

## Conference Paper

# The Responsibility of the Brand Owner for Counterfeit Goods

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**Abstract.**

Brand counterfeiting is a multidimensional problem. Brand counterfeiting is a crime, a waiver of consumer rights, and an infringement of intellectual property rights. The trademark regulation provides for the exclusive rights of the trademark owner using the Mark and is entitled to prohibit others from using the trademark without a license. The brand owners have the right to sue other parties who use their unlicensed trademarks. The complaint in trademark law puts the trademark owner to determine whether trademark forgery will be prosecuted. This concept puts the brand owner at the center of law enforcement for brand infringement. Registered trademark owners cannot release responsibility for protecting the consumer. This paper intends to seek an argumentation of a concept of the obligations of the brand's owner for the circulation of fake barrels. The results of the analysis show that the concept of offense complaint still needs to eliminate the obligation for registered trademark owners to protect users of fake brands.

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## 1. INTRODUCTION

The United States is currently placing Indonesia on the Priority Watch List.[1] This is a consequence of violations of intellectual property rights that are so massive and detrimental to the order of life in the economic, legal, and socio-cultural fields. Christopher May[2], in his book "The Global Political Economy of Intellectual Property Rights," said that the IPR instrument had been used as a tool for advanced industrial countries as an instrument of global economic politics. Trade policies related to the protection of IPR are the ways for giant countries to protect their economic interests.

As one of the critical elements in trade activities, intellectual property rights are the main drivers of national economic development, which support increasing production, creating jobs, increasing exports and foreign exchange, equalizing income, and strengthening the competitiveness of domestic products for the national interest. Trade is an effort to fulfill the needs of human life through an exchange system. This

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interdependence and need for a relationship between producers and society creates trade transactions. The community's need for goods or services provides opportunities for producers to provide and produce goods or services. Counterfeit goods hurt the hope of fulfilling the need for quality goods.

Counterfeit goods nowadays can be found easily in every region in Indonesia. Counterfeit goods are traded in many places in various cities; almost every city has a location where counterfeit goods are found. Counterfeit goods that are often found in society are goods in the form of collar shirts, T-shirts, shoes, and socks. Counterfeit goods in society are given the term KW goods. KW goods are a euphemism for stating that these goods are counterfeit goods. Most community members also understand that to meet their needs for certain products, and they can buy KW goods, such as clothing, medicines, motor vehicle spare parts, cosmetics, and other products. Trade in counterfeiting goods can be found in both those that are sold traditionally and those that are sold online.

Product counterfeiting is a problem for many industries on a global scale. Based on reports by INTA and The International Chamber of Commerce, the global economic value from counterfeiting and piracy is estimated to reach US\$ 2.3 trillion in 2022. In Indonesia, the results of the MIAP survey show that economic losses caused by product counterfeiting continue to increase yearly. In 2005 economic losses reached IDR 4.41 trillion and increased in 2014 with losses of up to IDR 65.1 trillion. (<http://kemenperin.go.id/artikel/9703/Kerugian-Akibat-Peredaran-Barang-Palsu-Capai-Rp-65-T>).

The trade-in counterfeit goods is a multidimensional and complex problem to unravel. From a legal standpoint, trade in counterfeit goods is a mark violation; from a criminal law perspective, it is a crime and, of course, a disregard for consumer rights. Various factors are driving the circulation of counterfeit goods in Indonesia, one of which is the nature of the offense. Complaint offense places the brand owner's position as a determinant of whether a brand counterfeiting act will be prosecuted. Brand owners who know their products are falsified and circulating in the market do not always complain about counterfeiting and sue those who counterfeit. One of the things to consider is the profit and loss factor if you are going to complain about the perpetrators of counterfeiting. In business calculations, if the claim is profitable, then it will be prosecuted. However, preferably if the complaint does not provide economic benefits, then almost certainly no complaint will be made.

