

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States



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ABSTRACT: The research explained comparatively the application of the first to file doctrine and the trademark dispute settlement mechanism in Indonesia and in the United States. The purpose of this research was to provide a broad explanation of the application of the first to file doctrine and provide an overview of the mechanism for settling the problem of infringement of trademark rights. This study used a normative juridical research method with a statutory approach (Statute Approach) accompanied by a Comparative Approach, the data used was secondary data. Based on the research results, it was known that the Trademark Law still recognizes and / or implements the first to file and first to use doctrine. In Indonesian law, which basically adheres to the first to file doctrine, it still provides room for the first user to claim ownership of a trademark. Meanwhile, The Lanham Act accommodates the doctrine of first to use and first to file simultaneously but is limited by the trademark rights protection space. The mechanisms for settling trademark rights infringement disputes in Indonesia and in the United States have similarities and differences. The similarity is in both country, trademark dispute settlement is done through the litigation and non-litigation mechanism. The difference is that in Indonesia the most common mechanism is litigation, while in the United States the non-litigation mechanism is preferred in settling disputes over trademark rights.

KEYWORDS: Comparison; First to File; Trademark

A. INTRODUCTION

Laws exist to realize the objectives of the law so that the values of justice, benefits and legal certainty can be felt by the public.¹ The presence of law is expected to act as a wall to discipline and protect human works. In the context of protecting human work, law is an instrument that aims to protect human work from actions that are detrimental to other humans.² The existence of economic globalization and the practice of global trade has given a new color in the development of law in Indonesia, especially in the provision of trademark rights protection. Article 1 point 1 of Law Number 20 of 2016 concerning Marks and Geographical Indications, hereinafter referred to as the Trademarks and Graphic Indications Law, provides a definition of a mark, in essence;

"Signs that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and / or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) or more of these elements to distinguish goods and/or services produced by persons or legal entities in trading activities of goods and/or services."

Trademark is an object of rights, and it is known as Trademark Rights. A trademark attached to an item is a differentiator from other goods. It should be understood that the intended trademark is not the product itself but something that is affixed or contained in an item. In the Trademark and Graphic Indication Law, particularly in Article 1 point 5 stipulates that;

"Right to trademark is an exclusive right granted by the state to the owner of a registered trademark for a certain period by using the trademark himself or giving permission to other parties to use it."

Since a trademark is a rights object, it is necessary to provide legal protection. This is where the law functions as a rights protector is needed.³ In essence, the philosophical basis for the application of the Trademark and Graphic Indication Law is to

¹ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2014). hlm. 58.

² Henry Donald Lbn. Toruan, "Penyelesaian Sengketa Hak Kekayaan Intelektual Melalui Acara Cepat Resolution of Intellectual Property Disputes by Fast Proceeding", *Jurnal Penelitian Hukum DE JURE*, 17.1 (2017). hlm. 81.

³ Winda Risna Yessiningrum, "Perlindungan Hukum Indikasi Geografis Sebagai Bagian Dari Hak Kekayaan Intelektual", *Jurnal IUS Kajian Hukum Dan Keadilan*, 3.7 (2015). hlm. 53.

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

protect the real interests of the trademark owner and have good intentions. Balance and fairness in implementing the trademark system with regard to legal certainty in the law enforcement and keep consider the national economic interests.⁴ In the context of realizing legal protection of the trademark rights mentioned in the Trademarks and Geographical Indications Law, adheres to the *first to file* doctrine. The *first to file* doctrine gives superior rights to trademark rights owners to be featured as the first party to register.⁵

Basically, the trademark rights recognition is intended to protect the interests of trademark holders and consumer protection in common, because such protection must always be balanced.⁶ Recognition of the trademark rights is born because of the first registration and not because of its use. The first registration is meant to be related to the *filing date* that has been registered at the Intellectual Property Directorate of the Law and Human Rights Ministry, which adheres to the *First to File* doctrine. If a registered trademark has been received by Intellectual Property Directorate, the owner of the registered trademark has the right to enjoy and the right to exploit the benefits of the registered trademark. Trademark protection that is obtained by the trademark owner applies to all lawsuits, both criminal lawsuits and civil lawsuits. The owner of a registered trademark has the right to unilaterally apply for the cancellation of the another person's trademark registration, if the registered trademark is substantially similar to the mark whose trademark rights are held by the owner.

Table 1. Trademark Registration and Protection in Indonesia 2015-2019

JENIS KI		PERMOHONAN MASUK PADA TAHUN TERTERA					PERLINDUNGAN MASUK PADA TAHUN TERTERA				
		2015	2016	2017	2018	2019	2015	2016	2017	2018	2019
MEREK	TOTAL	61.790	65.363	68.368	74.173	90.879	64.240	21.991	54.913	26.298	26.744
	LUAR NEGERI	15.492	15.994	16.466	12.741	12.245	18.061	5.854	15.992	7.014	5.925
	DOMESTIK	46.298	49.369	51.575	56.575	69.004	46.179	16.137	38.991	19.284	16.893
	APPLICATION FILLED UNDER MADRID PROTOCOL	-	-	-	4.857	9.630	-	-	-	-	-

Source: 2019 Intellectual Property General Directorate Annual Report⁷

Based on the table above, it was known that there were trademark rights registration and protection came from the Indonesian trademark and also from foreign countries, from 2015 until the 2019, to the Intellectual Property General Directorate, with trademark rights registration reached 360,591 trademarks, while trademark rights protection reached 194,186 trademarks in details. Depart from the information mentioned above, it was proved that the trademark registration in Indonesia is many. It can be explained that the more rights to a trademark that is requested for registration and protection, the more there will be plagiarism of the trademarks circulating in the community, causing material and immaterial losses to the real trademark owner.

