Brand Names Casanova

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Law of Effectiveness on the Brand Name Disputes for Better Industrial Protection

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Abstract

Brand name or trademarks as property rights of the companies are often filled up in Indonesian Courts as commercial conflicts. Any decision of courts on the brand name might support or not support the industrial protection in Indonesia. This paper was conducted to seek the effectiveness of Indonesian Law number 20 of 2016 of property law to support industry in Indonesia. A Qualitative Approach was conducted to collect data and analyze the effectiveness of Indonesian law from the filling up of brand names disputes in the courts. Data collection was of the Case of trademarks of J. Casanova versus Casanova. The Supreme Court has decided the winner in the Number 197PK / Pdt.Sus-HKI / 2018 and has used Law Number 20 of 2016 concerning trademarks and Geographical Indications where decisions at the District Court and Cassation level still use Law Number 15 of 2001 regarding brands. Data analysis showed that the Court had protected the property rights of trade Maks and it supports the industrial protection Law.

Keywords: brand names; property rights; trademarks; industry; law protection;

1. Introduction

Trademark or Brand Name (Kumar 2017 and Daley, 2014) is often filled up a court due to dispute of two companies. In the industry is a trademark plays important in creating the image of products; for individual brands are often considered to be able to raise one's level when the goods and services are used. Brand names contain quality value, and reliability for investment and marketing. Additionally, brand name could be a lifestyle, and make users feel so confident or even as an indicator of social class.

The property rights of companies have been regulated in Indonesia. State protects trademarks through the issuance of Indonesia Law No. 20 of 2016. The legal protection for brand name and trademark owners is intended to provide the exclusive rights; so that other parties cannot use the same or similar mark for registered goods or services. Such rights are monopolistic; only the brand owners can use them. Holder's Rights holders could use their brand with a record without violating the rules. It deserves the brand name and prohibits other parties to use the registered brand.

High competitiveness makes companies fall into profit makers without any appreciation to copy rights or property rights of others. Matondang, et al (2019) reported some culinary business used the traditional food brand in digital start up without care of trademarks. Further initial pre survey also found many products or services of unhealthy competition among producers by passing off or piggybacking the popularity of famous brands. A remarkable brand is well known if it has been popular public. But there is no exact size or standard if a

brand is famous. A brand deserves to a company for its effort or hard work in making an original or authentic style of its thinking and it does not constitute the "name" of a brand. So Brand becomes a general term, and shared knowledge, words of discovery. It can be the name of someone who famous in its time. Therefore, a brand can no longer be considered to have exclusive rights. A company with a brand name has the right to monopolize if the brand name is not the result of creation, innovation or unique invention. Thus, Trademark is considered to have similarities to a brand name in principle if the forming elements of a brand are not identical with other parties' brands. Still, there are additions or modifications that make it look a little different. Such brands have the potential to cause the public confusing in regard to the source of the product. If all the elements of the brands are identical to the other parties, the holders of rights would file up the case to commercial courts. The other party which used the brand has made the loyal buyers assume that product is from the same company (Rumadan, 2018).

In practice, it is often a famous trade mark was at least already registered in the country of origin to get protection from the State. Many cases make the famous foreign brands are directly protected without the need to be logged in another country because they are already recognized by costumers.A a result, the well-known brands are protected only for specific goods and services related to businesses or industries that have been registered. In contrast, famous brands can be protected from unauthorized use of products and services even if they are not included in the protection list. Famous brands are recognized with a higher reputation level than others. Concerning with the IPR of brand names and trade marks, this reserach was conducted to seek the Indonesian law system to protect the property rights and used the case of J Casanova versus Casanova as a law practice.

2. Design of Research

This reserach used a Qualitative Approach to seek the effectiveness of legal protection of Property Rights of companies such as Brand Names and Trade Marks. A legal research combined the normative and empirical sociology (Christiany, 2016; Widijowati et al, 2019). It collected the data from courts in which the brand name or trademark is considered to have an overall similarity if the appearance of all elements of the brand is identical (Anderson, 2010). Data collection was of the Case of trademarks between J. Casanova and Casano. In data analysis it took care of courts competence in making a deep evaluation of similarities of brand names. Even if there are differences, or those differences do not seem significant, but using similar brand name makes consumers not find differences. It makes buyers are confused in identifying the source of the products and creates an assumption that the two brands are corresponded and owned by the same company (Rumadan, 2018).

