

INDONESIA CULTURE CONSERVATION THROUGH THE LEGAL PROTECTION OF BATIK LUMAJANG TRADEMARK

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Background

On 2020 Indonesia has participated in the era of free market, and one of the impact from free market era that is Indonesia will be a free market for domestic and also foreign market, furthermore by the existance of free market era Indonesia society has an opportunity to sell the domestic product abroad. It becomes a strong reason why the intellectual right of Indonesia product needs to be protected by law regarding the globalization era. Indonesia has diverse culetur, one of the proud Indonesia product that has been admitted by UNESCO on 2009 is Batik. Batik is National product which is very proud for Indonesia. One of Batik product is Lumajang Batik. Lumajang Batik is a Batik craft which is from Lumajang, East Java in Indonesia well-known as Banana Town Lumajang Batik. Lumajang Batik is an original written batik which its pattern and colour show the real condition of Lumajang society in Lumajang District and the famous theme

of Lumajang Batik is banana or “jaran kencak” that become the icon of Lumajang District.

This research was inspired by the research team activity in dedication program for skim society “education and technology for society (IbM)”. It is a grant program from Directorate General of Higher Education the Ministry of Research, Technology and Higher Education year 2016 for Lumajang research team. Regarding to this activity, the researchers selected two Batik Craftmen as the partners as the requirement of IbM skim. Those are “UD Makarti Jaya and UD Batik Pasir Semeru”. Both of those partners were selected based on the requirement from Department of Industrial and trading in Lumajang district. UD Makarti Jaya as the pioneer of Batif Craft in Lumajang, and Batik Pasir Semeru is a developing and new industrial but it has improved its production quantity and its market. However, the weakness is both of those industrials have not have any legal protection yet. There are three partner issues which become the center in IbM activity. This product is not well-known among the society, it does not have any industry legality and it does not have any legal protection. However, in this research related to trademark protection, industry legality is the requirement as the registration to obtain the legal protection. From those partnership issues which become the justification to be solved through IbM program has been conducted: (1) to establish Batik exhibition, (2) to manage the legality of partnership industrial as the requirement in registering the trademark in the form of establishment corporation, Tax Identification

Number, Individual Business License, Company Registration, Industry Registration and Disorder License which all those requirements have to be complied. (3) to manage the trademark registration to General Directorate of Intellectual Property Rights The Ministry of Law and Human Rights which is already given the registration number while waiting for the secretion of trademark certificate minimum in two years after the registration, (4) to establish the law counseling related to the industry legality and the trademark protection for Batik Lumajang developers who have not possessed the business legality and have not registered their trademark. All those activities have benn conducted by research team, but the writing of this research will be limited only to the legal protection aspect of Batik Lumajang trademark.

Batik as the national product of Indonesisa which is sold internationally and also domestically should has a trademark which is symbolized the company. Trademark becomes very important because it shows the identity of batik's origin, the quality of batik and also as the image of the company who produces and sells the product. The trademark of Batik is the symbol of intellectual wealth so that's why this trademark is necessary to gain the legal protection. The legal protection of Batik trademark will extend the law certainty for the company as the trademark's owner in using the trademark, it aims to prevent unhealthy competition from other side in using the similar trademark or the whole trademark using batik trademark from the official owner. Regarding to this idea, the research team desires to apply this article into international

**journal related to “INDONESIA CULTURE
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OF BATIK LUMAJANG TRADEMARK.”**

Problem Formulation:

- 1. What is the function of trademark for producer and consumer?**
- 2. What is the nature of legal protection on the trademark?**

Research Method

This reasearch used the type of juridical sociology law research, according to¹ is a way or a procedure that is used to solve the research issue by analyzing the seconadary data first then it will be continued by analyzing the primary data on the field. The using of juridical sociology theory can be the research material for different aim. ² Juridical research is used by analyzing the legislation product related to the trademark, and all related concept, sociology research is used because this research was started by the grant activity for society related to the legal protection of Batik Lumajang Trademark.

