

Famous Brand Criteria and Protection of the Law Based on the Decision of the Court of RI Number 32 PK/Pdt.Sus-HKI/2018

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Abstract. The brand does not only function as a differentiator, but also functions as a company asset, especially a well-known brand. The problem of this research is determining the criteria for famous brands according to the Trademark Law and international regulations. Legal protection given to Skyworth brand owners and how the Judges consider the basis in deciding this case. Skyworth Company registered for class 16 in 2004. However, in 2016, Skyworth registered for goods/services class 7, 9 and 11 rejected by the Directorate General of IPR because Linawaty Hardjono had registered the mark goods/services of the same class without Skyworth Company's permission in 2006. The method used is a normative juridical method with qualitative analysis methods. From the results of the Skyworth Trademark research, it is included in the criteria of famous brands according to the Trademark Law and international regulations (Paris Convention, TRIPs, WIPO). Legal protection used is preventive and repressive legal protection. Basic Judges' consideration is the existence of a judge's mistake when deciding a case and when the judge rejects the Plaintiff's claim. The suggestion given is immediately made a register of famous brands according to the criteria in the law and Permenkumham, The Directorate General of Intellectual Property Rights must be more assertive in acting against the perpetrators of brand violations and the criminal sanctions imposed must be in accordance with the law.

Keywords: Legal Protection, Right to Trademark, Famous Trademark

1 Introduction

Protection of Intellectual Property Rights begins with an understanding of the need for a special form of respect for one's intellectual work and the rights that arise from the work itself. Intellectual Property Rights are only available when the intellectual abilities of human beings have formed something that can be seen, heard, read, and used practically. David I. Bainbridge said that Intellectual property is the collective name given to the legal right which protects the product of the human intellect.[1]

Intellectual Property Rights are categorized into 2 (two) groups, namely Copyright (Copy Rights) and Industrial Property Rights (Industrial Property Rights). Copyright (Copy Rights) is divided into Copyright (Copy Rights) and Rights relating to Copyright (Neighboring Rights). Furthermore, Industrial Property Rights are further classified into Patents, Trade Marks, Trade Secrets, Industrial Designs and Integrated Circuit Layout Designs.[2]

Brand rights as one part of Intellectual Property Rights is the most important thing to run a business smoothly and fairly business competition, because with the existence of a brand as a product identification, consumers can know and differentiate the quality of products or services that will use it. Without a brand, consumers will find it difficult to determine which quality products fit their needs. Therefore a brand can be a commercially valuable asset, even a brand is often more valuable than the real assets of a company.[3]

Understanding Trademark in Law No. 20 of 2016 in more detail voiced understanding of the brand, described that the brand is a sign that is displayed graphically in the form of images, logos, names, words, letters, numbers, 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/services produced by persons or legal entities in the trading of goods and/or services. Based on the above provisions, it is clear that the main function of a brand is to distinguish goods or services produced by other similar companies. Thus, the brand is the identification of the origin of the goods or services concerned with the manufacturer.[4]

Under the Trademark Law, a protected mark is a registered mark that gives rise to trademark rights. While the right to the mark is an exclusive right granted by the state to the trademark owner who is registered in the General Register of Marks for a certain period of time using the mark himself or giving permission to other parties to use it. Thus, the right to trademark is a right granted by the state to the owner of a registered mark.[5]

Internationally, well-known brand criteria are also found in the Paris Convention and Trade Related Aspects of Intellectual Property Rights (TRIPS). According to Article 16 paragraph (2) of the TRIPs Agreement, there is a critique of the fame nature of a trademark, among others, by taking into account the knowledge factor of a particular brand in the community, including the knowledge of participating countries about the condition of the mark concerned, obtained from the results of the promotion of the mark. Meanwhile, according to the Paris Convention the criteria for famous brands are not regulated by default. The criteria for declaring a brand as a well-known mark is a matter determined by each country. The notion of a well-known mark exists only in relation to knowledge or brand recognition among certain people in the business field concerned, including knowledge or recognition obtained as a result promotion of a brand.

