

LEGAL CERTAINTY TERM OF PROTECTION TRADEMARKS FOR SME AND IKM ACTORS

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Abstract

The practice of SMEs and IKM which are the most developed business units in Indonesia. Regarding its development, in order to create legal certainty and obtain legal protection, every SME and IKM actor should register their trademark. For applications for registration of trademarks that are accepted, SMEs and IKM actors obtain rights to trademarks, which furthermore the Menkumham via DGIP issues trademark certificates, the official excerpt of which can be obtained by SMEs and IKM actors through filing an application by paying an official fee. This study discusses the registration of trademarks by SME and IKM business actors and/or their proxies in order to create legal certainty and obtain legal protection. In this regard, this study uses the Theory of Legal Certainty, focused on examining legal certainty regarding the term of trademark protection for SMEs and IKM actors. This research is a type of normative research. The method used in this study is a normative juridical research method. This research is a prescriptive analysis, using various types of data in legal research related to national and regional economic growth. The results of the study conclude that legal certainty for trademark legal protection for SMEs and IKM actors is 10 (ten) years from the date of receipt, and can be extended for 10 (ten) years. In Law Number 20 of 2016, there is no legal certainty regarding the application for further extension by SMEs and IKM actors who own trademarks and/or their proxies in order to obtain trademark legal protection. Tariffs related to the registration or extension of trademarks have been determined by the Government in Government Regulation Number 28 of 2019.

I. Introduction

Small and Medium Enterprises (SMEs) and Small and Medium Industries (IKM) are the most growing business units in Indonesia. In 2022, SMEs totaled 8.71 million business units, and IKM reached 4.4 million business units, or as the majority (99.7%) of the total business units that require policy intervention and legal certainty in order to continue to grow. As a pillar of the national and regional economy, in 2022 the contribution of SMEs and IKM to the Gross Domestic Product (GDP) will reach 60.5%, and absorb as much as 96.9% of the total national employment.

The law regulates all areas of people's lives, not only the people of a nation but also UKM and IKM actors who always experience continuous development and change. The development of people's life history always causes changes in what is meant by law from time to time. Before people knew Positive Law, law was synonymous with habits and traditions that became a guide in life. The question about what is meant by law is a question that has more than one answer in accordance with the approach used, therefore law is essentially abstract (Ali, 2008).

According to Friedrich Carl von Savigny: "Law is a reflection of society, so that law cannot be separated from the nature of the nation. Law grows and arises from the legal awareness of society. Apart from that, the law is also useful for channeling the will of society towards the realization of the ideals of society. Law affects people's lives, and conversely society also influences law. Order and security in society will be maintained if every member of society obeys the rules that exist in society" (Najih *et al.*, 2014). According to Mochtar Kusumaatmadja: "Law is the whole of the rules and all the principles that regulate social life in society and aims to maintain order and includes various institutions and processes to realize the enactment of the rules as a reality in the community of business actors" (Syahrini, *et al.*, 2019).

Law is a political product established by the Government to regulate the life of the people, by its very nature governing and forcing. With the law, it is expected to create justice, legal certainty, the benefit/ happiness, truth, peace, order, and prosperity in people's lives. With the existence of law, it is hoped that justice, legal certainty, benefit/happiness, truth, peace, order and prosperity can be created in people's lives (Naldo *et al.*, 2017). According to Alvi Syahrin: "Law is formed and develops as a product that simultaneously influences, and therefore reflects the dynamics of a continuous process of interaction between various societal realities (human aspirations, religious beliefs, socio-economic, political, moral, cultural conditions and civilization in natural boundaries) with one another that confront human awareness and appreciation of that social reality, which is rooted in the view of life adopted and the interests of real human needs, so that the law and legal order are dynamic" (Syahrini, 2009).

In accordance with the provisions of Article 1 point (3) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution), Indonesia is a constitutional state. As a constitutional state, according to the Preamble of the 1945 Constitution, paragraph IV, one of the duties and responsibilities of the government (state in the narrow sense) is to provide protection for all Indonesian people. The protection provided by the state is legal protection. According to Philipus M. Hadjon: "Legal protection is given to the public so they can enjoy all the rights granted by law" (Hadjon, 1987). The legal protection provided by the state covers all fields, one of which is the field of Intellectual Property Rights (IPR).

IPR is essentially a right with special and special characteristics, because this right is granted by the state. The state based on the provisions of the law grants these special rights to those who are entitled, in accordance with the procedures and conditions that must be met" (Fahmi, 2008).

IPR protected by the state includes various types of rights, one of which is trademark rights and geographical indications. This is confirmed by Law Number 20 of 2016 concerning Trademarks and Geographical Indications (Law Number 20 of 2016). In Article 1 number (1), it is determined that: "A brand is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more of these elements to distinguish goods and/or services produced by persons or legal entities in trading activities of goods and/or services.

