

Legal Protection of the MS GLOW Brand Due to the Use of the Brand to Different Goods Class

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Abstract— Based on the provisions in Article 25 Paragraph 2 letter (g) of Law Number 20 Year 2016 on trademarks and geographical indications explains that the Trademark Certificate contains the class and type of goods and/or services for which the Trademark is registered. The data listed in DITJEN HKI regarding the class of goods MS GLOW with registration number IDM000731102, is class 32, namely instant powder drinks. While the goods produced and circulated are cosmetics that should be included in class 3. The difference in the class of goods that are not in accordance with the registered trademark certificate and contrary to the policy of BPOM (Food and Drug Administration) resulted in MS GLOW trademark can not be protected by law. Researchers are interested in further discussing the Legal Protection of the MS GLOW Trademark due to the Use of Trademarks in Different Classes of Goods.

Index Terms— legal protection, trademark, cosmetics.

1. Introduction

In the world of trade, one form of intellectual property rights is trademark and has been used since hundreds of years ago. Brands are used by producers to distinguish products in the form of goods and services so that they have a very important role [6]. The commercial value of a brand can be very high, and often the brand can increase the cost of the product relative to the product maker [5]. Trademark has a very important benefit both for business actors as the owner of the brand and for consumers as a connoisseur of products in the form of goods or services that are affixed with a brand that has been determined. A trademark must be registered in advance to obtain protection as stipulated in Article 1 Paragraph (5) of Law Number 20 Year 2016 on Trademark (hereinafter referred to as Trademark Law) which stipulates that: "The right to Trademark is an exclusive right granted by the State to the owner of a registered Trademark for a certain period of time by using the Trademark itself or giving permission to other parties to use it".

Provisions related to classes of goods and services are outlined in Government Regulation No. 24 of 1993 concerning Classes of Goods or Services for Trademark Registration (hereinafter referred to as the Government Regulation on Classes of Goods or Services). Until this work is made, the Government Regulation on Class of Goods or Services has not been updated. The problem is that the Government Regulation on Class of Goods or Services is based on the repealed Law No. 19 of 1992 on Trademarks, which in principle is confusing

legislation (law making process problem) [1]. In practice, the classification in the Government Regulation on Classes of Goods or Services is still used today. This disrupts legal certainty and in principle legislation, creating a legal vacuum for the class of goods or services. This legal vacuum is often utilized by certain parties irresponsibly to piggyback on the reputation or fame of a well-known trademark, by registering a trademark that is the same or similar to a well-known trademark in the class of goods and/or services that are not similar.

Then the Trademark registration becomes very important because it can be a proof of ownership if at any time there is a Trademark dispute. In addition, the use of Trademark must always be in accordance with the name and class registered. Therefore, it is important for businesses to be more careful and double-check the Trademark to be used and the Trademark that has been registered in order to get legal protection.

A case of a product that has a different class registration type number is MS GLOW, which is registered as a mark in class 32 for beverages. In principle, MS GLOW should have registered its mark in class 3 which is intended for cosmetics. Therefore, MS GLOW was involved in a dispute with PS GLOW, which was won by PS GLOW who had registered its mark in the cosmetics class. MS GLOW has been printing products that only include the MS GLOW brand, not in accordance with BPOM regulations, because it has never printed products with the MS GLOW for Cantik Skincare brand, and is not registered with BPOM. In fact, MS GLOW is a cosmetic trademark that has been operating since 2016, while PS GLOW has been operating since 2021. As a result, MS GLOW must also stop production and withdraw its products from the market as decided by the Surabaya Commercial Court[2].

The regulation of the class of goods or services that are still empty raises the uncertainty of legal protection for holders of rights to well-known trademarks if the trademark owned is piggybacked on its reputation by other parties by being registered in a different class of goods and/or services. These conditions should not be allowed to take place on a protracted basis so that a juridical settlement is needed even though the Government Regulation in question has not been issued [11]. The interests of the community on the right to protection of trademarks related to their livelihood was disturbed.

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2. Research Methods

This research is included in normative juridical research, namely research through an approach that examines document studies using secondary data such as legislation, court decisions, legal theories, and opinions of legal experts. Qualitative descriptive data analysis is done by analyzing secondary data that is narrative and theory, definition and substance sourced from some literature which is then analyzed in order to answer the problem of Legal Protection of MS GLOW Trademark due to the Use of Trademarks in Different Classes of Goods.

