

The Socio–Juridical Dimensions of Passing Off in Indonesia

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Submitted: 2023-10-01 | Reviewed: 2023-10-11 | Revised: 2023-10-22 | Accepted: 2023-10-24

How to cite: Baso, Fatihani, et al. “The Socio–Juridical Dimensions of Passing Off in Indonesia.” *Dialogia Iuridica*, Vol. 15, No. 1, 2023, pp. 113-127.

DOI:
<https://doi.org/10.28932/di.v15i1.7538>

ABSTRACT

There are many business actors marketing products that resemble well-known brands in Indonesia. To prove whether the Passing Off phenomenon occurs or not in Indonesia, the authors use The Classical Trinity Theory. The article’s aim is to explain the socio–juridical dimensions of passing off in Indonesia. Seeing that in Indonesia there are many business actors marketing products that resemble well-known brands. To prove whether the Passing Off phenomenon occurs or not in Indonesia, the author uses The Classical Trinity Theory. The research uses a juridical-normative method, with statute and conceptual approach based on literature study, analyzed qualitatively. The Classical Trinity Theory is a theory used as a basis for assessment which states whether a passing-off action occurred or not. First, Goodwill, is whether business actors use the reputation of well-known brand owners to support their business. Second, misrepresentation, there is confusion by consumers regarding genuine products and fake products. Third, damage, there is an element of deceptive branding and goods or services which could very well result in losses experienced by the owner of the well-known brand as a result of copying the company's identity.

Keywords: Socio–Juridical; Passing Off; Trademark

I. INTRODUCTION

Actions often take place aimed at seeking one's own profit using any technique that can result in losses for other parties. A brand as an indication that is quite useful for consumers to know, is often used as a tool to make easy profits, by imitating or trying to fake brands that are well-known to the public. Passing Off is a way taken by business actors to gain profits quickly, but this action does not take into account morals and ethics. This step is a form of bad faith from one of the parties who use another brand to support their brand. Passing Off can cause confusion in society. The basic things that can be seen to justify business actors passing off are based on David I Bainbridge's theory, Passing Off is divided into two, among others: (a) Passing Off Classic, which occurs when someone gives the impression that their product is someone else's product; or (b) Extended Passing Off, is to improve the quality of promotions and brands in a positive way, but the products owned by other people seem to be related to the well-known brand.

The boom in sales of well-known brands also occurs because of the principle of territorial protection. This means that protection is only provided in the country where the mark is registered. So, it is not surprising that many shops sell fake products from well-known brands because these brands are not registered in Indonesia. Although the Trademark Law regulates the issue of rejection of marks due to similarities in essence or overall similarity, it does not necessarily provide legal protection for registered marks.

Passing off is something that is not known in the civil law legal system, but is known in countries that adhere to the Common Law legal system. Passing off (reputation piggybacking) occurs when someone presents their goods as if they were goods belonging to another party who is already well-known and has a good reputation or at least has a relationship that causes confusion among the general public so this causes losses to the other party.

Passing off is not regulated in the Trademark Law because passing off not only protects registered marks but also marks that have not been registered. Meanwhile, the

Trademark Law only protects brands that have been registered, considering that Indonesia is a civil law. Civil law means that everything must have legality or written law (there must be black and white). Currently, if there is a case similar to passing off, it is handled using Article 21 of the Trademark Law, but with the caveat that the mark must be registered first. If asked whether passing off can be implemented in Indonesia, it will be difficult because of the different regimes. Passing off is common law while Indonesia adheres to civil law. So, passing off is not appropriate if adopted in the Trademark Law.

A previous study by Herti Yunita Putri examined the act of passing off which can be done via the Internet, which can be in the form of Cybersquatting and Tiposquatting. Lis Julianti stated that legal protection efforts for business actors related to passing off are difficult because there is no law regulating passing off in Indonesia. Azlia Hanjani strengthens the prevalence of passing off incidents in Indonesia through a case study of Endy Sitio's Domino which was proven to have committed passing off against Domino's Pizza. Case studies of passing off in Indonesia were also carried out by Rifky Ardian Nugroho. However, Rifky sees that the Trademark Law in Indonesia has attempted to provide legal protection for trademark rights against passing off actions through proof of bad faith actions. However, Daniella Natasha sees that Indonesia still does not provide legal protection for brand rights against passing off actions. This is proven by an analysis of Article 83 paragraph (2) of the Trademark Law.