In the Indonesian legal mechanism, the *first to file* doctrine protects local or foreign trademark rights assigned to registered trademarks. The legal protection acts as a preventive and repressive legal remedy. A preventive legal can be measured if the registration of a trademark is a step to claim a registered trademark so that other parties cannot use it. Preventive legal protection is carried out during the trademark registration process, this is intended so that new registrants do not register the same trademark as

⁴ Insan Budi Maulana, *Naskah Akademik Peraturan Perundang-Undangan Rancangan Undang-Undang Tentang Merek* (Jakarta, 2008). hlm. 14.

⁵ Paramitha Prananingtyas Ashari, Luthfan Ibnu, Budi Santoso, "Perlindungan Hukum Bagi Pemegang Hak Atas Merek Terhadap Nama Domain Yang Sama Menurut Hukum Positif Di Indonesia", *Diponegoro Law Journal*, 5.3 (2016), 1-18. hlm. 14.

⁶ Sanusi Bintang Andre Asmara, Sri Walny Rahayu, "Studi Kasus Penerapan Doktrin Pendaftaran First TO File Pada Pembatalan Merek Cap Mawar (Putusan MARI Nomor: 512 K/ PDT. SUS-HKI/2016)", *Syiah Kuala Law Journal*, 2.2 (2019). hlm. 191.

⁷ Direktorat Jenderal Kekayaan Intelektual, *Laporan Tahunan Direktorat Jenderal Kekayaan Intelektual Tahun 2019*, (2019).

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

a registered trademark.⁸ Meanwhile, repressive legal remedies are legal actions if at any time a trademark violation occurs, it can be resolved either by a civil suit or a criminal charge.⁹ Violation to trademark rights ownership that are resolved through the efforts of repressive law in Indonesia is very much like the loss of ownership of the trademark Gepek Benu with Jakarta Court Decision Number 56/Pdt.Sus-IPR/Merek/2019/PN Niaga Jak.Pus. The invalidation trademark of Ever Last still provide trademark ownership rights on the *Everlast World's Boxing Headquarters Corporation* incorporated in 1350 Broadwat, New York, NY 10018, USA by Decision No. 13 PK/Pdt.Sus -HKI/2014.

From those various trademark dispute settlements above, the doctrine of *first to file* provides legal certainty for trademark owners as evidenced by a trademark certificate so expected no controversy arose between the first user and the first registrar in later days.¹⁰ The application of the *First to File* Doctrine can also be found in various countries around the world aimed at providing legal certainty for trademark owners.¹¹ The application of this doctrine was a reason for the author to investigate and conduct a comparative study on the application of *first to file* doctrine held in Indonesia and in United States. This comparative study was expected to provide an update on *first to file* doctrine and trademark dispute settlement mechanisms against rights violations in Indonesia and in the United States.

This study is different from previous studies. Previous research that discussed the same theme as this research was conducted by Vania Isura Sitepu in her research entitled "*Pelaksanaan Prinsip First to File Dalam Penyelesaian Sengketa Merek Dagang Asing di Pengadilan – Studi Kasus tentang Gugatan Pencabutan Hak Merek "Toast Box" oleh BreadTalk Pte.Ltd No: 02/Merek/2011/PN.Niaga/Medan* (Implementation of the *First to File* Principle in Foreign Trademarks Dispute Settlement in Court – Case Study on Lawsuit for Revocation of Trademark Rights "*Toast Box*" by BreadTalk Pte . Ltd No: 02/ Merek/2011/PN.Niaga/Medan)." The research discussed the trademark rights protection in Indonesian positive law, the implementation of the *First to File* principle in resolving trademark disputes. Based on the results, that study concluded that the implementation of Principle *First t o File* in foreign trademark dispute settlement in the court in Indonesia was much ensuring legal certainty for applicants' trademark, who was granted by a certificate as a proof of registration and rights to the trademark, once regarded as the first user of the trademark that can be submitted as authentic evidence in a court examination.¹²

In addition, research that discussed the same theme has also been carried out by Michelle Nathania in her research entitled "*Analisis Konsepsi Asas First to File dalam Pembatalan Merek Terdaftar – Contoh Kasus: Putusan Kasasi Mahkamah Agung No. 999 K/Pdt.Sus-Hki/2019 dan Putusan Pengadilan Negeri No. 15/Pdt.Susmerek/2015/Pn.Niaga.Jkt.Pst* (Analysis of *First to File* Principles in Cancellation of Registered Trademarks – Case Example: Supreme Court Cassation Decision No. 999 K/Pdt.Sus-Hki/2019 and Court Decision No. 15/Pdt.Susmerek/2015/Pn.Niaga.Jkt.Pst." Based on this research, it was known that the practice of implementing the *first to file* doctrine in Indonesia there were often happened conflicts of law between the principle of *first to file* and well-known trademarks in the judiciary in Indonesia.¹³ Based on the previous researches it was mentioned that no one had specifically addressed the problems of research similar to this study. So, this research is different from previous studies and it is important to do. In this study, we will discuss how to compare the *First to File* doctrine in the trademark regime in Indonesia and the United States; and what is the mechanism for trademark rights violation settlement in Indonesia and in the United States.

