

CRIMINAL LAW ENFORCEMENT OF BRAND RIGHTS IN THE INDUSTRY ERA 4.0

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Abstract

The purpose this study is to identify element of error in trademark infringement based on the Trademark and Geographical Indication Law and the Criminal Law enforcement for trademark infringement based on the Trademark and Geographical Indication Law. In this study, the authors conducted normative legal research. Where in this study using the normative Juridical approach, namely research conducted by examining library materials or secondary data. Research materials used are secondary data, namely data obtained from official documents, books related to the object of research, research results in the form of reports, theses, dissertations and statutory regulations. The result indicated that first, the elements of error in the violation of marks in the Trademark Law and Geographical Indications are seen in the *actus reus* and *mens rea* perpetrators of trademark infringement. Where *actus reus* is manifested as an evil act that is deliberately committed, and *mens rea* is manifested in the form of evil intent, namely using it without rights. Second, enforcement of criminal law for violation of marks based on the Trademark and Geographical Indication Law is manifested in the imposition of criminal sanctions as stipulated in the provisions of Article 100 and Article 101 of the Trademark and Geographical Indication Law. Where in addition to the form of criminal sanctions there are also fines.

Keywords: Industry 4.0, law enforcement, trademark, geographical indication.

INTRODUCTION

Consumers are users of goods and services who have always been the main target of a company to increase sales of production of goods and or services. The consumer's first introduction to an item begins with the brand being read, then consumes the item. Consumer confidence is built when satisfied with the goods that have been consumed both in terms of taste, taste and quality. A trademark in a company has an important value. Brand is not only a corporate identity, but as a brand value. A trademark

with *brand* high value can mean that the brand has succeeded in building consumer trust and loyalty.

According to Forbes, there are a number of trademarks that have successfully captured the market, creating a brand value of more than US \$ 30 billion or the equivalent of Rp.418 trillion, namely: Apple, US \$ 205.5 billion, US \$ 265.8 billion, Samsung, US \$ 53.1 billion, US \$ 221.6 billion, McDonald's, US \$

43.8 billion, US \$ 96.1 billion and Nike, US \$ 36.8 billion, US \$ 36.7 billion.¹

The Industrial Revolution 4.0 is a phenomenon that collaborates cyber technology and automation technology. The application concept is centered on the concept of automation carried out by technology without the need for human labor in the application process. This certainly adds to the value of efficiency in a work environment where time management is considered as something vital and very much needed by industry players. In addition, good time management will exponentially impact labor quality and production costs. In this all-digital era of Industry 4.0, intellectual property is very easy to access and duplicate by irresponsible parties. "The theft of intellectual property will have an impact on the economy, investment, technology transfer, cost burdens to the government and society, as well as costs to consumers including health and safety risks, as well as costs for business," as stated by Erni Widhyastari, Director of Cooperation and Intellectual Property Empowerment.²

Currently, trademark infringement is not only limited to compensation, but can

commit a criminal act of using a mark which is basically a registered trademark owned by another party. This is as regulated in the provisions of Article 100 of Law Number 20 of 2016 concerning Marks and Geographical Indications.

Based on the above background, there are several formulation topics that can be discussed, namely:

1. What is the element of error in trademark infringement based on the Trademark and Geographical Indication Law?
2. How is the Criminal Law enforcement for trademark infringement based on the Trademark and Geographical Indication Law?

RESEARCH METHODOLOGY

In this study, the authors conducted normative legal research. Where in this study using the normative Juridical approach, namely research conducted by examining library materials or secondary data.³ Research materials used are secondary data, namely data obtained from official documents, books related to the object of research, research results in the form of reports, theses, theses, dissertations and statutory regulations.⁴

¹ Warta Ekonomi, <https://www.wartaekonomi.co.id/read237810/20-per-company-brand-trading-value-insane-selling-crazyPrevent-pencurian-kekayaan-intellellectual-di-era-4-0> access on 10 March 2020.

² <https://dgip.go.id/> access on 15 April 2020.

³ Soerjono Soekanto dan Sri Mamudji, 2004, *Penelitian Hukum Normatif*, Jakarta: PT. Raja Grafindo Persada, p. 11.

⁴ Zainuddin Ali, 2016, *Metode Penelitian Hukum*, Jakarta, Sinar Grafika, p. 106.