So the data analysis is concerned wi In indonesia Law Number 20 of 2016; there is a claim for compensation; in article 83 it is mentioned that the o ner of a registered mark and the recipient of a registered trademark license has a right to file a lawsuit against another party who without the right to use a target. It has a same principle for a part or whole for goods. In addition to criminal charges against people who violate the Intelectual Property rights (Douglas & Roy, 2012). If a violator of company's rights break the Law No. 20/ 2016,

then the lawsuit could be categorized the violator makes a copypaste version the brand name as unlawful acts (onrechtsmatige daad), (vide Article 1365 of the Civil Code).

3. Results and Discussion

A trademark registration system is divided into 3 (three), namely trademark registration with a declarative system, trademark registration with a constitutive system and registration of trademarks with priority rights. A declarative registration system creates the legal protection of the first user of the mark concerned. This trademark registration system was used in Law Number 21 of 1961. In other words, it was not the first registrant but the first use the brand name in Indonesia, and law gives the brand name rights. But in a trademark registration is not a priority meaning of the owner who uses the first time of tradr maark to obtain legal protection, even though it is not registered. In a declarative system, it implies a letter receiving of registration will be easy to prove; if there is another party claiming to be the owner of the mark concerned; it is simple to determine the holder of trade mark. That declarative procedure applies as long as the other party cannot prove to be the first time user of the registered mark. So the first time registration of a brand is only as a legal conjecture as a first time user. This trademark registration with a declarative system contains legal uncertainty, because the filing of a trademark can be cancelled at any time if other parties can prove to be the first owner of a mark that has been registered with the declarative system in Indonesia is no longer used since the enactment of Law No. 19 of 1992 about the brand names.

Trademark registration is a procedure to obtain the companies rights.Without admission the brand name legally the State could not give trademark owners the rights to the mark. Without registering a target, a person will not be given legal protection by the State. If the mark is copied by someone else in future, there is no legal standing. Trademark registration is efffective in Indonesia after the Law No. 19 of 1992 already imposed. It is a constitutive system of Law No. 20 of 2016. In this constituent system, legal protection is based on the first registrant in good faith.

Criminal prosecution in each offence stipulated in Law No. 20 of 2016 is the right of the state. As already explained, this criminal charge is intended to include the trademark rights (absolute rights). Unauthorized parties who try to interfere with these rights are threatened with criminal penalties. It should be noted that the criminal threat is a cumulative rather than of alternative procedure. So, in addition to being imposed with the risk of imprisonment on the perpetrators; they also are imposed the threat of punishment in the form of fines. Because if only the threat of penalties may be the offender does not object, but the risk of imprisonment and demands for civil compensation are also intended to make the offender deterrent (defensive purposes) and other people do not follow his actions.

Case Study in Court

The legality of J.Casanova versus Casanova Trademark in Judgment Case No. 197PK / Pdt.Sus-HKI / 2018

Decision of the Supreme Court No. 197PK / Pdt. Sus-HKI / 2018 has used Law Number 20 of 2016 concerning Trademarks and Geographical Indications where decisions at the District Court and Cassation level still use Law Number 15 of 2001 concerning brands. In the Decision of the Supreme Court of the Republic of Indonesia Number 197PK / Pdt.Sus-HKI / 2018, the Panel of Judges granted the request for a review conducted by Casanova and cancelled the Supreme Court's Cassation Decision No. 968 K / Pdt.Sus-HKI / 2016. December 6, 2016, which cancelled the decision of the Commercial Court in the Central Jakarta District Court Number 11 / Pdt.Sus-Trademark / 2016 / PN. Niaga.Jkt.Pst., Dated June 1, 2016.

