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Regulatory Concept of Trademark Protection against Cybersquatting in Indonesia

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ABSTRACT

This research analyzes the regulatory concept of Trademark Protection against Cybersquatting Crime in Indonesia. The first registrant principle applied in domain name registration allows certain parties to abuse this system by registering domain names that are similar to registered marks without going through substantive examination. This differs from the trademark registration system that applies the first-to-file principle. The research method used in this research is normative juridical, using a statutory approach and conceptual approach. The results show that the preventive measure that can be taken is to add a condition that the registration of a brand name must be accompanied by the registration of a domain name. This can help prevent the appropriation of domain names that are associated with brands. Additionally, effective law enforcement against cybersquatting cases must be carried out through both non-litigation and litigation channels to prevent the harmful practice of domain name grabbing that affects brand owners.

KEYWORDS

Protection;
Trademark;
Cybersquatting;
Domain Name

INTRODUCTION

Nowadays, technological advances will certainly have a direct or indirect impact on society. The internet that is present today is very important for a company to introduce and market its products. The internet is vital for the company to support the goals of the company itself. Even more than that, the internet is the center of all company activities. Indeed, the progress of the trade industry opens up enormous opportunities for those who want to run a business, both services and products. For business actors, improving the image is an advantage because it can be used as a guarantee.[1] This is because it is undeniable that it will make the public behavior to easily recognize a product both in terms of quality and quantity. Of course, it will be a positive element for both business actors and consumers. However, in line with this, there are also negative impacts that are very likely to harm the parties. Without good regulation, this will certainly result in the source of several conflicts, such as conflicts over the use of domain names on the website.[2]

The definition of a domain name is stated in Article 1 of the general provisions of Law No. 11 of 2008 concerning Electronic Information and Transactions (ITE Law), namely domain names are internet addresses of state administrators, persons, business entities, and/or communities, which can be used in communicating via the internet, in the form of codes or arrays of characters that are unique to indicate certain locations on the internet. In practice, the domain name has a close relationship with the brand of a product, this is because the domain name used is dominantly by the brand of a product so these two things have a strong relationship. Companies usually use the company name or trademark of the product they produce as their domain name because it is considered more intuitive and has been recognized in the community.

Article 23 paragraph (1) of Law No. 11 of 2008 concerning Information and Electronic Transactions states that domain names use the first file first serve principle as the principle of registration. The principle of the first registrant is interpreted as the first to arrive is the first to be served (first come first served principle). This principle is very different from the principle of registration in the field of intellectual property rights which uses the first-to-file principle because no substantive examination is required, such as the examination in trademark registration. By Article 3 of Law No. 20 Year 2016 on Trademarks and Geographical Indications, rights to trademarks arise due to registration. The registration in question is a registration that has gone through a series of material and formal examination processes until finally the issuance of a trademark certificate.[3]

The enactment of Law No. 15 of 2001 on Trademarks which has been replaced by Law No. 20 of 2016 on Trademarks and Geographical Indications (Trademark Law and Geographical Indications) so that the trademark has meaning and benefits

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1 Laurene Patricia & Wilma Silalahi, "Perlindungan Hukum Merek Terkenal Terhadap Tindakan Pemboncengan Reputasi di Indonesia: Studi Yuridis" (2024) 7:1 Ranah Res J Multidiscip Res Dev 105–110.

2 Asawati Nugrahani, *Sinkronisasi Pengaturan Hak Merek dan Nama Domain Berdasarkan Undang-Undang Nomor 20 Tahun 2016 tentang Merek dan Indikasi Geografis dan Undang-Undang No. 11 Tahun 2008 Juncto Undang-Undang No. 19 Tahun 2016 tentang Informasi dan Transaksi Elektronik* Universitas Sebelas Maret, 2018) [unpublished].

3 *Ibid*.

for the national interest, thus placing trademark registration as an effort to maintain fair business competition as well as an effort to provide legal protection to registered trademarks.[4] Trademark rights are not directly about an object, but are the right to use something. In other words, it is not a mixture of several elements such as names, words, letters, images, numbers, and colors, which have a distinguishing power, but related to the rights to signs that are categorized as intangible movable objects in the form of such rights. Trademark owners who have registered their trademarks will get legal protection in case of infringement of trademark rights. Property rights to trademark rights as intangible movable rights provide freedom to the owner in the form of full sovereignty. This can be seen in the exclusive nature (special) attached to the trademark rights.[5]

