

# Counterfeit Goods as a Complaint Offenses

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**Abstract.** In Law No. 20/2016 on brand, the characteristics of the criminal act of brand counterfeiting belong to the statement that all criminal act of brand counterfeiting is a violation that it is changed into a crime on complaint. The law enforcement resulted in the uncertainty of law and justice. Different court decisions based on different criminal charge and even different imposed articles are given to the matters of the same cases. This fact shows as brand owners tend not to complain because the maximum sanctions do not give satisfaction to the brand owner and do not provide a deterrent effect to the offender. Therefore, the crime on complaint shall be changed into ordinary offense and the criminal act of brand counterfeiting shall also be considered as a criminal act not as a violation only.

**Keywords:** Criminal Act, Brand Counterfeiting, Complaint Offenses, Law Enforcement

## 1 Introduction

Brands are used as a tool to differentiate goods and/or services produced by a company from other company's products and/or services similar. In this regard, a brand has economic value[1]. It is not uncommon that there is forgery of a brand, as a result a need for a regulation in attempt to fulfill such need Law No. 20 of 2016 concerning Trademarks and Geographical Indications is promulgated. Brands are also used to advance industries that are able to compete within the scope of national and international trade, a climate that encourages creation and innovation must be created. Indonesia has ratified the Agreement Establishing the World Trade Organization which includes the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) with Law Number 7 of 1994 so that it is necessary to regulate provisions regarding Industrial Design.[2]

That is the reason why Indonesian has regulated about this topic in Law No. 15 of 2001 concerning Trademarks. Yet, there are still a lot of counterfeit goods that are revolve around Indonesian people especially when one of *Tentara Nasional Indonesia* or TNI commander, General Moeldoko, admit that he bought a fake watch in front of the press at Hotel Borobudur, Jakarta.[3] He also asked by the press about the copyright issues, while laughing he replied that it is none of his business. [3]This case shows that a lot of Indonesian people, from upper to lower-middle class, still buy counterfeit goods that is supplied everywhere freely and does not takes copyright issues seriously even though that he is an important people in the country. Those makes us realize that regulation that regulates such thing does not work as we expected.

In Article 103 of Law No. 20 of 2016 concerning Trademarks and Geographical Indications stated that "*Criminal acts as referred to in Article 100 to Article 102 constitute an offense of complaint.*"[4] Those criminal acts that is stated in that article are concerning about copyright issues. From that statement we can say that the sale of counterfeit products or goods can only be dealt with by the authorities if there is a complaint from parties who feel disadvantaged by this, in this case the owner of the brand itself or the licensee.[5] Those regulations will make Indonesian people overlook copyrights issues and will make this issue become bigger and uncontrollable.

## 2 Method

Due to time constraints and restricted data resources that can be publicly accessed, the way of approach that may be applied is secondary research of analysing numerous verdicts issued by the court in

connection to the issue to gain an in-depth knowledge of the effect of the execution of the complaint offenses in addressing counterfeit goods cases in Indonesia. The qualitative research are being used as a way to process of naturalistic inquiry that seeks in-depth understanding of social phenomena within their natural setting.[6] It will be implemented is the use of Grounded Theory method, in which means data-explanatory[7], that involves the progressive identification and integration of categories of meaning from data.[8] This type of research is being used in order to gain an overview of the implementation of the counterfeit goods regulation in Indonesia.

### **3 Result and Discussion**

#### **3.1. Basic Theories**

Counterfeit products have spreads worldwide, and Indonesia is no exception. Losses due to rampant counterfeiting accounted to 43.2 trillion rupiahs in Gross Output and 34.2 trillion rupiahs in GDP.[9] Counterfeit products will not only harm the Original Brand, but also to Indonesia. According to Ekawati (2010) investors were hesitant to invest in Indonesian clothing industry because of the high level of piracy. So, we could say that counterfeiting activities may reduce the amount of future investment in textile and clothing industry. Not only that, the increase in demand of counterfeit products will bring negative impact to Indonesian economics, looking at the potential loss of state tax revenue due to the circulation of counterfeit products would reach 43.2 Trillion rupiahs.[9] However, Indonesian has not provided the regulation that can overcome this problem.

#### **3.2. Complaint Offenses**

Complaint offense is one type of offense or criminal offense which is expressly stated in the formulation that this crime can only be prosecuted if there are complaints from interested parties. Although the law itself does not explain the purpose of the offense, it is certain that the offense is not without reason or purpose. As an offense, the prosecution depends on the willingness and will of those affected by criminal acts or those who have an interest, in other words, those who have been charged with a crime have a role in determining whether the offender is prosecuted or not. Because prosecution is left to the will and will of those affected by crimes or those who have an interest, it is thus open to the possibility of a family settlement between those affected by crimes or those who have an interest in the perpetrators of crimes as a settlement of cases outside of law enforcement

In the reality of everyday life, the settlement of cases outside the interference of law enforcers for certain crimes is often felt to be better and more beneficial than the settlement through judicial channels. [10] The loss of settlement through legal means, among others, is not familial in nature so that it can stretch family relations and from a legal standpoint the process of settlement is quite long, especially if it reaches the Supreme Court level which takes years so that demands for justice from those affected by crime may will no longer be felt fulfilled because the matter itself has been forgotten.