The type of research used normative legal research, so in this study the authors use statute approach. As a normative legal research, it certainly uses statute approach, this is because what is being studied is various legal rules that are the focus as well as the central theme of a study.⁵ This is as stated by Peter Mahmud, that the statute approach is an approach using legislation and regulations.⁶

DISCUSSION

Industry 4.0

The Industrial Revolution is fundamentally changing the way people live and work processes, where advances in information technology can integrate in the world of life with digital that will have an impact on all disciplines. With the rapidly evolving development of information technology, breakthroughs include artificial intelligence, where computer technology is a discipline that adopts one's expertise into a technology-based application and gives birth to information technology and an automatically controlled production process. With the birth of digital technology today, the

so-called industry 4.0 was born.⁷ Prior to the birth of Industry 4.0, there had been three industrial revolutions marked by:

1. Discovery of steam engines and railways from 1750 to 1930;
2. Discovery of electricity, communication tools, chemistry and oil in 1870-1900;
3. Discovery of computers, internet, and mobile phones in the 1960s-present.⁸

Industry 4.0 is a term first coined in Germany in 2011 marked by the digital revolution. This industry is a digitally connected process industry that covers a wide range of technologies, ranging from 3D printing to robotics that are believed to increase productivity.⁹ The term Industry 4.0 has various definitions because it is still in the research and development stage. Angela Merkel argues that Industry 4.0 is a comprehensive transformation of the overall productive aspect of the industry through the conventional merging of digital and internet technology. Schlechtendahl, meanwhile, emphasizes the definition of industry 4.0 to the speed element of information availability, which is an industrial environment in which all

⁵ Johnny Ibrahim, 2010, *Teori dan Metodologi Penelitian Hukum Normatif*, Malang, Bayu Media, p. 57.

⁶ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta, Kencana, p. 103.

⁷ Hamdan, *Industry 4.0: Pengaruh Revolusi Industri Pada Kewirausahaan Demi Kemandirian Ekonomi*, Oktober 2018, Jurnal Nusamba, Vol. 3, No. 2, p. 1.

⁸ Taryono, Arie Purnomosidi, & Ratna Riyanti. 2019. *Perlindungan bagi Pekerja di Era Revolusi Industri 4.0 dalam Perspektif Hubungan Industrial Pancasila*. Prosiding Seminar Nasional & Call for Papers Hukum dan Industri, p. 48.

⁹ *ibid.*

its entities are always connected and able to provide information to each other.¹⁰

Some of the principles of industry 4.0 are as follows: interconnection is the ability of machines, sensor devices and people to connect and communicate with each other through the internet of thing (IoT), this principle requires collaboration of security and standards. Second, information transparency is the ability of information systems to create virtual copies of the physical world by enriching digital models with sensor data, including data and information provision. Third, technical assistance that includes the ability of aid systems to support humans by combining and evaluating information consciously to make informed decisions and solve urgent problems in a short period of time. Fourth, decentralized decisions that are the virtual physical ability to make their own decisions and perform tasks as effectively as possible.¹¹

Elements of errors in trade mark infringement based on the Trademark and Geographical Indication Law.

The principle of guilt "There is no punishment without error", which in Dutch, "*Geen Straf Zonder Schuld*" and in German,

¹⁰ Hoedi Prasetyo dan Wahyudi Sutopo. January 2018, *Industry 4.0: Telaah Klasifikasi Aspek dan Arah Pengembangan Riset*, J@ti Undip: Jurnal Teknik Industry, Vol. 13, No. 1, p. 18.

¹¹ Hamdan, *Op Cit*, p. 4.

"*Keine Strafe ohne Schuld*" which means Cannot be convicted without guilt. As for the elements of criminal action to be fulfilled bias must have 3 elements, namely:

1. Actions against the law
2. Error
3. Criminal

In seeing the element of error, it must be seen that the evil intention in the perpetrator. This is like the principle of "*actus non facit reum, nisi mens sit rea*", meaning that actions do not make people guilty unless there is a wrong mental attitude. So the guilty mind *mens rea* is a mistake which is the subjective nature of the criminal act, because it resides in the perpetrator.