Often a product with a certain brand waits for the company to be in demand by the market first to create a domain name. Domain Name is a unique name that represents an organization where the name will be used by internet users to connect to the organization. The system is designed so that a host or server is easier to remember and it is made in the form of a row of letters instead of a row of numbers that are easier to remember. A person can register a domain name with any name to become a website address whether it is used privately or commercially as long as the domain name does not conflict with the law. One of the things that is prohibited in the law is the use of domain names by incorporating other people's brands to piggyback on a certain product's likeness to confuse consumers. The use of domain names often rubs against registered trademark rights. For example, Mustika Ratu has owned the domain name Mustika-Ratu.co.id since September 5, 1996.[6] In Indonesia, the case of cybersquatting can be seen in the case of mastika-ratu.com, where PT. Mustika Ratu cannot register mastika-ratu.com as its website address, because there is already another party, who has registered mastika-ratu.com as its website address.[7]

The current ITE Law is an “umbrella” regulation, so it requires the “acceptance of the baton” of other regulations to regulate specific matters. The revision of the ITE Law has also been amended to Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions, and Law of the Republic of Indonesia Number 1 of 2024 concerning the Second Amendment to Law Number I1 of 2008 concerning Electronic Information and Transactions, but there are no changes regarding the regulation of domain names amended in the two Laws. So the polemic related to domain names due to cybersquatter still does not provide legal certainty.

The concept of preventive and repressive arrangements contained in the ITE Law and Trademark Law is not optimal in terms of cybersquatting. The existing regulations still prioritize repressive methods, not promoting more effective methods through optimizing prevention to minimize conflicts that occur, on the

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4 Sitti Fatimah Maddusila & Fathul Hamdani, “The Economic Aspects Regarding Copyright of the Song Shalawat Badar and Syubbanul Wathan: Dynamics and Implications” (2023) 7:3 Syiah Kuala Law J 310–320.

5 Andika Richardo Kaparang, “Penegakan Hukum terhadap Pelanggaran Merek Berdasarkan Ketentuan Perundang-Udangan di Indonesia” (2024) 13:2 Lex Priv.

6 Alusyanti Primawati, “Etika IT di Indonesia Studi Kasus: Cybersquatting pada Domain PT. Mustika Ratu” (2016) 7:1 Simetris J Tek Mesin, Elektro dan Ilmu Komput 421–426.

7 *Ibid*.

other hand, more optimal regulatory efforts can provide legal guarantees and protection for the community so that the purpose of the law, namely legal certainty, can be created.

METHOD

The research method used in this research is the normative juridical research method. By using a statutory approach and conceptual approach. The statutory approach is by examining existing laws and regulations. A conceptual approach means examining existing problems with views, doctrines, and legal theories that develop in law. This approach is used to dissect the legal issues at hand related to the regulation of brand protection against cybersquatting in Indonesia.

RESULT & DISCUSSION

Cybersquatting is one of the cybercrimes related to domain names. In simple terms, a domain name is like a person's phone number and home address. At first, domain names were used only to identify computers. Its use later became more intensive and domain names became part of a person's identity (such as an email address or website address).[8] The use of domain names is only for internet use. Cybersquatting is a practice by certain parties to pre-register a certain domain name associated with certain other companies to obtain large profits by selling the domain name to the company that has the right to own the domain name.

The actions of the cybersquatting perpetrators are very disturbing to the community. This is because the losses arising from the perpetrator's actions are certainly not only detrimental to the original brand owner but also to the brand's consumers. Moreover, if the perpetrator uses a domain that is similar to a well-known brand, the losses incurred will be even greater. However, Indonesia has not explained and regulated the definition of cybersquatting in its laws and regulations.

Article 1 point 20 of Law (Law) Number 19 of 2016 which regulates the Amendment to Law (Law) Number 11 of 2008 concerning Electronic Information and Transactions stipulates that "the definition of a domain name is the internet address of state administrators, persons, business entities, and/or communities, which can be used in communicating via the internet, in the form of a code or arrangement of characters that are unique to indicate a particular location on the internet". In the era of trade with the support of internet technology that allows cross-border trade transactions, domain names become very important to support business actors in terms of attracting customers. This is then utilized by cybersquatting actors to gain profits. The method taken by the perpetrators is to precede registering domains related to or similar to certain brands so that the original brand owner cannot register the same domain name.[9]

Trademark is part of Intellectual Property Law that has an important value based on economic aspects. A trademark is one form of Intellectual Property Rights

[8] Dewi Muti'ah & Firda Laily Mufid, "Regulasi Kejahatan Cyber sebagai Upaya Pertanggungjawaban Pelaku Tindak Pidana Cybersquatting" (2022) 8:1 Yust MERDEKA J Ilm Huk 1–9.