That the authors agree with the consideration of the decision of the Supreme Court in the Review has the following concerns that the J.Casanova Trademark does not have exclusive rights because the name of Casanova is taken from the general name or common name Casanova, and it has been used by many parties. The Casanova as a famous name is based on the legendary story of the Italian. It has the open attention of the most famous lovers and writers in the world, Giacomo CASANOVA during his lifetime, 1825-1898. That Italian story has made in an Indonesian book; read by millions of people and the story becomes legendary adventurous romance; it is exciting, amazing, passionate and sometimes tragic. So it is clear that Casanova is not a new thing or the word of the plaintiff's unique creation. Due to the fact Casanova had become a common naming or known by the general public throughout the world long before the company or the J.Casanova brand was established or registered; so that it cannot be claimed or monopolized to become only one party.

With some evidence that Casanova is a common name or public naming is evident from the number of registered in various countries on behalf of individuals or legal entities - different, among others: Casanova as brand name of the owner of AFN Broker LCC.1092 St.George Avenue Unit 166, Rahway, New Jersey 07065, US Country registered in Canada, named Casanova. Therefore, the J.Casanova as a brand cannot be claimed to have an exclusive rights to Casanova because it is not the result of creation, innovation and unique findings, but a story writer of Italy.

With the 1883 Paris Convention on Brand Name, submission applications for registration originating Brand Names from the countries incorporated in that convention is allowing the applicant to gain recognition. The filling up is in accordance to the date in the State of origin. It is a priority date in the country a destination in accordance with the Paris Convention participant. Convention became effective July 7, 1884. The laws brought forth by that Convention are administered by the World Intellectual Property Organization (WIPO) (Ricketson, 2015). The scope of items is clearly set out in the Paris Convention for the protection of industrial property in Article 1 (2). The protection of industrial property under the Convention includes patents, utility models, industrial designs, trademarks, service marks, trade names and indications of source or appellations of origin. Article 1 (2) adds that "Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour." (World Intellectual Property Organization, 2016)

Priority rights are filed within 6 (six) months from the date of receipt of the application for registration of the first trademark in another country that is a member of the Paris Convention. Proof of the applicant by using priority rights can be in the form of a request for registration along with a receipt of the application confirming the date of receipt of the application which has been translated into Indonesian by a sworn translator. If there is a lack of requirements in the requirements within 3 (three) months after the application for registration of the mark will still be processed without using priority rights (Rumadan, 2018).

The basic reasons for the rejection of a mark are divided into 2 (two), namely the absolute reasons for refusing trademark registration and the relative reasons for refusal of trademark registration based on bad faith. A qualification mark that cannot be registered as a mark is known based on absolute rejection. If a sign meets the basic qualifications of complete denial, it means that the mark naturally cannot function as a brand. A sign that does not have distinguishing features, sign that only describe the characteristics of a product, warning that is misleading, or signs that are public property.

Provisions that are the basis for trademarks that cannot be registered are Article 20 of Law No. 20 of 2016 which includes; trademarks that conflict with the state ideology, statutory regulations, morality, religion, decency, or public order. Furthermore, a mark cannot be registered because it is the same as, related to, or only mentions the goods and or services for which registration is requested, furthermore the mark contains elements that can mislead the public about the origin of quality, type, size, type, intended use of the goods and / or services for which registration is requested as well as brands that contain information that is not following the quality, benefits, or efficacy of the goods and / or services produced (Rumanda, 2018). Thus, Indonesia Law No. 20 of 2016 there is mention of criminal charges for those who violate the mark. In article 100 it is said that each person without the right to use the same trademark as a whole as a registered mark owned by another party for similar goods and / or services produced and / or traded, convicted or fined. Still, if the violation involves a licensing agreement, where the parties did not fulfil the contents of the contract either in whole or in part, the lawsuit could be categorized as Default Events in vide article 1234 of the Civil Code (Saidin, 2015).