The success of the brand owner in building a positive image of the product is one of the factors why the brand is counterfeited. The existence of the sale and purchase of KW goods in various places in Indonesia that lasted for a long time can be indicated that

so far, there has been neglect of counterfeiting goods with well-known brands by the brand owners. Allowing the circulation of counterfeit goods or not taking legal steps by original brand owners means that users of KW goods or counterfeit goods are parties who are in a very vulnerable position and do not receive legal protection. Brand owners who are given the right to use the brand and have the right to prohibit other parties from using it without their permission indicate the original brand owner as an unfair subject. Original brand owners are given exclusive rights and protected by the state but do not contribute to the protection of citizens in general (consumers). Previous research has shown that the problem of counterfeit brands is limited to protecting brand owners. [3]

The legal issue that will be studied is how is the legal concept of imposing the obligation of registered mark owners to make complaints about counterfeit goods.

The urgency of this study is to find a concept that provides a basic obligation for registered trademark owners to protect their own privacy rights. This is based on the fact that so much trade in goods with counterfeit brands is ignored by brand owners. This neglect results in the absence of law enforcement processes and ultimately harms the interests of consumers but, at the same time, results in the appearance of very poor legal protection for brands.

## 2. METHODOLOGY/ MATERIALS

This writing resulted from normative legal research using primary legal materials and secondary legal materials. Primary legal materials as documents that have binding power, such as laws and regulations. Secondary legal materials are legal materials that do not have binding power, namely in the form of opinions that have been published.[4] An analysis of the problems was carried out qualitatively using a conceptual approach and a statutory approach.

## 3. RESULTS AND DISCUSSIONS

### 3.1. Indonesia's Attachment and the Basic Concept of Intellectual Property Rights.

The term intellectual property rights later changed to Intellectual Property Rights in Indonesia, is a direct translation of intellectual property rights. Besides that, it is also known as intangible property, creative property, and incorporeal property. These terms appeared when a convention was signed, namely the Convention on Establishing the

World Intellectual Property Organization (WIPO), on 14 July 1967 in Stockholm. This convention is also the basis for the establishment of the World Intellectual Property Organization (WIPO), which took effect in 1970.

At the Ministerial Meeting in Punta del Este in September 1986, the meeting that launched the Uruguay Round of trade talks, intellectual property was included as a negotiating issue. The United States has support from Europe, Canada, and Japan for intellectual property inclusion in the Round, but it is essentially a US initiative. He is the US, more specifically the US business community, who has made things work on intellectual property issues.

On 15 April 1994, the Uruguay Round was concluded in Marrakech with the signing of what became known as the Uruguay Round. More than 100 countries signed the Final Act. It contains a number of agreements, including the Agreement Establishing the World Trade Organization and the TRAVEL Agreement. The TRIPS Agreement was made binding on all members of the World Trade Organization (WTO). There is no way for a country wishing to become or remain a member of a multilateral trading regime to waive the TRIPS Agreement.[5]

Indonesia declares itself to be bound by the WTO by Law No. 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization. The consequence is that Indonesia must establish the rule of law and improve the existing law in the field of IPR and consequently enforce Indonesian law.

Intellectual property rights are essentially substantively defined as rights to property that are products of human thought patterns (=human intellectual abilities).[6] Intellectual Property Rights (IPR) are aimed at giving appreciation to creative subjects for their creativity. This appreciation is manifested in the form of rights for creative subjects to benefit economically from the creative work produced and recognition of the work produced in the form of moral rights. In contrast to copyright, which has a personal relationship with the subject of the creator, the existence of a brand is very different. Creation for a Brand does not “manifest any ‘personality’ of the creator of the brand.”[7]

Thus, intellectual property rights, including trademarks, are rights that arise from human creativity, which are then determined based on legal rules. The IPR law that applies in Indonesia has a solid philosophical, theoretical, and juridical foundation.

Based on legal rules stipulated by the state, creative subjects are declared to have rights, and these rights are an appreciation of the work that has been produced. In addition to setting rights to subjects, intellectual property law provisions also protect subjects not to have their rights disturbed by providing prohibitions and threats of

sanctions for other parties who, without rights, take advantage of other people's creative work.

Intellectual Property Rights are rights to an object that originates from the work of the brain, the result of the work of the ratio.[8] IPR underwent division with the formulation of Intellectual Property Rights into seven fields, namely: Copyright, Patents, Trademarks, Geographical Indications, Industrial Designs, Layout Designs of Integrated Circuits, & Trade Secrets.[9] In the statistical records of the Directorate General of Intellectual Property (DITJEN KI), Trademarks are the most frequently registered Intellectual Property for protection by the business community. Business people in Indonesia, starting from Small and Micro Medium Enterprises (MSMEs) to public companies (TBK), have started to realize how important it is to protect the rights of Marks.

