

Does the Trademark Protection Regulation Protect Consumers against Counterfeit Products? Analyzing the Theories of Trademark and Indonesian Trademark Law

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ABSTRACT

Consumer protection against resellers infringing intellectual property (IP) is not guaranteed based on *Consumer Protection Act No. 8 of 1999* because it is argued that it is already regulated under IP laws, such as patent, trademark, and copyright laws, prohibiting the production or sale of products infringing IP law. However, because the nature of IP is to protect private rights, how can trademarks protect consumers? This paper analyzes trademark theories and the *Trademarks Act No. 20 of 2016* to establish whether trademarks protect consumers. This research concludes that most scholars use utilitarian and economic theories, supporting that trademarks protect consumers by balancing the trademark holder's economic right with the interests of the public as consumers. However, *Trademarks Act No. 20* provides very limited protection with only legal, philosophical arguments. Further protection is limited to simply safeguarding consumers from being misled or deceived by stipulation that a potential trademark is distinctive and not registered in bad faith. It neither provides any legal instrument for consumers injured or having suffered any loss nor allows consumers to report counterfeit goods or be reimbursed for loss or injury from buying those goods. Therefore, protecting customers is not the Indonesian trademark law's primary objective.

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INTRODUCTION

Counterfeit products might infringe consumers' fundamental rights such as the right to health and safety because they might harm consumers or cause losses. By purchasing a counterfeit product, consumers might endanger themselves. Almost all

products can be counterfeited and most of them pose a great risk to consumers' health and safety. Even though numerous counterfeit products are bought with full awareness, intention, and knowledge, (for example, Veblen goods such as bags, wallets, and sunglasses) they might endanger consumers by causing, for example, a severe allergic reaction. This misconduct is often referred to as a "victimless crime" because in this case, a consumer knowingly buying a counterfeit product would never have bought the original one (Reichelt, 2010).

As the problem of counterfeit products is most likely seen and discussed as an infringement of the trademark owner's right, the infringement of consumers' rights in this context seems to be ignored. It is argued that consumer protection against counterfeit products is provided through the trademark protection system. Prominent scholars understand that one of the functions of trademarks is to protect consumers. Trademark protection enables consumers to distinguish identical goods and avoid confusion (Economides, 1988). Trademarks also reduce consumer search cost as they convey the reputation of the product (Landes & Posner, 1987).

In Indonesia, the Bill on the Consumer Protection Act, discussed in the Parliament in 1999, proposed that it is a consumer's right to obtain products that do not infringe the regulations on intellectual property (IP) rights and that resellers should be obliged to produce and trade in products that do not infringe regulations on IP rights (Secretariat General of the Parliament, 2001). However,

this proposal was finally rejected during the discussion because it was argued that these points are regulated under IP law, such as patent law, trademark law, and copyright law.

Therefore, it is interesting to investigate whether IP law, especially trademark law, protects consumers against counterfeit products in the absence of such protection under the consumer protection law. As the nature of IP rights, including trademarks, is to protect the private right or interest of the trademark owner, it is also interesting to know whether trademark law also provides certain provisions to protect consumers from counterfeit products. Furthermore, the issue of whether trademarks actually protect consumers is more interesting because there is conflicting opinion among legal scholars regarding this issue.

Literature Review

The Trademark Protection System Protects Trademark Owners as well as Consumers. Considering trademark as a property seems to hinder its function to protect consumers. Basically trademark has two main functions as the basis for its legal protection. The first it is to individualize a product therefore the trademark must indicate the origin or source of the product. The second function is to distinguish between goods or services. The origin function is considered to protect the business interest to individualize his product. The distinguish function on the other hands protects consumers' interest so they would not be confused since they can distinguish

between products sold in the market. However, in practice the two functions are inseparable. Consumer can distinguish a product only if the trademark informs the consumer the producer or seller of the product (World Intellectual Property Organization [WIPO], 2004). The two functions can be seen in the definition of a trademark provided by WIPO where a trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors (WIPO, 1993).

