

LEGAL POLITICAL OF WELL-KNOWN TRADEMARK PROTECTION REVIEWED FROM DEVELOPMENT OF TRADEMARK LAW IN INDONESIA TO AVOID FRAUDULENT COMPETITION

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ABSTRACT

The achievement of a Trademark in order to become famous is not an easy job, the obstacle of building a Trademark into a well-known trademark is a factor that encourages the emergence of fraudulent competition that is detrimental to others. The Issuance of Law No. 20 of 2016 concerning Trademarks and Geographical Indications is deemed unable to accommodate fraudulent competition. This study aims to examine the law politics of famous Trademark protection in terms of the development of Trademark law in Indonesia and to compare the protection of famous Trademarks in Indonesia with other countries to avoid fraudulent competition in the use Trademarks. This study is applied a normative juridical approach. The results of the study show that even though Indonesia has made amendment toward Trademark Law (UUM) 5 times, there is no specific definition of a well-known brand within Indonesia. Indonesia does not yet have arrangements regarding fraudulent competition in the brand, even though Indonesia has anti-competition laws, but fraudulent competition in Indonesia does not use it as a legal basis.

Keywords: Trademark; Well-Known Trademark; Fraudulent Competition.

ABSTRAK

Pencapaian suatu merek menjadi terkenal bukanlah pekerjaan yang mudah, sulitnya membangun suatu merek menjadi merek terkenal merupakan faktor yang mendorong munculnya persaingan curang yang merugikan pihak lain. Lahirnya Undang-Undang No 20 Tahun 2016 tentang Merek dan Indikasi Geografis dirasa belum mampu mengakomodir adanya persaingan curang. Penelitian ini bertujuan untuk meneliti politik hukum perlindungan merek terkenal ditinjau dari perkembangan hukum merek di Indonesia serta melakukan perbandingan perlindungan merek terkenal di Indonesia dengan negara-negara lain untuk menghindari persaingan curang dalam merek. Penelitian ini menggunakan metode pendekatan yuridis normatif. Hasil penelitian menunjukkan bahwa meskipun Indonesia telah melakukan perubahan terhadap Undang-undang Merek (UUM) sebanyak 5 kali namun tetap tidak ditemukan adanya definisi mengenai merek terkenal secara spesifik didalam UUM Indonesia. Indonesia belum mempunyai pengaturan mengenai persaingan curang dalam merek, meskipun Indonesia memiliki Undang-undang anti persaingan, namun persaingan curang di Indonesia tidak menggunakannya sebagai dasar hukum.

Kata Kunci: Merek; Merek Terkenal; Persaingan Curang.

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A. Introduction

1. Issue .

The legal politics adopted by the Indonesian trademark law positions the rights arising from Intellectual Property Rights, especially the Right to Trademark of a product will become very important, namely in terms of legal protection. One of the ways to strengthen the trading system and fair business competition in developing a brand of a product or service is carry out legal protection against trademark registration (Haryani, 2010). In Indonesia, legal protection toward trademark has been regulated in several the Law of Trademarks. In a few times the Law on Trademark underwent several amendments , namely as follows :

- a) The Law No.21 of 1961 Concerning Of Trademark
- b) The Law No.19 of 1991 Concerning Of Trademark
- c) The Law No 14 of 1997 Concerning of Trademark
- d) The Law No 15 of 2001 Concerning of Trademark
- e). The Law No.20 of 2016 Concerning of Trademark and Geographical Indication

Indonesian Trademark law is recognized what is known as a well-known brand, but it does not distinguish the terminology between well-known brands and famous brands. Well-Known brands have been regulated both in Law No. 15 of

2001 concerning Trademarks and Law No. 20 of 2016 concerning Trademarks and Geographical Indication . In its substance , well-known brands are given legal protection even though Indonesia trademark Law has been change 5 times , but there is no definition of well-known trademark and more specific arrangements in a specific article.

The stages of a trademark of goods or services to be famous brand is not an easy process , because its achievement requires a lot of efforts, such as creativity, costs, energy spent and so on. Due to the difficulty of building a brand into a well-known brand, it is a factor that encourages the emergence of fraudulent competition that is detrimental to others. For example various imitation efforts by domestic traders against foreign brands whose are already well known without official permission or license from registered trademark owner .