The Legal material used in this research are:

a. Primary data

The data obtained by the time the research team conducted the grant activity for the society as Education and technology skim for society year 2016, interview with the related side on the partnership accompaniment in managing the business legality and the trademark registration of Batik Lumajang. The source of primary data was gathered from the chairman and staff of industrial and trading Department in Lumajang District and

also from the chairman and the staff of Licensing and integrated service department Lumajang District.

b. Secondary data

Secondary data used in this research are:

- 1) The primary legal material in the form of legislation that is the Law of Republic Indonesia Nomor 15 year 2001 on trademark.
- 2) The secondary law material that is law material which is related strongly to the primary law material and it can be used to analyze the primary law material, for instance journal and other experts' writing.

The trademark function for produsen and consumer

A trademark has an important role because trademark functions as the identity to differ the product of one company to others company in similar field, it also functions to connect the product to the seller as the reputation guarantee of its business' outcome in the trading. a trademark also functions as the promotion media in which its role as the business symbol to expand the product market and to attract the consumer's interest to buy the product, as the guarantee of the product quality because through the trademark the consumer can know the product quality that they buy, and also as the product origin where the product roles as the mark of its origin area that relates the product with the produsen or region/country³. Besides in the era of free market, trademark is one of the basis in modern trading. It is described as a basis because a trademark can be the basic in development of modern trading that can be used as a goodwill, the symbol of quality, quality

standard, as a medium to get into a market, and traded by quality in order to obtain numerous profit. Trademark serves easiness for the consumer in differing the product that they buy related to the good quality, the satisfactory, pride or other attribute that sticks to that product.⁴ according to preamble Laws no.15 year 2001 on trademark article a stated:

“that in the era of global trade and in line with the international conventions that have been ratified by Indonesia, the role of Mark has be come more important, particularlyin safeguard in a fair business competition”

This statement means that by the existance of mark in a product and/or similar service thus can be differed the origin, the quality and also the guarantee that the product is original. According to Article 1 paragraph (1) laws No. 15 year 2001 regarding marks that Mark shall mean a sign in the form of a picture, name, word, letters, figures, composition of colours, or a combination of said elements, having distinguishing features and used in the activities of trade in goods or services. In summary, mark is a sign of the goods’ or services’ origin which is related to its producen. Based on producen’s view, mark is used as the guarantee of the product result, especially the quality of its user. the consumer of special mark can emerge a certain image. Thus, the quality an unquality goods will have their own marks, even it is not impossible that the famous mark which is already well-known by the consumer will not be imitated or even falsified by other producers.⁵

The Nature of Trademark Legal Protection

World Trade Organization (WTO) is a frame as an international agreement and it becomes the reference of every business performer and the government policy which is related with the intellectual wealth right protection and foreign assignment besides other matters that relate to international trade transaction. The WTO former is one of the realization on financial institution which is established to manage the global financial that is related to regional and also international standards. As well as the GATT provision which is arranged in Agreement on Trade Related Aspect of Intellectual of Property Right (TRIPs). It is a sign that has to be obeyed well by the businessmen in Indonesia (H.OK. Sadikin: 2002: 329-330)

Mark is the part of intellectual wealth right, the right protection of the intellectual wealth internationally is started by the approval of Paris Convention on 1883 in Brussels, the convention has been amended for the last time in Stockholm on 1979. This Paris Convention regulates the protection right of the industry which covers *inventions, trademark, service mark, industrial design, utility model (small patent), trade names (designations under which an industrial or commercial activity is carried on), Geographical indications (indications of source and appellatynos of origin) and the repression of unfair competition*. The purpose of this Paris Convention is to protect the right of the inventor in industrial world.⁶ That the inventor in industrial world has their copyright of each their creation

The mark provision internationally does not only use Paris Conventional, mark field also established vary kinds of

international agreements, those are:⁷ Madrid Agreement 1891: *Madrid Agreement Concerning Repression of false Indications of Origin*. The content of this agreement is related to the enforcement effort to the forgery indication or the originity of a good;

1. Madrid Agreement 1891: *Madrid Arrangement Concerning the Internasional Registration of Trademark*. This agreement concerning the international registration of a trademark;
2. Den Haag Agreement 1925: *The Hague Arragement Concerning the International Deposit of Industrial Pattern and Design*. This agreement is related to the international saving of pictures or craft design;
3. Lisabon Agreement 1938: *Lisabon Agreement Concerning the Protection and international Registration of Declaration Origin*. This agreement is related to the protection and the international registration on the origin of the product;
4. Nice Agreement 1957: *Nice Agreement Concerning the International Classification of Goods and Service to Which Trademark Apply*. This agreement is related to the international classification of a trademark or service.