To fill the research gaps, the authors explain the socio-juridical dimensions of passing off in Indonesia. There are many business actors marketing products that resemble well-known brands in Indonesia. To prove whether the Passing Off phenomenon occurs or not in Indonesia, the authors use The Classical Trinity Theory.

The study used a qualitative research. The type of this study is normative or socio legal. Socio legal is research that works at the analytical level and perspective emic. So, the research is not based on the authors' assumptions but conceptual and theoretical facts. Technique and data collection procedure is a documentary study from the journal, book, and news about the cartel. Documentary studies can explore relevant information that occurred in the past, present, and future. The method of data analysis

first, the data analyzed is diverse that has different basic properties from one data to another. Second, the nature of the data analyzed is that it is entirely unity. It is characterized by a diversity of data and requires in-depth information.

II. DISCUSSION

1. The Socio – Juridical Dimensions of Passing Off in Indonesia

Based on David I Bainbridge theory, Passing Off is divided into two, among others: (a) Passing Off Classic, which occurs when someone gives the impression that their product is someone else's product; or (b) Extended Passing Off, is to improve the quality of promotions and brands in a positive way, but the products owned by other people seem to be related to the well-known brand.¹ This theory helps to detect whether business actors are do passing off or not. A business actor cannot be categorized as a passing off actor if the business actor does not create an image that the product he owns is the same product as the original (classical passing off) or the business actor does not associate or appear to be related to a well-known brand (extended passing off).

Passing Off is an act that violates brand rights because it uses the reputation of another business actor's brand to increase its brand. Building a brand is not an easy business, it requires a lot of effort and capital to build a strong image in society. It would be very unfair if the brand that has been built with great difficulty is imitated by irresponsible business actors. Business actors need legal protection for the brands they have built to avoid fraudulent acts that lead to fraudulent business competition.²

In reality, in the field, low knowledge regarding brand protection also greatly influences the low level of brand registration efforts, especially for brand owners in MSMEs (Micro, Small and Medium Enterprises). Even though the products produced are no less creative and innovative than other similar products, even imported products from other countries. However, there are also business actors who already know this function, but do not know the mechanism for obtaining brand rights protection. The

¹ Bainbridge, David I. *Intellectual Property*. 4th Edition. London, Pitman Publishing, 1999.

² Permata, Rika Ratna, et al. "Pentingnya Merek Bagi Pelaku Usaha Mikro, Kecil dan Menengah di Jawa Barat." *Dialogia Iuridica: Jurnal Hukum Bisnis dan Investasi*, Vol. 10 No.2, 2019, pp. 34–39, <http://dx.doi.org/10.28932/di.v10i2.1133>.

reason for limited costs is one of the considerations for not registering a brand, because basically, MSMEs are still starting businesses. In fact, someone's negligence in registering a brand can result in it being claimed/preceded by another party in registering the same or similar brand for similar goods or services, so that someone can lose the right to use their own brand which has actually already been used.³

There are several factors that cause brand rights violations by passing off of well-known brands, some of which are: 1) Economic factors, related to the perpetrator's desire to gain profits easily, quickly, and without spending large amounts of capital. 2) Cultural factors Society, regarding the behavior of people who are still not aware of the importance of brands and limited public knowledge regarding brand regulation. 3) Regulatory Factors, related to the lack of clear and firm regulations governing the act of passing off violations. 4) Supervision Factors, related to with the DJKI still frequently encountering negligence in accepting trademark registration applications in bad faith.⁴

1.1. The Overview of The Social Dimensions of Passing Off

1.1.1 Brand is Profitable

Brands that are piggybacked are profitable for business people to use because they are known to many people. Sometimes there are also business actors who have no intention of passing off, let alone creating unhealthy business competition. It can be seen that the profits obtained by business actors do not necessarily result in losses for brand owners. This can be proven by four things, namely: (a) Consumers do not feel cheated because consumers already know the quality and quality of the product they are getting, (b) The legitimate brand owner does not experience material losses due to decreased production results/turnover. Apart from that, the existence of business actors does not necessarily eliminate consumer trust in the products sold by brand owners, (c) The country is not harmed. As is known, brands as an intellectual property which is

³ Sukmadewi, Yudhitiya Dyah. "Pendaftaran Merek Asosiasi Sebagai Merek Kolektif (Kajian Terhadap Asosiasi Rajut Indonesia Wilayah Jawa Tengah)." *Jurnal Ius Constituendum*, Vol. 2, No.1, 2017, p. 109, <http://dx.doi.org/10.26623/jic.v2i1.547>.

