

Legal Aspects of Proportionality in Collective Brand Ownership Principles

Christian Andersen^a, **Evlyne Supratman**^b, **Daniel Hendrawan**^{c*}, ^{a,b,c}
Faculty of Law, Maranatha Christian University Email:
andersen.xtian@gmail.com^a, noveliadinda@gmail.com^b,
Daniel.hendrawan@rocketmail.com^{c*}

Indonesia has the fourth largest population in the world; with such a large population, Indonesia is one of the countries with the largest market share and this must be accompanied by adequate human resources. Indonesia is also enriched with a variety of indigenous cultures originating from 1,131 tribes (according to the Central Statistics Agency data based on the 2010 census) which includes various regional languages, traditional clothing, traditional songs, traditional cuisine, traditional medicine, handicrafts, traditional architecture and much more. Micro Small Medium Enterprise (MSME) in the creative industry sector has not yet been adequately protected by legal regulation related to Intellectual Property Rights. In reference to the Law Number 20 of 2016 concerning Trademarks and Geographical Indications, in the era of global trade, the role of Brands and Geographical Indications is very important, particularly in maintaining fair business competition and protection of Micro, Small and Medium Enterprises. Brands are generally registered for ownership only by one individual or legal entity. However, because Indonesia is very much dominated by MSMEs which on the one hand have limited capital but on the other also need their rights protected, then joint ownership of brands becomes necessary. This is possible in the form of collective brand ownership.

Key words: *Creative industry, Brand, and IP Law.*



Introduction

The creative industry in Indonesia has grown rapidly and has become one of the most important aspects in the economic sector. This can be seen from the Indonesia creative economy statistics agency which describes that from 2010 until 2015, the creative economy gross domestic product increased at an average 10.14 percent every year, from 525.96 trillion rupiah to 852.24 trillion rupiah. Micro, Small and Medium enterprises (MSME) make the largest contribution to gross domestic product (GDP) as a whole. The ministry of cooperatives and small and medium enterprises sector, states that MSME contributed to the GDP at 60.34 % in 2016. That means, MSME has become a major movement in the Indonesian economy.

The most successful micro and small entrepreneur business in Indonesia is the creative industry sector. The creative industry grew 5.76 percent in the year 2015, an above average national economic growth of 5.74 percent with added value of as much as 641,800 trillion rupiah of national income or seven per cent of the gross domestic product (Mutmainah, 2015). The percentage shows that MSME in the creative industry sector continues to grow and develop rapidly. The existence of a very close relationship between the protection of Intellectual Property and an increase in the domestic economic growth of a country is undeniable (Adora, 2017).

Basically, the small business industry is facing harder competition, so it must be able to produce products or services that have high competitiveness in improving business. For this reason, appropriate development is needed for small and medium businesses, through performance improvements that can enhance competitiveness and marketing in accordance with the characteristics of MSME and encompassing all of its limitations. Trademarks are generally registered to have the rights of only one individual or legal entity. However, because in Indonesia commerce is dominated by MSME, on one side with limited capital but on the other hand a need for protected of rights, joint ownership of a brand becomes necessary and this is possible in the form of collective brand ownership.

The need for legal protection for brand, grows rapidly when a brand is fringed or replicated by another business. In many such circumstances this adds to the importance of branding to distinguish the origin of goods and their quality. Trademark protection will be of ultimate importance and be protected by law if the trademark already registered. Trademark have to pass the applicable legal provisions and have passed a substantive examination. Registration of a trademark is mandatory for legal protection because it uses a constitutive system and this is in contrast to copyright registration, which is not a mandatory register because it uses a declarative system. In this regard, trademark registration is also closely related to Micro, Small and Medium Enterprise (MSME). World Intellectual Property Rights (WIPO) believe that MSME have a lot of potential for innovation and product creativity (AL Khuja & Mohamed, 2016).

Literature Review

The definition of brand in Article 1 number (1) of Law Number 20 Year 2016 concerning Marks and Geographical Indications is as follows: "A mark is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, 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 the trading of goods and / or services. " The definition of the brand according to the formulation of the Paris Convention is as a sign whose role is to distinguish the goods of one company from another company's goods. A brand owner generally has exclusive rights to use the brand or variations of the same goods or goods of a kind (Gautama, 1977).

Opinions of some scholars regarding brand definition are as follows:

- a. H.M.N. Purwo Sutjipto, provided a formula that: "A mark is a sign by which a certain object is made personal so that it can be distinguished from other similar objects (Purwo Sutjipto, 1984).
- b. Iur Soeryatin, formulated his formula by reviewing the brand from aspects of its function: "A brand is used to distinguish the goods concerned from other similar goods therefore goods in question with given the mark had: origin, name, guarantee of quality".