3. Results and Discussion

A. *Infringement of Law on the Use of MS GLOW Marks in Different Classes of Goods*

Article 1 Paragraph 1 of Law Number 20 Year 2016, Trademark can be interpreted as a sign that is shown graphically in the form of images, logos, word names, letters, numbers, color arrangements, in 2-dimensional and / or 3-dimensional form, sound, holograms, or a combination of 2 or more elements to distinguish goods and / or services produced by persons or legal entities in the trading activities of goods and / or services. Meanwhile, the TRIPs Agreement itself also describes the trademark, which is a distinguishing mark for other goods or services in the form of words including the name of the person, letters, numbers, and a combination of several colors. Therefore, the trademark has an important role for a product made by the company in order to prevent unfair business competition and make people confused when choosing the desired product, thus the state strongly guarantees the trademark owned by a company because the state gives exclusive rights to their owners of the trademark has been registered at Ditjen IPR according to the procedures that have been provided. Indonesian law trademark registration requirements are divided into 3 parts, namely [4]:

1. The owner of the trademark must be in good faith, the owner of the trademark can be an individual or legal entity because one trademark is used as a jointly owned trademark that becomes a unified whole;
2. Trademark cannot be registered if not memenuhi elements-elements in peraturan regarding trademarks,
3. Trademark will be rejected if there is a similarity in essence or entirety.

Trademarks are granted to applicants who are in good faith, which means that the applicant registers the trademark correctly according to the procedure and there is no intention to imitate or match other people's trademarks. The use of the trademark is also not allowed if it is not in accordance with the registered trademark which results in misleading consumers. Trademark infringement is divided into 3 categories, among others [9]:

1. Infringement that results in similarity of source, sponsor or even connection,
2. Counterfeiting with the use of the mark significantly no different from that required for recovery of 3 times the amount of actual damages as allowed by existing regulations,

3. Dilution of a mark that reduces the quality of a famous mark to identify and distinguish goods or services regarding confusing competition.

Trademark infringement has a special purpose for people who violate it is to *memperoleh profit* as much - as possible by easily imitating, falsifying brands - brands that are familiar to the public. As a result of the act the community is harmed as well as the company or the owner of the brand, consumers and even the state also feel harmed. If consumers feel harmed, then consumers can prove it. Can be said to be a violation of the trademark if it meets criteria below:

1. Have similarities that mislead consumers when producing goods or services that the company issued;
2. Have similarities in essence for the brand owned by the company.

If it has fulfilled the elements above, the trademark owner can file a lawsuit against the person who intentionally uses his trademark that has similarities in essence or in its entirety on goods or services that are similar or not similar in the form of compensation or cessation of all actions related to the use of the trademark without the right of *meluang* has been duly implemented, because such actions can harm the legitimate trademark owner.

Such problems occur in cosmetic products, namely MS GLOW. The MS GLOW trademark is registered and is in class 32 according to the data contained in the Intellectual Property Database with registration number IDM000731102 with an application date of April 26, 2018. There is a description of the goods in the registered mark, namely instant powder drinks. MS GLOW also has other registered trademarks. The trademark is "MS GLOW For Cantik Skincare". The trademark "MS GLOW For Cantik Skincare" has been registered in class 3, namely the class of beauty products or cosmetics in accordance with the registered at the Directorate General of IPR at registration number IDM000633038 with the application date of 20 September 2016. So the registered trademark is a trademark that has been registered at the Directorate General of IPR by obtaining a register number so that the trademark is said to be a valid trademark and can be protected.

However, so far MS GLOW has only used or included MS GLOW only in the skincare products it produces without including "For Cantik Skincare". This is not like what has been registered in class 32, namely cosmetics with the MS GLOW brand name "For Cantik Skincare". In the same case, the use of the MS GLOW mark is also not in accordance with the registered class of goods. The products produced and widely distributed are skincare or cosmetic products. While the registered class of goods is class 3, namely instant powder drinks. This of course contradicts the BPOM (Food and Drug Supervisory Agency) policy, where the use of the brand on the products produced must be in accordance with the products registered in the Directorate of Intellectual Property Rights.

In the explanation, it can be understood that the use of the MS GLOW trademark is not in accordance with the class of goods that have been registered. This can result in the MS GLOW trademark cannot be protected by law because its use is

not in accordance with the trademark certificate. The use of the mark in the goods produced must be in accordance with the registered mark and in accordance with the type of class of the mark. This is done to be able to provide legal certainty not only for the trademark owner. But also to provide certainty, assurance, and security for the public as consumers.

Law No. 20 of 2016 does not explain in detail about trademark infringement on the use of different classes of goods, but it is supported by the existence of several things that make MS GLOW's behavior violate the trademark. One of them, the use of trademarks used in different classes of goods or not in accordance with the registered class of goods. Article 4 Paragraph 2 letter (f) of Law Number 20 Year 2016 has explained that at the time of the application must include the class of goods and/or services as well as a description of the type of goods and/or services. The regulation is also supported in Article 25 Paragraph 2 letter (g) which explains that the Trademark Certificate contains the class and type of goods and/or services for which the Trademark is registered.