Black's Law Dictionary clarifies as "A word, phrase, logo or other graphic symbol used by a manufacturer or seller to distinguish its product from those of others". The matter of trademark is also explained in Article 15.1 the Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPs) which stated that Any sign, or a any combination of sign, capable of distinguishing the goods or services of one undertaking from those of undertaking, shall be capable of

constituting a trade mark. Such signs, in particular words, including personal names, letters numerals, figurative elements and combinations of colours as well any combination of such signs, shall be eligible for registration as trademarks.

In Indonesia it has been arranged the trademark Laws. The first trademark protection in Indonesia was arranged in Reglement Industrieele Eigendom Kolonien 1912 which was renewed and replaced by Laws No.21 1961 regarding Company Trademark and Trading Trademark, then was revised through Laws No.15 year 2001 regarding Marks. Laws No.15 year 2001 regarding Marks is the form of Indonesia's consistency on ratification that has been made by Indonesia as the participation in WTO and the agreement of TRIPs, based on Article 1 clause 1 Laws RI No.15 year 2001 regarding Marks, explains that:

“Mark shall mean a sign in the form of a picture, name, word, letters, figures, composition of colours, or a combination of said elements, having distinguishing features and used in the activities of trade in goods or services.”

Based on article 1 clause 1 above, there is an absolute requirement to make a trademark that is by having distinguishing feature. The absolute requirement of a trademark has to be met by everyone or a law firm that are willing to establish the trademark, so their trademark registration can be accepted and can be used as a trademark or a brand. The absolute requirement is that the mark shall have a distinguishing feature. In other words, the mark that is used in a brand has a power to differ the product of one company or

trading or the service of individual's production with other production. In Article 5 Laws of Republic Indonesia No.15 year 2001 regarding Marks stated that:

“A Mark shall not be registered if it contains one of the following elements: a. Contradicting with the prevailing rules and regulation, morality of religion, or public order; b. Having no distinguishing features; c. Having become public property; or d. Constituting information or related to the goods or services for which registration is requested.”

Article 5 above is strengthen by Article 6 concerning the provision of the refusal of trademark registration by General Directorate of Intellectual Property Rights The Ministry of Law and Human Rights if:

- a. Having similarity in the main or the whole part with a trademark of other party that has been registered earlier for the kind product or service;
- b. Having similairty in the main or the whole part with a famous trademark of other party for the kind product or service;
- c. Having similarity in the main or the whole part with geographic indication that has been known.

General Directorate of Intellectual Property Rights the Ministry of Law and Human Rights also has to reject the trademark registration if:

- a. is or resembles a famous person's name, photograph or legal entity belonging to another person, except a written agreement of the beneficiaries;
- b. an imitation or resembles the name or abbreviation of the name, flag, symbol or a symbol or emblem of a state or national and international institutions, except with the written agreement of the competent authority;
- c. an imitation or resemble the mark or seal or official stamp used state or government agency except upon the written agreement of the competent authority.

A brand that has the "distinguishing feature" then it should be simple should not be too complex also may not use the signs which are too easy. In order to provide individuality (personal characteristics) to an object then the brand must have individuality powers. thus the similarity between one product to other product is forbidden⁸. The equation was not only mean the overall equation (the brand is the totality imitated) but also includes a similarity in principle if there are similarities due to the elements that stand between one brand to another brand, which can cause the appearance of good equations on its form, placement ways, ways of writing or a combination of elements or rhyme similarity, words contained in those brands. There are three forms of the use of a brand that can be categorized in similarity in principle, those are:

- a. similarity in appearance confusing in appearance;
- b. similarity in sound = confusion when pronounced;
- c. Similarity in concept= the meaning is so similar that you recall the same thing.

