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The analysis of Business Competition Law Against the Abuse of Trademark Holders Exclusive Rights

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Abstract

This study aims to find and describe the criteria for abuse of the exclusive rights of brand holders. This research was conducted in Makassar using normative research methods by referring to the applicable legal rules and principles. In addition, it uses a comparative approach to find out the laws in force in other countries related to IPR and Business Competition Law. It provides an overview by presenting case illustrations to harmonize with applicable regulations in Indonesia. The collected material is then described to obtain a clear picture and answer the problems studied. The results obtained indicate that brand holders can abuse the exclusive rights of brand holders by looking at the criteria based on the IPR rules and the Business Competition Law and the illustrations of the cases described in this paper.

Keywords
intellectual property rights; business competition law; abuse of rights

I. Introduction

The soul of Indonesian economic democracy requires equal opportunities for every Indonesian citizen to participate in the production and marketing process of goods and/or services in a healthy, effective and efficient business climate to encourage economic growth and the functioning of a fair market economy. This is based on the principles of balance and justice in advancing the Indonesian economy. Furthermore, the role of the state is needed in terms of supervision of economic activities, so that economic activities can run according to what is aspired to.

Marketing is a process of planning and execution, starting from the conception stage, pricing, promotion, to the distribution of goods, ideas and services, to make exchanges that satisfy the individual and his institutions (Dianto in Asmuni *et al*, 2020). According to Tjiptono in Marlizar (2020) marketing performance is a function that has the greatest contact with the external environment, even though the company only has limited control over the company's environment. In the world of marketing, consumers are assets that must be maintained and maintained their existence in order to remain consistent with the products we produce (Romdonny and Rosmadi, 2019).

The IPR regulatory framework regulated in one of the WTO agendas, namely (Agreement of Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit), from now on referred to as TRIPs, is based on the consideration that trade in counterfeit goods is a trade barrier and is contrary to healthy competition. However, it is realized that improper implementation and enforcement of IPR can also become a trade barrier. One of the consequences of Indonesia's participation in international agreements concerning free trade and TRIPs (Trade Related Aspects on Intellectual Property Rights) is the necessity to reduce or eliminate obstacles in international trade and the recognition of Intellectual Property Rights.

In its development, improper implementation of IPR under IPR legal instruments that hinder trade abuses the implementation of IPR Exclusive Rights through licensing, wherein a license agreement some clauses are burdensome to the licensee, or some things are not allowed in the license, which can hinder trade. It is undeniable that the use and use of exclusive rights by IPR owners have created problems of economic justice and conflicts of interest, which can lead to anti-commons tragedies and in the end can threaten the sustainability of human life. One of the IPR regulatory frameworks, Law Number 20 of 2016 concerning Marks and Geographical Indications, stipulates that License Agreements are prohibited from containing provisions, either directly or indirectly, due to adverse effects on the Indonesian economy or contain restrictions that hinder the ability of the Indonesian people to control and develop the technology. A brand is a sign to identify goods and services origin from a company with other companies' goods and/or services. Marks are declared as exclusive rights because these rights are very personal rights for the owner and are given the right to use them themselves or permission to others to use them as they use them. In comparison, the license is a means for other people/parties to use the mark legally. The exclusive nature (monopoly) of brand rights as part of IPR is reduced with this license. Exclusive properties are attached to the owner, but some other parts are given to others.

In America, the arrangement of the trademark license agreement is closely related to the quality control provisions, which are the function of the trademark as an indication of origin and quality assurance, so that the quality control provisions are mandatory for licensors. This is to avoid fraudulent actions for consumers and to protect fair competition. However, sometimes the licensor includes provisions that violate the rules of fair competition, which incriminate one party, generally the licensee. This is said to be an act of brand abuse. We can see this provision in the illustration of the Sealy case, where the US government sued Sealy for alleged violations of Article 1 of the Sherman Act, where licensees agreed to an exclusive area allocation system to market Sealy products. Each manufacturer has exclusive territory in its licensing contract; this contract prohibits any producer from selling outside that area. At that time, licensee and Sealy shareholders began working together to set and monitor the minimum and maximum prices that retailers of Sealy products charge the advertised prices of Sealy products and ways to persuade retailers to comply with these prices. In 1933, the Sealy Corporation was reorganized to become Sealy, Incorporated. Sealy, Inc. made a new provision that any new manufacturer who entered the organization purchased Sealy stock. In the 1940s, Sealy's business increased, and many new licensees joined to cover previously open territories.

