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Omnibus Law Opportunities And Challenges Towards Entrepreneurs And Labor : Comparative Review

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Editor :

M. Ngazis, SH.,MH
Erna Sunarti, S.Pd.,M.Hum.
Nailul Mukorobin, S.Psi.

Desain Cover :

Muh. Arifin, S.Kom

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Jl. Raya Kaligawe KM. 4 PO. Box. 1054/SM

Semarang 50112 – Indonesia

Phone: +6224 6583584 (8 Saluran) psw. 569

Fax. + 6224 6592735

Email : pdih.fh@unissula.ac.id
www.pdih.unissula.ac.id / www.apic.unissula.ac.id

KATA PENGANTAR

Bismillahirrohmanirrohim

Assalamu'alaikum Wr. Wb.

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Pada seminar ini telah dipresentasikan hasil penelitian dosen dan mahasiswa yang diikuti oleh peneliti-peneliti dari berbagai universitas yang telah mebahas berbagai keilmuan Hukum dan Humaniora.

Sesungguhnya keberhasilan dalam mencapai tujuan pendidikan yang dicita-citakan sangat tergantung pada sikap mental, partisipasi serta disiplin setiap unsur yang terlibat dalam proses belajar mengajar. Mudah-mudahan seminar Internasional yang sederhana ini dapat memberi sumbangsih dalam mencerdaskan bangsa Indonesia serta semoga Allah SWT selalu menyertakan ridho-Nya. Amin. Akhir kata, kami mengucapkan terima kasih kepada pimpinan Universitas Islam Sultan Agung, pimpinan fakultas Hukum Unissuala, pemakalah, editor dan serta pihak-pihak yang telah membantu terselenggaranya seminar ini dengan lancar tanpa hambatan suatu apapun.

Wassalamu'alaikum Wr.Wb.

Table Of Content

IDEAL CONSTRUCTION OF THE IMPLEMENTATION OF A CONSTITUTIVE SYSTEM ("FIRST TO FILE") IN BRAND REGISTRATION

Hani Subagio
NIM : 10301700190

Abstract

The brand of a product as a means of promotion (trade promotion) and advertisement for producers or entrepreneurs who trade the goods or services concerned. The 1961 Trademark Law has many disadvantages because the Constitutive Registration System or "first to use principle" often creates difficulties in determining who is actually the first user with good faithagainst the trademark at issue.The paradigm used in this study is the constructivism paradigm, which is carried out using a normative juridical approach (legal research). Meanwhile, if needed it can also be supported with empirical data, based on an selective sample. In this specifications of the research conducted is descriptive analytical. In discussing the results of normative research, it is analyzed normatively and qualitatively, by first making efforts to determine the criteria for identification, classification, and systematic and to the effort of legal discovery, whether in the form of legal interpretation or legal construction to give birth to a legal argument.The "first to file" system has significant weaknesses. In the "first to file" registration system, the principle of brand acceptance is "first to file", meaning that anyone who registers first will be accepted by registering without questioning whether the registrant really uses the mark for the benefit of his business. In such case, the registrant then (in fact the user of the actual mark) must carry out a "Special Settlement" with the first registrant so that the first registrant will submit the mark to the registrant later.

A. Introductions

Brand rights as one part of Intellectual Property Rights is the most important thing, for the smooth running of a business and fair business competition, because with the existence of a brand as a product identification, consumers can know and differentiate the quality of products or services that will use it. Without a brand, consumers will find it difficult to determine which quality products according to needs. Therefore a brand can be a commercially valuable asset, even a brand is often more valuable than the real assets of a company.[1]

Giving a brand to a product or service can also prevent unfair business competition. An expensive product is usually not because of the product itself, but the influence of the brand. [2]This is what proves that

1. Tim Lindsey, Eddy Damian (Editor), HakKekayaanIntelektualSuatuPengantar, Ctk. Ketujuh, PT. Alumni, 2013, Bandung, page 131.
2. OK. Saidin, AspekHukumHakKekayaanIntelektual, Ctk. Kesembilan, PT. Raja GrafindoPersada, 2015, Jakarta, page 441.