Some forms of brand infringements such as imitation and counterfeiting of real brands are motivated by fraudulent competition or dishonest competition conducted by business actors in trading goods or services by carrying out ways that are contrary to good faith by excluding the value of honesty in conducting business regulations. The IPR regime should indeed accommodate the provisions regarding unfair business competition related to brand violations, because the brand is closely related to business activities and business activities must pay

attention toward aspects of fair business competition.

Based on the description of the legal issue above, then the topic of discussion that will be analyzed in this study are how is legal politics against the protection of well-known trademark in terms of the development of trademark law in Indonesia and how is the legal comparison of the protection of well-known trademark in Indonesia with other countries to avoid fraudulent competition in brands.

2. Theory

In order to obtain the maximum profit there are some business person who imitate trademarks in their efforts to gain market share. Imitation of this trademark is a dishonest act which will be detrimental to various parties, namely for the general public / namely consumers and for the actual brand owner. Brand Protection is influenced by two types of theories, namely (Hartono, 1982) :

a. Risk Theory

This theory views Brand as an intellectual work created or produced and then developed based on thought and effort that contains various risks. Therefore, protection of the creator, brand owner is seen as a natural thing and should be.

b. Incentive Theory

This theory was originally derived from the Reward Theory which states that inventors, creators and brand owners need to get protection

in recognition of their efforts or hard work in producing and using brands. The incentive theory then states that as a result of the award it will stimulate the parties to create a new discovery of intellectual works, more varied so that they can earn some profits.

Legal certainty is one of the things that is often compared and contrasted with justice, so that if there is justice it is difficult to get legal certainty and vice versa. In fact, Thomas Aquinas once said, although it is not straightforward that an unjust law is not a law (*lex injusta non est lex*), so that justice is a prerequisite for a rule of law can be categorized as law (Finnis, 2008).

Although it is literally named for certain, legal certainty itself is contains an uncertain understanding (Hijmans, 2006). Another aspect of the concept of legal certainty is the fact that an individual must be able to assess the consequences of his actions, both due to actions and negligence. The essence of legal certainty is provide a guarantee for the anticipation and fulfillment of the agreement and can be held liability for compliance to the agreement (Hijmans, 2006).

B. Research Method

This study use a normative juridical approach, it is a legal study of systematic law. Research on legal systematics is based on a basic legal system of understanding, which focuses on the legal community, the subject of

law, rights and obligations, legal event, and the object of law.

C. Result and Discussion

C.1. Legal Political of Well-Known Trademark In Indonesia Regulation of Well-Known Trademark

C.1.1. Regulation Of Well-Known Trademark

In order to be accepted by the wider community and become a well-known trademark, a product needs a long process. Brand owners must be able to market it and maintain the quality of the brand in order to remain in quality according to standards, expand distribution networks and be able to meet market needs. If these conditions can continue to be maintained, then the brand itself can represent product quality, and guarantee the reputation of the goods or services in trading activities (Bafadhal, 2018).

Conceptual framework of protection of well-known trademarks inside Article 6 The Paris Convention has laid the foundations of good protection, contains provisions for guarantees for more protection levels for well-known brands, but the Article only protects famous brands from the threat of well-known brand violations and does not protect the brand these are from the dilution of famous brands. In the next development, TRIPs, combining and extending protection for famous brands as laid out in the Paris Convention, TRIPs Article 16 paragraph (3) as stated:

Article 6 bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to

goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

This article begins with an extension of the scope of legal protection on Article 6 of the Paris Convention for non-similar goods or services provided that some conditions are met. First; a well-known trademark must be registered and the use of a younger mark in relation to goods or services will indicate a connection between the goods or services and the registered owner of a well-known brand and its interests may be damaged by the use of the mark. in Indonesia

Although there is no definition of a well-known trademark within Indonesian Trademark Law , we can see a description of the famous brand inside it which explains the criteria of the famous trademark itself, the criteria for the well-known trademark in the development of the Indonesian Trademark Law in brief can be seen in the table below:

Table 1.