In Indonesia, Article 1 of the 2016 Trademark Law defines a “trademark” as any sign that is capable of being graphically represented (1) in the form of a picture, logo, name, word, letter, numeral, or composition of colors; (2) in the form of 2- and/or 3-dimensional, sound, hologram; or (3) a combination of two or more said elements to distinguish the goods or services produced by one person or legal entity in the activities of trade in goods or services. Based on this definition, the key element of a trademark is a distinctive sign. The sign in a trademark provides information that is beneficial to both producers and consumers, protecting the private interest of the owner as well as the public interest of consumers.

Ono (1999) defined trademark right as “an inherent private right to claim exclusive possession of a trademark as between individuals” (pp. 1-2). As a distinctive sign, a trademark provides information that benefits producers, enabling them to identify their products and services. Trademarks protect the interest of the trademark owner,

rewarding their investment and goodwill in the product (Singh et al., 2015). Trademarks also provide the owner with an incentive to produce high quality products (Naser, 2007).

On the other hand, the sign in a trademark also provides information for consumers, enabling them to differentiate one product or producer from another. To fulfill this objective, therefore, the sign of a trademark should be distinctive. As a distinctive sign, a trademark’s main function is to identify the source and origin of a product (Naser, 2007). Trademarks enable consumers to locate and identify a product with little research (Singh et al., 2015).

Hence, trademarks help consumers from being deceived by counterfeit, low quality products. The trademark protection system prohibits the registration of any trademark that is similar to a registered trademark for the same kind of goods or services. The similarity in trademarks might deceive consumers, causing them to unintentionally purchase certain products.

A trademark does not necessarily provide information on the composition or characteristic of a product. However, consumers can acquire information on the quality of a product based on their own experience or that of others (Economides, 1998). A trademark may represent the quality of a product as the “quality experienced” by the consumer, guiding him to purchase a product of a particular trademark, expecting to experience the same “quality expectation” (Singh et al., 2015). This information, together with the advertisement provided by the company, will provide the consumer

information on the nature, origin, and quality of the product. With this lasting impression regarding information, the consumer will be guided to choose the product he needs (Singh et al., 2015).

Nevertheless, trademarks protect the public interest because IP delivers safe products to our homes by allowing consumers to identify respected and safe brands (Hirschmann, 2012,). Consumers will thus be able to recognize the product they desire without being obliged to differentiate between products or trying to stipulate which product identifies and fulfills their needs and preferences (Naser, 2007). Consumer protection on the ground of trademark law it to protect consumer against disinformation by minimizing the risk of being misled (Gruca, 2018).

Counterfeiting is Part of Trademark Infringement. All counterfeiting can be considered as trademark infringement. A trademark infringement is the unauthorized use of a trademark in connection with goods and/or services in a manner that is likely to cause consumer confusion, deception, or mistake about the source of the goods and/or services. Counterfeiting is defined in the Agreement on Trade-related Aspects of IP Rights (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994) in Article 51 “*counterfeit trademark goods*” + footnote 14 as follows:

Counterfeit trademark goods shall mean any goods, including packaging, bearing without authorization of trademark which

is identical to the trademark validity registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation. (p. 342).

Counterfeiting is part of the illicit activities related to IP infringement, meaning an infringement of the legal rights of an IP owner. Counterfeiting usually refers to trademark infringement cases. Counterfeiting is “any manufacturing of a product which is so closely imitates the appearance of the product of another to mislead a consumer that is the product of another.” It includes products that infringe trademarks and copying of packaging, labeling, and other significant features of the product (Organization for Economic Cooperation and Development [OECD], 1998).

Within the context of this research paper, counterfeit goods shall refer to goods that illegally imitate, copy, or duplicate another good, or use a registered trademark without authorization, and thus infringe the legal rights of the trademark owner. This means that the goods in question are made by producers other than the true and lawful trademark holder.

