



Use of “Similar” Criteria in the Legal Protection of Trademarks of Services

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Abstract. The study aim is to discover the “similar” criteria that have been used to determine the occurrence of trademark infringement of traded goods or services, as well as the efforts that can be made in the event of a loss due to infringement between various trademarks or services. The Trademark Law establishes that legal protection for trademarks is provided between similar goods or services. Even though, there are no clear standard for judging if an item or service is similar. This research uses the normative method by conducting a qualitative method of documents in the form of legislation and related case decisions. The topic results show that, first, the criteria between the goods or services are considered similar, namely the existence of similarities or relationships and very close attachments in their designation or use; secondly, in the event of a loss due to a violation between different Marks of Goods or Services, legal remedies can be pursued based on the existence of bad ethics. Actions should be taken so that clear criteria regarding similar understandings are will provide to determine the occurrence of trademark infringement in order to provide legal certainty in case settlement.

Keywords: Criteria · Legal protection · Brand

1 Introduction

Trademark rights, like other assets must be safeguarded by law. Trademark rights, like other property rights, must be protected [1]. Material rights are the rights to own or control an object, both movable and immovable/fixd, and they can be asserted against anyone. This means that everyone must recognize, respect, and pay attention to property rights because they are part of the material rights known as absolute rights/absolute rights [2]. Mark is used as a sign for products or services traded by the entitled party. In the case of trade and service company products, the usage of a brand influences the economic value because consumers choose particular products or services. It is suggested that brand image mediates the relationship between dimensions and customer satisfaction in the hotel industry context; accordingly [3]. Trademark erosion is one of the classic “catch-22s” of trademark law, it represents the brand’s complete success in representing the product towards the juncture in which the brand becomes the product and is no longer recognized separately as a brand [4].

In this cases, innovative consumer behavior can help to strengthen brand communities [5]. Branding is an intellectual work that must be guarded. Since intellectual property is

a private right, it must be protected [6]. Trademark rights are defined through registration in the Constitutional Procedure (First to File); this registration system confers rights to the first trademark registrant. In other words, the first registrant acquires the mark’s right, with a registration mark in the form of a trademark certificate serving as solid evidence of the mark’s owner [7].

A brand’s protection is used to safeguard similar goods or services [8]. In Article 1 of the Trademark Law, a Trademark is a Mark used on goods traded by a person or several persons jointly or by a legal entity to distinguish them from other similar goods [9]. At the same time, a ServiceMark is a Mark used to distinguish a service traded by a person or several persons jointly or a legal entity from other similar services [10]. According to Article 83 of the Trademark Law, the owner of a registered Mark and the recipient of a registered Mark License may file a lawsuit in the form of a compensation claim against another party who unlawfully uses a Mark that has similarities in principle or its entirety for similar goods and services.

Similarly, Article 100 of the Trademark Law states, among other things, that any Person without rights uses the same Mark in its entirety as another party’s registered mark for similar goods and services, and so on. In the research entitled: The Use of “Similar” Criteria in the Legal Protection of Trademarks or Services, using the normative method, by conducting a study of documents in the form of legislation and related case decisions which were analyzed qualitatively.

Examining the problem: first, how to determine whether an item or service is considered similar to goods or services using a registered mark belonging to another party and is considered a violation. Second, efforts can be made in the event of a loss due to infringement between different trademarks or services.

2 Research Method

This paper employs a normative legal research method that employs both a legal and a conceptual approach [11]. A statutory approach is based on a review of the laws and regulations about the issue at hand. The primary source of legal authority for this research is legislative legislation, namely Law no. 20 of 2016 on Trademarks and Geographical Indications and court decisions. The conceptual approach will provide understanding by utilizing doctrines in the form of legal expert opinions. This writing is also based on previous research findings. As a result, to conduct a more thorough investigation of the problem.

3 Findings and Discussion

Legal protection, in general, can be defined as the protection afforded to legal subjects, either preventive in the form of the rule of law standards ensuring that rights are not violated by third parties and granting legal subjects the right to sue, or repressive in the form of legal remedies available on both a civil and criminal level [12]. There are two types of legal protection: preventive legal protection and repressive legal protection [13]. Preventive legal protection is a type of legal protection that aims to prevent disputes by directing government actions to be cautious when making discretionary decisions.