B. DISCUSSION

1. Comparison of First to File Doctrine in Indonesia and United States Trademark Regime

Indonesia and the United States have basically ratified the Trips Agreement and the Paris Convention for the Industrial Property protection, which were signed in Paris and one of the international treaties related to intellectual property. The seriousness of the government in enhancing legal protection of their rights began when the Indonesian Government issued Presidential Decree No. 24/1979 concerning the Ratification of Paris Convention for the Protection of Industrial Property and Convention Establishing

⁸ Ifrani Ifrani Fajar, Mukti, Yati Nurhayati, 'Iktikad Tidak Baik Dalam Pendaftaran Dan Model Penegakan Hukum Merek Di Indonesia', *Jurnal Hukum Ius Quia Iustum*, 25.2 (2018). hlm. 223.

⁹ Wahyuni Erma, *Kebijakan Dan Manajemen Hukum Merek* (Yogyakarta: YPAPI, 2011). hlm. 3-4.

¹⁰ Edy Santoso, "Penegakan Hukum Terhadap Pelanggaran Merek Dagang Melalui Peran Kepabeanaan Sebagai Upaya Menjaga Keamanan Dan Kedaulatan Negara", *Jurnal Rechtsvinding*, 6.1 (2016). hlm. 124.

¹¹ Insan Budi Maulana. *Naskah Akademik Peraturan Perundang-Undangan Rancangan Undang-Undang Tentang Merek*, hlm. 42.

¹² Vania Isura Sitepu, "Pelaksanaan Prinsip First to File Dalam Penyelesaian Sengketa Merek Dagang Asing Di Pengadilan (Studi Kasus Tentang Gugatan Pencabutan Hak Merek 'Toast Box' Oleh BreadTalk Pte.Ltd No: 02/Merek/2011/PN.Niaga/Medan)", *Premise Law Journal*, 3.1 (2015). hlm. 9.

¹³ Michelle Nathania, 'Analisis Konsepsi Asas First To File Dalam Pembatalan Merek Terdaftar (Contoh Kasus: Putusan Kasasi Mahkamah Agung No. 999 K/Pdt.Sus-Hki/2019 Dan Putusan Pengadilan Negeri No. 15/Pdt.Susmerek/2015/Pn.Niaga.Jkt.Pst)', *Jurnal Hukum Adigama*, 3.2 (2020). hlm. 1442.

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

the World Intellectual Property Organization which was signed in Stockholm, July 14, 1967.¹⁴ As amended by Presidential Decree Number 15 of 1997 concerning Amendment to Decree Number 24 of 1979 concerning Ratification of the Paris Convention for the Protection of Industrial Property and Convention Establishing the World Intellectual Property Organization. When referring to the provisions of the Paris Convention that the establishment of such organizations was only to promote the protection of intellectual property rights through the participating countries, it is hoped that this cooperation will be able to provide legal certainty for the trademark rights holders of the convention union countries.¹⁵

When reviewing the Paris Convention, there are three important things that must be enforced by the participating countries, namely: national treatment, priority rights and registration.¹⁶ The principle of National Treatment means that every participating country citizen can claim other participating countries to act equally to all participating countries citizens in terms of trademark protection. The principle of priority rights, priority rights are given to every citizen of the participating country to register their trademark within a period of 6 (six) months from the date of registration of the trademark in another participating country. Meanwhile, the principle of registration is a global harmonization for each participant of the Paris Convention.

Trademark as an identification mark of a product, goods/services embedded in an item and an immaterial object which only provides benefits to the right holder of the trademark.¹⁷ In a legal perspective, the rights to the trademark as a protection and recovery efforts if the trademark is used by parties who does not have any interest or authority of the goods/services.¹⁸ Ownership of the right to a trademark as a trademark to promote traded goods or services has at least three registration functions, such as an authentic evidence, as the basis for rejection of a trademark which is same in whole or in principle to the registration being applied for by another person, and as a tool to prevent other people from partly or wholly using the trademark in goods distribution etc. The existence of the trademark will serve as a differentiator from other goods/services, as a tool for promotion and as a guarantee for the goods/services quality.

Trademark ownership rights in Indonesia first regulated in Law Number 21 of 1961 concerning the Company's Trademark and Commerce Trademark that was replacing heritage regulations from Netherland's colonialism legacy of 1912 on Industrial Property Rights. In accordance with Trademark Law, there was explained that there was no necessity for trademark owners to register, because the protection of rights to the trademark given to the first-time users, called as the declarative registration system or "first to use" system. The Trademark Law was established to protect the trademark owner of imitation goods that can be detrimental to the trademark owner.¹⁹ However, in the implementation of this declarative system, it was considered that it did not provide legal certainty, because the cancellation of trademark rights can occur at any time if the legal owner of the trademark can prove that he was the first to use of the trademark. The declarative system of trademark registration did not provide legal certainty for the users of the trademark.