The regulation has clearly stated that the trademark certificate contains the class and type of goods and/or services according to the registered trademark. Data listed in the Directorate General of IPR, the class of goods contained in the MS GLOW brand is class 32, namely instant powder drinks. While the goods produced and sold are cosmetics that should be in class 3. The MS GLOW brand should already have a certificate in class 3 with the brand "MS GLOW For Cantik Skincare" but so far MS GLOW has only used or included MS GLOW only in the skincare products it produces without including "For Cantik Skincare". The use of the mark in a different class of goods and not in accordance with the Trademark Certificate is what can make the MS GLOW mark unprotectable.

B. Legal Effects on MS GLOW Trademark Due to the Use of Trademarks in Different Classes of Goods

Use of the MS GLOW brand in different classes. This could prevent the MS GLOW brand from receiving protection. Therefore, if the use of an unprotected mark is substantially or completely similar to another protected mark of the same class (competitor), then the MS GLOW mark may be subject to brand plagiarism. This of course could result in the MS GLOW brand being subject to brand infringement which could cause parties with other brands protected for the same class (competitors) to submit legal action in the form of warnings, lawsuits, requests for product withdrawal, and even police reports and demands for compensation.

Use of the MS GLOW mark in a different class. This can make the MS GLOW mark unprotected. Therefore, if the use of an unprotected mark has similarities in essence or in its entirety with other protected marks for the same class (competitors) then the MS GLOW mark can be subject to trademark plagiarism. This of course can make the MS GLOW trademark subject to trademark infringement which can cause parties with other protected trademarks for the same class (competitors) to file legal remedies in the form of reprimands, lawsuits, requests for product recalls, to police reports and demands for

compensation.

The owner of the MS GLOW trademark uses its trademark on a different class of goods and is not in accordance with what is registered on the trademark certificate. It can be said that the owner of the MS GLOW trademark does not have good faith. This can be seen from the owner of MS GLOW who abuses the use of brand certificates and goods in circulation are not in accordance with the goods registered with BPOM. The MS GLOW trademark is registered and is in class 32 according to the data contained in the Intellectual Property Database with registration number IDM000731102 with a description of the goods, namely instant powder drinks. This is different from goods that have been widely circulated in the community, namely cosmetics.

Law Number 20 Year 2016 on Trademarks and Geographical Indications, there are several classifications of trademark infringement, namely:

- a. Using the same mark in its entirety
- b. Using the same mark substantially
- c. Using the same mark
- d. Using the same mark with geographical indication.

There are several classifications above, the acts committed by the owner of the MS GLOW mark can be categorized as trademark plagiarism in the form of trademark infringement by using the same mark substantially or in its entirety. This can be related according to other marks protected for the same class by competitors.

In addition, Article 83 of Law Number 20 Year 2016 on Trademarks and Geographical Indications also contains the Lawsuit on Trademark Infringement, namely:

The owner of a registered Trademark and/or the licensee of a registered Trademark may file a lawsuit against other parties who unlawfully use Trademarks that are substantially or wholly similar for similar goods and/or services in the form of:

1. A lawsuit for compensation; and/or
2. Cessation of all acts related to the use of the Trademark.
3. The lawsuit as referred to in paragraph (1) may also be filed by the owner of a well-known trademark based on a court decision.
4. The lawsuit as referred to in paragraph (1) shall be filed with the Commercial Court.

Based on the above article, it can be seen that any infringement of the trademark used without the right to file a lawsuit in the form of compensation and cessation of all acts related to the trademark. It gives the conclusion that the infringement of the trademark is a violation that is detrimental Competitors (in the same class) that have similarities in essence or as a whole with the MS GLOW trademark can file a lawsuit to the Commercial Court against the owner of the MS GLOW trademark which can be categorized as trademark plagiarism. In this case, it is using the same mark in essence or in its entirety in the form of a lawsuit for compensation and cessation of all acts related to the competitor's mark. In the lawsuit, the competitor can prove that the owner of the MS GLOW trademark has similarities in essence or as a whole to the trademark owned by the competitor.

In connection with the violations committed by the owner of the MS GLOW trademark, the legal consequences that arise can refer to the sanctions contained in Law Number 20 Year 2016. From the sanction articles, the acts committed by the owner of the MS GLOW brand refer to Article 100 paragraph (1) and (2) of Law Number 20 Year 2016.