Article 2 of Law No. 15 year 2001 regarding Marks mentions that the brand can be divided into two types, those are trademarks and Services. The trademark is a brand used on goods traded by a person or persons jointly or a legal entity to differentiate with other similar items. While the service brand is a brand that is used for services traded by a person or persons jointly or a legal entity to differentiate with other similar services. Besides, in article 1, paragraph (4) of Law No. 15 year 2001 regarding Marks also mentions the existence of a collective brand is a brand used on goods or services with the

same characteristics that are traded by several persons or legal entities together to distinguish the goods and / or services with the same characteristics that are traded by several persons or legal entities together to distinguish the goods or services and other similar collective brand. Classification does not make the existence of three types of brands. Type the brand there are only 2 type of the remained brand, those are trademarks and service marks. The differences in the collective mark is on the subject of consumer brands, which may collectively, while trademarks and service marks are usually used individually. Collective marks may be used by several people (a group of people), or may also be a legal entity (corporation combined).

Related legal protection can be explained the concept of the protection of the law by some experts that can be expressed as follows: Soetjipto Rahardja argues that legal protection is their attempt to protect one's interests by allocating a power to him to act in the interests. Furthermore, it was also argued that one of the properties and the goal of the law is to provide protection (shelter) to the public. Therefore the legal protection of the public must be realized in the form of their legal certainty⁹. Regarding the meaning of legal certainty can also be expressed by the expert opinion Jan M. Otto as quoted by¹⁰ that the rule of law in a particular situation requires the following: provided legal rules are clear, clear, consistent and easily available (accessible) and it is issued by the state power; that agencies' authorities (government) apply the rules of law consistently and also submit and obey it; that the majority of citizens in principle approved the contents and the area adjust

their behavior to the rules; Judicial decisions are concretely applied. Furthermore based on¹¹ that Legal certainty is an implementation of the law in accordance with its state that people can make sure that the law is implemented. In understanding the value of legal certainty, it should be noted that the law has a close relationship with the instrument of positive law and the role of the State in actualize the positive law. The concept of legal protection was also explained, that according to him, the legal protection is an activity to protect individuals by harmonizing the relationship values or rules that manifest in attitude and actions in creating their order in social life among the humans. Legal protection is something that protects the law subjects through the applicable legislation regulation and imposed with a sanction. Legal protection can be divided into two (2), those are:

a). Preventive Legal Protection, namely:

The protection provided by the government with the aim of preventing before the violation itself occurs. It is contained in the legislation in order to prevent an an offense and to provide sign or limitations in performing an obligation;

b). Legal Protection repressive items, those are:

The last Protection end sanctions such as fines, Imprisonment and additional penalties are given in case of a dispute, or a violation that has been conducted.

The concept of brand protection in Indonesia, is adopting a first constitutive or first registrants (first to file principle), then the legally protected brand is a registered

brand. This was stated in Article 3 of the Trademark Act of 2001 which specifies that

“The right to a Mark is the exclusive right granted by the State to the owner of a Mark which is registered in the General Register of Marks for a certain period of time, to himself use said Mark or to grant permission to another party to use it.”

There are two systems of trademark registration, those are the registration system of declarative and constitutive system, the system of declarative a system that claimed trademark rights was published by first user, in this registration system it does not give the right, but just give an allegation or suspicion by law that person the registered trademark that is entitled to the original first user of a mark registered. While the constitutive system is a system that states that the trademark rights can be reached after conducting the registration that has power. The constitutive system to acquire the trademark depends on its registration. A trademark registration in Indonesia is carried out by applying registration at the Directorate General of Intellectual Property Rights Ministry of Law and Human Rights, further step is by granting the trademark certificate. Especially with regard to the trademark certificate is a consequence of the constitutive registration system. A person can only prove that the trademark is already registered with the trademark certificate as well as proof of ownership. While the announcement, it is made by including the official news trademark. According to H. OK. Sadikin¹² regarding the announcement of a trademark registration is very important as the application of the publicity principle. If a brand is not