The advantage of a family settlement outside the court, is that a family relationship between one another is not disturbed and may even create a better family relationship, and in addition the solution is quick not to waste time and money, and the outcome of the settlement can satisfy all parties. [11] especially those affected by crime or those with an interest. For this reason, the author argues that the existence of complaint complaints is indeed a necessary and needed thing in people's lives.

#### **3.3. Trade Related Aspects of Intellectual Property Rights (TRIPs)**

Indonesia's participation in ratifying the Convention on the Establishment of a World Trade Organization that also includes agreements on the Trade Related Aspects of Intellectual Property Rights (TRIPs) as ratified by Law Number 7/1994[12] concerning the Ratification of the Agreement on Establishing the World Trade Organization, has demanded that Indonesia comply with and implement the contents of the international agreement. The ratification of the regulation encouraged Indonesia's participation in ratifying the Paris Convention for the Protection of Industrial Property which was ratified by Presidential Decree No. 15 of 1997 and the Trademark Law Treaty which was ratified by Presidential Decree No. 17 of 1997. [13]The international agreement makes it an obligation for Indonesia to adjust the Trademark Law that applies to the provisions of the ratified international agreement.

### **3.4. Law No 20/2016 Regarding Trademarks and Geographical Indications**

In Law 20/2016 concerning Trademarks, criminal acts regulated by this Law constitute an offense against complaints. This is evident from article 103 which states that the criminal offenses referred to in Article 100, Article 101, and Article 102 are complaints.

Based on Article 103 above, law enforcement officials, starting from the police, prosecutors and district court judges, can only process this case when there are complaints from the aggrieved party.[14] The disadvantaged party in this case is the registered trademark owner and registered service or licensee for registered brands and services, who feel harmed by the actions of others who make a brand or service that is similar or essentially the same as their trade or service mark similar to its registered brand or service mark.[15] In the past, brand crime was an ordinary crime, so anyone who knew of brand fraud could report to law enforcement officials.[16]

### **3.5 Judiciary Process for Crime on Counterfeit in the Pandemic Covid-19 Situation**

Based on the supreme court regulation number 4 years 2020 concerning Administration and procedural law for criminal offences through electronic based judiciary process (PERMA 4/20 on E-Litigation for Criminal trial) that the judiciary process for criminal offences in the pandemic covid-19 situation could be process through teleconferencing between panel judges, prosecutors and advocate or defendant. This also included or not limited to the law enforcement for criminal offences in relation with Intellectual property like counterfeit goods, that would be processed through teleconferencing mechanism or E-court.

Before enacting the PERMA 4/20, Indonesia's Supreme Court has issued the circular letter for all the court that giving a guidelines to entire district court in Indonesia to conduct the judicial process electronically or online court. The circular letter number 6 year 2020 also has giving a direction to district to prepare the criminal trial through teleconference in addition to prevent the spreading of covid-19 in the area of district court. On 25 of September 2020, Chief Justice of the Indonesian Supreme Court has signed and enacting the PERMA 4/20 on E-litigation for criminal trial, such PERMA has guided that criminal trial in pandemic situation through teleconference has to make sure that the respect to the rights of defendant should be delivered equally. The enactment of PERMA 4/20 also the way of The Supreme Court to response justice delivery to all defendant in order to deliver the rights of defendant to have a trial for their case immediately, this is the principle that mentioned in The Indonesian Procedure Laws.

Pandemic Covid-19 has also boosting the selling of some health product, for instance hand sanitizer, face mask and also disinfectant. In addition to prevent the counterfeit on health goods, Directorate General on Intellectual property (DGIP) has cooperate with police department to supervise the distribution of counterfeit brands (in health products) in some market place. The supervision mechanism on counterfeit brands (in health products) also has called the brands owner to report any counterfeiting their health products in market place through online reports. Based on the reports of DGIP, in the period of January to May 2020, DGIP Investigators has carried out about 138 prosecutions for actions against content violations or user access rights in electronic system. The counterfeiting brands in health product in the same periods, DGIP has reported 4 cases in online market place that related to the products such as face mask, hand sanitizers and personal protective equipment.

## **3.2. Discussions**

As in Article 103 of the Trademark Law it is clearly stipulated that the criminal offense referred to in Article 100, Article 101, and Article 102 constitute an offense. The implication of the complaint is that the police only wait for complaints from the aggrieved party. In other words, if no one complains, even if there has been brand fraud, the Police apparatus can just ignore or allow the perpetrator to be free without being legally processed.

In connection with criminal provisions as specified in Article 103 of the Trademark Law that brand crime is an offense of complaint. The law enforcement of the following Decisions of the Supreme Court (MA) is considered to lack legal protection for registered trademark owners because there must be complaints from the injured owner.