Article 100 paragraphs (1) and (2) of Law Number 20 Year 2016 on Trademarks and Geographical Indications states that:

1. Any person who without right uses the same mark in its entirety as a registered mark owned by another party for similar goods and/or services produced and/or traded, shall be punished with imprisonment of 5 (five) years and/or a maximum fine of Rp2,000,000,000.00 (two billion rupiah).
2. Any person who without right uses a trademark that is substantially similar to a registered trademark owned by another party for similar goods and/or services that are produced and/or traded, shall be punished with imprisonment of 4 (four) years and/or a maximum fine of Rp2,000,000,000.00 (two billion rupiah).

Based on the article, it is known that the form of trademark infringement in its entirety with a registered trademark owned by another party for similar goods and/or services produced and/or traded will receive a maximum imprisonment of 5 (five) years and a fine of Rp2,000,000,000.00 (two billion rupiah). While the trademark infringement in principal with registered trademarks owned by other parties for similar goods and/or services produced and/or traded will receive imprisonment for a maximum of 4 (four) years and a fine of Rp2,000,000,000.00 (two billion rupiah).

C. Form of Legal Protection of MS GLOW Trademark Due to the Use of Trademarks in Different Classes of Goods

The protection of the brand is not only related to the brand itself, but also a quality assurance of goods or services produced by the company. Based on these benefits, then the protection of the law is necessary for the achievement of 3 things, namely:

1. To ensure legal certainty for the inventor of the trademark, trademark owner, or holder of trademark rights.
2. To prevent the occurrence of violations and crimes on the trademark so that legal justice can be given to the rightful party.
3. To provide benefits to the community so that people are more encouraged to make and take care of their business trademark registration.

Trademark infringement is divided into 4 forms, namely the use of the same mark as a whole, the use of the same mark in essence, the use of the same mark, and the use of the same mark in essence with geographical indications. The existence of the form of trademark infringement requires the law to provide protection to the parties entitled to the trademark. Protection is very important considering how the trademark becomes important in industrial property rights. Article 35 of Law Number 20 Year 2016 on Trademarks and Geographical Indications that a trademark that has been registered gets legal

protection within a period of 10 (ten) years from the date of receipt of trademark registration.

The use of the mark on a different class of goods and not in accordance with listed on the registered trademark certificate by the owner of MS GLOW obtains external legal protection. External legal protection is the establishment of regulations aimed at the interests of weak parties born by the authorities. In accordance with its nature that a regulation should be made in a balanced and proportional manner without indiscriminately or in favor of certain parties. External legal protection is formed to prevent injustice, arbitrariness against the interests of other parties, and harm to weak parties [7].

The owner of a registered trademark can file a lawsuit against a person or legal entity that uses his trademark, which has similarities, either in essence or in its entirety without rights, in the form of a request for compensation with the cessation of the use of the trademark (Article 83 Paragraph (1) of Law Number 20 Year 2016 on Trademarks and Geographical Indications). The handling of trademark cases is resolved by the Commercial Court, this illustrates that it takes a special space in resolving cases related to trademarks. The authority of the Dragon Court which is a special court places the brand as an important thing and the pelran that the brand brings in the economic development of a country.

The issue of compensation that is mentioned in Article 83 paragraph (1) can be in the form of material and immaterial damages. For material compensation is a real compensation and can be assessed with a sum of money. While immaterial damages are damages that initially can not be said to have a monetary value, although later will get a description in court in a certain amount of money. Immaterial losses in the world of brands can be exemplified as moral losses and losses in the form of good name. Therefore, immaterial losses are not only requested by compensation in the form of a sum of money, but also can be in the form of restoring the good name of the brand or brand owner and apology announced in the mass media.

In this MS Glow case, it is known that the registered Trademark is "MS GLOW FOR CANTIK Skincare" in the cosmetics class. Meanwhile, in the practice of running a business, the Trademark that is often used is MS GLOW where this Trademark is actually registered in HAKI in class 32 with the classification of powder drinks. Referring to the expert testimony in the Surabaya Commercial Court decision, namely Dr. Suyud Margono and Adi Sopanto, the trademark cannot be protected if only the fragment is used and its use must be in accordance with the registered class. Therefore, the owner of the MS GLOW brand can use the brand "MS GLOW FOR CANTIK Skincare" if they want to conduct business activities in the cosmetics class. As stipulated in Law Number 20 Year 2016, a trademark may not have similarities in essence with other trademarks.

Therefore, Trademark registration becomes very important because it can be a proof of ownership if at any time there is a Trademark dispute. In addition, the use of Trademark must always be in accordance with the name and class registered. To that end, it is important for businesses to be more teliti and recheck the Trademark to be used and Trademark that has been

registered in order to get legal protection.

