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RESEARCH ARTICLE

THE EXISTENCE OF THE UNACCOMODATING REGULATION ON TRADEMARK AS BANK GUARANTY: FROM A JUSTICE VALUE PERSPECTIVE

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ABSTRACT

Trademark has so called economic right which is right to receive economic benefits of the trademark owned by the owner of trademark. With such economic right; therefore, ideally, trademark should be able to provide financial benefits and should also be used as the object of bank guaranty. However, trademark still does not have an adequate arrangement as a guaranty in Indonesia. Hence this article discusses more deeply on the existence of Indonesian Law No. 20 of 2016 on Trademark and Geographical Indication (Trademark and GI Law) which does not seem to accommodate trademark as fiduciary guaranty from the perspective of the value of justice. This is a normative legal research which uses statute, conceptual and analytical approaches. The results show that the implications of the existence of Trademark and GI Law which does not seem to accommodate trademark as fiduciary guaranty from the perspective of the value of justice in the perspective of the justice and utility values are: (1) absence of justice for entrepreneurs as the owners of trademark because their rights as trademark owners are not fully recognized; (2)stakeholders cannot enjoy the benefits of trademark rights as bank guaranty; and (3) trademark has not received adequate protection due to the absence of comprehensive juridical support and has no clear legal certainty in terms of the legality of trademark as guaranty in bank or other financial institutions.

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INTRODUCTION

The Indonesian government is very aware that in order to win globalization in terms of the economy is that for them to increase investment in Indonesia. International recognition of the market outlook in Indonesia can be seen from the rise in ratings of several domestic companies from international credit rating agencies (Diding S. A., Toto P., 2015, p.4). The Indonesian government continues to make efforts to support conducive investments in Indonesia including by issuing many Economic Policy Packages. The packages include the establishment of an export-based consortium, creative economy and Micro Small Medium Enterprises (MSMEs), e-commerce as well as opportunities for the younger generation to develop the creative economy, especially the digital creative industry (www.antaranews.com, 2016, see also Kominfo, 2015). In addition to capital owned by MSMEs and larger entrepreneurs in the form of movable and immovable properties, companies or entrepreneurs also have intangible assets that are used to support the development of their businesses, one of which is trademark. Entrepreneurs use their trademarks to promote the products they produce. The continuous efforts showed by the entrepreneurs to introduce their trademarks through various promotions with enormous costs aim to make their products to be known in the wider community. In relation to that, there are many trademarks belonging to Indonesian entrepreneurs are well known to the public. According to data obtained from 2010-2013, the application for trademark is the application of the most registered Intellectual Property Rights (IPR) compared to applications of copyright, industrial design and patent. In line with the above explanation, the Creative Economy Agency believes that the creative industry contribution to the growth of Gross Domestic Product (GDP) can increase steadily in the upcoming years. This is supported by extraordinary efforts to promote local creative industries in a number of exhibitions, both national and international. In its development, a number of countries actually push ahead the existence of its creative industries to sustain its economy because this sector has a multiplier effect, especially in terms of the use of technology and human resources. Economic development, as part of national development, is one of the efforts to achieve a just and prosperous society based on *Pancasila* (five basic principles of the Republic of Indonesia) and the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution). In order to preserve and continue sustainable development, the development actors both government and society, both individuals and legal entities, require substantial funds. Along with the increase in development activities, the need for funding is also increased.

Majority of the said needed funds are obtained through lending and borrowing activities (elucidation of Indonesian Law No. 42 of 1999 on Fiduciary Guaranty, which hereinafter referred to as Fiduciary Guaranty Law). Nowadays, a lot of trademarks appear in the society, even a lot of them are well known marks due to the promotion created by and reputation maintained by each entrepreneur to grow the business. In order to increase business turnover (or size of the company), as owner of trademark, on the one hand he/she need the funding or capital whether from bank loans or lending and borrowing activities to be able to meet the needs. Factually until now, even after the establishment of Trademark and GI Law, still there is no regulation that regulate trademark to be used as an object of fiduciary guaranty. Trademark as fiduciary guaranty in banking sector is relevant to be regulated in Indonesia. Such matter was often discussed as agenda of discussion in, for example, Sessions of the United Nations Commission on International Trade Law (UNCITRAL) (Jeremy Phillips, 2007; p. 2-7); Working Group VI on Security Interest; secured transactions law, including in the Second International Colloquium on Secured Transactions Security interests in IPR, Vienna, 18-19 January 2007 and in the 13th Session held in New York on 19-23 May 2008, discussed security rights in intellectual property (collateral rights in intellectual property) will be used as collateral to obtain bank credit internationally.
Similar to copyright, trademark is also one of the intangible movable right as stipulated in Trademark and GI Law. In this case, the trademark also has economic right, namely the right to obtain economic benefits for the trademark owned by the trademark owner. Therefore, trademark with its economic right can provide financial benefits; thus, trademark should be able to use as guaranty object. By making a trademark as an object of property guaranty (fiduciary) in banking sector (lending and borrowing funds) will greatly help all parties, namely: the trademark owners, in this case entrepreneurs or MSMEs; banks; and at the end to wider community.