The expansion of the scope of legal protection for well-known marks in the TRIPs Agreement is contained in Article 16 Paragraphs (2) and (3) of the Indonesian TRIP Agreement which has ratified the Agreement on Establishing the World Trade Organization as well as being bound to all the provisions in the TRIPs agreement. Thus, relating to expanding legal protection for well-known brands, Indonesia must carry out its international obligations to protect famous brands at least as per the legal protection standards given in Article 16 Paragraphs (2) and (3) of the TRIPs Agreement.[6]

One example of a famous trademark dispute case raised by the author is a trademark dispute case between Skyworth Group LTD and Linawaty Hardjono as the owner of the brand on the same name and logo as the company Skyworth Group LTD. That the Plaintiff in this matter is the Skyworth Group LTD is a well-known company from China which began in 1988 based on the evidence of certificates issued by the Government of China and has long been known in various countries in the world, registered for types of goods class 07, 09, 11.

The Plaintiff sued this case in the Central Jakarta Commercial Court because Linawaty Hardjono had made a bad faith by imitating the plaintiff's Skyworth logo and had similarity in principle and in whole for similar or non-similar services to the plaintiff's services. In addition, due to the actions of the defendant, the plaintiff cannot register its production goods in classes 7.9 and 11 to the Directorate General of Intellectual Property Rights.

Based on the *Judex Facti* verdict of the Commercial Court at the Central Jakarta Commercial Court, Skyworth Group LTD undertook a legal review to the Supreme Court of the Republic of Indonesia in register Number: 32 PK/Pdt.Sus-HKI/2018,[7] then by the Supreme Court of the Republic of Indonesia the verdict was handed down with amar granted the Plaintiff's claim for the whole. The Defendant was sentenced by stopping the promotion, distribution and or marketing and also withdrawing from the market the products using the Plaintiff's SKYWORTH brand and logo in the Territory of Indonesia or outside the Territory of the Republic of Indonesia and paying the court fees at all court levels and at the review hearing, IDR 10,000,000.00 (ten million rupiah).

From the above background, the problem can be formulated as follows:

1. Are the criteria of famous brands belonging to Skyworth Group LTD in accordance with Law Number 20 Of 2016 concerning Trademarks and Geographical Indications and international regulations?
2. How is the legal protection given to the well-known mark in this case, Skyworth Group LTD, for bad faith from Linawaty Hardjono?
3. What is the basis for the consideration of the Supreme Court Judges in deciding Case Number 32: PK/Pdt.Sus-HKI/2018?

2 Method

The method used in this research is the normative juridical approach. The specifications used are descriptive analysis. Data analysis method used in this study is a qualitative analysis method, namely research that uses descriptive analysis data, so the data that has been obtained will be arranged systematically, logically and juridically.

3 Results

3.1 Position Case

Skyworth Group LTD (Plaintiff) is a well-known company from China which was established since 1988 based on evidence of certificates issued by the Government of China for types of electronic goods contained in classes 07.09 and 11.

On December 13, 2004, the Skyworth Group LTD has submitted an application for registration of the Skyworth trademark and logo for the class of goods/services number 16 to the Directorate General of Intellectual Property Rights and has issued a brand certificate to the Skyworth Group LTD. Without the plaintiff's approval, on December 22, 2006, Linawaty Hardjono registered Skyworth's trademark and logo with the Ministry of Justice and Human Rights cq DG IPR.

On September 3, 2014, Skyworth Group LTD has registered trademarks for the type of goods classification number 7.9 and 11 to the Directorate General of Intellectual Property Rights, but this application was rejected by the Directorate General of Intellectual Property Rights because they had received a registration of Skyworth's goods and services from the Defendant.