⁴ Khotimah, et al. "Faktor-Faktor Penyebab Terjadinya Pelanggaran Hak Merek Berupa Pemboncengan Reputasi (Passing Off) Merek Terkenal Ditinjau dari Undang-Undang Nomor 20 Tahun 2016 tentang Merek dan Indikasi Geografis." *Jurnal Ilmiah Wahana Pendidikan*, Vol. 8, No. 20, 2022, pp. 398-420, <https://doi.org/10.5281/zenodo.7243144>.

closely related to economic and trade activities play a very important role because they can increase economic growth in the form of a country's national income (Growth National Product), (d) Passing Off carried out by these business actors does not damage trade relations between Indonesia and other countries, especially in the use of well-known brands.

A brand is not only a sign for a goods or service, but a brand can also be said to be an asset for the company or owner of the brand for the goods or services. Branding or what is also known as branding is very important in marketing. Because the brand is what differentiates one product from another. Apart from that, by branding we can usually sell products more expensively than products without a brand.⁵

1.1.2 The Brand Owner never sues

Brand owners do not mind this act of imitation, but quite the opposite. The brand owner thinks that the product is interesting and great. Apart from that, the brand owner feels that this is not an act of bad faith. This is because business actors who use brands from brand owners do not base their actions on bad faith because business actors realize that what they hold belongs to someone else. A person is categorized as having bad faith if the holder knows that the item he is holding is not his property and intends to manipulate it.

The term regarding bad faith in Civil Code (*Burgerlijk Wetboek or BW*) is found in the chapter on property law, namely article 530 BW which states “*besit* there are those who are in good faith (*bezit te goedertrouw*) there are those who are in bad faith (*bezit te kwadertrouw*)”. In article 532 paragraph (1) BW then explains the meaning of possession in bad faith, namely “possession in bad faith occurs when the holder knows that the item he is holding is not his property”. In Blacks's Law Dictionary, the term bad faith is defined as:⁶ “*the opposite of good faith, generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by*

⁵ Kowel, Fandy H. “Perlindungan Hukum Terhadap Penerima Lisensi Merek di Indonesia.” *Lex et Societatis*, Vol. 5, No. 3, 2017, pp. 53–58, <https://doi.org/10.35796/les.v5i3.15575>.

⁶ Garner, Bryan A. *Black's Law Dictionary*. United States of America, Thomson-West, 2004.

an honest mistake as to one's rights or duties, but by some interested or sinister motive."

It means the opposite of good faith, generally implying or involving actual fraud or constructive deception, or designed to mislead or defraud another person, or the neglect or refusal to fulfill some contractual duty or obligation, not motivated by honest mistake regarding one's rights or obligations, but by evil interests or motives. Based on this understanding, it can be categorized that MSME actors do not have the intention to act in bad faith.

1.1.3 The Brand is Already Well-Known

Trade in well-known brands sells quickly on the market, resulting in relatively large profits in a relatively short time. As a result, there is a tendency for business actors to gain profits by passing off but violating the law.

However, back in case, we have to see whether it brings harm to the owners of well-known brands, because consumers already understand very well which brands are fake and which are genuine. Apart from that, if you look at David I Bainbridge's theory about 2 types of passing off, namely classical passing off and extended passing off, a business actor cannot be categorized as a passing off actor if the business actor does not create an image that the product he owns is the same product as the original one. (classical passing off) and business actors do not associate or appear to have a connection with well-known brands (extended passing off).

Passing off is an unlawful act. Elements against the law according to BW, namely:⁷ (a) the element of error, namely deliberate action with the awareness that one's actions are detrimental to others in order to benefit oneself, (b) elements of a causal relationship between actions and losses, namely losses that arise as a result of the actions of the perpetrator of passing off against the original brand owner, which can be material or immaterial losses, (d) and the element of loss, namely the owner of the original brand suffers losses due to decreased turnover, customer disappointment

⁷ Fahmi, Septian Nur. *Perbuatan Pemboncengan Reputasi (Passing Off) Terhadap Merek Dagang Action of Passing off Toward Trademark*, Tesis, Universitas Jember, 2019.

because the brand is considered to be still in production, the quality of goods can decrease and reputation can be tarnished.

However, business actors cannot be said to be passing off because it does not cause losses to the brand owner. This is because the business actor does not have the bad faith to commit actual fraud or constructive fraud, or is designed to mislead or defraud others, or the neglect or refusal to fulfill some contractual duty or obligation, is not motivated by malicious motives.