the brand is an immaterial property right. Basically a trademark is an object of rights just like any other goods that can be owned,[3] it also becomes part of the wealth of the trademark owner who needs to get legal protection. Trademark as a right, then it must be protected, like the right to other assets. Trademarks are also property and the law functions to protect the products.[4]

Trademark rights need to be protected, in accordance with the concept of understanding rights, that rights are interests protected by law, while interests are demands of individuals or groups that are expected to be fulfilled.[5] Through brands, entrepreneurs can maintain and guarantee the quality of goods and / or services produced and prevent unfair competition (concurrency) from other entrepreneurs with bad intentions who intend to piggyback their reputation.

The brand itself is an intellectual work as a right that needs to be protected. The brand also functions as a means of promotion (means of trade promotion) and advertisement for producers or entrepreneurs who trade the goods or services concerned. Brands that are supported by advertising media make entrepreneurs have the ability to stimulate consumer demand while maintaining consumer loyalty for the products and / or services they produce. This is what makes a brand a competitive advantage and ownership advantages to compete in the global market.[6]

Undang-Undang No. 21 Tahun1961 has many disadvantages because the Constitutive Registration System or "first to use" principleoften creates difficulties in determining who is actually the first user against the Trademark dispute.[7] Therefore, in this declarative registration system, if there is a dispute it is not easy to prove who actually used the Trademark for the first time to determine who is really entitled. A trademark owner who does not register his mark, must provide evidence of the use of his mark with various letters or other testimonies that are not easy to collect or present.

Based on the description above shows that the Trademark that has been owned and used even has a well-known reputation, registration can still be submitted by other parties and accepted registration, which eventually lead to dispute lawsuit cancellation. So the author is interested in taking the issue of how the ideal construction of the application of the Constitutional System "First to File" in the registration of Trademarks in order to provide legal protection to related parties based on the values of justice and usefulness and legal certainty.

C. Research Methods

The paradigm used in this research is the constructivism paradigm,[8] because thisresearch is intended to produce thoughts or ideas as well as new theories regarding the brand registration system in providing legal protection to related parties. Constructivism paradigm is used in this study because it allows researchers to see and understand the trademark registration system in providing legal protection to related parties

3. RahmiJened, HukumMerek Trademark Law. Dalam Era Global &IntegrasiEkonomi, Prenadamedia Group, 2015, Jakarta, page. 2-3.
4. Elisabeth NurhainiButarbutar, HukumHartaKekayaan, MenurutSistematika KUH Perdata dan Perkembangannya, PT RefikaAditama, 2012, Bandung, page 25.
5. TitonSlametKurnia, PerlindunganHukumTerhadapMerekTerkenal di Indonesia PascaPerjanjian TRIPS, PT Alumni, 2011, Bandung, page 104.
6. RahmiJened, op. cit, page. 4
7. Sudargo Gautama, HukumMerek Indonesia, PT. Citra Aditya Bakti 1989, Bandung, page 20.
8. Agus Salim, Teori dan Paradigma: PenelitianSosialBukuSumberUntukPenelitianKualitatif, Tiara Wacana, 2006, Yogyakarta, page 68-72.

This research was conducted using a normative juridical approach (legal research),[9] or also called doctrinal research, which uses or is based on data sources in the form of laws and regulations, court decisions, theories and legal concepts and views of legal scholars, the results of which analyzed using normative-qualitative methods. Meanwhile, if needed it can also be supported with empirical data, by basing on an a-selective sample.[10] In the specification of the research conducted is descriptive analytical, which is describing a legal condition as it is with the constructivist study paradigm, then by pouring it into a logical, systematic and comprehensive discussion.

The legal material in normative research can be divided into research sources in the form of primary legal materials and secondary legal materials, namely:

a. Primary legal materials can be in the form of Regulations per Law, Review / Resume / Manuscript or official notes on the discussion of the Draft Legislation, Court Decisions, Jurisprudence, customary law.
b. Secondary Legal Material, in the form of all publications on law that are not official documents, Draft Laws, legal books, legal dictionaries, legal journals, comments on court decisions, scientific works of expert scholars, research results.