Counterfeiting Harms Consumers. The ultimate victims for counterfeiting are consumers. Some counterfeit products might pose a threat to consumers. Counterfeit medicines present an increasing threat

to public health, in both developed and developing countries. Counterfeit medicines can result in the failure of medical treatment and are harmful to the safety of consumers. In Nigeria in 1990, 109 children died after consuming counterfeit paracetamol (World Health Organization [WHO], 2003). In Haiti in 1995 and in India in 1998, counterfeit paracetamol cough syrup caused 129 deaths, 30 of which were infants (Newton et al., 2001).

A low quality of counterfeit medicines results in low efficacy, adverse clinical results, failure of treatment, and death of individual consumers. Counterfeit medicines containing reduced active constituents contribute to global microbial resistance and more instances of fatal disease (Lybecker, 2007) and drug resistance (WHO, 2003).

Furthermore, counterfeit medicines take advantage of consumers' limited health budgets, making them pay for medicines that have little or no medicinal value, causing unresolved health problems and perhaps even death. On February 14, 2012, the Food and Drug Administration (FDA) issued letters to 19 medical practices in the United States, warning about a counterfeit version of Avastin 400mg/16mL that did not contain the medicine's active ingredient, bevacizumab, which might have resulted in patients not receiving the required therapy (FDA, 2012).

MATERIALS AND METHODS

This research is a normative legal research, a research methodology used to find a legal rules, principles, or doctrines (Marzuki,

2005). This research examines written legal norms or laws that are theories of trademark and Indonesian trademark law, focusing on whether trademark law protects consumers. The data gathered as primary legal resources are *Trademarks Act No. 20 of 2016* and *Consumer Protection Act No. 8 of 1999*. Furthermore, the secondary legal resources are books or articles written by scholars on IP, trademarks, consumer protection, and counterfeiting. The data gathered were then analyzed using the qualitative data analysis method.

RESULTS

Theories of Trademarks Protecting Consumers

Utilitarian and Economic Analysis Theories: Preventing Consumers from being Misled and Reducing Consumer Search Costs. The largest theoretical framework to justify the protection of property rights is John Locke's labor theory and other theories under the title "Natural Rights" (Naser, 2007). In the 19th century, courts applied the natural rights theory as the basis to protect IP right, arguing that property rights were intended to preserve for individuals a zone of free action and the ability to reap the benefits of their own labor or industry (McKenna, 2007). In the context of trademarks, the natural right theory called on courts to protect the fruits of a producer's honest labor by preventing competitors from stealing its trade, but also to avoid interfering with the rights of others to develop their own trade. However, according to Naser (2007), Locke's theory

of property is inapplicable to trademarks because a trademark is not an object per se but a right or entitlement of rights to use the mark and prevent others from using it.

Furthermore, Naser argued that utilitarian and economic arguments justified the current trademark protection system. Trademarks are essential to provide maximum protection to trademark owners by providing an incentive to produce high quality products. This has led to the introduction of the concept of dilution that gives the trademark owner the right to monopolize the trademark and to prevent any public access to the trademark (Naser, 2007).

Some scholars justify that trademarks also protect consumers under the theories of Utilitarian and Economic Analysis theories. The utilitarian rationale argues that trademark protection will result in the maximization of wealth. Trademark monopolies, together with protection and enforcement, will lead to the reduction of wealth to its optimal levels (Kinsella, 2001).

From the perspective of economic analysis, the sign of a trademark can resolve the problem of information irregularity (Riley, 1990). Trademarks enable consumers to identify a product by the mark it bears and to distinguish it from other products or the same kind of goods or services (Carter, 1990). The benefits of trademarks in lowering consumer search costs presuppose the legal protection of trademarks (Landes & Posner, 1987). The most considered benefit of trademarks for consumers is that a trademark reduces consumers' search costs

(Landes & Posner, 1988). The rationale of a trademark is to facilitate and enhance consumer decisions (Economides, 1988) in choosing the product they want to purchase (Naser, 2007). The trademark is protected under trademark law because of its function to convey information and help consumers in their purchasing decisions. Trademark law is principally concerned with ensuring that consumers are not misled in the marketplace and is therefore particularly amenable to economic analysis (Menell, 2000).