Arranging the complaint offense in the Trademark Law can certainly hinder the enforcement of brand law in Indonesia. The law enforcement will not take action if the aggrieved party does not complain of the

violation to the police. As long as no one is harmed in this case, the legal apparatus cannot carry out their duties in the criminal justice system.

Sudargo Gautama and Rizawanto Winata, said that the complaint in the Trademark Law was a setback, "If the threat of this sentence and criminal charges only depends on complaints from people who feel they are harmed"<sup>1</sup>. [17] It will be more effective if the prosecutor himself is without the need for complaints from interested people, prosecution actions are held in the event of an unnatural occurrence in the community.

The argument is supported by a comparison of the decision's verdict on counterfeit goods and the complainant. Based on a comparison of three decisions, Decision No. 282/Pid.Sus/ 2016/PN YYK, Decision No. 87/Pid.Sus/ 2019/PN PTI, and Decision No. 1215/Pid.Sus/ 2017/PN Tjk, the first two decisions determine that the complainant is the right holder and/or owner of the brand itself. On the other hand, for the final verdict that the complainant is Lampung Police Officers who performed inspections of the goods of the brands in the defendant's store came up with the conclusion of relieving the defendant from any charges. Based on the above statement, it is possible to deduce that there are disparities in the processing of cases brought by the right holder and/or owner as interested parties and the complaint brought by the law enforcement itself, which will result in the outcomes of the verdict. Furthermore, it can be observed that the position of law enforcement as the complainant with the authority to promote the public interest would not aid in the proper handling of the case.

However, brand owners seldom complain since the highest sanctions do not satisfy the brand owner and have no deterrence impact on the perpetrator. In fact, this trend is caused because it is very unlikely if only brand owners can complain about their own brand, but other people who are not related as the owner of the falsified brand should be able to make reports as well as the usual offenses that apply at the time of Law No.19 1992 jo Law No. 14 of 1997.

The nature of the complaint is that there is a person who complains, or the complainant can revoke the complaint instead of the report. The interest of someone in the complaint offense has the right to make a complaint because it is very disadvantaged if the case is tried compared to the loss of public interest. While the public interest in criminal law (public law) takes precedence, it does not depend on the person who suffers from an offense, but basically is charged or assigned by law to the authorities because his position is authorized for that.

The use of complaints in the Trademark Law is possible because the legislators assess that it is far more important to protect the interests of family needs in society than to protect property rights in the community. If this becomes the basis of philosophical considerations, then the position of ownership rights to the brand is not of high value for defend rights in IPR and more importantly are the needs of the family in the community.

The use of offense complaints in the Trademark Law can be understood because the background is the choice of values which are more likely to protect private jurisdiction than the area of criminal law. This means that the application of fines or compensation is preferred, rather than the application of criminal sanctions. In essence, complaint complaints do not provide legal protection to consumers because there will not be many people who complain about brand falsification. Julius Rizaldi disagreed with the enforcement of the complaints filed in the Trademark Law, the complaint offense should be changed or returned to ordinary offenses, thereby emphasizing the enforcement and legal protection of consumers and causing deterrent effects for the perpetrators or brand counterfeiters.

## 4 Conclusion

After Indonesia has ratified Trade Related Aspects of Intellectual Property Rights (TRIPs) under Law Number 7/1994 which makes it an obligation for Indonesia to adjust the Trademark Law that applies to the provisions of the ratified international agreement. That is why the Law Number 20 of 2016 concerning Trademarks and Geographical Indication is made. According to the regulations under article 103 which stated that the criminal offenses referred to in Article 100, Article 101, and Article 102 are complaints.

Arranging the complaint offense in the Trademark Law can certainly hinder the enforcement of brand law in Indonesia. The law enforcement will not take action if the aggrieved party does not complain of the violation to the police. As long as no one is harmed in this case, the legal apparatus cannot carry out their duties in the criminal justice system. According to Sudargo Gautama and Rizawanto Winata the complaint in the Trademark Law was a setback. It is proved as nowadays brand owners tend not to complain because

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<sup>1</sup> Gautama, Sudargo and Winata, Rizawanto. *"Undang-Undang Merek Baru Tahun 2001"*, 1, Bandung: Citra Adhya bakti, 2002.

the maximum sanctions do not give satisfaction to the brand owner and do not provide a deterrent effect to the offender.

In addition to the very low number of cases of counterfeiting brands of health products mostly because of the criminal prosecution on the counterfeiting goods could only be prosecuted based on the report by the brands owner. Even though in practice, sometime the DGIP investigators after finishing their monitoring works through online market place, they send the letter to the brand owners to make a report to the DGIP. One of the study by Pelita Harapan University has found that over 110 court decision only 8 decision that the defendant was the producer of the counterfeiting goods. In relation with health products, the prosecutions to the counterfeiting goods or brands should be severely punished, this is related to protect the public health

Based on the facts above, to improve the regulation and phenomenon of brand law enforcement in Indonesia, it is recommended that complaint complaints regulated in Article 100 up to Article 103 of the Trademark Law be changed to ordinary offenses as applied to Law No.19 of 1992 concerning Trademarks in conjunction with Law No. 14/1997 on Trademarks (Old Law).

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