Based on the provisions of Article 46 paragraph (2) of Law Number 20 Year 2016 Regarding Trademarks and Geographical Indications the request for registration of a collective trademark should submit a copy of the regulation on the use of said trademark as a collective mark, signed by the owner of the trademark concerned. Rules on the use of the trademark are made by the owners of the collective mark based on an agreement and it is appropriate that an agreement which becomes an engagement be made based on the principle of proportionality to fulfil the sense of justice between the parties bound to it. The understanding of the principle of proportionality can be traced from the origin of the word "proportion" which means comparison and balance while "proportional" means according to proportion and balanced. The proportional principle does not concern the balance or equality of results but rather emphasizes the proportion of the distribution of rights and obligations between the parties.

Research Questions

Based on the description above there are problems where proportional distribution becomes the potential for the risk of developing conflict between investors and fellow collective brand owners so through this research, several legal issues are examined, including:



1. How do the parties accommodate the proportional principle in the collective brand ownership clause in Indonesia?
2. How is legal protection for third parties such as investors related to the existence of proportional principles in collective brand ownership?

Theoretical Framework

Article 1 of Law Number 20 Year 2008 concerning Micro, Small and Medium Enterprises, states that what is meant by:

- a. Micro Business is a productive business owned by individuals and/or entities individual businesses that meet the micro business criteria as regulated in this law.
- b. Small Business is a productive economy business that stands alone, which is conducted by individuals or business entities that are not subsidiaries or non-branch companies that are owned, controlled, or are part of both direct and indirect businesses of medium or large businesses that meet the criteria of small businesses as referred to in this Law.
- c. Medium Business is a productive economic business that stands alone, which is carried out by individuals or business entities that are not subsidiaries or branch companies that are owned, controlled, or become part either directly or indirectly of small businesses or large businesses with total net assets or annual sales proceeds as regulated by this law (Law of Republic of Indonesia, 2008).

The collective brand can be traced historically from Vetro Artistico and the making of its glass from the Scresissima tradition of the 10th century in Venezia, before the ornate glass crafters were moved to the island of Murano. However the collective brand as a certified trademark starts from the collective brand Belgian Abbey Beer which began with brewing by Trappist monks in Westmalle in 1836, where the beer was made exclusively for priests (Trademark Law in Indonesia) (Jened, 2015). Collective brands are regulated in Article 7 by the Paris Convention for the Protection of Industrial Property Rights (1883/1967). Under Article 7 of the Paris Convention, member countries must accept the registration of collective marks owned by associations whose existence does not conflict with the law of origin even if the association does not have a commercial or industrial establishment in the country. Each country assesses certain conditions whereby the collective mark is protected or registration denied if the collective mark is contrary to public interest. As such, collective brand protection must not be denied on the grounds that the association is not established in the country where the protection is requested.

In Indonesia, collective marks are regulated in Articles 46 to 51 Law Number 20 Year 2016 concerning Trademarks and Geographical Indications. The definition of a collective mark according to the Trademark Law Article 1 Paragraph (4) is, a mark used on goods and/or

services with the same characteristics regarding the nature, general characteristics and quality of the goods or services as well as supervision that will be traded by several people or legal entities together to differentiate from other similar goods and / or services. Sudargo Gautama believes that the signs introduced under the term collective brand do not serve to distinguish the goods or services of a company from other companies. However, a collective brand is used to distinguish geographical origins or different characteristics of goods or services from different companies that use the same brand collectively under the supervision of trademark holder. In other words, the objects and services are given certain guarantees about their quality.

By the form, descriptions and/or sound a brand indicates the exact shape and quality of the goods or services that will be traded by the manufacturer. In addition to the above definitions, several other legal scholars argue the following about the understanding of a brand:

- a. H. M. N. Poerwo Sutjipto "brand is a sign by which a certain object is personalized, so that it can be distinguished from other similar objects.
- b. R. Sukardono, indicates that a brand is a sign (Javanese: a feature) with which a product is guaranteed, where it is also necessary to personalize the origin of the goods or guarantee the quality of the goods in comparison with similar goods which are made or traded by people or other corporate bodies.
- c. Tirtaamidjaya, citing Vollmar's opinion, proposed the formula that a factory or trade mark is a sign affixed on the goods or on the packaging in order to differentiate the goods from similar goods.

Further to trademarks and service marks, there are also so-called collective marks. A collective brand is not a type of brand but rather a choice in using a brand which can be accomplished individually or collectively. Collective marks are defined as brands used on goods and/or services with the same characteristics and are traded together by several people or legal entities to differentiate from other similar goods and/or services. Collective brands are usually owned by members of an association or the association. Generally, the trademark rights system adopted globally is of two types:

- a. Constitutive system, which is a system where the rights to a brand are created because of the registration of the person concerned. The advantage of this constitutive system is that it guarantees legal certainty because with the registration of a person's mark at the Trademark Office the registrant is considered as the legal trademark owner.
- b. Declarative system, which is a system where the rights to a mark arise because of the first use by the owner of the mark even though the mark is not registered by the mark owner. This system exhibits weakness because it is not known when a brand is used by someone. If there is a dispute between two parties where one side of party claims that they are using the mark



the first time and the other party also claims the same, it is difficult to prove who is correct (Sjahputra & Herjandono, 1997).