Along with the times in Indonesia, SMEs and IKM actors use brands. Trademarks used by business actors can be divided into trademarks and service marks as part of Intellectual Property Rights. Related to these developments, in order to create legal certainty and obtain legal protection, of course every SME and IKM actor should register their trademark (trademark). The state through the Ministry of Law and Human Rights (Kemenkumham) organizes trademark registration.

In order to register a trademark, SMEs and IKM actors (people, i.e. humans and entities) and/or their proxies must submit an application for trademark registration. Applications for registration of trademarks are submitted by SMEs and IKM actors and/or their proxies in good will to the Minister of Law and Human Rights (Menkumham) via the Directorate General of Intellectual Property (DJKI), both electronically and non-electronically, using the language Indonesia

Trademark registration is carried out on a first-to-file basis. In the event that the trademark registration application is accepted, the SMEs and IKM actors obtain the rights to the trademark. Furthermore, Menkumham via DJKI issued a trademark certificate. Upon issued trademark certificates, SMEs and IKM actors and/or their proxies (by paying an official fee) can submit an application to obtain an official excerpt of the trademark certificate.

Through the registration of trademarks, legal certainty is created and legal protection is obtained for SMEs and IKM actors (whose applications have been received) as owners of trademarks, both for self-use and for use by other parties (SMEs and IKM actors) based on a permit (licence).

Trademark rights owned by SMEs and IKM actors are absolute material rights, which have a legal protection period. Thus, it is necessary to study legal certainty regarding the legal protection period for SMEs and IKM actors. This research is focused on examining in order to answer problems regarding legal certainty regarding the term of trademark legal protection for SMEs and IKM actors and their tariff charges.

2. Research Method

This research is a type of normative research. The method used in this study is a normative juridical research method (Soekanto dan Sri, 2004). This research is a prescriptive analysis. The data used in this study are data as commonly used in business law research in general, namely primary data, secondary data, and tertiary data (Sunggono, 2002). All data obtained will be used to examine business law issues in this study, in order to obtain answers.

3. Results and Discussion

IPR is a material right that is legal and legally recognized, over intangible objects in the form of intellectual property. Intellectual property is wealth for all the products of intelligence production such as technology, knowledge, art, literature, song compositions, writings, and so on (Fuady, 2012).

IPR has exclusive and special characteristics because it is granted by the state. The state based on statutory provisions grants exclusive rights to legal subjects who are entitled, in accordance with legal procedures and various legal requirements that must be met (Hartono, 1993). It is the duty and responsibility of the state to provide legal protection for IPR. In Indonesia, IPRs that are given legal protection by the state include copyrights, protection of plant varieties, trade secrets, industrial designs, layout designs of integrated circuits, patents, as well as marks and geographical indications.

Regarding the brand, it has been determined in Law Number 20 of 2016, and various related laws and regulations that have been derived from it. Brands are divided into trademarks and service marks. In Article 1 number (2) of Law Number 20 of 2016, it is determined that: "Trademarks are brands used on goods traded by a person or several people together or a legal entity to differentiate from other similar goods". In number (3), it is also determined that: "A service mark is a mark used for services traded by a person or several people jointly or a legal entity to differentiate it from other similar services".

Until now, business practices have developed in Indonesia. Business is an activity done by people on a regular and ongoing basis, with the ultimate aim is to earn a profit (Business is an activity carried out by people regularly and continuously with the ultimate goal of making a profit) (Naldo *et al.*, 2019). Related to these developments, in order to create legal certainty and obtain legal protection, of course, every SME and IKM actor should register their trademarks.

The state through Kemenkumham organizes trademark registration. Trademark registration is carried out on a first-to-file basis. Based on the first to file principle, legal certainty is created and legal protection is obtained for perpetrators as trademark owners, if the trademark has been registered beforehand. UKM and IKM actors and/or their proxies, register trademarks by submitting applications for trademark registration, which are submitted in good faith to the Menkumham via DJKI, both electronically and non-electronically, using the Indonesian language. With respect to the application for registration of a trademark that is received, SMEs and IKM actors obtain rights to the trademark. Furthermore, Menkumham via DJKI issued a trademark certificate. Upon issued trademark certificates, SMEs and IKM actors and/or their proxies (as trademark owners), by paying an official fee, can submit an application to obtain an official excerpt of the trademark certificate. With the registration of trademarks, of course, legal certainty is created and legal protection is obtained for SMEs and IKM actors as trademark owners, for their own use. Furthermore, UKM and IKM actors can also grant licenses to other UKM and IKM actors to use their trademarks.