registered and not published, so it is not born what is called as the existence right, the brand has never been considered untenable to anyone, not born principle of droit de suite, there is no preference right and so forth. Therefore, the transfer of the brand to a third party must also be registered so that the nature of the product rights arising. Legal protection of the brand will only take place if the trademark is registered. Thus the registration is an absolute condition for the trademark right. Without the registration then there is no rights to the trademark, and there is also no legal protection on the target trademark. By registering the trademark against a person or legal entity who registered, then the brand has specific rights or so-called "exclusive rights" as defined in Article 3 by Law 15 of 2001 on the brand, that is the exclusive rights granted by the state to the trademark owners. In general, exclusive rights can be defined as "the right to provide legal protection to the owner of the trademark, and is the only owner that has the right to wear and use it as well as prohibiting anyone from owning and using the trademark." Thus, the exclusive rights contains two things, firstly to use its own trademark, secondly, members of other parties permission to use the trademark. In connection with the provisions of article 3 of Law Number 15 of which states that the rights to the trademark is specifically granted by the State to the owner of the registered mark, then Article 7 determines that the registered mark obtains the legal protection for a period of 10 (ten) years and it is applicable since it obtains its trademark right, it gives a signal that there is no obligation for a person or a legal entity to register a trademark owned but

if they want to get the trademark protection from law, then the mark concerned must be registered first.

On Intellectual Property Rights, there are the two special privileges or known as exclusive right, those are the economy right (economy right) and moral rights (moral right) in addition to their social function¹³ Economic rights are the right to obtain an advantage over intellectual property. Rights in the form of profits earned some money for using the license by other parties. This is because the intellectual property rights can be the object of trade in the business world. Economic rights may be transferred, while moral rights are the rights which protect private interests (reputation) of the creator or the inventor. The rights attached to the person of the creator or inventor of a personal nature, showing a characteristic associated with a good name, ability and integrity which are only owned by the creator or inventor and eternal which means attached to the creator or inventor for the whole of their life even after death. Intent social function in this case is that in addition to the intellectual property rights for the benefit of private owners as well as to the public interest. In connection with the trademark rights so the right that he owns is the economic rights, that is the right to obtain an economic benefit from the right to use their own or through the use of the trademark license as contained in the provisions of article 3 of Law Number 15 of 2001 on the brand. While social function means that the use of the trademark should not be contrary to the public order, religious morality, decency and its use is not only for the welfare of the owners but also for the welfare of general society.

The legal protection system based on the principle of first to file granted to the holder of the registered mark who has good purpose in preventive and repressive. Protection of preventive law is conducted through trademark registration and protection of repressive laws for violation of the brand through a civil action or criminal charges Within the Law of the Republic of Indonesia number 15 year 2001 regarding mark also has to accommodate the legal protection of the brand as repressive as settled in Chapter XI Settlement Part One lawsuit of Trademark dispute article 76 states:

- (1). The owner of a registered Mark may file a law suit against any other party that unlaw fully uses his Mark for goods and services which has similarity in its essential part or its entirety with his Mark, in the form of:
 - a. claim for compensation, and/or
 - b. the termination of all acts that are related with the use of the relevant Mark.
- (2). The lawsuit referred to in paragraph (1) shall be filed at the Commercial Court.

Regarding the other repressive protection which is regulated in Chapter XIV Settlement Part One lawsuit of Trademark Article 90 stated:

“Any person who deliberately and without right uses a Mark which is similar in its entirety to a registered Mark of another party for the same kind of goods and/or services produced and/or traded shall be sentenced to imprisonment for a maximum period of 5 (five) years and/or a fine of a maximum amount of Rp1.000.000.000.00 (one billion rupiahs).

Article 91 Laws No. 15 year 2001 regarding Marks stated:

“Any person who deliberately and without right uses a Mark which is similar in its essential part to a registered Mark of another party for the same kind of goods and/or services produced and/or traded shall be sentenced to imprisonment for

a maximum period of 4 (four) years and a fine of a maximum amount of Rp800,000,000.00 (eight hundred million rupiahs).

Related to this violation, is also stated in Article 94 Laws No. 15 year 2001 regarding Marks:

“Any person who trades goods and/or services that are known or shall be known that the goods and/or services resulted from the infringement as referred to in Article 90, Article 91, Article 92, and Article 93 shall be sentenced to imprisonment for a maximum period of 1 (one) year and a fine of a maximum amount of Rp200,000,000.00 (two hundred million rupiahs).

Under the provisions of the articles mentioned above, the registered mark owners obtains the protection for violations of the trademark rights, both in tort and criminal. The owner of a registered trademark shall have the right to apply for the cancellation of the trademark registration of other people who do not rights.

