

# The Law of Effectiveness on Brand Name Disputes for Better Industrial Protection

*by* Kusbianto Kusbianto

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# The Law of Effectiveness on Brand Name Disputes for Better Industrial Protection

Kusbianto<sup>a</sup>, Ayu Trisna Dewi<sup>b</sup>, Mahadi Oloan Sitanggang<sup>c</sup>, <sup>a,b</sup>Faculty of Law, Universitas Darmawangsa, Medan-Indonesia, <sup>c</sup>Dharmawangsa Law Office, Medan-Indonesia

Brand name or trademarks as the property rights of companies are often consumed in Indonesian Courts as commercial conflicts. Any decision of the courts on a brand name might support or not support 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 analyse the effectiveness of Indonesian law from the high consumption of brand name disputes in the courts. The data collection comprised the case of trademarks between J. Casanova and Casano. The Supreme Court 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. The data analysis showed that the Court had protected the property rights of trademarks and it supports the industrial protection Law.

**Keywords:** *Brand names, Property rights, Trademarks, Industry, Law protection.*

## Introduction

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

The Government regulates the property rights of companies. Indonesian law itself protects trademarks through the issuance of law number 20 of 2016. The legal protection for brand



name and trademark owners is intended to provide exclusive rights, so that other parties can<sup>22</sup> use the same or similar mark for registered goods or services. These proprietary rights are monopolistic, meaning that only the brand owner can use them. Rights holders can use their brand with a record, without violating the rules that exist in the use of the brand and meanwhile prohibiting other parties from using the same brand.

A high competitiveness subjects companies to fall into <sup>46</sup>fit makers without any appreciation to the copy rights or property rights of others. Matondang, S.A, Rahma S, Haramian, T and Syahlan (2019) reported a culinary business used the traditional food brand in digital start up and without the care of trademarks. A 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 in the public sphere, but there is no exact size or standard if a brand is famous. A brand is considered to be 'recognised' when it is in the form of effort or the hard work of a company in making a brand with an original or authentic style of its own thinking, and which does not constitute the 'name' of a brand that becomes a general term, shared knowledge, word/s of discovery or the name of someone who was famous in its time. Therefore, a brand can no longer be said to have exclusive rights or the right to monopolise if the brand name is not the result of creation, innovation or unique invention. Thus, the trademark is considered to have similarities in principle if the forming elements of a brand are not identical with other parties' brands. However, there are additions or modifications that make it look a little different. Such brands have the potential to cause confusion amongst the public regarding the source of the product. This mistake occurs indirectly, as if all the elements of the brand are identical to the brands of other parties. Moreover, the existence of a component in common can make people assume that there is a connection between one brand and another and assume both are sourced from the same party (Rumadan, 2018).

In practice, often a well-known mark must at least be registered in the country of origin to receive protection from the State. In contrast, foreign brands are usually protected without the need to be logged in another country because they are already well known. On the other hand, well-known brands are protected only for goods and services related to businesses or industries that have been registered. In contrast, famous brands can be protected from the unauthorised use of products and services, even if they are not included in the protection list. Famous brands are recognised with a higher reputation level than others. This research was conducted to determine the effectiveness of the Indonesian law system to protect property rights and considers the case of J Casanova against Casano to achieve this.



## Design of the Research

This research used a qualitative approach to seek the effectiveness of the legal protection of the property rights of companies, such as brand names and Trademarks. Furthermore, it is a legal research which combined normative and empirical sociology (Christiany, 2016; Widijowati et al., 2019). The data was collected from the 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). The data collection was comprised of the disputed case of trademarks between J. Casanova and Casano. The data analysis considered the courts' competence in making a deep evaluation of the similarities of brand names. Even if there are differences, or those differences do not seem significant, using a similar brand name misleadingly positions consumers not to find or determine the differences between them. It makes buyers confused in identifying the source of the products, assuming that the two brands are interrelated and owned by the same company (Rumadan, 2018).

Therefore, the data analysis is concerned with Indonesian Law Number 20 of 2016, where there is a claim for compensation. In article 83, it is said that the owner of a registered mark and the recipient of a registered trademark license can file a lawsuit against another party who are without the right to use a target which has the same principle in principle or whole for goods. In addition, to issuing criminal charges against people who violate these rights (Douglas, F & Roy W., 2012). If the violator of that right is merely a right that has been stated in Law Number 20 Year 2016, then the lawsuit can be categorised as an event of unlawful acts (vide Article 1365 of the Civil Code).