The Characteristic Of Well-Known Brand inside Several Indonesian Trademark Law

Regulation	Well –Known Trademark
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Law No.14 Of 1997	(As for the criteria for well-known trademark in addition to paying attention to the general knowledge of the community, the determination is also based on the reputation of the relevant trademark obtained due to the promotion carried out by the owner accompanied by proof of registration of the mark in several countries (if any). If the above matters have not been considered sufficient, then the judge can order an institution that is independent to conduct surveys in order to obtain conclusions about the popularity of the trademark).		taking into account the general knowledge of the community regarding the mark in the business field concerned. Besides that, it is also noted that the reputation of a well-known trademark was obtained because of the intense and massive promotion, investment in several countries in the world carried out by its owner and accompanied by proof of registration of the mark in several countries. If the above matters are not considered sufficient, the Commercial Court may order an independent institution to conduct a survey in order to obtain conclusions about whether or not the trademark is the basis for rejection.
Law No.15 Of 2001	The Rejection of the application for a trademark that has the same principal or all with a well-known mark for similar goods and / or services is carried out by	Law No.20 of 2016	The Rejection of an application of the application for a trademark that has

essentially the same or the whole with a well-known trademark belonging to another party for goods / or similar services is carried out by taking into account the general knowledge of the community regarding the mark in the business field concerned. In addition, it is also noted that the reputation of the trademark was obtained due to the intense and massive promotion, investment in several countries in the world carried out by the owner, and accompanied by proof of registration of the Mark in several countries. If this is not considered sufficient, the Commercial Court may order an independent institution to conduct a survey in order to obtain conclusions about whether or not the mark is the basis for rejection.

Based on the description above, it can be stated broadly about the criteria of famous brands in Indonesia / which consists of:

- pay attention to public knowledge about the brand in the business field concerned
- pay attention to the reputation of the brand
- accompanied by proof of registration of the mark in various countries.

C.1.2. Legal Protection Toward Well-known Trademark To Prevent Fraudulent Competition Practices in the Use of Trademark

Legal protection of Intellectual Property Rights is a legal system consisting of elements (Maileni, 2018):

- protection on subjects
- protection on Object
- registration of protection
- protection period
- legal actions in the protection of intellectual property rights

Indonesia adheres first to file principle with a constitutive system. This system requires the registration of Trademarks so that a Trademark can get protection, this system is also known as the first to file system. This system confirms that the person who first registered the Trademark is entitled to the rights of the Trademark. Although Indonesia adheres to Trademark registration based on a constitutive system, protection of well-

known Trademarks that have not been registered in Indonesia will still get protection, because Indonesia has ratified the Paris Convention and the TRIPS Agreement (The World Trade Organization's TRIPS Agreement) (Desmayanti, 2018)

An application for registration of a mark will be accepted by the registration if it has fulfilled the requirements both formality and substantive that have been determined by the Trademark Law. An important condition that is at the same time a major feature of a brand is that there is sufficient distinctiveness. The trademark used must be such that it has enough strength to distinguish the goods or services of a company from other company's production goods or services.

After receive of the Trademark Certificate and registration of the relevant trademark in the General Register of Trademarks, The registered trademark owner has the exclusive right to be exclusive to enjoy the right to exploit profit (exclusive financial exploitation). Thus, trademark protection is given to registered trademark owners. However, it is also possible that protection against unregistered brands is provided that the brand is included in the category of well-known trademark. In order to fulfill its commitment as one of the member states of the Paris Convention and signatory to the TRIPS Agreement, the Indonesian government has made several changes to the Trademark Law since

1997 and supplemented it with articles giving authority to the relevant authority, namely the Directorate General of Intellectual Property Rights), In this case the Directorate of Trademarks, to protect a well-known brand by rejecting a trademark registration application that contains similarities both principally and as a whole with a well-known brand owned by another party, especially for similar goods and / or services (Boen, 2009), as stated in Article 21 paragraph (1) letter b. The Brand Law allows the owner of the original famous brand to file a lawsuit for cancellation of brand registration through the commercial court, even though he does not have a trademark registration as stated in article 76 paragraph (2). Based on the foregoing, it is clear that well-known brand owners will obtain preventive legal protection with various trademark application requirements even though well-known brands are not registered.