In the history of trademark registration in Indonesia, the declarative system can be found in Article 2 paragraph (1) of Act 21 of 1961 that in essence stated:

"The special right to use a trademark to distinguish goods produced by a company or goods owned by a person or an entity from the goods of another person or body is given to anyone who for the first time uses the mark for the above purposes in Indonesia. The special right to use the trademark applies only to goods of the same type as the goods marked with the trademark and is valid for three years after the last use of the mark."

The article explained that the emergence of the trademark due to the use of the first, although the owner of the trademark had been registered their trademark but the ownership rights was not obtainable after registration, but for the first user. In addition,

¹⁴ Keputusan Presiden Nomor 24 Tahun 1979 tentang Pengesahan "Paris Convention For The Protection Of Industrial property"

¹⁵ Article 3 Convention Establishing the World Intellectual Property Organization, yang berbunyi "The objectives of the Organization are: (i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, (ii) to ensure administrative cooperation among the Unions".

¹⁶ R. Murjiyanto, "Konsep Kepemilikan Hak Atas Merek di Indonesia (Studi Pergeseran Sistem Deklaratif ke Dalam Sistem Konstitutif)" (Disertasi, Universitas Islam Indonesia, DI Yogyakarta (2016) hlm. 13. Dikutip dari Althaf marsoof, Trips Compatibility of Sri Lankan Trademark law, "The Journal of World Intellectual Property" 15.1 (2012) hlm. 52.

¹⁷ Sbarina Aurellia & Chirstine S.T Kansil, "Analisis Penerapan Perjanjian Internasional Merek Terhadap Merek Terkenal di Indonesia", *Jurnal Hukum Adigama*, 3, 2 (2020), hlm. 1074.

¹⁸ Michelle Nathania, "Analisis Konsepsi Asas First to File Dalam Pembatalan Merek Terdaftar (Contoh Kasus: Putusan Kasasi Mahkamah Agung No. 999 K/PDDT.SUS-HKI/2019 dan Putusan Pengadilan Negeri No. 15/PDT.SUS-MEREK/2015/PN.Niaga.JKT.PST)", *Jurnal Hukum Adigama*, 3, 2, (2020), hlm.1426.

¹⁹ Undang-Undang Nomor 21 Tahun 1961 Tentang Merek Perusahaan dan Merek Perniagaan, yang berbunyi "Bahwa perlu diadakan Undang-undang tentang merek perusahaan dan merek perniagaan sehingga khalayak ramai dilindungi terhadap tiruan barang-barang yang memakai suatu merek yang sudah dikenalnya sebagai merek barang-barang yang bermutu baik"

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

Article 2 paragraph (3) explained that if the goods bearing the trademark had been exhibited by him in an official national exhibition, the application for registration of the trademark was submitted within six months after opening, then he was deemed to be a user of the mark at the time the trademark was displayed.

The application of the declarative system only raised an allegation of the right to be the first user of the trademark concerned. However, this system was considered to be less guaranteeing legal certainty than the constitutive system based on the first registration which provides more legal protection and legal certainty. In line with that, Emmy Pangaribuan explained that the constitutive system provides more legal certainty for registered trademarks.²⁰ In addition, the use of the *first to use principle* often created difficulties in determining the owner of the first trademark and it was possible for foreign parties to claim so that it was very difficult for law enforcers to determine who was the first user.

The Declarative System (*First to Use*) has been replaced by the Constitutional System (*First to File*) to be a solution to provide legal certainty for trademark rights holders. This change can be found in Law Number 19 of 1992 concerning Trademarks; Law No. 14 of 1997 on Trademarks, Law No. 15 of 2001 concerning Trademark, and Law No. 20 of 2016 on Marks and Geographical Indications. This change has given a positive aura because the trademark ownership rights are given to the registrar for the first time which is marked by a trademark certificate which has the same evidentiary power value as an authentic deed.

The use of the *first to file* doctrine is implicitly written in Article 3 of Trademarks and Geographical Indications Law, that "The right to a trademark is obtained after the trademark is registered." Ownership of the right to a trademark implies that the legal protection of the right to a trademark occurs when there is an initiative of the trademark owner to apply for registration with the Director of Trademarks and Geographical Indications Intellectual Property Directorate. In accordance with Article 4 paragraph (1) of the Trademarks and Geographical Indications Law, applications for registration of trademarks can be submitted by applicants or their attorney to Intellectual Property Directorate electronically or directly, both for Trademarks and Service Trademarks. Legal protection for the registration of the trademark rights will equally apply to foreign or local trademarks, well-known or not well-known yet, only if the mark has been registered.

Referring to Article 4, a Trademark Registration may be filed by some requirements, namely:²¹

- a. The application must at least state: 1) the date, month and year of the application; 2) The applicant's full name, nationality and address; 3) The attorney's full name and address if the application is filed through an attorney; 4) Color, if the trademark being applied for registration uses a color element; 5) Name of country and date of the first application for a trademark, if the Application is filed with a Priority Right; and 6) Class of goods and / or service classes and description of the types of goods and/or types of services;
- b. The application for trademark registration must be affixed with a signature and proof of payment;
- c. If the applied mark is in 3 (three) dimensional form, the characteristic form of the trademark is attached, if the registered trademark is in the form of a voice, it can be attached in the form of a notation and a sound recording;
- d. Application for registration of a trademark must attach a statement of ownership of the trademark applied for by the registrant.