For Linawaty Hardjono's actions, Skyworth submitted a lawsuit to the Central Jakarta Commercial Court on November 18, 2015. During the trial at the Commercial Court,

Defendant I and Defendant II through their legal counsel filed an exception. However, the Central Jakarta Commercial Court Judge rejected the exceptions submitted by the Defendants and granted the Plaintiff's claim in full;

The Cassation Petitioner (Linawaty Hardjono) through his attorney, filed an appeal on January 7, 2016. The Supreme Court finally issued a decision Number 165 K/Pdt.Sus-HKI/2016 dated July 8, 2016 with the decision to grant the appeal of the Linawaty Hardjono Party and cancel the appeal Central Jakarta Commercial Court Decision Number 47/Pdt.Sus-Trademark/2015.PN Niaga Jkt.Pst;

On August 28, 2017, Skyworth submitted a request for a review hearing at the Registrar's Office of the Central Jakarta Commercial Court. Based on the judge's judgment, the Supreme Court believes that there is sufficient reason to grant the request for Skyworth Group LTD Review and cancel the Supreme Court's decision No. 165 K/Pdt.Sus-HKI/2016 by punishing the Defendant to stop the promotion and pay the court fee at all levels of justice and at review examination of IDR 10,000,000.00 (ten million rupiah).[8]

3.2 Overview of Famous Brands

The criteria for famous brands are regulated in the World Intellectual Property Organizations (WIPO) agreed in the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks that these factors can be used to determine whether the brands are in the well-known categories, namely:

- 1) The level of brand knowledge or recognition in the sector that is relevant to the community;
- 2) Existence, level and geographical area of brand use;
- 3) Existence, level and geographical area of brand promotion;
- 4) Existence and geographical area of any registration or application for registration of a mark;
- 5) Evidence of recognition of ownership of the right to a mark by an authorized body such as a court ruling that notifies legal ownership of a well-known mark;
- 6) Brand value.

The definition of a famous brand is not specifically regulated in Law No. 20 of 2016,[9] but the regulation of well-known brands can be seen in the Elucidation of Article 21 paragraph (1) letters b and c, which states the rejection of an application that has similarities in principle or in whole with another party's famous brand for similar goods and/or services. In the Explanation, it was revealed that the rejection was made by taking into account the general public knowledge of the mark in the relevant business field. In addition, consideration is also given to the brand's reputation that is obtained due to intense and massive promotion, investment in several countries in the world by its owner, and accompanied by evidence of registration of the mark referred to in several countries. If this has not been considered sufficient, the Commercial Court will order an independent institution to conduct a survey in order to obtain conclusions about whether or not the brand is the basis for rejection.

4 Discussion

4.1 Criteria for Famous Trademarks according to Law No. 20 of 2016 and International Regulations

4.1.1 According to Law No. 20 of 2016

The criteria of famous Trademarks is stated in the Elucidation of Article 21 of Law No. 20 of 2016. Based on the Elucidation of the Article, it can be concluded that the criteria for brands that can be categorized as well-known brands are:

- 1) General knowledge of the community in the field of business concerned. The Skyworth Group LTD brand is traded in class 16 (sixteen). So the people who are associated with this class of goods know for sure that the Skyworth Group LTD brand is a well-known brand.
- 2) Brand reputation because of the incessant promotion. The Skyworth brand is traded in 197 (one hundred ninety-seven) countries, so this brand is very popular in the types of goods grade 7, 9, 11, 16 in Indonesia.
- 3) Investments made by their owners in several countries. Regarding investments made by Skyworth Group in 197 countries around the world prove that the Plaintiff's Skyworth logo and brand are well known internationally. The following are some countries such as Switzerland, Germany, Russia, Malta, Italy, Oman, Hong Kong, Korea, the Philippines, Bahrain, Laos.
- 4) Proof of registration in several countries in the world. Australia, Class 9, registered Number 1020718, September 15, 2004. United States, Class 9, registered Number 2,229,833, March 9, 1999. Germany, Number 396 08 907, registered October 29, 1996. Canada, Number TMA710, 491 , registered March 31, 2008.
- 5) The results of a survey conducted by an independent institution but appointed by the Commercial Court.