[9] Widiya Murti Astrini & Elfrida Ratnawati, "Reformasi Hukum di Bidang Kekayaan Intelektual untuk Mengantisipasi Pelanggaran Merek melalui Nama Domain (Cybersquatting)" (2023) 3:2 J Cahaya Mandalika 510–517.

that is very important in the process of trading an industrial product, both domestic trade and international trade, because with a trademark attached to an industrial product, every consumer can distinguish quality and quantity assurance contained in an industrial product.[10]

Trademark registered in the Directorate of Trademark according to the Constitutive System (active) with the doctrine of "prior in filling" that the right to a Trademark is the party who registered the Trademark, also known as the principle of "presumption of ownership". So the registration creates a right to the Trademark. The party who registered it is the only one who is entitled to a Trademark and third parties must respect the rights of the registrant as an absolute right. First to file is termed as a constitutive system that requires the registration for the first time for the trademark to obtain protection so that the legal consequences of trademark rights are based on registration.[11]

Every brand displays a form of reputation that has moral, material, and commercial value. Reputation attached to the brand is a form of property rights. Reputation in the business world is seen as the key to the success or failure of a business, where many entrepreneurs are competing to cultivate or maintain their reputation by maintaining product quality and providing services. For traders or entrepreneurs, brands are one of the media to gain a good reputation and trust from consumers. This certainly does not provide benefits for the company. Brands either directly or indirectly represent the quality, and reputation of a product. Therefore, the brand has an important position in the development of the business or business of traders or entrepreneurs who are good for consumers, a brand is something (image or name) that can be used to identify a product of goods or services in the market.[12]

In general, there are three differences between trademark and domain registration, including:[13]

1. The domain naming system does not care whether the name used is similar to other things that confuse customers. This happens because, in domain names, the names used cannot be the same in characters, but names that are only a few characters apart are still allowed. For example, in domain name registration, if the name "XYZFarm.com" has been registered, then other users who register "XYZFarmer.com" are still allowed. However, when registering a brand name, the similarity between the brand name and the existing brand name must first be considered whether it can be validly registered or not.

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[10] Yusuf Gunawan, "Penyelesaian Sengketa Merek Terdaftar dan Merek Terkenal dalam Mewujudkan Perlindungan Hukum" (2022) 2:2 Iblam Law Rev 141–164.

[11] Medisita Nurfauziah Istiqmalia & Iwan Erar Joesoef, "Itikad Baik dalam Pendaftaran Merek: Studi Perlindungan Hukum Pemilik Merek Terkenal di Indonesia" (2021) 2:3 J Penegakan Huk Indones 406–426.

[12] Gossain Jotyka & I Gusti Ketut Riski Suputra, "Prosedur pendaftaran dan pengalihan merek serta upaya perlindungan hukum terhadap merek terkenal menurut Undang-Undang Nomor 15 Tahun 2001" (2021) 3:2 Ganesha Law Rev 125–139.

[13] Elza Syarief et al, "Hubungan Antara Hukum Merek dengan Cybersquatting dalam Putusan Pengadilan Negeri Jakarta Pusat Nomor: 299/PDT.G/2013/PN.JKT.PST" (2021) 4:2 Pagaruyuang Law J 179–190.

2. Unlike trademarks, domain name registration is not tied to a classification system of goods and services that must be adhered to. As a result, if there are trademarks with similar names, which are different goods or services, they can coexist when registering the trademark, each domain name is not the same and is usually owned by one owner. Consumers sometimes search for products on the internet first by looking at the web address at www.com, this leads to competition between trademark owners in registering domain names that match their product names, and registering a product name by a company may lead to lost sales opportunities caused by dissatisfied consumers who may switch to competing products because they cannot access information on the product's web address.
3. Domain names do not recognize country boundaries. General TLDs can be registered and accessed by companies/organizations from different countries. Similar to general TLDs, there are also ccTLDs. ccTLDs are high-level domains that are based on a country's code and are generally registered by companies in that country. Although the original purpose of ccTLDs was to facilitate companies in each country to have their domains, this still does not restrict companies from outside the country to register themselves with the country's domain. This poses the problem that if a company wants to upgrade to an international company, they will be competing for the right to obtain domains that match their trademarks around the world.[14]

The juridical foundation of domain names and trademarks has also distinguished the position between the two. The Law on Trademarks in Indonesia states that a trademark is a sign in the form of a picture, name, word, letters, numbers, color arrangement, or a combination of these elements that have distinguishing power and are used in trading activities of goods or services. Meanwhile, the regulation on domain names has not been regulated by the government.