In discussing the results of normative research, it is analyzed normatively qualitatively, by first making efforts to determine the criteria for identification, classification, and systematic and to the effort of legal discovery, whether in the form of legal interpretation or legal construction to give birth to a legal argument. A qualitative analysis approach by focusing on the general principles that underlie the manifestation of the phenomena that exist in human life.[11]

D. Discussion

1. Definition of Intelectuall Property Rights

Understanding Intellectual Property Rights Intellectual property rights are material rights, the rights to an object that comes from the work of the brain, the work of the human ratio.[12]Intellectual Property Rights are basically rights that arise as a result of human intellectual abilities that produce a process or product that is beneficial to humanity in various fields such as science, art, literature, inventions in technology.[13]The conception of intellectual property rights is based on the idea that intellectual work that has been produced by humans requires the sacrifice of energy, time and money. This sacrifice makes the work that has been produced has economic value because of the benefits that can be enjoyed. This encourages the need for appreciation for the results in the form of legal protection.

Intellectual Property Rights is a translation of Intellectual Property Rights, as stipulated in Undang-Undang No. 7 Tahun 1994 concerning ratification of the WTO (Agreement Establishing The World Trade Organization, which means the right to wealth from human intellectual abilities, which has a relationship with the rights of a person (human rights). World Intellectual Property Organization states this as a creation of thought human beings including their inventions, literary and artistic works, symbols, names, imagesand

9. Suratman, dan Philips Dillah, MetodePenelitianHukum, Alfabeta, 2012, Bandung, page 11.
10. Vredenbregt, J., Metode dan Teknik Penelitian Masyarakat, PT Gramedia, 1978, Jakarta, page 34.
11. Burhan Ashofa, MetodePenelitianHukum, RinekaCipta, 1996, Jakarta, page 20-21.
12. Budi Santoso, Pengantar HKI dan Audit HKI untuk Perusahaan, Pustaka Magister, Semarang, 2009, page 3.
    Adrian Sutedi, HakAtasKekayaanIntelektual, SinarGrafika, 2013, Jakarta, page 13.
13.

designs used in trade.[14]The essence of Intellectual Property Rights itself is based on a very basic view in which intellectual works produced by humans, in the process making of course requires a special skill or expertise and also tenacity and of course requires a lot of effort as well as sacrifice.Possession of the rights to the results of intellectual creation is very abstract compared to the ownership of objects that are visible, but these rights approach the rights of objects, after all second these rights are absolute a, there is an analogy that after an intangible object comes out of the human mind, incarnates in a literary, scientific, artistic or artistic opinion. So, in the form of tangible (lichamelijkezaak) which in its utilization (exploit) and reproduction can be a source of profit for money. This is what justifies the classification of these rights into existing property law.[15]There are several important elements in Intellectual Property Rights, including:

a. An exclusive right granted by law;
b. This right is related to human effort based on intellectual ability; and
c. Intellectual ability has economic value.

2. Trademark Registration

In order to be accepted as a brand, the absolute requirement is that it must have sufficient distinction. In Indonesia, there are 2 (two) types of brand registration systems, namely:

a. Declarative Registration System

Declarative registration system is the right to a mark created because of the first use (first user rights), although not registered this system is adhered to in Law Number 21 of 1961 concerning Trademarks, where Article 2 Paragraph (1) reads: "Special rights to use a mark in order to differentiate the goods produced by a company or merchandise of a person or other entity is given to those who for the first time use the mark for the above purposes in Indonesia ". The function of trademark registration does not provide rights, but only provides allegations that the person whose trademark is registered is entitled to be the first user. The advantage is that the person entitled to the trademark is not someone who is formally registered with the trademark, but must be someone who truly uses or uses it.[16]