Given the early indications that the nature of the brand as a communicative medium for products, that basically brand protection can be explained by using property theory and concentrating on the function of the economy-exchange trade of signs. This, of course, must recognize the fact that in law, trademarks are explicitly recognized as objects of property and also must accommodate the notion that was viewing trademarks as assets that deserve protection because of their value rather than their function. It is no less important that it must be recognized that trademarks, as a system of information communication from various directions, again do not deserve protection unless all parties involved actively participate.[10]

Marks are given an authentic meaning in the Trademark Law; the meaning of Marks in Article 1 number (1) of Law Number 20 of 2016 concerning Trademarks and Geographical Indications is as follows:

"A brand is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, or color arrangement, in 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 a person or legal entity in the activity of trading goods and/or services."

The essence of a brand is used by producers or brand owners to protect their products in the form of trade goods. The function of a brand is as follows:[11]

a. The differentiating function is to differentiate one company's products from another company's.

b. The function of reputation assurance is that apart from being a sign of the product's origin, it also directly connects the brand's reputation with the manufacturer, as well as guaranteeing the quality of the product.

c. The promotional function, namely the brand, is also used as a means of introducing new products and maintaining the reputation of the old traded products, as well as to dominate the market.

d. The function of stimulating investment and industrial growth is that brands can support industrial growth through both foreign and domestic investment in dealing with the free market mechanism period.

Trademark legal protection is given to registered trademark owners. Registration is the main thing for protection under trademark law. The registration system used is a constitutive system. A registered mark on DGIP is given protection to exclusively use the Mark it owns and has the right to prohibit other parties from using the Mark without rights. Trademark rights are exclusive rights granted by the state to registered Mark owners for a certain period of time by using the Mark themselves or by giving permission to other parties to use it.

Counterfeit goods are defined as the production of an item produced by a party that does not have permission from the legitimate brand owner. In society, it is often known as a counterfeit, replica, imitation, clone, artificial, counterfeit, duplicate, or similar term, which is very difficult to distinguish from the original item. (<https://support.google.com/adwordspolicy/answer/176017?hl=id>, ) Consumers who do not have experience and knowledge of genuine products may be mistaken in making choices between genuine products and counterfeit products.

Perpetrators of product imitation in the provisions of the trademark law are stated as committing an offense. Law Number 20 of 2016 concerning Trademarks and Geographical Indications provides identification of acts as trademark violations as stated in Articles 100, 101, and 102. Furthermore, Article 103 states that the criminal acts referred to in Articles 100 to 102 constitute a complaint offense.

### 3.2. Trade in Counterfeit Goods

Business products indicated as counterfeit goods are of exceptionally high value, which depends on consumer involvement. Often seen as a victimless crime, it is a complex trade to control because as long as consumers want a specific brand, the greater the market for counterfeit goods. There is an inherent and fundamental contradiction in the consumer's view of counterfeit goods, willing to buy and use counterfeit goods but condemning counterfeiting on the part of those who do.[12]

Counterfeit goods are packaged and labeled to resemble the original brand name and the original product. Therefore, counterfeit products often create the illusion of

consumers thinking that they are buying genuine goods. Counterfeiting is a real threat and looms over all manufacturers. With this background information, it is necessary to observe how the Theory of Reasoned Action (TRA) can help identify the factors that influence consumer behavioral intentions toward purchasing counterfeit products. Six primary factors influencing counterfeit purchases have been identified, and TRA has been applied to investigate the impact of these factors on consumer behavior patterns. These factors are (1) social motivation, (2) personal satisfaction, (3) perception, (4) values, (5) brand loyalty, and (6) ethics. 'Influence from society' and 'value for money' have been identified as the top two reasons motivating consumers to buy counterfeit products based on a survey. [13]

### 3.3. Common Offenses Vs. Complaint Offenses.

Historically, the nature of offenses in the trademark law in Indonesia can be seen that Law No. 25 of 2001 concerning Trademarks applies a system of ordinary offenses, while Law NO. 20 of 2016 concerning Marks and Geographical Indications implements a complaint offense system. The two delict systems each have their strengths and weaknesses. Various articles have stated the weakness of complaint offenses that depend on the need for a civil settlement first. In previous practices, it has been proven that even ordinary offenses have led to excesses in their implementation. There are criminal cases on Mark that are not actually criminal cases. Especially when it is associated with the doctrine in the criminal law system that illegal settlement is the "ultimum remedium".