A trademark can be registered if it meets the trademark registration requirements. Article 20 of the Trademarks and Geographical Indications Law states that registration of a trademark may only be carried out if the it does not:²²

- a. Against the state ideology, laws, morality, religion, morality, or public order;
- b. Same with, relating to or only mentioning the goods and/or services the applicant is requesting;
- c. Contains elements that can mislead the public regarding the origin, quality, type, size, type, purpose of use of the goods and/or services being applied for registration or constituting the names of protected plant varieties for similar goods and/or services;
- d. Making information that is inconsistent with the quality, benefits, or efficacy of the goods and/or services produced;
- e. Has no distinguishing power; and/or
- f. A common name and/or symbol of public property.

Article 21 Paragraph (1) The Law on Trademarks and Geographical Indications explains that if the trademark has met the registration requirements, the trademark rights ownership can be rejected if it is similar to:

- a. Trademark registered with another party or filed earlier by another party for goods and/or services in kind;
- b. Well-known trademarks owned by other parties for similar goods and/or services;
- c. Well-known trademarks belonging to other parties for goods and/or services not of the same type that meet these requirements; or
- d. Registered Geographical Indication

²⁰ Rika Ratna Permata, Tasya Safiranita, Biondy Utama "Pentingnya Merek Bagi Pelaku Usaha Mikro, Kecil dan Menengah di Jawa Barat", *Dialogia Iuridica*, 10. 2, (2019), hlm. 37.

²¹ Pasal 4 Undang Undang Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis

²² Pasal 21 Undang Undang Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

An application for trademark registration may also be rejected in accordance with Article 21 paragraph (2) of the Trademarks and Geographical Indication Law, if it: is or resembles the name or abbreviation of the name of a famous person, photograph, or the name of a legal entity owned by another person, except with the written consent of the entitled; is an imitation or resembles the name or abbreviation of the name or abbreviation of the name, flag, emblem or symbol or emblem of a country, an official sign or seal or stamp of a state or government institution as long as there is no approval from the competent authorities.²³

If you look at the application for trademark registration with the first to file system, sometimes it can cause some issues, especially for foreign trademark. It means that many trademarks are registered by people with badfaith to gain advantage for themselves.²⁴ However, sometimes the Trademark and Geographical Indication Law does not apply a pure and strict first to file system. It can be seen by granting priority rights to participating countries of the Paris Convention for the protection of Industrial Property or Agraement Establishing the World Trade Organization to obtain prior recognition provided that the date of receipt in the country of origin is the priority date of the destination country. The granting of priority rights must be submitted within 6 (six) six months after the first application for registration of a trademark in another country has been received.²⁵

Application for trademark registration, both in general and based on priority, in a substantive examination must be completed no later than 150 (one hundred and fifty) days after the end of the announcement.²⁶ If no objection is found and it does not contradict Article 20 and 21 of the Trademarks and Geographical Indication Law, according to Article 25, a registered Trademark Certificate will be issued. The Trademark and Geographical Indication Law also implicitly recognizes the existence of the first user of a trademark so that it can be said that the Trademark and Geographical Trademark Law still provides limited space for the right to a trademark for the first user (*first to use*). As in Article 21 paragraph (1) letters b and c of the Trademarks and Geographical Indication Law, it says:

"Well-known trademarks owned by other parties for similar goods and / or services; Well-known trademarks owned by other parties for goods and / or services not of the same type that meet these requirements"

If it refers to the sound of that article may imply that a trademark can not be registered and must be rejected if these trademarks have in common or that trademark are owned by other parties have been well known that it could be described that law still recognize the existence of the trademark as a result of the first user and famous. Departing from this, the law still provides room for the trademark owner of the first user to claim ownership of the trademark provided that if the trademark can be proven that the trademark belongs to him, he must immediately register in accordance with the prevailing laws and regulations.

If there are any study comparing between trademark protection in Indonesia and the United States trademark legislation, as known as *Lanham Act*, they also have to accommodate the agreement of the Paris Convention. Even though the United States is bound by the First to File system that applies to participating countries in the convention, the Uncle Sam's country still applies the declarative system (*first to use*) as contained in the Lanham Act of 1946 or the Federal Trademark Lanham Act. The Lanham Act hints that everyone is given the right to retain the rights to the trademark based on the State Law and the National Law (*federal law*) without registration of the trademark.²⁷

Based on the *US Trade Mark Law* Article 45 or g 1127, 15 USC explains that;

"A trademark is any word, name, symbol, or design, or any combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of the goods."

In the *Lanham Act*, which nationally organize registered trademarks, defines a trademark as "any word, name, symbol, or device" used by a person in commerce to identify and conduct research substantively about differences in goods from other production. This serves to (1) identify the difference between a trademark and other goods; (2) that the trademark is owned by one person or a legal entity; (3) the existence of the trademark will indicate that the products produced have the same quality and as ingredients to promote the trademark.