Repressive legal protection, on the other hand, is a legal protection that seeks to resolve disputes. The law provides legal safeguards for the following: (a) The requirement to deny registration of a mark that is identical in principle or entirety to another party's registered mark, including a mark with a well-known reputation, (b) A civil case in which the registered owner seeks cancellation of the registered trademark, (c) A civil lawsuit in which the registered owner demands compensation and the suspension of trademark-related activity against third parties who use their marks without authorization, (d) Attempts to impose criminal sanctions on parties who use the same mark in principle and total with registered trademarks of other parties without rights [14].

A brand is a symbol or identity used to differentiate products or services from other goods or services exchanged, allowing the brand of one item or service to be distinguished from the brand of another item or service [15]. Because the brand serves a purpose by distinguishing one product or service from other goods or services, particularly similar goods or services, it is necessary to protect the mark or the registered mark holder's rights for people to understand and distinguish between well-known and unknown brands [16]. The business actor who trades and circulates or trades an item or service must be held accountable for the items or services traded or cultivated. Assume an issue exists with the traded goods or services, even if it poses a risk to third parties or consumers. In that instance, it will be very evident who owns the business and who is responsible for distributing the goods or services [17].

Producers use brands to guarantee the value of their products, particularly the wearer's quality. Brands are required to determine the choice of goods to be purchased by consumers [18]. As a result of knowing who distributes goods or commercializes services, the consumer community will be able to determine the type of goods or services required more easily. The relevant trademarks demonstrate the possibility of being used as a quality consideration for consumers when selecting goods. This is due to the brand's function as an identifier and guaranteeing the quality of the brand's goods or services. Because the brand's function is to serve as an identifier to distinguish a company's products from those of other companies, this could be because unethical behavior is more directly related to brand and product attitudes, which can have an impact on performance [19]. As a side effect, the brand can influence consumers' product selection, and the brand is a company asset that can add value to the company. A brand can be thought of as a type of asset, not just a general "asset" that adds value to the firm [20].

Consumers often prioritize the quality of goods and services when making purchases [21]. According to a survey, buyers have a fundamental psychological urge to purchase a product that is guaranteed to be of high quality. When consumers can rely on quality assurance, they feel secure [22]. Even if it becomes essential to prevent the circulation of goods or services bearing unregistered marks, it is hoped that once a product or service is distributed or an attempt to utilize a mark is made, the mark must be registered. If this clause is violated, severe penalties apply. Strict provisions requiring trademark registration and implementing penalties benefit non-tax state revenues by increasing registered trademarks [23].

It is not easy to ascertain who produces or distributes goods or services traded or farmed under unregistered marks [24]. Meanwhile, let us assume that a registered trademark is employed. In that situation, determining who makes and distributes the goods

or services traded or farmed will be straightforward, either via a physical inspection of the mark or through tracing through the trademark registration administration office. In this case, the Ministry of Law and Human Rights Directorate of Wealth and Intellectuals [25]. The system for regulating trademark registration under the Trademark Law is inconsistent because it allows owners of unregistered marks to apply for cancellation of registered marks even in the absence of well-known conditions, rendering the Constitutive System in trademark registration meaningless the right registered mark weak/not strong [26].

Officials in charge of trademark registration must reject applications for registering trademarks that have already been registered or are well-known [27]. A person who registers a trademark establishes legally that he is the trademark's legitimate owner. On the other hand, third parties that intend to use the same mark for similar goods or services will be denied registration by the Mark office. The trademark registration system is designed to protect business owners who own brands, consumers, the public through the prevention and control of all forms of fraudulent competition, as well as justice, order, and legal certainty; therefore, trademark registration should be avoided if it is inconsistent with these goals [28]. Provisions of the Act that are legally advantageous, such as an equal division of the State Administrative System, can also give legal certainty by granting rights based on the Act. Similarly, registered mark owners will obtain legal assurance regarding their marks' practical protection.