So, the Skyworth brand is classified as a well-known brand according to Act Number 20 of 2016.

4.1.2 According to the Paris Convention, TRIPS and WIPO

In Article 6 of the Paris Convention for the Protection of Industrial Property but does not provide definitions or criteria for a well-known trademark (Wellknown Trademark), but rather regulates the form of protection for a famous trademark to the extent that each member or competent authority in a country must reject the same application for registration or similar to a brand that is considered famous in a country. The criteria for declaring a brand as a well-known brand is determined by each country.

Two factors in determining the fame of a brand based on Article 16 paragraph (2) of the TRIPs Agreement are knowledge of the brand and promotion. Brand knowledge refers to public knowledge in the relevant sector, not public knowledge or the general public.

In addition, there is a promotion factor. A brand can be said to be a well-known brand if in its efforts followed by the implementation of promotions such as publications in various media or investments in various countries. One example of this promotion according to Indonesian Jurisprudence can also be done by proving that there is a separate website owned by the brand famous so that the general public can access all information about the brand.[10]

Skyworth Company also has a website that can be accessed in several countries for the investment in 197 countries. The website address includes Hong Kong: <https://hk.iskyworth.com/USA>: <https://skyworthusa.com/>.

Promotion can be done in various ways. One of them is Sales Promotion. Sales promotion is a form of promotional activities in the form of samples or examples, coupons or vouchers, premiums, price packages, money back offers and sweepstakes.[11]

Skyworth Company draws a lot to commemorate Skyworth's Global 408 TV Festival. Under these provisions, consumers are required to purchase 55inch Android Television products belonging to the Skyworth Company and each product purchase, the consumer will get a voucher to be drawn. The prizes offered are also quite diverse, namely travel vouchers, shopping vouchers and spa vouchers.

Promotion by Skyworth Company is not only through the media website and in the form of sweepstakes, but through print media. This can be seen in the promotion of Coccaa Television which is a product of the Skyworth Company in one of the Kompas newspapers.

Other international regulations governing the criteria for the recognition of a brand are the 1999 WIPO Joint Recommendation Concerning Provision on the Protection of Well-Known Marks. These criteria consist of:

- 1) The level of knowledge and recognition of a brand in the relevant sector in society. The Skyworth brand is traded in the class 16 classification so that people associated with that class of goods know for certain that the Skyworth Group LTD brand is a well-known brand.
- 2) The existence, area and geographical area of the use of the mark. The Skyworth Company has long been known and circulated in 197 countries and was first established in 1988.
- 3) The existence, area and geographical area of each brand promotion. Skyworth Group LTD was founded in 1988 until now, this proves that the promotion carried out by the company to maintain its existence requires a lot of effort and costs.
- 4) The existence and geographical area of each trademark registration. SKYWORTH has been applied to registered trademarks in 197 countries such as the United States in 1999, Germany in 1996 and the United Kingdom in 2008.
- 5) Evidence of recognition of ownership of the rights to the mark by the authorized body. Proof of ownership of the Skyworth trademark is a certificate issued by the Chinese Government (proof P-2) of its trademark registration in 1988.
- 6) Brand value. Skyworth Company has good value and high value products in the eyes of consumers to the international scene. This is evidenced by several awards for its brands such as In 2010 Skyworth entered the 10 Best Products in the world Skyworth brand also has a very high brand value, from 2008 to 2014 the number reached 33.4 billion USD.

4.2 Legal Protection for Famous Skyworth Trademark Owners for Bad Faith (Bad Faith) Linawaty Hardjono

Legal protection can be in the form of preventive or repressive protection.

Preventive legal protection is done through trademark registration. That the registered mark has legal protection for a period of 10 (ten) years and is retroactive from the date of receipt.

Repressive legal protection is carried out if there is a violation of the right to the mark through a civil lawsuit and or criminal charges. The owner of a registered mark has legal

protection for violations of the right to a mark either in the form of a claim for compensation or termination of all acts related to the use of the mark or based on criminal lawsuits through law enforcement officials.