Discussions

The formulation of the concept of bad faith can be measured from two perspectives, namely, subjective view and objective perspective. Subjectively it is someone's honesty in doing something legal. At the same time, the objective of bad faith is that the implementation of an agreement must be based on compliance norms or what is perceived as appropriate in society (Rumadan, 2018).In contrast, we agree with the judge's consideration; Because Intellectual property rights are relations between individuals and with other property rights. Nonetheless, an intellectual property law seems to have abstract rights. It needs to analyze the legal recognition and protection of intellectual property. According to Bois (2018), it needs details elaboration and justification with theories of property rights and a specific technique to evaluate the rights of companies to have brand names.

The Reward theory implies that a creator or an inventor is legally protected for any efforts. The reward is a particular monetary return, object or event that an employee receives

in exchange for his/her work or for having done something well (Santos & Mejia, 2015). A reward system provides incentives and access simultaneously: the creator of intellectual property is compensated for the costs of creation, but as there is no right to exclude others, the competition will bring price down to marginal cost. The problem is to compute the optimal reward. The danger lies in the possibility of politicization of this reward system (Ilie, 2014). The reward theory recommends the individuals rewards, not only for their creation but for the societal benefit of their inventions (Bois, 2018). It is a creative effort – in the intellectual property. The creator has an exclusive intellectual property right; it is a reward for the creative endeavour. The legislation makes the possibility for the intellectual product creators to protection. Bois argued that the creator who meets the legal procedure would be rewarded with a specific right (Bois, 2018).

Furthermore, the Risk theory indicated that Intellectual Property is the result of a research and it contains risks. Thus it is natural to provide temporary protection for creativities that include these risks (Rumadan, 2018). In practice, however, with insurance risk theory or with the application of the theory of probability on insurance risk problems (Aven & Aven, 2015) has the advantage; it covers a wide field of different risks and risk problems. In the insurance texts--and a vast collection of risk situations = claims occurred (with corresponding loss amounts) is available in the claims acts (Aven & Aven, 2015). Therefore in technical contexts, the concept of 'risk' could have specific meanings which are widely used across disciplines, ranging from 'the cause of, the probability of, or an unwanted event which may or may not occur' to a decision that has been made under the condition of known probabilities (Spikin, 2013). Risk theory is a part of possibility idea which has a long tradition, particularly within Swedish insurance research. It inspired the development of the method for stochastic processes and during the 1960-80's, it has turned out that many problems in queuing theory, storage theory and risk theory are closely related and can be solved by the same procedures. That idea has resulted in some simplifications of the argument. Thus it was technically complicated analytical method, and had been replaced by probabilistic techniques which are more intuitive. In these notes, Martin-Loof & Skoollermo (2011) recommended the Probability theory to replace Risk theory.

In the Ethical theory, brand protection refers to fairness or justice. Specifically, the principle is that a person cannot reap from what he has not planted. More specifically, by taking someone else's brand, it makes someone has taken advantage of the goodwill produced by the original brand owner (Rumadan, 2018). Ethics is commonly corresponding with the organisations innovation and with professional codes of conduct. For instance, medical and business ethics are often formalised in sets of rules; guidelines stating of employees ethics in their profession such as in respect of a duty of care or confidentiality that health care workers owe to their patients. It can be the medical ethical principles of beneficence, non-maleficence, respect for autonomy, and justice (Traer, 2013). Ethical theories have two main aims. The first is enumerative aim: state the acts that professionals ought or ought not to perform. The second is explanatory purpose: mention the reasons of professional conduct (Wraight, 2011).

The Labour Theory emphasizes aspects of the process of producing something and something provided. Everyone has a brain, but not everyone could maximize the function of the brain to create something (Irawan, 2012). Thus the quantity of labour determines the value of the entire quantity in producing a commodity. It is not only expended on its

production but also the unfavourable circumstances (Albert & Whitaker, 2001) during the incubation process and finalized of creation. That portion of the value refers to an abstract quantity and production means. The portion of value is proxy to the total energy expended; it thus falls into two portions, they are wages and profits (Cohen, 2011).

Based on the theory that Intellectual Property will be protected insofar as it is an inventor's creativity in making the brand name where the Casanova brand name is taken from the name of a famous figure whose story is already known and used by many parties as a brand name because it is the exclusive right of the Casanova name it cannot be used as a sole proprietorship on behalf of the mark. Then the brand name cannot be claimed or monopolized to become only one party and ownership of Casanova in Indonesia.