Banks in Indonesia have not implemented IPR as credit guaranty through fiduciary due to several obstacles in the implementation. As for trademark, it still has not been fully recognized as fiduciary guaranty in banking sector in Indonesia. Many things have caused this, for example the value, market, ownership and inadequate regulation on trademark as guaranty. Based on the above elaboration, this article discusses more deeply the existence of Trademark and GI Law which does not seem to accommodate trademark as fiduciary guaranty from the perspective of the value of justice. The research method used in this article is a normative legal research method with statute, conceptual and analytical approaches.

RESULTS AND ANALYSIS

Utilization of Trademark in Economic Activities: In the development of trademark, people tend to pay more attention on what people will get by utilizing trademark, or in other words, how can trademark bring added value to people's life. Trademark is no longer seen as a tool to bring consumers to products sold by or services provided by producers. For producer, trademark is indeed important. Consumers who are satisfied with certain goods or services will be led by such trademark to rediscover the said goods or products they want. From modern trademark law perspective, trademark is placed as a repository of value and meaning; therefore, it only fulfils objective in the industrial field policy, namely increasing trademark value (Henny M., see Mark PM, 2017, p.1846). A trademark that has a good reputation constitutes as a guarantee of the performance quality of an individual or corporate performance. Undoubtedly, protection of trademark is very important in today's business. Over time, the role of trademark is expanding and changing. Trademark is no longer just signs or symbols, but it is a reflection of someone's lifestyle. Nowadays, the tendency is a consumer will to spend more on goods with certain reputable trademark that strong enough to show his/her lifestyle than other less reputable trademarks to show off such lifestyle. Companies exploit potential customers and/or customers' emotional needs to encourage them to consume more on their products or services. For example, Nike through its famous motto "Just Do It" tries to persuade runners by selling athletes' achievements (AB. Susanto, H. Wijanarko, 2004, p. 3). The legal protection of the trademark is hoped to help trademark owners to gain benefits of their trademark ownership. It is believed that a careful trademarking and good management in the end will provide good amount of income to such trademark owners as well as will provide positive impact towards other parties for example the stakeholders. This is in line with the Utilitarianism Theory that emphasizes the protection of property rights should be able to maximize the welfare of many people. In the study of the IPR protection, Utilitarianist thinking from Jeremy Bentham is often used as a foundation in discussing the protection of IPR laws. According to Bentham, the ultimate end of legislation is the greatest happiness of the greatest number (AgusSardjono, 2006, p. 32-33). Indeed, Bentham's utility principle is not only intended solely for the happiness of society, but includes society in its figure as an individual. Thus, it can be argued that Bentham's thinking could support both the individualistic and communal ideas. As trademark contains economic values; therefore, it is very important to protect it from the undesirable action. In line to that, there is also relevant theories from R. Sherwood on the importance of providing legal protection, especially to the works of human's intellectual creativity. One of them is Reward Theory (William F., 1999, p. 2-8) which means the recognition of intellectual work that has been produced by someone so that he/she is given appreciation for his/her creative efforts in creating such works.

Implication of Trademark Regulations in Indonesia: Indonesia must face several consequences as Indonesia is member in various organizations in international level. The necessity to reduce and eliminate obstacles in international trade and the recognition of the existence of more effective protection of IPR is logical consequences of Indonesia's participation as a member of international agreements and the World Trade Organization (WTO). Especially the arrangement of Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement which is an agreement that gives recognition regarding IPR. Furthermore, Indonesia must develop procedures for implementing IPR in free trade. There are several elements contained under TRIPs that need to be observed by several countries, including Indonesia, in adjusting their national legislations in the IPR sector. These elements are elements in the form of new norms, higher standards and strict law enforcement (Hasbir P., 2017, p. 286-287). This is so that international trade goes well and there are no obstacles. Obviously, member countries are encouraged to further improve more effective protection and law enforcement related to IPR. The ASEAN Economic Community (AEC) is an economic collaboration in the ASEAN region with agreed agreements which aimed at improving the welfare of the

people in the ASEAN region. ASEAN countries have enormous interests because their member countries have comparative advantages. The establishment of the AEC with the aim of improving the welfare of its people is in line with the Utilitarianism, namely legal thoughts related to the fundamentals of the economy. Regulations that are created solely to create the welfare of the country. Indonesia, as a member of the ASEAN Community, has made adjustments to several Laws and Regulations related to IPR. One of them is the Trademark and GI Law. Several things related to the agreed results have been implemented in the law. In relation to trademark as guaranty, the topics of security interest, security rights in intellectual property, secured transactions law and intellectual property law exist in each countries actually already discussed in the Working Group hearing held by United Nations Commission on International Trade Law (UNCITRAL).