Trademark rights owned by SMEs and IKM actors are absolute material rights, which have a legal protection period. Regarding the legal protection period for trademarks provided by the state to SMEs and IKM actors, of course there must be legal certainty. The law has a purpose. In addition to justice and expediency, the purpose of law is also legal certainty.

Gustav Radburch, has put forward the Theory of Legal Certainty.

According to Gustav Radburch: "Legal certainty not only requires the validity of legal rules laid down by power, it also makes demands on their contents, it demands that the law be capable of being administered with certainty, that is practicable (legal certainty does not only require the validity of legal regulations that are made through power, but also demands that all of its contents can be administered with certainty so that it can be implemented)" (Purwaningsih, 2005). Legal certainty is defined as clarity of norms so that they can be used as guidelines for the people who are subject to regulations (Wijaya, 2014). According to M. Yahya Harahap: "Legal certainty is the certainty of the regulation itself or the certainty of the regulation" (Harahap, 2002). According to Dominikus Rato: "Legal certainty can only be answered normatively, not sociologically" (Rato, 2010). Legal certainty normatively is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense of not causing doubts and logical. It is also clear in the sense of being a system of norms with other norms so that they do not clash or cause a conflict of norms. Legal certainty refers to the enforcement of clear, permanent, consistent and consistent laws whose implementation cannot be influenced by subjective circumstances (Kansil, 2009).

Based on the Theory of Legal Certainty put forward by Gustav Radburch, and in accordance with the opinions of legal experts (M. Yahya Harahap, Dominikus Rato, and C.S.T. Kansil) regarding legal certainty, it is emphasized that legal certainty can only be answered normatively. Thus, regarding legal certainty regarding the legal protection period for trademarks for SMEs and IKM owners of trademarks, of course, this must also be answered normatively. The normative answer in question can be obtained by examining specifically based on the provisions in Law Number 20 of 2016. This is based on one of the principles of the validity of laws and regulations, namely the principle of *lex specialist derogat lex generalis* (statutory regulations that specifically override the enactment of general laws and regulations) (Lihat, 2010). In Article 35 of Law Number 20 of 2016, it is determined that:

1. "Registered marks receive legal protection for a period of 10 (ten) years from the date of receipt;
2. The period of protection referred to in paragraph (1) can be extended for the same period;
3. The application for extension as referred to in paragraph (2) shall be submitted electronically or non-electronically in the Indonesian language by the mark owner or their proxies within 6 (six) months before the expiration of the protection period for said registered mark and is subject to a fee;
4. The application for extension as referred to in paragraph (2) may still be submitted within a maximum period of 6 (six) months after the expiration of the registered mark protection period by being subject to fees and fines equal to the cost of the extension.

Based on the provisions of Article 35 paragraph (1) of Law Number 20 of 2016, it is emphasized that the legal protection period for trademarks for SMEs and IKM owners of trademarks is 10 (ten) years from the date of receipt. In accordance with the provisions of paragraph (2), the legal protection period for trademark rights owned by SMEs and IKM actors can be extended for 10 (ten) years.

Applications for trademark extensions owned by UKM and IKM actors, submitted by UKM and IKM actors and/or their proxies electronically or non-electronically, using the Indonesian language within 6 (six) months prior to the end of the trademark protection period, subject to official fees. Applications can also still be submitted by SMEs and IKM owners of trademarks and/or their proxies, within a maximum period of 6 (six) months after the

expiration of the trademark protection period by being subject to an official fee and a fine equal to the renewal fee.

Applications for extensions are approved, on condition that SMEs and IKM owners of trademarks and/or their proxies attach a statement letter stating that the trademark concerned is still being used on the goods as stated in the trademark certificate, and the goods are still being produced and/or traded. If the requirements are not met, the application for extension is rejected. Registration of trademarks as an effort to increase the certainty of producer identity (SMEs and IKM actors), product competitiveness and certainty of sales results in the national/regional economy (Gross National Product {PNB}/Gross Regional Domestic Product {PDRB}).

Payment of the trademark registration fee will become Non-Tax State Revenue (PNBP) in the State Budget (APBN) post. In this regard, the Government and Regional Governments (Pemda) should have disbursed APBN and Regional Revenue and Expenditure Budget (APBD) funds for SMEs and IKM actors in order to encourage progress in state finances and the national and regional economy. On the other hand, the Government and Regional Governments must also be able to provide fiscal facilities, capital assistance for People's Business Credit (KUR) with soft interest, production equipment assistance, and others to encourage business progress for SMEs and IKM players, such as providing Import Ease for Export Purposes (KITE) through the exemption of Value Added Tax (PPN) and Sales Tax on Luxury Goods (PPnBM) on imports of goods (in accordance with the provisions of Article 1 and Article 2 of Minister of Finance Regulation Number 110/PMK.04/2019 Concerning Exemption of Import Duty and No Added Tax Collected Value or Value Added Tax and Sales Tax on Luxury Goods on the Import of Goods and/or Materials and/or Machinery by Small and Medium Industries with Export Purposes {PMK Number 110/PMK.04/2019}).