The complaint offense is in line with essential principles in the legal system. Namely, because trademark rights are civil rights, the settlement of disputes must also be carried out with a civil settlement system. Settlement through criminal law can be carried out by considering that civilly it does not get a good settlement. This is in accordance with the principle in criminal law itself, namely the "ultimum remedium." It is with this principle that Law No. 20 of 2016 changed the ordinary crime system to a complaint crime system. However, the implementation of the law is often not in line with the basic ideas that underlie the norms.

The nature of the brand criminal offense is a complaint offense in Law Number 20 of 2016 concerning Marks and Geographical Indications stated in Article 103. The complaint offense contained in the Trademark law is stated as a relative complaint offense.[14] Relative complaint offenses are crimes committed, which are not actually

complaint crimes, but specific to certain matters, which are actually required as complaint offenses. This means that the protection provided by the Trademark Law can only be processed with a complaint from the brand owner. The consequence is that if the brand owner or license holder makes no complaints, then the crime of trademark infringement cannot be prosecuted by law enforcement officials. In other words, without the active participation of the brand owner or license holder in making complaints to legal officials, legal officials can only take legal action because criminal complaints on marks are absolute.

### 3.4. Brand Owners and Consumer Rights

The brand is a product differentiator and ultimately guides consumers to identify the product to be purchased to meet their life needs. Conceptually, goods in circulation must be ensured to meet the needs of consumers. The consumer protection law states that consumers have rights, including: Based on article 4 of the Consumer Protection Act, The rights of the consumers are:

- a. to obtain comfort, security, and safety in using or consuming the goods and/or service;
- b. to choose the goods and/or services and obtain Point B the said goods and/or services in accordance with the promised conversion value and conditions and warranty;
- c. to obtain correct, clear and honest information on the condition and warranty of the goods and/or services;
- d. to be heard in expressing opinions and complaints about the goods and/or services they use or consume;
- e. to obtain proper advocacy, protection, and settlement in the consumer's protection dispute;
- f. to obtain consumer training and education;
- g. to receive proper and honest, and non-discriminatory treatment or service,
- h. to obtain compensation, redress, and/or substitution if the goods and/or services received are not in accord with the Agreement or not received as requested,
- i. to obtain rights as regulated in the other provisions of the law.

Article 7 provides a formulation of the obligations of producers, namely:

The obligations of the entrepreneurs:

- a. to act in good faith in conducting the business;



b. to provide correct, clear and honest information with regard to the condition and warranty of the goods and/or services and provide explanations on the use, repair, and maintenance;

c. to treat and serve the consumers properly and honestly and non-discriminatively;

d. to guarantee the goods and/or services produced and/or traded based on the prevailing quality standard provisions of the goods and/or services;

e. to provide the opportunity to the consumers to test and or/try on certain goods and/or services and provide warranty and/or guarantee on the produced and/or traded goods;

f. to provide compensation, redress, and/or substitution for the damages caused by the use, consumption, and application of the goods and/or services;

g. to provide compensation, redress, and/or substitution if the goods and/or services received or used do not comply with the Agreement

Consumer rights in the consumer protection law deal with producers. This provision regulates how the Producer, as the party that produces an item, must be responsible for the product that has been issued. Legal logic can be accepted and understood, and of course, the relationship between producers and consumers in a transactional relationship can be subject to lawsuits. Consumer protection laws provide accountability for the products it manufactures. The consumer protection law does not provide room for counterfeits of its products. In the consumer protection law, one of the principles of responsibility in law can include:

**Principle of Liability based on Fault** This principle is generally applicable in civil law, significantly in Articles 1365, 1366, and 1367 of Civil Law. This principle of responsibility is generally acceptable because it is fair for the wrongdoer to compensate for the victim's loss. In other words, it is unfair if an innocent person has to compensate for the losses suffered by others, in the legal doctrine known as the principle of vicarious liability and corporate liability. Vicarious liability implies the employer is responsible for losses to other parties incurred by people or employees under their supervision. Corporate liability has the same meaning as vicarious liability. According to this doctrine, the institution that oversees a group of workers has a responsibility towards the workforce it employs.