Article 1 of Law Number 20 Year 2008 concerning Micro, Small and Medium Enterprises, states what is meant by:

- a. Micro Business is a productive business owned by individuals and/or entities individual businesses that meet the micro business criteria as regulated in this law.
- b. Small Business is a productive economy business that stands alone, which is conducted by individuals or business entities that are not subsidiaries or non-branch companies that are owned or controlled, or are part of both direct and indirect businesses of medium or large businesses that meet the criteria of small businesses as referred to in this Law.
- c. Medium Business is a productive economic business that stands alone, which is carried out by individuals or business entities that are not subsidiaries or branch companies that are owned, controlled, or become part either directly or indirectly of small or large businesses with total net assets or annual sales proceeds as regulated by this law (Law of Republic of Indonesia, 2008).

In Indonesia, collective marks are regulated in Articles 46 to 51 Law Number 20 Year 2016 concerning Trademarks and Geographical Indications. The definition of a collective mark according to the Trademark Law Article 1 Paragraph (4), is, a mark used on goods and/or services with the same characteristics regarding the nature, general characteristics and quality of the goods or services as well as supervision that will be traded by several people or legal entities together to differentiate from other similar goods and / or services. Sudargo Gautama believes that the signs introduced under the term collective brand do not serve to distinguish the goods or services of a company from other companies. However, a collective brand is used to distinguish geographical origins or characteristics of goods or services from different companies who use the same brand that is collectively supervised. In other words, the objects and services are given certain guarantees about their quality (Gautama, 1977).

Analysis

The proportional principle does not mean mathematically balanced or equal of quantities or quantities, but rather emphasizes the proportion of the distribution of rights and obligations between the parties. The proportionality of the distribution of rights and obligations must be realized in the whole contractual relationship process, both in the pre-contractual phase, contract formation, and contract implementation. Likewise, it needs to be considered from the business aspects that underlie the relations of the parties, so that it can be said whether the relationship can be equitably accepted as a proportional contractual relationship pattern. The proportionality of the distribution of rights and obligations for collective brand owners uses a



benchmark of the magnitude of the sacrifices and obligations that are carried out to suit the number of rights they deserve.

The initiator of the first idea in the creation of a collective brand has already made a big effort through stages that are not equal to other collective brand owners such as a long process of research and development that requires speculative initial capital and opens up a vast marketing network (networking) which requires a lot of time, thought and costs. Therefore, if the initiator of the first idea gets more rights than other collective brand owners, this is not a form of injustice but a balance of distribution of rights and obligations based on the principle of proportionality, since based on the provisions of the proportional principle, it is appropriate to make sacrifices or carry out obligations and consequently should be awarded more rights or results. Thus, the distribution of rights in collective brand ownership does not have to be the same amount in every collective brand owner to be said to fulfil a sense of justice, but the distribution of rights is only said to be fair if it meets the principle of proportionality, namely the distribution of the number of rights in accordance with the sacrifices and obligations made by each collective brand owner.

Collective marks are exceptions to the principles placed on brands that are considered as origin symbols indicating individual sources of goods and / or services. However collective brands can be used by a variety of traders rather than individual uses, provided that the diverse traders are members of the association. Based on the intellectual property rights of many countries, the brand owner is an association or a place of business including a community institution or a cooperative.

Discussion

As explained above, the registration of a collective mark must be accompanied by the delivery of a copy of the regulation on the use of the collective mark signed by the owner of the mark concerned. A mandated element is the regulation regarding supervision of the use of the mark and sanctions for the use of the collective mark that is contrary to the agreed rules. Therefore, in the regulation of the use of a collective mark, it is obliged to regulate the rights and obligations of the owners of the collective mark in terms of supervision and use of the collective mark accompanied by certain sanctions in the event of a violation of the regulation. This arrangement regarding the rights and obligations of the collective brand owners needs to be based on the principle of proportionality.

This collective mark can only be used by members registered by an organization that has the collective mark. This is regulated in Article 46 Paragraph (1) of the Trademark Law, namely that an application for registration of a mark as a collective mark can only be accepted if the application clearly states that the mark will be used as a collective mark.

Furthermore, the Regulations on the Use of Collective Marks (PPMK) contain at least:

- a. the nature, general characteristics, or quality of the goods or services to be produced and traded;
- b. supervision of the use of collective brands; and
- c. sanctions for violations of the provisions on the use of collective marks (Law of Republic of Indonesia, 2016).