In the attachment to Government Regulation Number 28 of 2019 Concerning Types and Tariffs for Types of Non-Tax State Revenues Applying to the Ministry of Law and Human Rights (PP Number 28 of 2019), the registration fee for the UKM trademark is Rp. 350.000,- (online), or Rp. 450.000,- (manually), with a maximum of 10 (ten) claims per application for each application. It is known that the tariff for extending the trademark protection period is Rp. 1,000,000, - (online) and Rp. 1.200.000,- (if done manually) for a period of every 10 (ten) years. Thus it is clear that there is a conflict between the legal provisions and the policies of the Government and the Regional Government which continue to strive to foster SMEs and IKM, which continue to provide lightening of the burden so that they can compete in the domestic and global markets.

In particular for the local government, it is hoped that they will be able to make policies. For example, by providing financial assistance for the registration or renewal of trademarks that fulfill legal certainty regarding the imposition of registration fees or renewal of trademarks for SMEs and IKM actors, by making them mandatory or optional affairs for the development of SMEs and SMEs to encourage regional economic structures.

Based on the existing presentation, it is emphasized that the legal protection period for SMEs and IKM trademark owners is a maximum of 20 (twenty) years from the date of receipt of the trademark, and the application for extension of the trademark has also been approved. In practice, of course, it is possible that SMEs and IKM owners of trademarks and/or their proxies, resubmit applications for further extensions (for the 2nd {twice} time or more) in order to obtain protection for trademarks that are still used on goods as stated in trademark certificate, and the goods are still being produced and/or traded. Related to this possibility, of

course there is also a need for legal certainty regarding the application for further extension. This assertion is based on the fact that this matter has not yet been regulated in Law Number 20 of 2016.

It has been emphasized that legal certainty can only be answered normatively. Regarding the absence of legal certainty regarding the application for further extension in Law Number 20 of 2016, in Law there is an adage, namely *gouverner c'est prévoir*, which means that in running a government one has to look/study ahead and plan what to do (Naldo, 2021).

It is hoped that the Government together with the House of Representatives (DPR) in revising Law Number 20 of 2016, will add to the provisions of the article regarding the request for further extension of trademarks owned by business actors that are still used on goods (goods are still being produced and/or traded). In this way, legal certainty is created regarding the application for further extension by business actors owning trademarks and/or their proxies in order to obtain legal protection for trademarks.

Regarding the development of SMEs and IKM, it is hoped that the Regional Government can make policies related to funding assistance for registration or extension of trademarks for SMEs and IKM actors, by making this a mandatory or optional matter to encourage the growth of SMEs and IKM which incidentally can boost the national and regional economy. Regarding tariffs, it is necessary to have legal certainty regarding the reduction of the burden of registration fees or the extension of trademarks (as PNBP). Certainty regarding this, of course, also ideally does not lead to regulatory conflicts (legal disharmony) between trademark protection and APBN and APBD allocations made to foster SMEs and IKM as the lifeblood of the regional and national economy.

4. Conclusion

In order to create legal certainty and obtain legal protection, it is appropriate for every SME and IKM actor to register their trademark. UKM and IKM actors and/or their proxies register trademarks by submitting an application to the Menkumham via DGIP, both electronically and non-electronically using the Indonesian language. With respect to applications for trademark registration that are accepted, SMEs and IKM players obtain trademark rights, and the Menkumham issues trademark certificates. Actors and IKM as trademark owners, by paying an official fee, can submit an application to obtain an official excerpt of a trademark certificate.

Legal certainty for trademark protection for SMEs and IKM actors is 10 (ten) years from the date of receipt, and can be extended for 10 (ten) years. The application for extension is approved, with the condition that the SMEs and IKM owners of the trademark and/or their proxies attach a statement regarding 2 (two) matters, if these 2 (two) conditions are not met, the application for extension is rejected. In Law Number 20 of 2016, there is no legal certainty regarding the application for further extension by SMEs and IKM actors who own trademarks and/or their proxies in order to obtain trademark legal protection.

In particular for the Regional Government, it is hoped that it will foster SMEs and IKM. Regarding the development of SMEs and IKM as well as the registration or renewal of trademarks, it is hoped that the regional government will make a policy by providing financial assistance for registering and extending trademarks for SMEs and SMEs in their area. With the growth/development of SMEs and IKM, it is hoped that it will encourage regional and national economic growth

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