On the contrary, it can be explained that business actors cannot be held responsible for losses suffered by consumers who consume counterfeit goods, goods that are not produced by producers. This situation will certainly place the consumer as a victim of

the Producer's actions, in this case, the brand owner who does not make a complaint to prosecute the perpetrators of brand counterfeiting.

### 3.5. Relations between Rights and Obligations

The study of law is very common in connecting rights and obligations. Rights and obligations in the concept of contract law as something in pairs. This then causes that there is a close correlation between rights and obligations.

Kelsen provides an explanation by saying that the configuration of rights and obligations is related to the relationship between law and morals. In the book "Pure Theory of Law" (Chapter IV Section 29), Kelsen states that morals always prioritize obligations, whereas law always prioritizes rights. In German and Dutch, the words "rights" and "law" use the same terminology, namely *Recht*. Law is *Recht* in objective sense (law in an objective sense), while rights are *Recht* in subjective sense (law in a subjective sense).[15]

Intellectual property rights as rights granted to subjects on the basis of statutory rules. Intellectual property rights as personal rights and are monopolistic. Registered trademark owners are granted rights, and their rights are adequately protected under the rule of law. This legal protection is clearly regulated in the law. In practice, easily find legal protection for owners of registered marks.

Trademark law regulations are different when compared to patent laws. In law NO. 13 of 2016 concerning Patents. In patent law, there are obligations imposed on the patent owner to be fulfilled after the patent is registered. The obligations of the patent owner are regulated in articles 20 and 21. Placing the obligations on the right owner as fulfilling the principle of balance is a fair thing. The state provides rights but, at the same time, imposes obligations that provide benefits to the state and society. Observing Law No. 20 of 2016 concerning Marks and Geographical Indications, one needs help finding an article that regulates the obligations of registered trademark owners as regulated in the patent law.

Intellectual property rights as rights granted by the state are very fair if the state imposes obligations on subjects who have been granted rights. This will certainly provide proportional benefits to the state and society. The principle of justice is upheld by the state both to brand holders and to society. Exclusive and personal rights certainly do not eliminate moral obligations as the principles of justice that have been stated above.

There is a development of the concept of responsibility for losses suffered by users of products whose brands are counterfeit brands. This responsibility is well known in judicial practice in common law countries, namely the concept of secondary liability. (Mark McKenna, 2011) This concept is more towards trademark infringement, referring to situations where a party other than the direct infringer, such as a retailer, distributor, or online platform, could be held liable for trademark infringement. This is intended to provide a basis for arguments regarding legal protection for consumers that can be sued against dealers or distributors, or other parties. Secondary liability or secondary liability in trademark infringement refers to situations where a party other than the direct infringer, such as a retailer, distributor, or online platform, may be liable for trademark infringement.

There are two secondary types of liability in trademark infringement: contribution and facilitation. Contributory liability occurs when another party assists or encourages trademark infringement by another party while facilitating liability occurs when another party provides the means or facilities to commit trademark infringement. ([16]

In some cases, a retailer, distributor, or online platform may be held liable for trademark infringement if they know or should have known that the goods they are selling or facilitating are infringing the trademarks of others and they have not taken action to prevent this. In this case, they may be subject to lawsuits by the owner of the injured trademark.[7]

## 4. CONCLUSION AND RECOMMENDATION

Registered trademark owners have exclusive rights granted by the state to use the Mark and give permission to other people in an effort to obtain financial benefits from the rights granted by the state. The trademark law does not place an obligation on brand holders to protect their personal rights. However, this does not mean that brand owners can waive the obligation to supervise their rights if they are misused by other parties. This means that the brand owner is obliged to supervise the brand he owns. In the event that there is a violation of trademark rights, for example, the distribution of counterfeit goods, it is obligatory to take appropriate legal action to safeguard these rights. With this step, consumers can avoid losses that cannot possibly be claimed against brand owners on the basis of legal protection for consumers while at the same time maintaining the country's reputation in providing protection to brand rights owners.

Taking this into account, it can be recommended that there is a need to change legal norms by including an article that explicitly obliges brand owners to safeguard their own

rights in a manner that is in accordance with existing procedures, namely by submitting a complaint to authorized law enforcement officers.

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