The owner of a registered trademark has legal protection for violations toward registered trademark rights both in the form of compensation claims (and claims for cancellation of brand registration) and based on criminal law through law enforcement officers. This refractive legal protection is given , if there has been a violation toward registered trademark (including well-known trademark).

In this case the role of the judiciary and other law enforcement agencies such as the police, civil

servant investigators and the prosecutor's office is very necessary. The owner of a registered trademark gets legal protection for violations of the rights to the mark both in the form of compensation claims and based on criminal lawsuits through law enforcement officers.

C.1.3. Infringement of Well-Known Trademark as a Form of Fraudulent Competition.

o Case study of famous trademark violations between Cardinal vs Cadinar

Brand violations committed by CADINAR occur because there have been similarities in essence between the CADINAR brand and the CARDINAL brand, it can be seen from the similarity, which gives the impression of an element or similarity / equality of speech, method of determination, method of writing elements or similarity / equality of pronunciation , CADINAR branded products with CARDINAL brand names for similar goods and misleading / confusing customers when they would purchase goods belonging to the Plaintiff.

Aside from the basic equation, the type of class of goods / product traded are in class 25, well known as apparel. And to safeguard greater losses of Plaintiffs and maintain business competition conditions that cheat, deceive or mislead customers / consumers using the CADINAR brand on 15 August 2007, class 25, the Plaintiff may request that the Central Jakarta

Commercial Court order First Defendants is being ordered formerly not to use the CADINAR brand in carrying out its trading business activities until the decision of this case is legally binding.

C.1.4. Fraudulent Competition On Infringement Of Well - Known Trademark

Consumers assess the brand, reputation, image and a number of qualities that consumers want related to the brand. The right brand and carefully selected are valuable business assets for most companies. It is estimated that in 2004 the value of the Coca Cola stamp was US \$ 67.39 billion (Jened, 2015).

The basic norms of trademark protection state that no one has the right to offer goods to the public as if they were other businessman goods. Unfair competition from other entrepreneurs who had bad faith to piggyback on reputation requires the Indonesian Government to play an active role in overcoming Passing Off violations (Jened, 2015).

If it concerns a well-known trademark , then protection is extended not only to goods and or similar services, but also to goods and or services of a similar type. Meanwhile, to measure the fame of a brand is done by paying attention to the general knowledge of the community regarding the brand in the business field concerned. In addition, it is also noted that the reputation of well-known brands is obtained because of the intense and massive promotion, investments in various

countries in the world carried out by their owners, and accompanied by proof of registration of these marks in several countries. If these things are not considered sufficient, The Commercial Court may order independent institutions to conduct surveys to obtain conclusions about the popularity of a trademark which is the legal reason for refusing application of trademark registration (Jened, 2015).

C.1.5. Legal Protection Toward Well-Known Trademark related to Fraudulent Competition Practices

C.1.5.1. Civil Code (Burgerlijk Wetboek)

As for the truth of the definition of unlawful suit, if implemented or applied to the Trademark Law, the study is Article 1365 of the Civil Code is now no longer possible to be applied in the demands of fraudulent competition. This is for reasons that are before the Act No. 19 of 1992 concerning the Juncto Act No. 14 of 1997 Juncto Act No. 15 of 2001 concerning Trademarks, the Law No. 21 of 1961 concerning Trademarks whose trademark registration system adheres to a declarative system.

C.1.5.2. Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

Even though Indonesia's Government has been issued Law No.5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. However, in practice this

regulation has never been used as a legal basis for registered brand violation law enforcement in fraudulent competition.

C.1.5.3. Law No.8 of 1999 Concerning Consumer Protection

The consumer protection law does not regulate the field of Intellectual Property Rights as described in the general explanation which specifically excludes the regulation of consumer rights that arise in the field of Intellectual Property Rights. This means to know the rights of consumers in the field of IPR, it is necessary to look at the arrangements in other laws (Shidarta, 2000).