This has been done by Skyworth by submitting a lawsuit to the Central Jakarta Commercial Court for the ill will of the party Linawaty Hardjono who violated the provisions in Article 21 of Law Number 20 Of 2016 namely the Application was rejected if the mark has the same principle in principle or in whole with the registered trademark of the party Other and well-known brands belonging to other parties for goods that are not of the same type.

Legal protection is also given to the trademark owner as stipulated in Article 76 (1) of Law Number 20 Of 2016, namely that a claim for cancellation can be filed by an interested party based on the reasoning in Article 21. not good according to Article 21 and Skyworth is an interested party to file a cancellation claim.

Skyworth can file a lawsuit for compensation and termination of all acts of the Skyworth trademark owned by Linawaty Hardjono. This is regulated in Article 83 (1) of Law Number 20 Of 2016. The compensation given by the Panel of Judges to Linawaty Hardjono is IDR 5,000,000,000.00 (five billion rupiah). According to the author this is not quite right, because according to Law Number 20 Of 2016 Article 100 paragraph (1) and (2) the maximum compensation amounted to IDR 2,000,000,000.00 (two billion rupiah). As an alternative, it is better if the compensation for the Defendant is not more than what is stipulated in the law, besides that the Panel of Judges can impose a prison sentence of 5 years for Article 100 paragraph (1) and 4 years for Article 100 paragraph (2).

International regulated legal protection is also provided for famous brands. It is regulated in Paris Convention Article 6 bis (3) that there is no set period of time for filing a cancellation mark. Article 10 bis (3) of the Paris Convention requires member States to provide protection to famous brands from unfair competition. Furthermore, in TRIPS Article 16 (1) emphasizes the existence of the principle of honest trade practice to prevent other parties or entities that in bad faith use the brand of goods or services that have been used by other parties before.

4.3 Legal Considerations of the Supreme Court Judge Council on Case in Case Number 32 PK/Pdt.Sus-HKI/2018 in accordance with Law Number 20 of 2016 concerning Trademarks and Geographical Indications

Skyworth submitted a request for a review hearing at the Registrar's Office of the Central Jakarta District/Commercial Court on August 28, 2017. The petition. The Supreme Court granted the Petitioner's Request for Reconsideration with the following considerations:

- 1) Whereas Judex Juris in its decision had made a judge's error or a real mistake because he had canceled the Judex Facti/Commercial Court Decision at the Central Jakarta District Court Number 47/Pdt.Sus-Merek/2015/PN Niaga Jkt. Pst., November 18, 2015 and by stating the refusal of the lawsuit.
- 2) Whereas there is no Government Regulation related to Article 6 paragraph (2) of Law Number 15 of 2001 concerning Trademarks, concerning Protection of Famous Trademarks of the same type, the Supreme Court is of the opinion that in accordance with the results of the Civil Chamber Formulation as outlined in Circular Letter The Supreme Court No. 3 of 2015 should have been a Judex Juris verdict stating a lawsuit cannot be accepted, not stating a rejected claim like the Judex Juris decision.

In Judex Juris, it was stated that the Cassation Respondent in submitting the claim to the Central Jakarta Commercial Court had passed the deadline (expired). According to the author,

this is not appropriate because Article 69 paragraph 1 of Law No. 15 of 2001 concerning Trademarks [12] which are now regulated in Article 77 of Law No. 20 of 2016 concerning Trademarks and Geographical Indications that a filing of a claim for cancellation of a mark can only be submitted within a period of 5 years from the date of trademark registration by the interested parties. In this case, Skyworth Group LTD in filing their lawsuit to cancel the logo and trademark of Skyworth owned by Linawaty Hardjono had passed the deadline set by the Act. Cancellation of trademark registration can only be submitted within 5 years from the date of registration considering the SKYWORTH + Logo mark which is one of the objects of dispute has been registered for more than 10 years and even the SKYWORTH + Logo mark has been renewed.