The element of error is a subjective element of a criminal code, so mistakes have two aspects, namely a psychological and a juridical aspect. From a psychological point of view, the fault must be sought in the inner heart of the perpetrator, that is, there is an inner relationship with the actions he committed, so that he can be held accountable for his actions. A madman who commits an action against the law may be said to have no inner connection between himself and the action he does, because he does not realize the result of that action.

To find out the inner attitude of a person who commits a criminal act, namely by shifting the error in the psychological sense

into a normative error, meaning that according to the size commonly used by society, external measures are used to determine whether there is an inner relationship between the perpetrator and his actions. Sudarto argued in an extreme way that "The guilt of a perpetrator cannot possibly be found in the head of the perpetrator himself, but in what is heard, seen, and then concluded in the trial.

The elements of error that are psychological and normative that mistakes have several elements:

1. In nature mean there is the ability to be responsible for the perpetrator, in the sense that the person's soul is in a healthy and normal state.
2. There is an inner relationship between the perpetrator and his actions, whether deliberate (*dolus*) or due to negligence (*culpa*).
3. The absence of reasons for the perpetrators to erase mistakes.

Criminal law recognizes two forms of error, namely intentional *or dolus* and negligence *or culpa*. Most of the articles in the Criminal Code make mistakes in the form of deliberate use of various formulations, in addition to some of the crimes committed by negligence, for example in Articles 359 and 360 of the Criminal Code which are often

applied in traffic accident cases. Several forms of error are:

1. Deliberate (*dolus*). *Dolus* in Dutch is called *opzet* and in English is called intention. First of all, it should be noted that the Criminal Code (KUHP) does not formulate what is meant by *opzet*. However, the definition of *opzet* is very important, because it is used as an element of some criminal incidents in addition to incidents that have a culpa element.¹²
2. The meaning of intent and negligence is not regulated in the Criminal Code. In *Memory van Toeliching* explained that the definition of intent is *Willens en watens* which means it is wanted and realize fullor rather someone who commits an act with deliberate actions should require it and must realize the possible consequences or know will happen because of his actions.

This element of willfulness and negligence only applies to crimes and not to offenses. Regarding the meaning of wanting, that will can be addressed to:

- a. Prohibited acts or Prohibited criminal act;
- b. consequences
- c. Conditions which a constitute.

Law Number 20 of 2016 concerning Marks and Geographical (hereinafter referred

¹² C.S.T. Kansil. 2004, *Pokok-Pokok Hukum Pidana*. Jakarta: Pradnya Paramita, p: 51

to as Law No. 20/2016) indications regulates sanctions for infringement of Marks in order to protect trademark rights. In the provisions of Chapter XVIII concerning Criminal Provisions, articles 100-103 Law No. 20/2016 provide sanctions in the form of imprisonment and fines. Article 100 Law No. 20/2016 states that:

- (1) Any person who without right uses the same Mark in its entirety as the registered Mark of another party for similar goods and / or services produced and / or traded, shall be punished with imprisonment of 5 (five) years and / or a maximum fine of Rp. 2,000,000,000.00 (two billion rupiah).
- (2) Any person who unlawfully uses a Mark which is essentially similar to a registered Mark owned by another party for similar goods and / or services produced and / or traded, shall be punished with imprisonment for a maximum of 4 (four) years and / or a maximum fine of IDR 2,000,000. 000.00 (two billion rupiah).
- (3) Any person who violates the provisions as intended in paragraphs (1) and (2), whose type of goods causes health problems, environmental disturbances, and / or human death, will be punished with imprisonment for a maximum of 10 (ten) years and / or a maximum fine a lot of IDR 5,000,000,000.00 (five billion rupiah).

Article 102 Law No. 20/2016 states that:

Any person who trades goods and / or services which is known or should be suspected of knowing that the goods and / or services and / or products are the result of a criminal act as referred to in Article 100 and Article 101 Law No. 20/2016 shall be sentenced to a maximum imprisonment of 1 (one) year or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah).

The provisions of Article 100 paragraph (1) of Law No. 20/2016 containing three (3) elements namely:

1. Everyone;
2. With no right;
3. Using the brand.

So the element of fault on trademark infringement are those who deliberately knowing and use without rights the same trademark as a whole for the registered marks.

Criminal Law Enforcement for trademark infringement based on the Trademark and Geographical Indication Law.