The definition of trademark in the United States does not differ much with Indonesia but the fundamental difference lies in the process of trademark rights ownership. Basically, trademark registration in the United States must be used in good faith for business purposes in accordance with USC Article 10 (a) or g 1060, 15 which states "*a registerd mark or a mark for which an application to register has been filed shal be assignable with the good will of the bussnies in the which the mark is used*" "when referring to the Trademark registration application system in the United States, it can be done through the delivery of office

²³ Pasal 21 Undang Undang Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis

²⁴ Michelle Nathania & Ariawan, Analisis Konsepsi Asas *First To File* Dalam Pembatalan Merek Terdaftar (Contoh Kasus: Putusan Kasasi Mahkamah Agung No. 999 K/Pdt.Sus-HKI/2019 Dan Putusan Pengadilan Negeri No. 15/Pdt.Sus-Merek/2015/Pn.Niaga.Jkt.Pst", hlm. 1433.

²⁵ Pasal 9 Undang Undang Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis

²⁶ Pasal 23 ayat (5) Undang Undang Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis

²⁷ Mohammad Ghuffran, "Prinsip *First To File* Dalam Pendaftaran Hak Merek di Indonesia (Studi Putusan PK Nomor: 179PK/PDT.SUS/2012)", (Tesis, Universitas Sumatera Utara, 2017), hlm.47.

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

USPTO (*United States Patent and Trademark office*), either directly or indirectly. If the requirements have been met and the prosecutor has examined the mark, an agreement will be made on the ownership of the trademark.²⁸

The implementation of the trademark registration system in the United States containing two systems, namely the declarative system (*first to use*) and the constitutive system (*first to file*) that is still guarantee the ownership to the registered trademark rights and unregistered on unhealthy competition. The party engaging in such unfair competition must be held accountable by the perpetrator as shown in Article 43 (a) or g 1125 (a), 15 USC Lanham Act.²⁹ The system of ownership of trademarks based on the *national system of trademark registration* must be based on good faith.

USC Article 22 or g 1072, 15, Lanham Act says:

“Registration of a mark on the principal register provided by this chapter or under the Act of March 3, 1881, or the Act of February 20, 1905 shall be constructive notice of the registrant's claim of ownership thereof.”

Based on the formulation of the article, it can be taken a meaning that the trademark registration with constitutive system (*first to file*) as primary registers implemented nationally means that the trademark ownership rights that has registered will apply statewide. Unlike the declarative system adopted in the United States that the trademark ownership rights will directly follow the trademark owner will but apply only country portion where the trademark was introduced to the public. This means that if a person or group of people makes a product's trademark, the state's protection for the trademark is limited because it only applies in that state.

When referring to the comparative study between trademarks ownership in Indonesia and the United States, Indonesia enforces the *first to file* (constitutive) doctrine, the law still provides room for the owner of the first user mark to claim trademark ownership and to prove his ownership. If the first user can prove this, they will immediately register in accordance with the prevailing laws and regulations. Therefore, referring to the Trademark and Geographical Indication Law, the process of ownership of trademarks in Indonesia applies the constitutive principle (*first to file*) not absolutely because it still provides space for the first user based on a declarative system (*first to use*) to claim the mark. It is different from the Trademark Ownership System in the United States, because in *The Lanham Act* applies the declarative principle (*first to use*) and the constitutive principle (*first to file*) simultaneously, but the declarative system is only enforced in the owner's *state (state law)*, while the constitutive system will be enforced nationally (*federal law*).

2. Dispute Settlement Mechanisms of Trademark Rights Infringement in Indonesia and in the United States

A trademark is an asset for its owner, it is called an asset because the trademark has economic value. The economic value of a trademark will be high if it is known by the wider community. So that the more famous a trademark is, the higher its economic value will be.³⁰ A mark is a well-known trademark if it has the following characteristics, namely vigorous promotion, international registration and obvious use by the general public.³¹ The economic value of a trademark is obtained by the trademark owner because of the inherent economic rights to it. The economic right itself is a right to obtain benefits in the form of royalties, money.³² The high value of a trademark on the one hand brings benefits to the trademark owner, but on the other hand, a well-known trademark has a great potential for plagiarism or imitation by other irresponsible parties, which in the end as a result of this act violates the trademark and trademark disputes.

A trademark dispute occurs because of a violation of the economic rights of a certain trademark owner, usually a well-known trademark owner. The occurrence of violations of these economic rights is due to parties who market products using trademark that are basically the same as trademarks that are already registered.³³ The meaning of the phrase "similarity in essence" as explained in the explanatory section of Article 21 paragraph 1 of the Trademark Law, is a similarity due to the dominant element between the imitated trademark and the imitating trademark, thus creating similarities in terms of form, method of placement, the way of writing, the combination of elements and the way of pronouncing the trademark.³⁴ If there is a violation of trademark rights,

²⁸ Yudhi Priyo Amboro Steven, "Tinjauan Yuridis Perlindungan Hak Merek Dalam Perspektif Perbandingan Hukum Indonesia dan Amerika Serikat", *Journal of Judicial Review*, XVII, 2, (2015), hlm.54.

²⁹ R. Murjiyanto, Konsep Kepemilikan Hak Atas Merek di Indonesia (Studi Pergeseran Sistem "Deklaratif ke Dalam Sistem Konstitutif" hlm. 13.

³⁰ Fajar, Mukti, Yati Nurhayati. "Iktikad Tidak Baik Dalam Pendaftaran Dan Model Penegakan Hukum Merek Di Indonesia", hlm. 227.