## Results and Discussion

A trademark registration system is divided into three components, namely trademark registration with a declarative system, trademark registration with a constitutive system, and registration of trademarks with priority rights. A declarative registration system is a system that receives 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 in Indonesia that gave rise to that right. In a trademark registration with a declarative system, registration is not a priority. This means that the owner who obtains legal protection is the one who uses it first, even though it is not registered. The enrolment in a declarative system means that by receiving a registration letter, it will be easy to prove if there is a registration letter, and it will also be easy to determine if there is another party claiming to be the owner of the mark concerned. Of course, this applies as long as the other party cannot prove to be the first-time user of the registered mark. Thus, 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, and is no longer used since the enactment of Law Number 19 of 1992 about the brand.

Trademark registration is a must to obtain trademark rights. Without registration, the State will not give trademark owners the rights to the mark. This case means that without registering a target, a person will not be given legal protection by the State if the mark is copied by someone else. The trademark registration used in Indonesia since Law Number 19 of 1992, is a constitutive system that until now, changed to Law 20 of 2016. In this constituent system, legal protection is based on the first registrant and in good faith.

The criminal prosecution in each offence and stipulated in Law Number 20 of 2016, is the right of the State. As already explained, this criminal charge contends that the trademark rights include material rights (absolute rights). The unauthorised parties who try to interfere with these rights are threatened with criminal penalties. It must also be noted that the criminal threat is cumulative rather than alternative. So, in addition to being imposed with the risk of imprisonment, it also imposes the threat of punishment in the form of fines. If there is only the threat of penalties, it may result that the offender does not object. However, the risk of imprisonment and demands for civil compensation are also intended to make prospective offender deterrent (defensive purposes), and persuade other people not to follow their actions.

### *Case Study in Court*

The legality of J.CASANOVA AND CASANOVA Trademark in case judgment Number 197PK/Pdt.Sus-HKI/2018

The Decision of the Supreme Court Number 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 Number 968 K/Pdt.Sus-HKI/2016 on 6 December 2016, which further cancelled the decision of the Commercial Court in the Central Jakarta District Court Number 11/Pdt.Sus-Trademark/2016/PN.Niaga.Jkt.Pst and dated 1 June 2016.

The author agrees in consideration of the decision of the Supreme Court in the Review, and has the following concerns that the J.CASANOVA trademark does not have exclusive rights because the name, Casanova, is taken from the general name or common name Casanova, and has been used by many parties. The name is based on the legendary story of the Italian





State, in the form recognition of true stories and the open attention of one of the most famous lovers and writers in the world, Giacomo Casanova (1825–1898). It has been made into an Indonesian translation book that is read by millions of people, and the story has become a legendary adventurous romance that is exciting, amazing, passionate, and sometimes tragic. Therefore, it is clear that Casanova is not a new concept or the word of the plaintiff's unique creation, due to the fact Casanova had become a common naming or is known by the general public throughout the world and long before the company or the J.CASANOVA brand was established or registered. Thus, it cannot be claimed or monopolised to the use of only one party.

There is sufficient<sup>51</sup> evidence that CASANOVA is a common name or public naming, as is evident from the number of registrations in various countries and on behalf of individuals or legal entities, including, among others: CASANOVA, which is the name of the owner of AFN Broker LCC.1092 St. George Avenue Unit 166, Rahway, New Jersey 07065, US Country registered in Canada, CASANOVA Nma. Therefore, the J.CASANOVA brand cannot claim that it has exclusive rights to the name because the name is not the result of creation, innovation or unique findings.

With the Paris Convention being interpreted, one of the objectives is that the application obtains the right to submit applications for registration and originating<sup>3</sup> from the countries incorporated in the Paris convention. This allows the applicant to gain recognition that the filing date in the State of origin is a<sup>48</sup> priority date in the country destination, which is also one<sup>23</sup> of the Paris Convention participants. The Paris Convention was signed in Paris, France, on 20 March 1883, and the Convention became effective on 7 July 1884. The laws brought forth by this Convention are still in force, and they are administered by the World Intellectual Property Organization (WIPO), whose<sup>46</sup> headquarters are located in Geneva, Switzerland (Ricketson, 2015). The scope of items is clearly set<sup>28</sup> 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).