C.1.5.4. Law No.20 Of 2016 Concerning Trademark and Geographical Indication

The concept of fraudulent competition is not regulated inside Trademark Law, but there are articles that mention fraudulent competition so that this article is interpreted as a provision relating to fraudulent competition, namely the provisions of Article 21 paragraph (3) and Explanation of Article 21 paragraph (3) Indonesian Trademark Law states:

"The application is rejected if submitted by the applicant who is not in good faith" As for the explanation:

"What is meant by an" unwilling applicant "is that the Applicant who is reasonably suspected in registering his Trademark has the intention to imitate, copy, or follow another party's Brand for the sake of his business to create unfair business competition conditions, deceive, or mislead consumers.

The explanatory provisions of Article 4 of the Indonesia Trademark Act are only for the administration of trademark registration and not for resolving fraudulent competition disputes. This provision also has the indecisiveness of the formulation of deceptive and misleading words and the formulation of fraudulent competition, making it difficult to formulate fraudulent, deceptive and misleading competition actions.

C.1.5.5. Criminal Code (Wetboek Van Straftrecht)

The goal of competition in the general sense is that fraudulent competition is not the same as the definition of criminal law stipulated in the Criminal Law Article 382 bis of the Criminal Code. Whereas fraudulent competition specifically means that fraudulent competition is a type of fraud regulated in the provisions of Chapter XXV of the second book of the Criminal Code entitled *Bedrog*, which means fraud in a broad sense. In this chapter, it is alluded to fraudulent competition, namely in the provisions of Article 378 of the Criminal Code, because fraudulent competition itself is included in the type of criminal fraud (Suryadirja, 2012).

Why the existence of a trademark is considered capable of preventing the occurrence of unfair business competition? With trademark, similar products or services can be distinguished from their origin, quality and assurance that the product is original. The global trade era can only

be maintained if there is a healthy business competition climate (Faradz, 2008)

C.1.5.6 . Paris Convention

In Article 10 of the Paris Convention there is a provision that member states of Paris Convention must provide protection to prevent unfair competition. In this case the deemed unfair competition is an act that is contrary to industrial honest practices and commercial matters. Besides that, it also regulates the prohibition of acts that create errors regarding the origin of goods / industrial and commercial businesses of competing entrepreneurs and actions that can disrupt the public (Pratiwi, 2014)

Trademark infringement is regulated in Article 51 of the TRIPs Agreement, that is, a member country is obliged to carry out procedures that allow legal right holders to import fake trademarked goods to submit written applications to the authorities so that customs delays are made regarding the release of goods in the trade flow. As long as it meets the requirements in this section, members also make it possible to submit the same application to goods that involve other violations of IPR. Besides that, for goods to be exported, member countries can also establish the same procedure (Pratiwi, 2014)

C.2. Legal Comparison Of Well-Known Trademark in Various Country

C.2.1. Regulation Of Well-Known Trademark in United States

US Trademark regulation became equal to England and Germany with the issuance of the Lanham Act in July 1946. The name Lanham was the name of a congressman who dedicated himself to the birth of the Law. The Lanham Act is the same as the British Brand Law because it was adopted the principle of usage, but here the emphasis is on the use of trademark more than what was adopted in England at first. Not only the desire to use the trademark (intention to use), but also the actual usage until that the trademark is registered. This emphasis is then removed to answer changes that occur internationally. The Lanham Act itself has undergone several changes since it was first established in 1946.

The definition of a famous trademark reads as follows:

For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

- i. The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- ii. The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- iii. The extent of actual recognition of the mark.
- iv. Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

Prevention of trademark's use based on acts of fraudulent competition in the United States is regulated in Article 43 (a) of the Lanham Act. Provisions in Article 43 (a) of the Lanham Act emphasizes two categories of fraudulent competition actions, namely acts of violation of brand use that cause consumer confusion over the source of goods and actions that prohibit improper advertising. And also the provisions of Article 43 (a) of the Lanham Act are given to protect the packaging of well-known brand products that are not registered in America (Suryadirja, 2012).