³¹ Agung Sujatmiko, "Perjanjian Lisensi Merek Terkenal", *Mimbar Hukum*, 22.2 (2010). hlm. 258.

³² Kholis Roisah Yulia Widiastuti Hayuningru, "Perlindungan Hak Ekonomi Terhadap Penggunaan Merek Dalam Perjanjian Waralaba", *Jurnal Law Reform*, 11.2 (2015). hlm. 260.

³³ Novira Maharani Sukma Dendya Widya Chandra, Budi Santoso, "Perlindungan Merek Terkenal Asing Yang Belum Terdaftar Di Indonesia (Studi Kasus Sengketa Merek KEEN)", *Notarius*, 13.1 (2012). hlm. 317.

³⁴ Evelyn Larissa Florentia Wijaya, "Perlindungan Hukum Konsumen Atas Kesamaan Bunyi Merek Terhadap Barang Yang Tidak Sejenis", *Jurnal Cendekia Hukum*, 5.2 (2020). hlm. 186.

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

it must be resolved immediately using legal instruments. This is where the function of law appears as an instrument for solving problems in society.³⁵ The existence of law as an instrument of dispute resolution in the community arises when a trademark dispute occurs. Law with aspects of formal legality and material legality,³⁶ will be an instrument to resolve trademark disputes that occur.

The context of this study will be to compare the mechanism of dispute settlement on Trademark Infringement in Indonesia and in the United States. In principle, the dispute settlement mechanism is a procedure for resolving disputes over violation of trademark rights in Indonesia compared to the United States.

Comparative discussion of the dispute settlement mechanism on trademark rights infringement in Indonesia than in the United States will first look at the related dispute settlement mechanism in Indonesia. Whereas the mechanism for resolving disputes over violation of the rights to a trademark in Indonesia is regulated in Articles 83 to 103 of the Trademark Law. Basically, the settlement of disputes over violation of trademark rights can be done through 2 (two) mechanisms, namely: the dispute settlement mechanism for trademark rights by litigation and the mechanism for resolving disputes over trademark rights by means of non-litigation.

The mechanism for resolving disputes over trademark rights by litigation as stipulated in Article 83 to Article 92 of the Trademark Law. The mechanism for the settlement of the dispute begins with a lawsuit against infringement of the right to a trademark filed by the owner of the registered trademark or the owner of a famous trademark against another party suspected of violating the rights to the trademark, the main criterion for violating the rights to the trademark in question is that there is a similarity in essence or in its entirety. The lawsuit submitted is in the form of a claim for compensation and / or termination of the use of the mark which is submitted to the Commercial Court. During the case review process, the plaintiff can ask the judges to stop the defendant's production and distribution activities. This was done with the aim that the registered mark owner would not suffer greater losses, if the defendant's production and distribution activities were not stopped.

The procedure for a lawsuit for trademark rights infringement, is submitted to the Head of the Commercial Court (Ketua Pengadilan Niaga – KPN) in accordance with the defendant's jurisdiction. If the defendant resides abroad, the lawsuit is filed at the Central Jakarta KPN. The filed lawsuit is accepted by the Commercial Court clerk and a receipt is given at the time of receipt of the lawsuit. At the latest 2 (two) days after receipt of the lawsuit, the Registrar is obliged to submit the lawsuit to KPN. Furthermore, no later than 3 (three) days after the lawsuit is received by KPN, the KPN must study and appoint a panel of judges to determine the day of the trial. After the specified day of the trial, then the parties will be summoned by the bailiff of maximum seven (7) days after the lawsuit is filed. The examination process up to the verdict of the lawsuit is not later than 90 (ninety) days after the case is examined. If it exceeds that time, it can also be extended for a maximum of 30 (thirty) days with the approval of the Chief Justice of the Supreme Court (Ketua Mahkamah Agung – KMA). The lawsuit hearing was held in a trial open to the public. The commercial court decision must be given to the parties a maximum of 14 (fourteen) days after the decision is read.

If one of the parties or parties in the case wants to file a legal action against the commercial court ruling, then a cassation action can be filed against the commercial court decision. The application of the appeal be filed within 14 (fourteen) days after the decision of the Commercial Court was read. After an application for cassation is submitted, the application is received by the clerk and the applicant for cassation is given a receipt. The clerk of the clerk must notify the petition for cassation to the respondent, a maximum of 7 (seven) days after the application for cassation is registered. The clerk of the cassation must submit a memorandum of cassation to the respondent for cassation no later than 2 (two) days after the memory of cassation is received. Respondent can submit a counter cassation memory to the clerk within 14 (fourteen) days after the cassation memory appeal is received by the defendant. Subsequently, the clerk of the court is obliged to submit a counter-appeal to the applicant a maximum of 7 (seven) days after the counter-appeal is received by the clerk of the respondent. Furthermore, the clerk of the court must submit the cassation case file to the Supreme Court (Mahkamah Agung – MA) a maximum of 7 (seven) days after the counter appeal memory is received by the applicant. The cassation examination hearing is held for a maximum of 90 (ninety) days, since the appeal for cassation and the cassation decision must have been there. The clerk of the Supreme Court delivers the cassation decision to the clerk of the Commercial Court, a maximum of 7 days after the decision is pronounced. Furthermore, the bailiff is obliged to convey the contents of the cassation decision to the appeal applicant a maximum of 3 (three) days from the date of receipt of the cassation decision.