According to J. Thomas Mc. Carthy and Perreault Cannon define passing off in brands as follows:⁸ (1) Is the addition of a trademark, (2) Deliberately manipulate the brand and do not comply with the provisions of advertising, (3) Even though there is no evidence of violation, misleading consumers still cannot be justified.

If viewed from the theory put forward by J. Thomas Mc. Carthy and Perreault Cannon regarding whether the business actor knows that his actions are passing off or not can be analyzed by whether the perpetrator intentionally misleads or deceives buyers. If business actors do not misrepresent the public, then business actors do not deceive, let alone mislead consumers (passing off).

1.2 Proving Passing Off through The Classical Trinity Theory

To prove whether business actors are passing off, it can be analyzed using The Classical Trinity Theory. This theory is a determination of the act of passing off which is generally used as a basis for assessment, which states whether the act of passing off occurred or not. The description of this theory is:⁹

(a) Goodwill

Goodwill is the good name (reputation) of a brand. This reputation can provide added value to a product and/or service that differentiates it from other brands. Goodwill is defined in Black's Law Dictionary as follows: “A *business's reputation, customer base, and other intangible assets are taken into account*

⁸ Cannon, et al. *Manajemen Pemasaran*. Jakarta, Salemba Empat, 2008.

⁹ Rizaldi, Julius. *Perlindungan Kemasan Produk Merek Terkenal terhadap Persaingan Curang di Indonesia dikaitkan dengan Undang-undang Merek dan TRIPs-WTO*. Bandung, Alumni, 2009.

when valuing the business, particularly for purchase; this includes the capacity to generate income above that which would be anticipated from the business viewed as a simple collection of assets. Trademark infringement is a form of goodwill theft because a well-known company's trademark or service mark is a representation of its goodwill. The goodwill a trademark carries is also transferred when it is assigned, by the same token. Reputation, credit, honesty, a good name, and dependability are all simply other names for goodwill”.

According to this definition, goodwill is the image of a brand or company associated with a well-known or established brand. A brand's goodwill (reputation) can help a company make more money. As a result, goodwill is classified as an intangible asset. Many entrepreneurs are willing to spend a lot of time, energy, and money on promotion and advertising, maintaining product quality, conducting product research and development, and so on to gain and maintain this goodwill. It makes sense to protect good intentions considering the time, effort, and expense involved.

A brand for a manufacturer is an image and a good name for the company, apart from that, it is also part of the business strategy. There is no business actor who does not use a brand as an identity for the goods they produce or the services they provide. The identity manifested in the brand is an identifier and at the same time differentiates the brand of a particular company from the brands of other companies.¹⁰

In determining the criteria for a Mark to be a well-known Mark as referred to in paragraph (1), it is carried out by taking into account: a. the level of public knowledge or recognition of said Mark in the field of business concerned as a well-known Mark; b. the sales volume of goods and/or services and profits derived from the use of said mark by the owner; c. the market share controlled by the Mark in relation to the distribution of goods and/or services in the community; e. the length of time the Mark has been in use; f. the level of marketing efforts made to promote the Brand, including the cost of those efforts;

¹⁰ Arifin, Zaenal and Muhammad Iqbal. “Perlindungan Hukum Terhadap Merek Yang Terdaftar.” *Jurnal Ius Constituendum*, Vol. 5 No.1, 2020, p. 47, <http://dx.doi.org/10.26623/jic.v5i1.2117>.

g. the registration of the Mark in other countries; h. the degree to which law enforcement has been successful in the field of trademarks, particularly with regard to the institutions' recognition of the Marks as well-known Marks; or i. the value placed on the Mark as a result of its good name and guarantee.

As the business world develops, the function of a brand has developed, it not only functions as a tool to identify goods and/or services but also radiates the reputation and goodwill of a brand. When someone hears brand A, he not only identifies the brand as a brand for goods or services but also the reputation and goodwill that is behind the brand.¹¹

Reputation and goodwill are selling points (selling power) that are generally only possessed by well-known brands. Famous brands have greater selling power than ordinary brands in general. A well-known brand reflects the reputation and goodwill that the brand owner has worked hard to build. Owners of well-known brands receive expanded protection, namely that owners of well-known brands are protected not only for goods and/or services that are similar but also apply to goods and/or services that are not similar. In practice, well-known brands are often used without permission by other parties to seek shortcut or quick profits. So famous brands need to be given protection. Apart from protecting well-known brands, protection must also be provided for ordinary brands.¹²

(b) Misrepresentation

Misrepresentation is one of the elements in determining whether passing off has occurred or not. Misrepresentation is manipulation by entrepreneurs towards the public so that it has the potential to create a public framing that goods and services that are not purely owned by the company are manipulating other people's brands. Because brands, goods and services are almost completely related or related, this is an aspect of infringement.