<sup>3</sup> Priority rights are filed within six months from the date of receipt of the application for registration of the first trademark in another country, which is a member of the Paris Convention. The proof of the applicant by using priority rights can be in the form of a request for registration and accompanied with a receipt of the application, which confirms the date of



the receipt of the application and that has been translated into Indonesian by a sworn translator. If there is a lacking in the requirements within three months after the application for registration of the mark, it will still be processed and without using priority rights (Rumadan, 2018).

The reasons which are the basis for the rejection of a mark are divided into two aspects. Namely, the absolute reasons for refusing trademark registration, and the relative reasons for refusal of trademark registration, which are based on bad faith. A qualification mark that cannot be registered as a mark is known to be based on an absolute rejection. If a sign meets the basic qualifications of complete denial, it means that the mark naturally cannot function as a brand. This may include a sign that does not have distinguishing features, that only describes the characteristics of a product, whose warning is misleading or possesses signs that are public property.

The provisions that are the basis for trademarks that cannot be registered are Article 20 of Law Number 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 the services for which registration is requested, as well as brands that contain information that does not follow the quality, benefits or efficacy of the goods and/or services produced (Rumanda, 2018). In Law Number 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, is convicted or fined. However, 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 categorised as 'default events' in vide article 1234 of the Civil Code (Saidin, 2015).

## Discussion

The formulation of the concept of bad faith can be measured from two perspectives. Namely, the subjective view, and the objective perspective. Subjectively, it is someone's honesty in performing 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, the author agrees that it is based on the judges' consideration and on several theories that occur in the field of intellectual property. Intellectual property rights are relations between individuals, as is the case with other property rights. However, intellectual property law pertains to rights in abstract objects. It is



necessary to ask whether the legal recognition and protection of intellectual property may be explained and justified by utilising general property theories or whether a distinctive method of intellectual property needs to be developed (Bois, 2018).

The reward theory implies that the creator or inventor are legally protected for any efforts. The term, 'rewards', can be defined as a particular monetary return, object or event that an employee receives in exchange for his or 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 the price down to a marginal cost. The problem is computing the optimal reward. The danger lies in the possibility of politicisation of this reward system (Ilie, 2014). The reward theory advocates rewarding individuals not only for their labour, but for the societal benefit of their effort; creative effort, in the context of intellectual property. The creator receives an exclusive intellectual property right as a reward for the creative endeavours. The resource is legally excludable because legislation creates the possibility for the creators of intellectual products to invoke legal protection for these products, provided that the requirements are met and as stipulated for each category (Bois, 2018).

Furthermore, the risk theory indicates that intellectual property is the result of a researcher and contains risks. Thus, it is natural to provide temporary protection for activities that include these risks (Rumadan, 2018). However, in practice, Aven and Aven (2015) identify risk theory with insurance risk theory or with the application of the theory of probability on insurance risk problems. This general definition has the advantage, in that it covers a wide field of different risks and risk problems as specified in the insurance texts. Furthermore, a vast collection of risk situations results in claims occurred with corresponding loss amounts and 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 branch of possibility that has a long tradition, particularly within Swedish insurance research. This research inspired the development of the method for stochastic processes, and during the nineteen-sixties to the nineteen-eighties, it was found that many problems in queuing theory, storage theory, and risk theory are closely related and can be solved by the same methods. This assumption has resulted in several simplifications of the argument, in that technically complicated analytical methods have been replaced by probabilistic techniques which are more intuitive. In these notes, we will, as far as possible, use these probabilistic methods (Martin-Loof & Skoollermo, 2011).