I. The Concept of Preventive Arrangements for Trademark Protection Against Cybersquatting Crimes

Preventive efforts are made with the addition of trademark registration requirements that have gone through substantive testing. The requirement in question is to register a domain name because the domain name is first come first served. This will make it impossible for a particular product mark to be registered twice. So if someone registers a domain name using his trademark or someone else's trademark, then the person who first registered the domain name has the right to the domain name, the prevention mechanism is very necessary through the Trademark Law.

Usually, products with certain brands wait for their products or companies to be famous first to register domain names. Thus, domain name grabbing by cybersquatter often occurs. With a mechanism like this, of course, cybersquatting can be prevented by adding the final requirement in brand registration, namely

[14] *Ibid*.

domain name registration.[15] Trademark registration is carried out based on the Trademark Application of the trademark owner or who is entitled to the trademark or through his attorney. The application for trademark registration must later be submitted to the minister, either electronically or non-electronically in Indonesian.16) In Article 4 Paragraph (2) in conjunction with the Minister of Law and Human Rights Regulation No. 67 Year 2016, Article 3 Paragraph (2) trademark applications filed either electronically or non-electronically must include the required supporting documents, which as follows:

1. Date, month and year of the trademark application;
2. Full name, nationality, and address of the applicant;
3. Full name and address of the proxy if the trademark application is filed through a proxy;
4. Color if the mark applied for registration uses the color element;
5. The name of the country and date of the first request for the mark in the case of an application filed with Priority Rights; and
6. Class of goods and/or services as well as a description of the type of goods and/or type of Services.[16]

According to Article 13 in conjunction with the Minister of Law and Human Rights Regulation No. 67 Year 2016, Article 4 Paragraph (1) Trademark applications that have completed the minimum requirements of trademark registration, namely in the form of a completed trademark registration form, trademark label and proof of payment of fees, it will be given a date of receipt. Within a maximum period of 15 (fifteen) days from the date of receipt, the Directorate General will examine the completeness of the documents required for registration of the trademark often referred to as the examination of formalities.

For trademark applications that only meet the minimum requirements then within a maximum period of 30 (thirty) days from the date of receipt, the trademark applicant or his attorney will be given a notification letter to complete the trademark registration requirements within a maximum period of 2 (two) months from the date of receipt of the notification letter by Article 11 Paragraph (2) Juncto Minister of Law and Human Rights Regulation No. 67 Year 2016 Article 10 Paragraphs (1), (2) and (3).

If within 2 (2) months, the completeness of the requirements are not met as well, then the minister will notify in writing the applicant or his attorney that his trademark application is considered withdrawn by Article 12 in conjunction with Regulation of the Minister of Law and Human Rights No. 67 the Year 2016 Article 10 Paragraph (4). Article 14 in conjunction with Regulation of the Minister of Law and Human Rights No. 67 of 2016 Article 4 Paragraphs (2) and (3) explains that after passing the formality examination stage, the trademark application will be announced by the minister in the official trademark news within a maximum period of 15 (fifteen) days from the date of receipt. The announcement period of the trademark application lasts for 2 (two) months in the official trademark news which

[15] Wilson Wijaya & Christine ST Kansil, "Analisis Kekuatan Unsur Itikad Baik Pada Pelaksanaan Pendaftaran Merek Di Indonesia (Studi Kasus Putusan Mahkamah Agung Nomor 364k/Pdt. Sus-Hki/2014) Berdasarkan Undang-Undang Nomor 20 Tahun 2016" (2018) 1:1 J Huk Adigama.

[16] *Ibid*.

will be published periodically by the minister through electronic and/or non-electronic means.

The next stage for trademark applications that have passed the announcement period of 2 months is substantive examination. In the substantive examination,[17] The trademark application will be examined by the trademark examiner based on the provisions stipulated in Article 20 and Article 21 of the Trademark and Geographical Indications Law, namely articles governing unregistrable and refused trademarks. In Article 24 Paragraph (1), the result of substantive examination by the trademark examiner can be a trademark application that can be registered and a trademark application that is refused registration. If the trademark examiner decides that the trademark application can be registered, then the minister shall:

1. Registering the mark;
2. Notify the applicant or his attorney of the registration of the mark;
3. Issuing a brand certificate; and
4. Announcing the registration of the trademark in the official trademark news, both electronic and non-electronic.

After going through a substantive examination, the next requirement is to register a domain name using the brand of a registered product, so that cases of domain name registration using a company's brand can be prevented. For this reason, the addition of trademark registration requirements to Law No. 20 of 2016 concerning Trademarks and geographical indications needs to be done.