Toward the cassation decision which has permanent legal force, a legal remedy for judicial review (Peninjauan Kembali – PK) can be filed. If the decision of the commercial court or the decision of the cassation or the decision of the PK, has permanent

³⁵ Firman Freaddy Busroh, "Konseptualisasi Omnibus Law Dalam Menyelesaikan Permasalahan Regulasi Pertanahan", *Arena Hukum*, 10.2 (2017). hlm. 229.

³⁶ Amiek Soemarmi Kornelius Benuf, Ery Agus Priyono, Siti Mahmudah, Siti Malikhatun Badriyah, Bagus Rahmanda, "Efektifitas Pengaturan Dan Pengawasan Bisnis Financial Technology (*Peer to Peer Lending*) Di Indonesia", *Pandecta: Jurnal Penelitian Ilmu Hukum (Research Law Journal)*, 15.2 (2020). hlm. 221.

Comparison of First to File Doctrine and Trademark Dispute Settlement Mechanism in Indonesia and the United States

legal force (*Inkracht Van Gewijsde*), then the implementation of the decision is carried out by the minister of law and human rights, by canceling or deleting the registration of the trademark of the party who has violated the trademark rights. After the deletion of the mark is carried out, it must be announced in the official news. Procedures for lawsuits up to three decisions are legally enforceable and up to the implementation of these decisions constitute mechanisms for resolving disputes over violation of trademark rights by litigation in Indonesia.

The non-litigation dispute settlement mechanism regarding the violation of the trademark rights is regulated in Article 93 of the Trademark Law, the phrase used in the Trademark Law is "alternative dispute resolution". This dispute resolution mechanism is carried out through arbitration or alternative dispute resolution. The definition of "alternative dispute resolution" include negotiation, mediation, conciliation, and other ways that was chosen by the parties. Non-litigation alternative dispute resolution for business people is very profitable. This is because the dispute resolution process by mediation or negotiation or consolidation or by other means chosen by the parties to the dispute, will seek a win- win solution or win-win result.³⁷ In principle, the settlement of disputes over violation of trademark rights through non-litigation is based on the agreement of the litigant parties.

Meanwhile, the mechanism for resolving disputes over trademark rights violations in the United States is based on the *Lanham Act* (United States Trademark Law), in the Lanham Act there 2 (two systems of protection of trademark rights, namely declarative and constitutive) are adopted. This means that in the United States the protection of the trademark rights is based on who used the trademark for the first time based on the principle that the user has a better right and / or who registered the trademark for the first time. In the constitutive system adopted by the United States, the registration of trademark rights is based on state or national law. For determines which system is used in the United States, whether it is declarative or constitutive, so the parties to the dispute are given the freedom to use which system to apply, with the approval of the judge.³⁸ Trademark disputes that occur in the United States are principally the same as those in Indonesia, namely both are caused by violations of the economic rights of the real trademark owner.

The mechanism for resolving disputes over violation of trademark rights in the United States is almost the same as in Indonesia, which is known as litigation and non-litigation settlement. In litigation, namely through judicial institutions in the United States that are authorized to examine and prosecute violations of trademark rights, in the state or federal state of the United States of America. The law used is also the law of the state where the dispute over the violation of the trademark rights is committed. The mechanism for resolving trademark infringement disputes in the United States is carried out on a non- litigation basis, namely through the United States arbitration body. The legal basis can be found in the most important federal law is the Federal Arbitration Act or "FAA". Based on the above explanation regarding the dispute settlement mechanism on trademark rights in Indonesia and in the United States, it is known that there are similarities and differences. The equation is done through the litigation and non-litigation channels. The difference is that there is a fact that in Indonesia the most common route is litigation, while in the United States the non-litigation path is preferred in resolving disputes over trademark rights.

C. CONCLUSION

A trademark as an object attached to an item is a distinguishing force from other goods. Trademark protection are really needed to be improved in order to provide legal certainty for trademark owners. When referring to the comparative study between ownership rights to the trademark in Indonesia and the United States, the Doctrine of first to file (constitutive) imposed on Indonesian laws are not absolute, but still leave room for the user's first trademark to claim ownership of the trademark this case shows that Indonesia still recognizes trademark ownership based on a declarative system (first to use). Unlike the Trademark Ownership System in the United States, The Lanham Act applies the declarative principle (first to use) and the constitutive principle (first to file) simultaneously, but the declarative system is only enforced in the owner's state (state law), while the constitutive system will be enforced nationally (federal law). Furthermore, the mechanisms for resolving disputes over trademark rights violations in Indonesia and in the United States have similarities and differences. The equation is done through the litigation and non-litigation channels. The difference is that there is a fact that in Indonesia the most common route is litigation, while in the United States the non-litigation path is preferred in resolving disputes over trademark rights.

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³⁷ Kornelius Benuf Iqbal Satrio Putra, Budi Santoso, "Online Dispute Resolution Sebagai Alternatif Penyelesaian Sengketa Bisnis Financial Technology Di Indonesia", *Simbur Cahaya*, 27.2 (2021). hlm. 17.

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