Brand protection is used to safeguard similar goods or services [29]. According to the definition of a mark in Article 1 of the Trademark Law, which states that a trademark is used on goods traded by a person or several persons jointly or by a legal entity to distinguish them from other similar goods [30]. A trademark is any symbol, word, name, or other device used to identify and distinguish one party's goods or services from those of another [31]. Intermediate Service Trademark is a trademark used for services traded by a person or several persons jointly or by a legal entity to distinguish them from other similar services [32]. Article 83 of the Trademark Law states that the owner of a registered Mark and the recipient of a registered Mark License may file a lawsuit against another party without the right to use a Mark that is essentially the same or entirely for similar goods/or services, including compensation claims. Likewise, the provisions for criminal sanctions in Article 100 of the Trademark Law include, among other things, the exact wording that everyone without the right to use the same mark as a whole as a registered mark belonging to another party for similar goods and services and so on.

In an example of the Decision of the Supreme Court of the Republic of Indonesia number: 699K/Pdt.Sus/2009, in the case of a position, the Plaintiff has used the Mark under the name and logo “NATASHA” since 1999, which is registered in the General Register of Marks with registration number 540373 dated June 10, 2002, in class 44 for types of services including beauty salon services for skincare and beauty care, beauty skincare salons, medical skincare, provision of spas, saunas, solariums, provision of information and advice services regarding the use of skincare products, beauty and cosmetics, beauty salons and others [33].

Plaintiff was aware, during its development, that cosmetic products or beauty-related products bearing the “NATASHA” brand and logo had circulated in the community. Plaintiff then verified the registration of the Mark in the form of the name and logo

“NATASHA” in class 3 (three), i.e., the class of goods in the form of beauty products. Plaintiff is aware, based on the results of the check, that the General Register of Marks has registered the Mark in the form of the name and logo “NATASHA” in class 3 (three) on behalf of Defendant, as stated in the Mark Certificate with number IDM00099671 dated November 27, 2006. The Plaintiffs then filed legal action against the cancellation of the lawsuit in the Semarang District Court’s Commercial Court.

Against the lawsuit in the case, the Commercial Court at the Semarang District Court has decided, namely, decision No. 01/HAKI/M/2009/PN.COMMERCIAL.SMG. Dated May 27, 2009, which in essence: Accept and grant the Plaintiff’s claim in part; Canceling or at least declaring the Mark Certificate null and void with No. IDM00099671 for Mark in the form of the name and logo “NATASHA” in class 3 (three) dated November 27, 2006, on behalf of Defendant I from the General Register of Marks; Declaring that the Plaintiff is the holder of the Mark in the form of a valid “NATASHA” name and logo; Ordered Defendant II (Directorate General of Intellectual Property Rights) to submit and obey the decision of the Commercial Court at the Semarang District Court by crossing out Mark Certificate No. IDM00099671 for the brand name and logo “NATASHA” for class 3 (three) dated November 27, 2006, on behalf of the Defendant from the General Register of Marks with all the legal consequences; Ordered Defendant to destroy the entire stock of goods included in class 3 with the brand name and logo “NATASHA” and stop activities from producing, market, distribute, promote, store, trade, offer to sell, supply or conduct transactions in other ways, printing, making packaging, labels, films (negative) and making designs for products that are included in class 3 (beauty and skincare products and others).

Against this decision, defendant filed a cassation to the Supreme Court, but in its decision rejected the cassation proposed by defendant. Regarding the reasons for the Cassation submitted by the applicant, the Supreme Court thinks: That the reasons in the Cassation cannot be justified because the *Judex Facts/Commercial Court* at the Semarang District Court is correct and has not wrongly applied the law because it is based on evidence marked with a P.IA in the form of a Certificate Brand Name and Logo NATASHA on behalf of Plaintiff No. 540373 dated June 13, 2003, and evidence marked P1-3 in the form of Certificate of Brand Name and Logo NATASHA on behalf of Defendant I No. IDM00099671 has similarities in essence. Whereas the two Marks are Brand Names (Naming) that show good similarities, regarding the form, placement method, writing method, wording, the letters and sounds in speech, except for color, even though the dominant and prominent element in the two marks is the word “NATASHA,” not the Logo or color.