Conclusion

1. Brands have the capacity to display their essential differentiation functions in the eyes of the relevant consumer average.
2. A brand will need to maintain free descriptive indications for legal use for other entrepreneurs.
3. This meets the need to prevent the granting of monopoly in connection with signs or indications that are commonly used in trade.

Collective brand owners are responsible for ensuring compliance with standards that are normally in accordance with the Regulations on the Use of Collective Trademarks (PPMK). The function of the collective brand is to inform the public about the particular special picture of the product for which the collective brand is used.

Knowing the importance of protecting Intellectual Property Rights for every product of human thought, every product should be registered in accordance with the provisions of the applicable laws and regulations. The limited capital available should not be a barrier to the registration because the government has provided solutions through collective ownership of such rights through the Collective Mark. Implementation of collective brand implementation should be based on regulations on the use of collective brands that meet the principle of proportionality in order to deliver a sense of justice for all collective brand owners.



REFERENCES

- Adora, N. M. (2017). Entrepreneurial activities and teaching performance of faculty members of the university of Eastern Philippines. *International Journal of Business and Administrative Studies*, 3(4), 142-151.
- AL Khuja, M. S. A., & Mohamed, Z. A. B. (2016). Investigating the adoption of E-Business Technology by Small and Medium Enterprises. *Journal of Administrative and Business Studies*, 2(2), 71-83.
- Anggadwita, G., & Dhewanto, W. (2016). Women's entrepreneurial intentions in micro and small enterprises (MSEs) in Indonesia: The influence of environmental factors on perceived behavioral control. *Journal of Administrative and Business Studies*, 1(1), 1-7.
- Boonvut, Saratchanut. 2017. The Quality Financial Statements of Small and Medium Enterprises Business (SME's) in View of the Tax Auditor. *International Journal of Business and Economic Affairs*, 2(6), 335-340
- Gautama, S. (1977). *Hukum Merek Indonesia*, Bandung: Penerbit Alumni
- Jened, R. (2015). *Hukum Merek (Trademark Law) Dalam Era Global dan Integrasi Ekonomi*. Jakarta: Kencana Prenadamedia Group.
- Law of Republic of Indonesia. (2008). *Article 1 of Law Number 20 Year 2008 Regarding Micro, Small and Medium Enterprises Intermediate*. Available from: <http://eng.kppu.go.id/newkppu/wp-content/uploads/LAW-OF-THE-REPUBLIC-OF-INDONESIA-20-OF-2008.pdf>
- Law of Republic of Indonesia. (2016). Article 46 Paragraph (3) of Law Number 20 Year 2016 concerning Marks and Indications Geographical. Available from: <http://ditjenpp.kemenkumham.go.id/arsip/terjemahan/38.pdf>
- Mutmainah. (2015) Effectiveness of Empowerment Micro Enterprise. *Jurnal Ekonomi Pembangunan*, 16(1), Juni 2015, 85-101.
- Mutmainah, D. A. (2016). *Kontribusi UMKM Terhadap PDB Tembus Lebih Dari 60 Persen* , *CNN Indonesia*. Available from: <https://www.cnnindonesia.com/ekonomi/20161121122525-92-174080/kontribusi-umkm-terhadap-pdb-tembus-lebih-dari-60-persen>
- Niesing, C. M., Merwe, S. W. D., & Potgieter, D. M. (2016). The impact of income-generating projects on stimulating the development of entrepreneurial activities in communities:



The holding hands case. *International Journal of Business and Economic Affairs*, 1(1), 36-46.

OK, H. (2003). *Aspek hukum hak kekayaan intelektual:(intellectual property rights)*. Penerbit Pt Raja Grafindo Persada.

Omar, Bendjima., and Khamsa, LARGUO. 2017. The impact of cultural values on the performance of small and medium-enterprises (Case study of managers in Bechar, Algeria). *International Journal of Business and Administrative Studies*, 3(6), 217-228.

Purwo Sutjipto, H.M.N. (1984). *Pengertian Pokok-Pokok Hukum Dagang Indonesia*, Jakarta: Djambatan.

Sardjono, A., Prastyo, B. A., & Larasati, D. G. (2013). Pelaksanaan Perlindungan Hukum Merek Untuk Pengusaha UKM Batik Di Pekalongan, Solo, dan Yogyakarta. *Jurnal Hukum & Pembangunan*, 43(4), 470-491.

Sjahputra, I., & Herjandono, H. (1997). *Hukum Merek Baru Indonesia Seluk Beluk Tanya Jawab Merek Teori Dan Praktik*.

Utomo, T.S. (2009). *Hak Kekayaan Intelektual (HKI) di Era Global*. Yogyakarta : Pokok-pokok Hukum Bisnis. Jakarta : Salemba Empat