole with the "IWAN TIRTA" Marks (along with their variations) belonging to the Plaintiff for similar goods;
- 4) Cancel or declare null and void with all legal consequences the registration of the Mark "PUSAKA IWAN TIRTA + LOGO," which was registered with the Co-Defendant on behalf of the Defendant in Class 35 with Registration Number IDM000209085 registration date July 2, 2009;
- 5) Ordered the Co-Defendant to immediately cancel and cross out the Mark "PUSAKA IWAN TIRTA + LOGO," which was registered with the Co-Defendant on behalf of the Defendant in Class 35 with Registration Number IDM000209085 registration date July 2, 2009, from the General Register of Brands and to announce it in the Official Mark Gazette in accordance with the provisions of the Law Applicable Trademark Act;
- 6) Ordered Co-Defendant to submit and comply with this Decision;
- 7) Sentenced the Defendant to pay court costs incurred in this case amounting to Rp. 2,516,000.00 (two million five hundred and sixteen thousand rupiahs); and Rejecting other claims and the rest.

After the Decision of the Commercial Court at the Central Jakarta District Court was pronounced in the presence of the Cassation Appellant on February 5, 2018, against this Decision, the Cassation Petitioner, through his attorney based on a Special Power of Attorney dated February 6, 2018, submitted a request for cassation on February 14, 2018, as evident from the Deed of Statement of Application Cassation Number 02 K/Pdt.Sus-HKI/2018/PN.Niaga.Jkt.Pst. Jo. Number 51/Pdt.Sus-Merek/2017/PN.Niaga.Jkt.Pst., made by the Registrar of the Commercial Court at the Central Jakarta District Court, the application is accompanied by a memorandum of cassation received by the Registrar of the Commercial Court at the Central Jakarta District Court on February 26, 2018.

Based on the cassation memorandum received on February 26, 2018, which is an integral part of this Decision, the Appellant requests that:

- 1) Receive a cassation request from the Cassation Petitioner/Defendant;
- 2) Granted the cassation request from the Cassation Petitioner/Defendant as a whole;
- 3) Canceled the Decision of the Commercial Court at the Central Jakarta District Court Number 51/Pdt.Sus-Merek/2017/PN.NIAGA.JKT.PST. February 5, 2018;
- 4) Punish the Cassation Respondent/Plaintiff to pay the entire costs of this case at all levels. In contrast, against the cassation memorandum, the Respondent for cassation has filed a counter-cassation memorandum on March 21, 2018, which basically rejects the cassation request from the Cassation Appellant.

Considering these reasons, the Supreme Court thinks that these reasons cannot be justified because after carefully examining the cassation memorandum dated February 26, 2018, and the counter memorandum dated March 21, 2018, related to *Judex Facti's* considerations in this case, the Commercial Court at the District Court Central Jakarta is not wrong to apply the law with the following considerations:

- 1) The Plaintiff's Mark is indeed a well-known mark, especially in Classes 24 and 25, so the registration of the Defendant's Mark by using/using similarities in principle or its entirety (P.1) is in bad faith and is prohibited by law;
- 2) Plaintiff's trademark Iwan Tirta has been registered since 2006, while Defendant's trademark registration in 2009 was clearly in bad faith.

Regarding the above considerations, it turns out that the Decision of the Commercial Court at the Central Jakarta District Court, in this case, is not contrary to law and/or statutes, so the cassation petition filed by the Cassation Petitioner, PT. Iwan Tirta's Pusaka must be rejected. Because the cassation petition from the Cassation Appellant was rejected, the Cassation Appellant must be punished to pay court costs at all levels of the judiciary. In the end, the Supreme Court Judge decided by adjudicating: First, Rejecting the cassation request from the Cassation Petitioner: PT. The Iwan Tirta Heritage; Second, punishing the Cassation Petitioner to pay court costs at all levels of Court, which at the cassation level amounted to Rp. 5,000,000.00 (five million rupiah).

Conclusion

Based on the discussion and analysis of the case above, it can be concluded that legal action in the form of a lawsuit to the Commercial Court, based on the new Decision, can be used to cancel the registered Mark.

Besides that, the form of legal protection for registered trademark owners is related to the application of the First-to-File principle to parties passing off registered brands, including, namely, the Plaintiff (brand holder Iwan Tirta) as the sole legal owner and rights holder of marks that have a dominant element or element uses the word "Iwan Tirta" in all Classes registered at the Directorate General of Intellectual Property Rights, KEMENKUMHAM of the Republic of Indonesia, and cancels or declares null and void with all legal consequences the registration of a Mark "Pusaka Iwan Tirta & Logo" which was registered with the Co-Defendant (Ditjen KI KEMENKUMHAM) on behalf of the Defendant, and punished the Cassation Petitioner (Defendant/ PT Pustaka Iwan Tirta) to pay case costs at all levels of justice which are at the cassation level.

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