b. Constitutional Registration System

In accordance with Article 3 of Law Number 15 Year 2001 Concerning Trademarks, in Indonesia the registration of a mark uses a constitutive system. This also applies in Law Number 20 Year 2016 concerning Trademarks and Geographical Indications, the party registering a trademark first, is the person entitled to the mark, where everyone must respect their rights as ownership rights (first to file principal). This constitutive system has the advantage of legal certainty to determine whose brand is most important to be protected. It is enough to see who first gets the filling date or is registered in the general register of brands. But the disadvantage is that brands that are formally registered but are never used by their owners. The principle of brand protection in Indonesia is to provide brand protection for registered brands in good faith. Brands are protected with the aim of identifying and differentiating products. The brand used is not just adopting a brand without a trusted use and just an attempt to hold the market. Good faith is known as substantive laden in the brand. Article 21 Paragraph (3) of Law Number 20 Year

14. Tomi SuryoUtomo, HakKekayaanIntelektual (HKI) di Era Globalisasi, Sebuah Kajian Kontemporer, Yogyakarta, GrahaIlmu, 2010, Yogyakarta, page 1
15.
16. PipinSyarifin dan DedahDjubaedah, PeraturanHakKekayaanIntelektual di Indonesia, Pustaka Bani Quraisy, 2004, Bandung, page 174.

2016 concerning Trademarks and Geographical Indications determines that trademarks cannot be registered on the basis of an application submitted by an applicant in bad faith.

3. Application of Ideal Construction in Legal Protection in Trademark Registration System

Legal protection is the right of every citizen, and on the other hand that legal protection is an obligation for the country itself, therefore the state is obliged to provide legal protection to its citizens. In principle, legal protection for the community rests and comes from the concept of recognition and protection of human dignity, and dignity. So that the recognition and protection of the rights of the suspect as part of human rights without discrimination. Legal protection is all efforts to fulfill rights and provide assistance to provide security for witnesses and / or victims, which can be realized in forms such as through restitution, compensation, medical services, and legal assistance.[17] According to Setiono, legal protection is an act or effort to protect the public from arbitrary acts by the authorities that are not in accordance with the rule of law, to realize order and peace, so that it allows humans to enjoy their dignity as human beings.[18]

Some government efforts through Undang-Undang No. 15 Tahun2001 concerning Brands in Providing Protection to Famous Trademarks in Indonesia, among others, by determining brand requirements. An absolute requirement for a mark that must be fulfilled by any person or legal entity who wants to use a mark, so that the mark can be accepted and used as a trademark or trade mark, the absolute requirement that must be fulfilled is that the mark must have sufficient distinction. In other words, the sign used must be such that it has enough power to distinguish the goods produced by a company or commercial goods (trade) or services from the production of someone from the goods or services from the production of someone from the goods or services produced by people other. Because of the brand, goods or services produced can be distinguished. For more details, Prof. Mr. Dr.Sudargo Gautama stated that when discussing the 1961 Trademark Law which is also in the opinion of the author still relevant for this description, namely as follows:

a. Contrary to decency and public order

b. Signs that have no distinction

c. Public Ownership Signs

d. Merupukan information or check with the goods or services requested registration

The issue of the brand is actually not new for Indonesia. In the history of brand legislation, it can be seen that in the Dutch colonial period the EigendomIndustriele Regulations (RIE) were enacted in Staatblad 1912 Number 545 jo Staatblad 1913 Number 214. During the Japanese occupation, a trademark regulation, called Osamu Seire Number 30 concerning Registration of trade marks which take effect on the 1st of 9th month of Syowa (Japanese year 2603). After Indonesian Independence (17 August 1945), the regulation was still enforced based on Article II of the Transitional Rules of the 1945 Constitution.