The entrepreneurs, trademark owners, banks and other stakeholders in Indonesia to date need regulations that has clarity and legal certainty to be able to make trademark as a bank guaranty. It is because trademark owners need their trademark to be accepted as bank guaranty. With such guaranty, trademark owners will be able to increase the capital from their intangible asset. The competitor countries of Indonesia and fellow members of international organizations have given a positive response and have even made efforts to harmonize their national laws with the international agreements agreed upon including the rights to the trademark as guaranty. However, with the enactment of Trademarks and GI Law in 2016, there has been no clear response whether trademark can be used as guaranty in Indonesia. One of them is caused by the banks and other related parties who are not ready to regulate trademark as guaranty.

On the one side, creative economy has very beneficial potential towards general welfare for Indonesian people. However in the other side, still, several things need to be examined to find solutions to problems that arise in the creative economy in Indonesia (Adi S., 2016, p. 31) for example: (1) actors of creative economy do not have optimal quality and quantity in progressively converting into sources of foreign exchange: (2) minim award, appreciation and legal protection for creative economic actors and the products they produce; and moreover banks still do not side with creative economy actors. Answering the problems or challenges that exist, legal development must be carried out progressively. It is necessary to reform the legal paradigm so that the laws that were established fundamentally have legislative quality that is capable of engineering the community's and/or creative economic actor's culture, especially creative economic actors. Hence, will result in the creation of creative economic actors who are globally competitive. Basically, both MSMEs and other entrepreneurs need capital to be able to develop their business potential. With strong capital, both MSMEs and Indonesian entrepreneurs can access local, regional and international markets and even compete with other countries' products. From the above explanation, it can be concluded that the role of capital is very significant for Indonesian entrepreneurs on a small scale to "snapper" scale to participate in global world economic activities.

The Risks of the Presence of Trademark as Intangible Object and Not as Bank's Credit Guaranty: IPR are property rights derived from intellectual abilities/creative activities of a human mind ability, then expressed to the general audience in various forms which have benefits, economic values and are useful in supporting human life, (Suyud M., 2015, h. 113). IPR is a part of an object, namely an immaterial object. In civil law, objects are grouped into tangible and intangible objects. IPR can be classified as property right because IPR itself has the basic characteristics of property rights. Property right is an absolute right to an object that gives power directly to an object and can be defended against anyone (Zen Umar Purba, 2000, p. 4). This right is very strong, that is, property right can be maintained by the owner to everyone who disrupts their rights. HKI has economic value because the obtained royalties can provide economic benefits for IPR owners and contribute to the country's economy.

Indonesian countries, including other member countries of the WTO, especially developing countries, have national legal system that is related to IPR which is influenced by the laws of several countries. This is because of the dynamic and progressive development of international law whose existence first developed. So that the national laws of many developing countries are coloured by the legal system adopted by several countries. WTO, as an international economic organization, regulates economic matters that are met with standards that must be met by regional and international countries. On the other hand, the World Intellectual Property Organization (WIPO) was formed by United Nations (UN) as a special body which granted with authority in the field of IPR. In international level, parties with IPR have access to obtain credit from the banks. This opportunity has been utilized by several WTO member countries in adding funding sources for entrepreneurs to increase their business capital. The arrangement of IPR as bank credit guaranty under the laws indirectly becomes the basis of motivation for creators, inventors to be more productive in creating new works (Trias, P.K., 2017; p. 32). In reality there are many countries still doubt or have not applied IPR, in this case trademark, as intangible objects to be used as credit for the bank. This is due to the absence of regulations regarding guarantees, especially on clear trademark rights. In particular, banks are still hesitant in accepting rights to the trademark. The above-mentioned phenomenon has several risk impacts, as follows:

- MSMEs and Indonesian entrepreneur do not have open access to funds from banks, so they must seek other sources of funding for capital. So that there is a loss of potential employment or absorption of unemployed people in the community;
- The banking sector loses potential profits in its business related to income from the credit sector;
- Indonesia's economic growth and development are hampered compared to the developed countries' economic and even such growth and development are behind other countries or neighbouring countries who are competitors of Indonesia;
- The IPR community in general and trademark owner in particular will lose passion in increasing the growth of IPR in Indonesia due to the lack of a conducive climate that motivates the community to increase IPR in Indonesia.