In Lumajang, there are 33 centers of batik craftsmen that spread across 14 Districts by local governments Lumajang, it was named as the hometown of batik Lumajang, when the research team conducted a community service for 33 centers of batik Lumajang as much as 29 batik centers have not registered their trademarks to Directorate General of Intellectual Property Rights so that the research team provides legal counseling on the importance of trademark registration for Lumajang batik as a legal protection. There are three (3) speakers who presented at the event, The material is the Legal Education from the three speakers that took different topics, those are:

- 1. Legal Education Material was from the Department of Trade and Industry Lumajang given by the Head of Department of**

Trade and Industry Lumajang Drs. Agus Eko Suprayitno, MP regarding the policy of Local Government in the District Lumajang One The Sentra Batik;

- 2. Legal Education material was from the Office of Integrated Services Joko Sulistyono, S.Pi regarding the Licensing Service in the Office of Integrated Services;**
- 3. Legal Education material by the Chairman of the Executive Team IBM University Ratnaningsih Lumajang, SH, M.H regarding the Law Protection of Trademarks**

The purpose of this legal counseling is to provide motivation and awareness for Lumajang batik craftsmen in order to fulfill the legality operations by the time of registering its trademark in order to obtain the legal protection by providing socialization related functionality, usefulness and urgency of the submission for the development of batik Lumajang.

Conclusion

Trademark is a symbol or image of a goods and services that are beneficial for both producers and consumers. The concept of brand protection in Indonesia, is adopting a first constitutive or registrants (first to file principle), then the legally protected trademark is a registered trademark. The legal protection system based on the principle of first to file granted to the holder of the registered mark who has good purpose which is preventive and repressive. Preventive legal protection is conducted through trademark registration, and legal protection for violation repressive brand through civil lawsuits or criminal prosecution, in other words to get a legal protection the trademark should be registered first. An absolute

requirement of the registered trademark is if it has a "distinguishing feature". On intellectual property rights attached the name "exclusive Rights" and the trademark "right of Economics" for their owners to use their trademark or licensed to other parties which would have economic benefits. Trademarks also has a social function so that the use of trademarks should not be contrary to the public order, religious morality, decency and its use is not only for the welfare of the owners but also for the welfare of society in general.

Footnote:

¹ Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta, UI Press, 2010, h.8

² Bambang Soegono, *Metodologi Penelitian Hukum*, Jakarta, PT Raja Grafindo Persada, 2004, h.73

³ Abdulkadir Muhammad, *Kajian Hukum Ekonomi Hak Kekayaan Intelektual*, Bandung, PT Citra Aditya Bakti, 2001, h.120

⁴ Darmadi Durianto, Sugiarto dan Tony Sitinjak, *Strategi Menaklukkan Pasar Melalui Riset Ekuitas Perilaku Merek*, Jakarta, Gramedia Utama Pustaka, 2001, h. 2

⁵ Insan Budi Maulana, *Sukses Bisnis Melalui Merek, Paten dan Hak Cipta*, Bandung, Citra Aditya Bakti, 1997, h.97

⁶ Rahmadi Usman, *Hukum Hak Kekayaan Intelektual Perlindungan dan Dimensi Hukumnya di Indonesia*, Bandung, PT Alumni, 2003, h.9

⁷ Abdulkadir Muhammad, *Hukum Perusahaan Indonesia*, Bandung, Citra Aditya Bhakti, 2001, h.331

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- ⁸ H.OK. Sadikin, *Aspek Hukum Intelektual* , Jakarta, PT. Raja Grafindo Persada., 2002,h.457
- ⁹ Soetjipto Rahardjo, *Permasalahan Hukum di Indonesia*, Bandung ,Alumni, 1983, h.121
- ¹⁰ Arief Sidharta, *Hukum dan Logika*, , Bandung, Alumni, 2006, h.85
- ¹¹ Fernando M Manulang, *Menggapai Hukum Berkeadilan, Tinjauan Hukum Kodrat dan Antinomy Nilai*, Kompas, Jakarta, 2007, h. 95
- ¹² H.OK. Sadikin, op.cit. h473
- ¹³ Abdulkadir Muhammad 1, opcit. H 19