II. The Concept of Repressive Regulation of Trademark Protection Against Cybersquatting

The rapid development of the internet has caused the law to limp along. Website is very important for a product to compete in the market. Domain name as a requirement to create a website does not have adequate regulation. In the ITE Law, the regulation of domain names is only found in Article 23, Article 24, Article 25, and Article 26. As a result, the current repressive efforts do not provide legal certainty.[18] The current debate in court seems to be based on different perceptions of ownership rights over domain names. In its development, it is rather difficult to define that a domain name is categorized as a property right, a right to a brand, or only a lease right.

Trademark as one of the copyrights is a work of having an individual or group that makes it so that it can be called a creator with imaginative and creative work, as well as its characteristics. The existence of copyright infringement, such as piracy or theft of the work of others, plagiarism or misuse of intellectual property rights belonging to others, misuse of images for personal gain without permission, and misuse of songs or musical instruments without mentioning the source. Thus, the ITE Law is one of the law enforcement tools for the threat of cybercrime in cases of copyright infringement that have been regulated in Law No. 12 of 1997. The existence of the ITE Law through supporting articles of Copyright protection has

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[17] *Ibid*.

[18] Hukum Online, "Kasus mustika-ratu Sekadar Cari Sensasi", (2001), online: <https://www.hukumonline.com/berita/a/kasus-mustikaratu-sekadar-cari-sensasi--hol3589/>.

played an important role in avoiding any violations committed by irresponsible groups. The policy has emphasized the prohibition of copyright infringement in the online context, establishing sanctions against violators, and closing access to websites that violate copyright to play a role in strengthening the protection of the privacy of works.[19]

Law number 28 of 2014 on Copyright has also regulated the criminal law sanctions for cyber criminals who commit copyright infringement, which is sentenced to a maximum imprisonment of 10 years and a fine of RP. 4,000,000,000 (4 billion rupiah). On the other hand, related to domain names, because the rules regarding domain names in Indonesia are still subject to the arrangements used by the international world, namely ICANN (Internet Corporation for Assigned Names and Numbers), the internet authority authorized to handle IP Address issues, as well as domain name system management. So that all legal consequences arising from the use of domain names and domain name disputes that may occur, can use UDRP (Uniform Dispute Resolution). An effort to resolve domain name disputes through non-litigation channels. In addition to the UDRP, an initiative was taken by Pandi by establishing a special unit for domain name dispute resolution called Domain Name Dispute Resolution (PPND).[20]

In realizing legal protection in Indonesia, the settlement of disputes over Registered Trademarks and Famous Trademarks as das sein or ius constituted can be done through the Commercial Court and Alternative Dispute Resolution outside the court, namely through Arbitration and the object of trademark disputes are similar in essence or whole, bad faith for similar or dissimilar goods/services as well as the subject of the dispute then the registration of the trademark should be rejected and the registered trademark can be canceled and/or abolished, as a legal discovery the judge stated that the same trademark can be owned by Registered Trademarks and Famous Trademarks.[21]

The formation of regulations needs to be designed immediately. The current ITE Law is an “umbrella” regulation, so it requires the “acceptance of the baton” of other regulations to regulate specific matters, namely formally and materially. By forming a domain name law, clarity of rules will be created and polemics related to law enforcement in the field of domain names can be resolved. Legal unification in terms of domain names is needed to ensure legal certainty.

CONCLUSION

The first registrant principle applied in domain name registration allows certain parties to abuse this system by registering domain names that are similar to registered marks without going through substantive examination. This differs from the trademark registration system that applies the first-to-file principle, where the first registered mark has stronger rights. Therefore, the risk of domain name appropriation of brands is higher, as domain registration does not go through an in-depth verification process.

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19 Kaparang, *supra* note 5.

20 Sholahuddin Al-Fatih, “Analisis Keterhubungan Konsep Merek dengan Nama Domain: Kajian Kekayaan Intelektual di Indonesia” (2021) 23:2 J Judic Rev 257–264.

21 Gunawan, *supra* note 10.

To solve the problem, a preventive measure that can be taken is to add a condition that the registration of a brand name must be accompanied by the registration of a domain name. This can help to prevent domain name grabbing over trademarks. In addition, optimal law enforcement against cybersquatting cases also needs to be carried out, both through non-litigation and litigation channels, to prevent the practice of domain name grabbing that harms brand owners. With these measures, the protection of intellectual property rights, especially trademarks, can be more effectively maintained.

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