The Critiques. Mark P. McKenna criticized the established theory that trademarks protected consumers, by stating that trademark law was not traditionally intended to protect consumer. Instead, trademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors (McKenna, 2007). Furthermore, he argued that American courts protected producers from illegitimately diverted trade by recognizing property rights. This property-based system of trademark protection was largely derived from the natural rights theory of property that predominantly influenced courts during the time American trademark law developed in the nineteenth century (McKenna, 2007).

From the historical and philosophical context of the traditional trademark decision, he concluded that trademark law has never focused primarily on consumer interest. However, he still agreed that courts did acknowledge the benefit of trademark protection for consumers. Some courts in

the US stated that one of the reasons for protecting trademarks was to prevent fraud taking place for the public, but this was a secondary goal. Courts emphasized that trademark protection was primarily intended not for consumers' benefit but for producers' interests (McKenna, 2007).

McKenna also criticized modern trademark scholars who argued that trademark law had recently lost its consumer focus in that there had been a shift in modern trademark law, from a consumer focus to a producer focus. He argued that the ultimate object of protection in both traditional and modern trademark law was the producer's business. Traditional trademark law merely saw trademarks as a vehicle for consumers to match products with their producers, whereas modern trademark law intended to increase brand value (McKenna, 2007).

The Proposal of Consumer Rights against Products Infringing IP Rights in the Previous Bill of the Consumer Protection Law

In the previous Bill of the Consumer Protection Law, there were four proposals regarding IP rights:

1. Consumer's right to obtain products that do not infringe IP rights
2. Consumer's obligation to respect regulation on IP rights
3. Reseller's obligation to produce and/or to trade in products that do not infringe IP rights
4. Provision regarding prohibited acts where resellers are prohibited to

trade in products that are defective, tainted, or that infringe IP rights.

However, these proposals were then rejected by the government because it was argued that they were already regulated under IP laws. The objection was opposed by a member of parliament, who argued that because IP rights are a relatively new issue in Indonesia, the provisions might strengthen consumer protection law. However, the government again rejected the proposals, arguing that such similar regulations cannot be found in any consumer protection law in other countries. Finally, both the government and the parliament reached an agreement to delete the proposals. In accordance, this issue was accommodated in the General Explanation of the consumer protection law, stating that the resellers infringing IP law shall not be regulated under the consumer protection law. Instead, it has been regulated under the law on copyright, law on patents, and law on trademarks, which prohibit resellers from producing or trading in goods and/or services that infringe the regulations on IP right (Secretariat General of the Parliament, 2001).

Consumer Protection under the Indonesian Trademark Law

Indonesian trademark law, *Trademark and Geographical Indication Act No. 20 of 2016* was enacted on November 25, 2016, replacing the previous *Trademark Act No. 15 of 2001*. There are some major changes in the new trademark law, considering protection of trademark and geographical indication.

Consumer Protection Law recognized that one of the roles of trademarks is to protect consumers, as a philosophical argument. The word “consumer” appears three times in trademark law:

1. In the consideration part of the law point a *Trademark and Geographical Indication Act No. 20 of 2016* as follows: “whereas in the era of global trade, in line with international convention ratified by Indonesia, the role of Trademark and Geographical Indications has gained great significance, particularly in the context of maintaining fair, just business competition, consumer protection, and the protection of Micro, Small, and Medium Business as well as the domestic industry”.
2. In the elucidation of Article 21 paragraph 3 of the *Trademark Act No. 20 of 2016* when explaining about “applicant not acting in good faith”, as follows: “referred to as “Applicant not acting in good faith” shall be an applicant who, in registering the mark concerned, is reasonably suspected of having the intent to imitate, copy, or follow the mark of another party for the purpose of advancing his/her business interest creating unfair business competitions, deceiving or misleading consumers”.
3. In the elucidation of Article 76 paragraph 1 *Trademark Act No. 20 of 2016*, when explaining about an

“interested party” who can file a trademark cancellation lawsuit, as follows: “referred to as “interested party” shall be those other than the owner of registered mark, prosecutor, foundation/institution in the field of consumers, and religious council/institution”.