C.2.2. Regulation Of Well-Known Trademark In Japan

Protection of Trademarks in Japan is regulated in the Japan Trademark Act (Act. No 127) and Unhealthy Competition Prevention Laws. Although the objectives of the two are different, the two laws generally apply in "building economic order through maintenance, the business reputation of people who use trademarks and contribute to the interests of consumers".

Protection of well-known Trademark is regulated in Article 4 paragraph (1) as reads:

"A trademark which is well-known among consumers as indicating the goods or services related to business of another person or a trademark similar to it and such trademark is to be used for those goods or services or similar to them."

Trademark protection also refers to fraudulent competition laws which are realized to protect business reputation against fraudulent concurrency actions on well-known brands. The regulation of fraudulent competition in Japan is regulated in the Unfair Competition Law, Japan, Law No. 47, promulgated on May 19, 1993 (Amendments by: Law No. 116, of December 14, 1994) article 2.

C.2.3. Regulation Of well-Known Trademark In Australia

The 1955 Act entered into force in 1958, replacing the 1905 Act. During this period, annual trademark registration applications increased from 3,583 to 10,195. Australian trademark laws have been developing since then and today the applicable law is the Trademark Law 1995.

Article 120 paragraph (4) of the 1995 Trademark Law determines whether it is necessary to "take into account the level of popularity of trademarks are known in the relevant public sector, whether as a result of trademark promotion or for other reasons.

In providing protection against well-known brands, Australia imposes a defensive principle that aims to provide well-known brand protection against fraudulent competition or passing off. The advantage of a defensive registration is that it is used to prevent everyone from registering a brand that seems to be the same or confusing (Pearson & Miller, 1990). Article 17 of the Australian

Trademark Law of 1995 sets forth provisions for defensive registration of trademarks in Australia (Lohare, 2006).

The similarities between the four countries can be seen from the definition of a well-known brand, where the four countries are outline defines a well-known brand as a brand that has a real reputation in the wider community, while an explanation of the reputation itself has a further understanding that varies between countries. However, Australia and Indonesia do not explain in detail the definition of a well-known brand in a special article as contained in the US and Japanese Trademark Law, discussions about famous brands appear only in sub-articles.

Regarding to fraudulent competition which related with misuse of well-known brands, it can be seen that the four countries already have rules regarding this matter. Unlike the other three countries, Japan has its own laws regarding fraudulent competition in brand violations, namely through the Unfair Competition Law, No. 47. While the US and Australia regulate fraudulent competition directly in the Trademark Law. Likewise with Indonesia, which does not have a specific law governing fraudulent competition in brands, even though Indonesia has an anti-competition law namely Law No.5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition as the Unfair Competition Law Japan, but fraudulent

competition does not use this law as a legal basis for registered brand violation law enforcement in fraudulent competition. Explanation provisions Article 4 UUM Indonesia is only intended for administration of trademark registration and not for resolving fraudulent competition disputes. This provision also has the indecisiveness of the formulation of deceptive and misleading words and the formulation of fraudulent competition, making it difficult to formulate fraudulent, deceptive and misleading competition actions.

D. Conclusion

Indonesia has experienced five amendment toward Trademark Law, where the current Trademark act is Law No.20 of 2016 concerning Trademarks and Geographical Indications. Although there is no specific definition of a well-known brand within Indonesia Trademark Law from the beginning it was formed until this day, but we can see a description of the famous brand in these regulation which explains the criteria of the famous brand itself which can be found further in the article explanation section.

Although Indonesia has an anti-competition law, namely Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition Unhealthy Competition Law from Japan, but intense competition in Indonesia does not use laws to enforce it on fraudulent business competition case. The existence of fraudulent competition practices, not only famous

brand owner companies that will but the community as consumers and also harmed (Marwiyah, 2010). For owners who lose is lower income and quality of goods and services, it will reduce the image of the product in the eyes of consumers. Consumers who produce low numbers (Marwiyah, 2010).

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Criminal Code

Law No.20 of 2016 Concerning Trademark and
Geographical Indication

The Law No 5 Of 1999 Concerning Prohibition of
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