¹¹ Safiranita, Tasya, et al. "Penyelesaian Sengketa Merek Terkenal 'SEPHORA' atas Dasar Persamaan Pada Pokoknya Berdasarkan Herzien Inlandsch Reglement (HIR) dan Undang-Undang Merek." *Dialogia Iuridica: Jurnal Hukum Bisnis dan Investasi*, Vol. 9, No.1, 2017, p. 112, <https://doi.org/10.28932/di.v9i1.734>.

¹² *Ibid.*

Regarding Black's Law Dictionary, misrepresentation defined that “the act of misrepresenting or estimating something, usually with the intent to deceive.” Misrepresentation as one of the factors in building a person's reputation (passing off) is the act of conveying information to the public in such a way that the public is led to believe that the goods and/or services provided belong to someone, another party, or that the person has a business relationship with another party. Misrepresentation in relation to brands, namely whether there is an element of deliberate or unintentional imitation of a brand with someone else's company, is well known. Therefore, monitoring prices on the shelf or the entire shelf is very important to determine whether misrepresentation (fraud) has occurred or not.

Similarity is defined as “similarity” so that the similarity in question is that there is an element of dominance of one of the brands, so that the impression is similar. There are three types of equations. The first is phonetic similarity, namely similarity based on the sound of the brand. b. Visual similarity, or a similar impression caused by the influence of graphic elements and the same shape, structure, color, writing font or placement model, and placement. c. Substance similarities, similarities related to brand meaning, psychology, or closely related to other brands.

Assessing brand similarity, the parts that make up a brand must be considered as a unified whole without breaking up when properly observed and analyzed so that both visually and carefully. Therefore, these brands must be put side by side to compare.

(c) Damages/likelihood of damages

The final part is that there is an element of deceptive branding and goods or services which could very well result in losses experienced by the owner of the well-known brand as a result of copying the company's identity. Likewise, it has been discussed previously that the legal brand owner does not experience material losses due to decreased production results/turnover. Apart from that, the existence of business actors does not necessarily eliminate consumer trust in the products sold by brand owners.

The final condition for determining the act of passing off is compensation/possible loss, namely loss or the possibility of harming the brand owner as a result of fraud by brand imitators.

A company's reputation can be seen as a barometer of its success or failure. As a result, protecting an entrepreneur's reputation from parties with bad intentions who want to piggyback on their reputation is very important in the business world. In practice, scholars such as Rosoque Reynolds and Natalie Stoianoff argue that passing off is definitely related to classical trinity theory in the United States and Europe. Apart from brand regulations, there are interesting regulations in Indonesia regarding Passing Off, namely regulations regarding company names. Of course, the setting of a brand - in this case, a trademark - and a company name are conceptually different. A trademark is different from a company name because it can be conceptualized as a sign that differentiates the goods and/or services offered (the product). The company name is intended to identify the company rather than the product. However, the existence of regulations governing both causes unrest in society. This can be caused by overlapping functions between the two which both have identification and reputation functions (Quality Assurance Function).¹³

III. CONCLUSION

Based on the Classical Trinity Theory, passing off can be identified through three things, namely: First, goodwill, or the good name of the brand owner, is used by business people to support their business, thereby causing confusion in society. Second, misrepresentation, in this section often causes confusion among consumers which results in consumers not being able to differentiate between fake products and genuine products. Third, damages, and the confusion caused result in losses for the brand owner. The research is inseparable from several limitations known through observations throughout the study. This research can be developed or strengthened again through

¹³ Pentakosta, Kimham. "Tindakan Passing Off Terhadap Merek Dalam Pemakaian Nama Perseroan Terbatas di Indonesia" *Syiah Kuala Law Journal*, Vol. 4, No.1, 2020, pp. 1–10, <https://doi.org/10.24815/sklj.v4i1.15749>.

field studies to obtain field data regarding passing off cases in Indonesia. Therefore, further research is expected to discuss the passing off phenomenon in Indonesia.

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