The term “consumer protection” appears only once in the consideration part of the law point a. The consideration part point a of a law contains the philosophical arguments justifying the proposed law, describing that the law should be promulgated considering the philosophy of life, understanding, and legal ideals that include the atmosphere of inner and philosophy of the nation that originated from Pancasila and the Preamble of the 1945 Constitution of the State of the Republic of Indonesia (Soeprapto, 2007). Finding the word “consumer” in explaining “interested party” is meaningless in the context of justifying the idea that trademark law protects consumers.

However, the words “deceiving or misleading the consumer” that are found when explaining the “applicant not acting in good faith” may have a correlation in this context. Although that is not its primary objective, as one of the requirements of registering a trademark is “in good faith” to prevent consumers from being deceived or misled, trademark law certainly intends to protect consumers because there are no further provisions related to consumer protection. As McKenna (2007) pointed out that a trademark was a vehicle for consumers to match products with their producers,

trademark law also required that a trademark be distinctive to enable consumers to differentiate between producers of similar products. Registration will refuse any similarity of a trademark with an already registered trademark (Articles 20 and 21 of the *Trademarks Act No. 20 of 2016*).

Indonesian Trademark Law Does Not Provide Any Legal Instrument for Consumers to Report Counterfeit Products. Although IP rights are private rights and are enforceable by means of civil litigation, the prevalence of counterfeiting (that relates to trademark infringement) and piracy (that concerns copyright infringement) and the economic damage they cause has led to an increased importance of criminal sanctions. The infringement of other IP rights is generally not criminalized (World Intellectual Property Organization [WIPO], 2012). For cases that disturb market order and economic development and can cause huge losses to the State and the people, criminal procedures should be upheld to deter criminals (Jianming, 2004). As has been highlighted by the World Intellectual Property Organization (WIPO), counterfeiting and piracy are often results of criminal activities that impact other public interests such as the prevention of organized crime, public health concerns, and the protection of the public purse (WIPO, 2012).

Nevertheless, under trademark law, the criminal procedure alleging counterfeit or infringement of the criminal provision of trademark law is considered an offense

based on a complaint. Article 103 of the *Trademark Act No. 20 of 2016*, states that criminal offenses as detailed in articles 100–102 shall be offenses based on a complaint. Therefore, only the legitimate owner of the infringed trademark can file a report to the police or investigator within the related government agency. In practice, the submitted report should be accompanied by evidence of a trademark certificate. Based on trademark law, therefore, a consumer has no legal capacity and is not considered to have any legal interest to file a complaint of knowing about or suffering because of counterfeit products. Trademark law strictly limits the trademark owner as the one who has the legal capacity to start criminal procedures regarding counterfeiting.

Indonesian Trademark Law Does Not Provide Any Legal Instrument for Consumers to Ask for Compensation for Injury or Loss Resulting from Counterfeit Products. As mentioned above, consumers may suffer injuries and/or loss after purchasing counterfeit products. However, trademark law does not provide any legal instrument for consumers to ask for any compensation. Under Article 83 of the *Trademark Act No. 20 of 2016*, the owner of a registered trademark and/or licensee of a registered mark can file a claim against another party that uses the mark without permission and has similarities in part or in entirety with the goods and/or services of the same type in the form of the following:

1. Claim for damages; and/or
2. Halting all production related to the use of the mark concerned.

According to Article 83 of the *Trademark Act No. 20 of 2016*, the consumer does not have the legal standing to file a claim for a trademark infringement and to claim for compensation for damages occurred. The standing is limited to the owner of a registered trademark or licensee.