Plaintiff’s NATASHA Mark is to protect goods or services in class [34] including beauty salons, skincare and beauty treatments including cosmetics, and others, while Defendant’s NATASHA Mark is to protect goods and services of all kinds cosmetic powder, fragrances. perfume, perfume, hair oil. Goods can be said to be similar to other goods even though they are in different classes because of the very close relationship between the two goods in the purpose of their use, moreover, the two NATASHA Marks each protect cosmetic items which are very closely related to beauty for humans. Whereas the existence of class, differences is only for the administration of payments at the Mark Office, and cannot be related to similar goods/services because an item cannot

necessarily be said to be similar even though it is in the same class. Thus, Defendant I, who registered the NATASHA Mark long after Plaintiff registered the NATASHA Mark for similar goods (although different classes), was inappropriate and dishonest because he intended to ride, imitate, and plagiarize the fame of the Plaintiff’s NATASHA Mark, which could mislead consumers because they think cosmetic and other products from Defendant I came from the Plaintiff’s products.

Based on these considerations, the Supreme Court rejected Defendant’s original cassation request. and cannot be associated with similar goods/services because an item cannot necessarily be similar even though it is in the same class. Thus, Defendant I, who registered the NATASHA Mark long after Plaintiff registered the NATASHA Mark for similar goods (although different classes), was inappropriate and dishonest because he intended to ride, imitate, and plagiarize the fame of the Plaintiff’s NATASHA Mark, which could mislead consumers because they think cosmetic and other products from Defendant I came from the Plaintiff’s products. Based on these considerations, the Supreme Court rejected Defendant’s original cassation request. and cannot be associated with similar goods/services because an item cannot necessarily be similar even though it is in the same class.

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The Judge of Cassation’s decision can be interpreted as determining whether or not an item or service is similar, not only in terms of physical appearance or use but also on a very close relationship/attachment between the two goods in the purpose of their use,

even though they are in different classes [54]. According to the law, legal protection for a mark is only granted to goods or services of the same kind. There are exceptions; in some cases, goods or services of a different type receive protection that will be further regulated in government regulations, but there has been no further regulation until now [35].

A Mark for similar goods or services will not be a problem if used by the same company or the owner of the same registered Mark. This is done to make it easier to build the fame or reputation of the product or service among consumers by using a brand already for other well-known goods or services. As all good brand managers understand, a product's or service's brand image can include more than just its name or logo [36]. Since firms are required to print a product's label in the country's official language, a firm may prefer to keep the same packaging and composition if it sells a given branded product in two countries that share an official language [37]. However, it will be a problem if it is used without permission by third parties, mainly if it can cause harm to the Mark owner.

The Trademark Law's good faith principle is used as a condition for trademark registration. The trademark registrar must act in good faith and be legally protected. There is a genuine resemblance or resemblance, even identical to the registered mark. Thus, goods or services that are not of the same type must also be protected in terms of another party using a registered mark without the right to do so based on bad ethics. The intention of the party that agrees in good faith is not to harm the promised partner or the public interest [38]. In this case, another party uses a registered Mark without intentionally imitating or enhancing the fame of the Mark to benefit himself at the expense of the registered Mark's owner, even if the registered Mark is used for goods or services of a different type. Such actions can, of course, result in unfair competition, as one of the goals of the brand protection regulation is to avoid unfair competition over the use of other parties' trademarks, particularly those that are already well-known [39]. This is intended to provide legal protection to Mark owners who have acted in good faith and worked hard to establish the reputation of a Mark used for traded goods or services [40].

4 Conclusion

The following conclusions can be drawn from the analysis results: first, to determine an item or service that is considered similar to goods or services that use a brand belonging to another party and is considered a violation, it can be based on the goods or services concerned showing similarities, or it can be based on a very close comparison to the goods or services that do not show similarities. Second, the use of other parties' marks for goods or services that are not of the same type can still be carried out through legal remedies—both civil and criminal based on bad ethics from other parties who use a registered Mark without intentionally imitating or boosting the fame of the Mark to benefit themselves by harming the owner of the registered Mark, even if it is used for goods or services that are not of the same type. This is intended to provide legal protection to trademark owners who have worked hard to establish the reputation of a trademark used for traded goods or services.

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