Furthermore, since the era of open economic policy in 1961, Law No. 21/1961 concerning Company Trademarks and Trade Marks was enacted which replaced Dutch colonial legacy regulations that were deemed inadequate, even though the Act basically had many similarities with colonial legal products. The dutch. In 1992 the new Trademark Law was enacted and took effect on April 1, 1993, replacing the Trademark Law of 1961. With the April 1 1993, replacing the Trademark Law of 1961. With the new law, an administrative decree related to the procedure for registering their trademarks was made. In connection

17. SoerjonoSoekanto, PengantarPenelitianHukum, Jakarta, UI Press, 1984, Jakarta, page 133.
18. Setiono, Rule Of Law (SupremasiHukum), Magister IlmuHukumPascaSarjanaUniveristasSebelasMaret, 2004, Surakarta, page 3.

with the interests of the reform of the TrademarkUU, Indonesia participated in ratifying the International WIPO Trademark agreement. In 1997, the 1992 Trademark Law was amended by considering the articles of the International Treaty on Aspects related to the trade in Intellectual Property Rights (TRIPs) - GATT. These articles contain protection for indications of geographical origin. The law also changes the provisions in the previous law whereby the user of the first trademark in Indonesia has the right to register the mark as a trademark.[19]

Subsequent developments, the Trademark Law has undergone changes, both replaced and revised because the value is not in accordance with the development of circumstances and needs. In the end, in 2001 Act No. 15 of 2001 concerning Trademark was enacted. This Trademark Law is a law that regulates brand protection in Indonesia. The law is the latest legal product in the field of trademark in response to adjusting brand protection in Indonesia with international standards contained in Article 15 of the TRIPs Agreement in lieu of the previous law namely Undang-Undang 14 Tahun 1997.

The declarative system is considered to be less guarantee that Article 90 of the Trademark Law affirms the goods of legal certainty compared to the constitutive system based on the first registration which provides more legal protection. The first registrar system is also called the first to principle file. That is, the registered mark is the one who qualifies and is the first. Not all brands can be registered. Trademarks cannot be registered on the basis of an application submitted by an applicant in bad faith. An applicant in bad faith is an applicant who registered his trademark improperly and dishonestly, there are hidden intentions such as piggybacking, imitating, or plagiarizing of fame leading to unfair competition and deceiving or misleading consumers.[20]

However, the first to file system has significant weaknesses. In the first to file registration system, the principle of brand acceptance is first to file, meaning that anyone who registers first will be accepted by registering without questioning whether the registrant really uses the mark for the benefit of his business. Some possibilities can occur after the first registration is entered, for example other registrants who actually have direct interest in the mark, because this registrant actually uses the item. In such case, the registrant then (in fact the user of the actual mark) must carry out a "Special Settlement" with the first registrant so that the first registrant will submit the mark to the registrant later. Things like this are the main problem in the constitutive registration system. If we examine it carefully, the first to file system actually opens up opportunities for piracy of a brand, especially trademarks owned by foreign parties.

E. Closing

In order to be accepted as a brand, the absolute requirement is that it must have sufficient distinction. In Indonesia, there are 2 (two) types of brand registration systems, namely:

a. Declarative Registration System

b. Constitutional Registration System

Undang-UndangNo. 15 Tahun2001 concerning Brand applying a constitutive system. That is, the right to a mark is obtained because of the registration process, which is the registrant of the first mark entitled to the mark However, the first to file system has significant weaknesses. In the first to file registration system, the principle of brand acceptance is first to file, meaning that anyone who registers first will be accepted by

19. HakAtasKekayaanIntelektualSuatuPengantar, Bandung : Alumni, 2002, page 132. Baca juga lebihjauh, Tim Lindsey, Eddy damian, Simon Butt, Tomi suryoUtomo, HakAtasKekayaanIntelektualSuatuPengantar, Bandung : Alumni, 2006
20. Venantia Sri Hadiarianti, HakKekayaanIntelektul: Merek dan MerekTerkenal, Jakarta: UnikaAtma Jaya, Edisi Mei-Agustus 200

registering without questioning whether the registrant really uses the mark for the benefit of his business.

Some possibilities can occur after the first registration entry. Things like this are the main problem in the constitutive registration system. If we examine it carefully, the first to file system actually opens up opportunities for piracy of a brand, especially trademarks owned by foreign parties. This system must be reconstructed with a strict arrangement in the Trademark Law, so that the weaknesses in this system that cause problems can be immediately resolved. One of them is by tightening the absolute conditions in trademark registration.

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