Indonesia itself adheres to a constitutive system (first to file), or the first to submit a registration will receive legal protection. In fact, Casanova itself registered its trademark in Indonesia with the registration number: IDM000324610 registered since May 25, 2010, at the Ministry of Law and Human Rights cq, Directorate General of Intellectual Property Rights cq Director of Trademarks while J.Casanova registered trademarks with application number D002015007026 class 03 dated February 23, 2015, Therefore according to article 21 paragraph (1) and (3) it is clear that J.Casanova has no intention of registering without the permission of the legal holder in Indonesia on the Casanova mark "What is meant by 'Applicant in bad faith' is the Applicant who is reasonably suspected in registering their trademarks have the intention to imitate, copy, or follow the trademarks of other parties in the interest of their business, creating unfair business competition conditions, deceiving, misleading consumers "so that it clearly states in letter No. 6004 / ALNA / XII / 15 that is registered but rejected by The Director General of IPR because it is considered to have similarities in principle with the CAS brand _ ANOVA which is in item class 3, for types of goods: "Cosmetics", preparations to discolour and grow hair, toilet and fragrance items, shampoo, hair rince, deodorant stick, deodorant spray, nail polish, eye shadow, hair oil, dental cream, dental poultice, shaving cream.

So it is clear that the Casanova brand has the good faith so that it obtains the brand certificate by going through the trademark registration procedure in Indonesia with the registration number: IDM000324610 registered since May 25, 2010, and also the Casanova mark in various countries such as Singapore, Malaysia and the Philippines.

In the decision of the Supreme Court at the reconsideration level, cancelled the conclusion of the Supreme Court Number 968 K / Pdt.Sus-HKI / 2016 dated December 6, 2016, which vacated the decision of the Commercial Court at the Central Jakarta District Court Number 11 / Pdt.Sus-Merk.PN. Niaga.Jkt.Pst. Therefore the Casanova brand has the legality of trademark rights with a registration number: IDM000324610 registered since May 25, 2010, is given legal protection by the State of Indonesia based on article 35 paragraph (1) of Law No. 20 of 2016 concerning Trademarks and Geographical Indications for 10 Years from the date of receipt.

Based on this, the authors also agreed on the decision of the Supreme Court at the level of Review that granted the request for reconsideration. Therefore, the author agrees with all conclusions in the Decision of the Supreme Court of the Republic of Indonesia Number 197PK / Pdt.Sus-HKI / 2018. For this decision the Casanova brand has full legality in Indonesia over the mark and based on the State's Territorial Sovereignty Theory that the full

power possessed by a State in exercising jurisdiction exclusively in the territory of its country, where the full authority to carry out and enforce national law. Then the disputing parties must submit to and obey federal laws where the decision has been decided, and the decision has permanent legal force (Inkracht van gewijsde). A trademark right is an exclusive right (Jelena, et al. 2019) which is a monopoly granted by the state to the owner of a trademark that is registered in the public register. But a brand will lose exclusive rights and trust if a brand name is not the result of unique findings, innovation and creation. The name Casanova is a name that has been known in the world through legendary stories in books and on the big screen and is used in various countries for name brands.

Conclusions

Data analysis gives two conclusions

(1). Testing on the Brand Names or Trademarks Regulation Indonesia, it found the practice of a constitutive system (first to file), or the first to submit a registration will receive legal protection. In fact, Casanova itself registered its trademark in Indonesia with the registration number: IDM000324610 registered since May 25, 2010, at the Ministry of Law and Human Rights

(2). The trademark dispute case makes J.Casanova unable to claim or be monopolized by just one party. As for the decision of the Supreme Court of the Republic of Indonesia Number 197PK / Pdt.Sus-HKI / 2018, per Law No. 20 of 2016 concerning Trademarks and Geographical Indications and Intellectual Property Theories that the creator or inventor will be given protection for his efforts and efforts.

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