In the ethical theory, brand protection is based on the idea of fairness or justice. Specifically, the principle is that a person cannot reap from what he has not planted. More specifically, that by taking someone else's brand, someone has <sup>4</sup> taken advantage of the goodwill produced by the original brand owner (Rumadan, 2018). Ethics is often used in connection with the activities of organisations and with professional codes of conduct. For instance, medical and business ethics, which are often formalised in terms of an exhaustive sets of rules or guidelines stating how employees are expected to behave in their workplaces. This includes in the respect of a duty of care or confidentiality that healthcare workers owe to their patients or the medical ethical <sup>15</sup> principles of beneficence, non-maleficence, respect for autonomy, and justice (Traer, 2013). Ethical theories have two main aims. The first is enumerative, to identify those acts that we ought or ought not to perform. The second is explanatory, to provide an account as to why we ought or ought not to perform the acts identified (Wraight, 2011).

In the labour theory, it emphasises aspects of the process of producing something and something that is provided. Everyone has a brain, but not every <sup>5</sup> one can utilise the function of the brain (intellectual) to create something (Irawan, 2012). Thus, the quantity of labour governing the value of the entire quantity produced of a commodity is not that expended on its production, but that which would need to be spent if the whole production <sup>5</sup> took place under the most unfavourable circumstances (Albert & Whitaker, 2001). The portion of the value which is absorbed by rent corresponds to the difference between this fictitious quantity of labour and the one expended on the production of the commodity. The portion of value corresponding to the amount of energy expended is split up into wages and profits (Cohen, 2011).

<sup>45</sup> 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 is 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. Therefore, the brand name cannot be claimed or monopolised to become the ownership and use of only one party in Indonesia.

Indonesia itself adheres to a constitutive system of the first to file or the first to submit a registration will receive the legal protection. In fact, Casanova itself registered its trademark in Indonesia with <sup>33</sup> the registration number IDM000324610, and has been registered since 25 May 2010, at the Ministry of Law and Human Rights cq, Directorate General of Intellectual Property Rights cq Director of Trademarks. Meanwhile, J.CASANOVA registered trademarks with application number D002015007026 class 03 and dated 23 February 2015. Therefore, according to article 21 paragraphs 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 of registering their trademarks and has the intention to imitate, copy or follow the trademarks of other parties in the interest of their business, creating unfair business competition conditions, and deceiving, and misleading consumers. Therefore, it clearly states in letter No.6004/ALNA/XII/15 that it 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 type of goods, 'Cosmetics': preparations to discolour and grow hair, toilet and fragrance items, shampoo, hair rinse, deodorant stick, deodorant spray, nail polish, eye shadow, hair oil, dental cream, dental poultice, and shaving cream.

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

<sup>54</sup> the decision of the Supreme Court at the reconsideration level, it cancelled the conclusion of the Supreme Court Number 968 K/Pdt.Sus-HKI/2016 and dated 6 December 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 and registered since 25 May 2010, is given the legal protection by the State of Indonesia, based on article 35 paragraph 1 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications, for ten years from the date of receipt.

<sup>17</sup> Based on this, the authors also agreed on the decision of the Supreme Court at the level of review, which granted the request for reconsideration. Therefore, the author agrees with all the 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 is 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 there is the full authority to carry out and enforce the national law. Subsequently, the disputing parties must submit to and obey federal laws where the decision has been decided, and the decision has a permanent legal force (Inkracht van gewijsde). A trademark right is an exclusive right (Jelena, D J et al., 2019), which is a monopoly granted by the State to the owner of a trademark that is registered in the public register. However, 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.



## Conclusion

The data analysis provides two conclusions:

1. The testing <sup>41</sup> the brand names or trademarks regulation in Indonesia found the practice of a <sup>31</sup> constitutive system (first to file) or <sup>32</sup> the first to submit a registration will receive the legal protection. In fact, the brand Casanova itself registered the trademark in Indonesia with the <sup>33</sup> registration number IDM000324610, and it has been registered since 25 May 2010, at the Ministry of Law and Human Rights
2. <sup>34</sup> The trademark dispute case has resulted in the name 'J<sup>3</sup>CASANOVA' being unable to be claim or monopolised by just one party. As for the <sup>35</sup> decision of the Supreme Court of the <sup>44</sup> Republic of Indonesia Number 197PK/Pdt.Sus-HKI/2018, it was handed down per Law Number 20 of 2016, concerning Trademarks and Geographical Indications and Intellectual Property Theories, that <sup>36</sup> the creator or inventor will be given protection for his or her efforts.



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