In the end, the purpose of credit is not achieved optimally (Nasroen Y., Nina KD, 2015; p. 10), namely: government programs in the field of economy and development are not

optimally achieved; in terms of community interests, namely business needs are not met and optimal profit from the banking sector are not achieved for the survival of the company and expansion of business and banking services. Finally, the continuous national development in order to create a just and prosperous Indonesian society based on Pancasila (Five basic principles in Indonesia) and the 1945 Indonesian Constitution may be clogged up.

It is noted that trademark still cannot be used as guaranty in Indonesia due to the following obstacles:

- Banking still relies on collateral in the form tangible assets. The lack of adequate juridical support on allowing trademark or IPR as guaranty. Commercial banks and other banks are still fixated by regulations from Bank Indonesia concerning Quality Control of Assets related to credit collateral;
- The assessment of IPR assets or trademark has not received adequate juridical support. Indonesia does not yet have a strong reference, or in other words, Indonesia is not yet convinced of the results of the assessment of intangible moving objects;
- The absence of appraisal institution (assessor) related to IPR in Indonesia that has credibility recognized by the government;
- Need of juridical support from the competent authority. Harmonious and synchronous arrangement of trademark as guaranty between one law to another is also needed.
- The absence of a clear vision from the stakeholders, especially from the government and legislative bodies on the direction of IPR policies in the future.
- Legal risks that often occur in the society, for example: trademark falsification, passing off, etc.

Indeed, some functions of the IPR system in Indonesia have been running, one of which is the IPR protection. It is just that the function of IPR or trademark as a guaranty that still becomes problem. Trademark certificates can simply be used as fiduciary guaranty because such trademark can be classified as intangible assets. All stakeholders are supposed to be sensitive and proactive in understanding and analysing this phenomenon, in this case the phenomenon of creative economic capabilities in producing IPR and capital needs for future development. Financing for guaranty in the form of IPR object is very relevant to round up the vision of stakeholders to focus on the strength and potential contribution of IPR to the Indonesian economy in the future. The application of stakeholder theory in the public sector seems to be in line with the development of globalization. Stakeholders should introduce to banks to the public sector so-called business-based ideas related to IPR financing. In addition, public decision makers must intelligently see the society development in order to analyse opportunities and threats as well as mitigate risks related to IPR financing programs as guaranty to banks. Obviously, access to capital is the right of MSMEs and all business actors as it is part of human rights, namely economic rights that need to be fought for in the context of economic development. Indonesia is a country based on law, so it is clear that legal guarantees of human rights are upheld and human rights, especially economic rights, are respected and protected (See Moch. Mahfud MD, 2001; p. 28). With regard to economic rights as rights that must be fought for, the government must seek solutions to problems faced by the business world in order to achieve the fulfilment of business actors in economic development. In terms of justice, Rawls argues, namely that the distribution of primary social goods is called fair if the distribution is carried out evenly, unless uneven distribution is an advantage for everyone. The primary social goods in question are the basic needs that we really need to be able to live properly as humans and society. These basic needs include basic rights, freedom, welfare, and perfection. With regard to access to capital, the community of trademark owners and MSMEs who have IPR but feel that have not yet gotten a fair sense is because their basic rights to obtain capital have not yet been fulfilled which affect the prosperity aspect.
Economic democracy with core of justice cannot be fully realized if it is associated with the rights of entrepreneurs, MSMEs entrepreneurs or creative economic entrepreneurs to gain access to capital. The opportunity for IPR (as intangible asset) to become a guaranty in order to obtain capital from bank will increase the size of the business of Indonesian entrepreneurs. Therefore, this no longer raises disparities and imbalances in the economic field, especially related to Indonesia facing free market competition in the international trade.

Conclusion

Implications of the existence of Trademark and GI Law which does not accommodate trademark as a fiduciary guaranty in the perspective in the perspective of the justice and utility values are: (1) absence of justice for entrepreneursas the owners of trademark because their rights as trademark owners are not fully recognized; (2)stakeholders cannot enjoy the benefits oftrademark rights as bank guaranty due to: (a) MSMEs and Indonesian entrepreneurs do not have open access to funds from banks, so they must seek other sources of funding for capital. So that there is a loss of potential employment or absorption of unemployed people in the community; (b) the banking sector loses potential profits in its business related to income from the credit sector; (c) Indonesia's economic growth and development are hampered compared to the developed countries' economic and even such growth and development are behind other countries or neighbouring countries who are competitors of Indonesia; (d) The IPR community in general and trademark owner in particular will lose passion in increasing the growth of IPR in Indonesia due to the lack of a conducive climate that motivates the community to increase IPR in Indonesia; and (3) with no comprehensive juridical support, it means that trademark has not received adequate protection and it has no clear legal certainty in terms of the legality of trademark as guaranty in bank or other financial institutions.

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