DISCUSSIONS

The Preamble of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement states that WTO members recognize that IP rights are private rights (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994). The Panel of EC-Trademark and Geographical Indications suggested that TRIPs should not only provide positive rights to exploit or use certain subject matter, but rather provide for the grants of negative right to prevent certain acts (Guan, 2014). As a private right, therefore, the holder of the right should be the one who has the right to initiate the monitoring and enforcement of the right through civil or criminal procedures.

Under the theories of Utilitarian and Economic Analysis, some scholars justify consumer protection under the trademark system. The utilitarian rationale argues that trademark protection will result in the maximization of wealth (Naser, 2007). Meanwhile, from the perspective of economic analysis, trademarks protect consumers in terms of resolving problems

of information irregularity, identifying, and distinguishing products of the same kind in terms of goods or services, lowering consumer search costs, facilitating and enhancing consumer decisions, conveying information and helping consumers in their purchasing decisions, and ensuring that consumers are not misled in the marketplace (Landes & Posner, 1988).

The findings of the examination of trademark law show that the Indonesian trademark law acknowledges consumer protection as one of the philosophical arguments for trademark protection because it is explicitly written in the consideration part of the law. The Indonesian trademark law accommodates this understanding that a trademark is a private right. It gives the right solely to the trademark owner to initiate monitoring and to enforce their right. It is the decision of the trademark owners whether they want to fight for their right and prevent others from infringing their trademark. Thus, if for some reason trademark owners are unlikely to use their rights, no other party can push them to do so. Furthermore, because it is considered as a right, there is no sanction that can be imposed on the trademark owner for not exercising their rights.

This problem can arise when counterfeited products injure consumers and the trademark owner does not want to exercise his right for some reason. As trademark law does not allow the injured consumer or the government to initiate legal action, the only hope for consumers is that the government may utilize another legal

instrument aside trademark law. Indonesia has some other regulations that can be used to combat counterfeit products and to protect consumers, including the consumer protection law, *Consumer Protection Act No. 8 of 1999* and the health law, *Health Act No. 36 of 2009*.

The Consumer Protection Act No. 8 of 1999 protects end-user consumers in general. There is no specific regulation on protecting consumers against counterfeit medicines. *The Consumer Protection Act No. 8* protects consumers against unstandardized products (Article 8). Under the *Health Act No. 36 of 2009*, the counterfeit medicines are considered as illegal medicines, and there are some criminal provisions under both laws that can be applied to medicine counterfeiters.

The findings of this research support those of McKenna (2007) who stated that both traditional and modern trademark law were not intended to protect the consumer. They were predominantly producer-centered and protected property rights, intending only to prevent competitors from dishonestly diverting customers who otherwise would have gone to the leading user of a mark (McKenna, 2007). Indonesian trademark law was not primarily intended to protect consumers and provided little protection to consumers, similar to the United Arab Emirates. Although trademark laws protect consumers by requiring elements of distinctiveness to prevent misleading consumers, they do not provide deterrent safeguards (Massadeh & Al-Nusair, 2017).

CONCLUSIONS

This research concludes that most scholars use utilitarian and economic theories to justify that trademarks protect consumers by the need to balance the economic right of the trademark holder with the interests of the public as consumers. The utilitarian rationale argues that trademark protection will result in the maximization of wealth. The perspective of economic analysis provides the argument that trademarks protect consumers in terms of resolving problems of information irregularity, identifying and distinguishing products of the same kind in terms of goods or services, lowering consumer search costs, facilitating and enhancing consumer decisions, conveying information and helping consumers in their purchasing decisions, and ensuring that consumers are not misled in the marketplace. However, Law No. 20 of 2016 on trademarks provides very limited protection for consumers. In conclusion, currently, the Indonesian trademark law possesses limited function to protect consumers.

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