Trademark rights are exclusive rights granted by the state to the registered trademark owner for a certain period of time by using the trademark itself or giving permission to other parties to use it. Special rights to use this trademark that berfungsi like a monopoly that only applies to certain goods and services. Therefore, the trademark gives a special right or absolute right to the concerned, then the right can be defended against anyone. Trademark rights granted to the owner of the trademark in good faith, its use includes goods and services [8].

4. Conclusions

The use of the MS GLOW brand on different classes of goods is a violation of the law because it is not in accordance with the registered Trademark Certificate and contrary to the BPOM (Food and Drug Supervisory Agency) policy, where the use of brands on manufactured products must be in accordance with the products registered in the Directorate of Intellectual Property Rights. This results in the MS GLOW brand cannot be protected by law. If the use of an unprotected mark has similarities in essence or in its entirety with other protected marks for the same class (competitors), then the MS GLOW mark can be plagiarized (trademark infringement). This has been regulated in Article 4 Paragraph 2 letter (f) of Law Number 20 Year 2016 explaining that at the time of application must include the class of goods and/or services as well as a description of the type of goods and/or services. The regulation is supported by Article 25 Paragraph 2 letter (g) which explains that the Trademark Certificate contains the class and type of goods and/or services for which the Trademark is registered. MS GLOW brand goods class data listed in the Directorate General of IPR with registration number IDM000731102 is class 32, namely instant powder drinks. While the goods produced and sold are cosmetics that should be in class 3. The MS GLOW brand already has a certificate in class 3 with the brand "MS GLOW For Cantik Skincare" but so far MS GLOW has only used or included MS GLOW only in the skincare products it produces without including "For Cantik Skincare".

The legal consequences of the MS GLOW trademark due to the use of trademarks in different classes of goods result in parties with other protected trademarks for the same class (competitors) can file legal remedies in the form of reprimands, lawsuits, requests for product withdrawal, to police reports and demands for compensation. In connection with violations committed by the owner of the MS GLOW trademark, the legal consequences that arise refer to sanctions and can be charged with criminal threats as stated in Article 100 paragraph (1) and (2) of Law Number 20 Year 2016 concerning Trademarks and Geographical Indications. Based on the article, it is known that the form of trademark infringement in its entirety with a registered trademark owned by another party for similar goods and/or services produced and/or traded will receive a maximum imprisonment of 5 (five) years and a fine of Rp2,000,000,000.00 (two billion rupiah). While the trademark infringement essentially with a registered trademark owned by another party for similar goods and/or services produced and/or traded will get a maximum imprisonment of 4 (four) years and

a fine of Rp2,000,000,000.00 (two billion rupiah).

The form of legal protection of the MS GLOW trademark due to the use of the trademark on a different class of goods refers to external legal protection. In accordance with Article 4 Paragraph (2) letter f of Law Number 20 Year 2016, the applicant for Trademark registration shall include the class of goods and/or services. The registered trademark can only be used in the field of business in accordance with the registered class. A Trademark can also be registered in more than one class to prevent the use of the same Trademark in another class. Furthermore, the use of the Trademark name must also be in accordance with the registered name.

5. Suggestion

For Business Actors must be more careful and understand the importance of the classification of classes of goods and / or services listed on the trademark certificate. Where the use of a trademark for a product or goods must be in accordance with the class of goods on a registered trademark certificate. It is also included to use and include the mark on the product in full according to what is contained in the trademark certificate and not just a fragment so that the trademark gets protection and guarantee of legal certainty. In addition, it aims to avoid telrkelna acts of plagiarism of other people's marks and what things are not allowed to be used in the trademark. This is important to do to prevent disputes in the future.

For the Government needs to increase socialization about the importance of registration and use of trademarks in accordance with the trademark class. In addition, to prevent forms of Trademark infringement, the government through the Directorate General is the Directorate General of Intellectual Property Rights under the Ministry of Law and Human Rights need to improve supervision, through monitoring, evaluation and periodic reporting, regarding cases of infringement of Trademarks that have been registered. Law enforcement needs to be implemented effectively through the judicial process by institutions that have the authority in accordance with the legislation. Furthermore, the government is expected to be more thorough in conducting a more in-depth examination of the application for trademark registration before the registration application is accepted.

For consumers should be more celrdas, meticulous, and careful in choosing a product. Where the product must be appropriate and does not violate the applicable regulations. Products selected by consumers must be in accordance with the registered products at the Directorate General of IPR in order to ensure that the products used are safe.

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