However, Article 77 paragraph 2 of Law Number 20 Of 2016 concerning Trademarks and Geographical Indications states that "a claim for cancellation can be filed indefinitely if the mark concerned is against religious morality, decency or public order", which is in the Elucidation of Article 77 paragraph 2 Law Number 20 Of 2016 "Public Order" also means "bad faith". Skyworth Group LTD has the authority as a Plaintiff because the Plaintiff suffers a loss due to the actions of the Defendant who registered the Skyworth logo and trademark without permission from the Plaintiff in bad faith to piggyback, imitate or cheat the fame of the other party's trademark for the benefit of its business which results in losses to the Plaintiff and has misled and deceived consumers.

The author's opinion is when Law Number 15 of 2001 is still taken an effect, there is no regulation regarding the protection of famous trademarks which are not of the same type, so in this case the Supreme Court states that the Plaintiff's claim cannot be accepted rather than rejected, this is stated in a Supreme Court Circular Number 3 of 2015. However, in Act Number 20 of 2016 concerning Trademarks and Geographical Indications, it has regulated the protection of famous brands for goods/services which are not of the same type, this is stated in Article 21 paragraph (1) letter c: "Application is rejected if The mark has similarities in principle or in whole with: c. Other parties' well-known brands for goods and/or services that do not have the same type that meet certain requirements."

Rejection of an application based on a well-known mark for goods and/or services that are not the same type must meet certain requirements. According to Article 19 paragraph (3) Permenkumham Number 67 of 2016, certain requirements include:[13]

- a. Any objection that has been submitted in writing by a well-known Trademark Owner against the Application; and
- b. Famous brands that have been registered.

Skyworth has filed an objection namely a written lawsuit to Linawaty Hardjono to the Central Jakarta Commercial Court. Skyworth is a well-known trademark that has been registered for class 16 classifications to the Directorate General of Intellectual Property Rights. So that the requirements for filing an objection with Linawaty Hardjono have been met by the Skyworth Group LTD.

In this case, the Judge in the Central Jakarta Commercial Court in its decision has successfully conduct a Judicial Activism to provide protection for famous brands that are not the same type even though there are no implementing regulations because Indonesia is a participant/signatory to the World Trade Organization Agreements with TRIP's as an attachment and the Paris Convention so it is obliged protect famous brands including those that are not the same type.

5 Conclusion

The criteria of famous brands belonging to Skyworth Group LTD are in accordance with the criteria set out in Law Number 20 Of 2016 on Geographical Marks and Indications and international Regulations such as the Paris Convention, TRIPs and the 1999 WIPO Joint Recommendation Concerning Provision on the Protection of Well-Known Marks. Elucidation of Article 21 of Law Number 20 Of 2016 states the criteria for famous brands consisting of general public knowledge in the field concerned, brand reputation due to promotion, investments made by their owners in several countries, proof of registration in several countries in the world, and the results of surveys conducted by an independent agency, which is relevant to the criteria of famous brands in the TRIPs, Paris Convention, and WIPO.

Legal protection for famous brands in the Skyworth case consists of two, namely preventive and repressive protection. Preventive protection has been carried out by Skyworth Company by registering its trademark (first to file) with the Directorate General of Intellectual Property Rights. In Article 35 of Law Number 20 of 2016 registered trademarks receive protection for 10 years. For repressive protection, the Skyworth Group LTD has filed a claim for cancellation of the mark to the Central Jakarta Commercial Court for acts committed in bad faith (bad faith) by the Party Linawaty Hardjono.

The basis for the consideration of the Supreme Court Judges in deciding the review case of Skyworth Group LTD is that there is a mistake of the judge in canceling the decision Number 47/Pdt. well-known for non-identical goods so the judge rejected the Plaintiff's claim. However, in the Supreme Court Circular Letter Number 3 of 2015, the lawsuit should not be accepted rather than rejected.

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