Criminal law enforcement is an effort to translate and realize the wishes of criminal law into reality. This is related to cases of violations that occur then the state has the obligation to enforce the law of the rules that have been made by the government on matters that are against the law (*On Recht*) and impose sorrow (suffering) on those who

violate the prohibition. The manifestation of this criminal law enforcement must be preceded by the existence of a brand crime. Trademark or *strafbarfeit crime* is an act of breaking the law that has been done intentionally or unintentionally by someone who can be accounted for for their actions and which have been declared by law as punishable. The formula above is generally known as offense, whose main conditions are:

1. Fulfillment of all the elements of the offense as contained in the offense formula;
2. Can be accounted for by the perpetrator;
3. The perpetrator's actions must be carried out intentionally or unintentionally, and;
4. The perpetrator can be punished.

So based on the above definition, the criminal act of trademark is an act violating the law in this case is the Trademark Law Number 20 of 2016 concerning Marks and Geographical Indications, namely actions that have been done intentionally or unintentionally by someone who can be held accountable for their actions. And which has been declared by law as a punishable act. Enforcement of criminal law that occurs in society can be carried out by penal (criminal law) and non-penal (without using criminal law).

In the era of the Industrial revolution 4.0, free trade was very competitive. In fact,

this competition becomes an act that is very reasonable, but in line with the current development pattern, business competition becomes unnatural if the competition is carried out in an unfair manner where competitors are acting detrimental to other parties, either directly or indirectly. The existence of a regulation is used as a form of preventive effort in order to maintain a conducive business climate so that it runs naturally and healthily.

The mode of counterfeiting, piracy of well-known brands has so far been done to make a profit. *Money oriented* is the main thing in business competition in the era of the industrial revolution 4.0. This is tantamount to hijacking other people's creativity. If the deliberative law enforcement (non-Penal law enforcement) is not resolved, it will proceed to the litigation or trial process (penal law enforcement).

In the Trademark and Geographical Indication Law, there are several articles which indicate that Indonesia imposes the application of criminal sanctions against perpetrators of criminal acts, namely:

1. Article 100 Law No. 20/2016.

In this article, it basically states that every person without rights uses the same Mark in its entirety as a registered Mark belonging to a party. Other goods and/or services of the same kind that are

produced and/or traded, shall be punished with imprisonment for a maximum of 5 (five) years and/or a maximum fine of Rp. 2,000,000,000.00 (two billion rupiah).

The value of the penalties for the fine is doubled compared to the provisions stipulated in the previous Trademark Law. Where in the previous Trademark Law the fine was only Rp. 1,000,000,000.00 (one billion rupiah). The increase in the criminal sanctions of such fines can have a deterrent effect on the perpetrators of brand criminal acts.

2. Article 101 Law No. 20/2016.

This provision states that every person who without rights uses a sign which has the same characteristics in whole with the Geographical Indication of another party for goods and/or products which are the same or similar to registered goods and / or products, will be sentenced to imprisonment at the longest. 4 (four) years and / or a maximum fine of IDR 2,000,000,000.00. The criminal sanction is reduced compared to the previous law, with a criminal sanction of 5 (five) years and the penalty is increased to two billion rupiah.

In the era of the Industrial Revolution 4.0, criminal law enforcement by imposing criminal sanctions on perpetrators of brand crime is an effort to realize rules that are

obeyed and can also create healthy and conducive competition.

CLOSING

Based on the description above, it can be concluded that:

1. The elements of error in the violation of marks in the Trademark Law and Geographical Indications are seen in the *actus reus* and *mens rea* perpetrators of trademark infringement. Where *actus reus* is manifested as an evil act that is deliberately committed, and *mens rea* is manifested in the form of evil intent, namely using it without rights.
2. Enforcement of criminal law for violation of marks based on the Trademark and Geographical Indication Law is manifested in the imposition of criminal sanctions as stipulated in the provisions of Article 100 and Article 101 of the Trademark and Geographical Indication Law. Where in addition to the form of criminal sanctions there are also fines.

In the era of the Industrial Revolution 4.0, the provisions regarding fines should be given ten times, considering that the perpetrators of trademark violations have benefited themselves which resulted in losses for registered mark owners. So that the

deterrent effect for violators can be optimally applied.

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