The Sherman Act states that any contract, combination, or conspiracy that restricts trade is illegal. The United States filed a civil lawsuit against Sealy, Inc. on charges of violating the Sherman Act by setting minimum retail prices and forcing retailers to comply with those prices. It is also alleged that the exclusive territorial arrangement of Sealy, Inc. violates the Sherman Act. The district court ruled that Sealy, Inc.'s pricing violates the Sherman Act, but the zoning does not. The United States is appealing a district court decision on the legality of Sealy, Inc.'s licensing structure. In an appeals court against Sealy Inc.'s zoning lawsuit, the court ruled that Sealy's licensing structure was a horizontal trade restriction, a violation of the Sherman Act. The court noted that the licensee controlled Sealy's day-to-day business through its board of directors and executive committee, including granting, assigning, reassigning, and terminating exclusive territorial licenses. Judge Fortas argued that Sealy's behavior was a combination of trade restrictions, arguing that Sealy's territorial restrictions were part of a recognized unlawful pricing scheme. While acknowledging that territorial boundaries serve other purposes, Sealy argues that his connection to price-fixing is sufficient to sue them for unlawful acts of restraint of trade. In another reference, it is stated that the territorial restrictions in the trademark license agreement violate business competition law, where trademark licensors cannot legally limit the area where their licensee can compete. Trademark licensors are not exempt from antitrust laws, and any territorial restrictions imposed under the guise of trademark laws are unlawful.

The case above is one example of abuse of a trademark license with allegations of price-fixing violation. For instance, in the Antitrust Guideline for The Licensing of Intellectual Property Rights, the price-fixing in the license agreement is an anti-competitive clause. In contrary, in Europe, horizontal pricing agreements are prohibited under Article 81(1).

The question then arises whether a brand can be misused in a license agreement, considering that a brand is only a distinguishing mark on a product. Furthermore, the licensing agreement arrangements in Indonesia in the context of business competition law. The license agreement is excluded from Law number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. It is clearly stated in Article 50 letter b, which concern about:

"What is excluded from the provisions of this law are the agreements relating to Intellectual Property Rights such as licenses for Patents, Trademarks, Copyrights, Industrial Product Designs, integrated electronic circuits and trade secrets as well as agreements related to franchising."

This provision means if there is an abuse of intellectual property rights that can lead to monopoly or unfair business competition, this law will not be covered. Since the exclusive rights of IPR can lead to dominance, and if misused, it can lead to monopolies and unfair business competition and, in the end, will impact business actors. Furthermore, criticized as it is an inconsistency arised. Suyud Margono emphasized the exclusive nature attached to IPR is not for monopoly, let alone for carrying out fraudulent competition. If the special right is used to inhibit competition, then the action is considered an act against the law.

Those provisions are further regulated in the Regulation of the Business Competition Supervisory Commission Number 2 of 2009 concerning Guidelines for Exceptions to the Application of Article 50 letter b of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition in Agreements Relating to Intellectual Property Rights. The existence of this regulation is a statement of justification that the potential for abuse of IPR through licensing is possible, so it should be prevented as early as possible through the regulation. The guidelines explain that exceptions can be made if a license agreement fulfils the elements to be categorized as a monopoly act or unfair business competition. An exclusive agreement clause in the license agreement, called price restrictions. However, it should be noted that if a license agreement contains an exclusive agreement clause, the license agreement is not necessarily considered to violate the Antitrust Law. It is necessary to look at the facts and conditions that support it to determine that a license agreement has an anti-competitive nature to hinder economic growth. For this reason, it is necessary to study further regarding licenses that have the potential to be misused by Mark holders. This is because no matter how far a monopoly gives IPR freedom to exploit its IPR, it cannot be denied that IPR is part of economic activity. In its implementation, there are still limits to prevent the occurrence of acts of abuse that can hinder economic growth.

Based on the description, the main research problem is the criteria for abuse of the trademark holder's exclusive proper license in the license agreement based on the rules of business competition law and intellectual property rights law.

This study aims to find and describe the criteria for abuse of the exclusive rights of brand holders and be able to provide benefits to create a balance between business competition and intellectual property rights to be able to realize fair business competition.

II. Research Method

This research was conducted using a normative legal research method, using three approaches, namely the legal approach, the conceptual approach, and the comparative approach. This study uses two types of legal materials, namely primary legal materials, which are statutory regulations, and secondary legal materials, in the form of literature obtained from several libraries and several previous research results related to the problems discussed by the author.

III. Results and Discussion

3.1 Abuse of Exclusive Rights Criteria of Brand Holders in License Agreements based on Intellectual Property Rights Law

The regulations regarding the rights of trademark owners are regulated in legal rules where the owner of a registered mark has the exclusive right to use the mark, it can also be given to other parties to use the mark, without prejudice to existing rights, and does not affect the rights obtained from the trademark. Countries as an effort to protect trademark rights based on use. The mark owner can exercise the exclusive right to transfer his mark to another party through a license agreement.

The provisions of Article 42 paragraph (1) of Law Number 20 of 2016 states that the owner of a registered mark has the right to grant a license to another party with an agreement that the licensee will use the mark for part or all of the types of goods or services.

The criteria for prohibited license agreements are determined by the Law Number 20 of 2016. The criteria are regulated in Article 42 paragraph (6), which stipulates that the license agreement is prohibited from containing provisions that can directly or indirectly cause adverse effects on the Indonesian economy or contain restrictions that hinder the ability of the Indonesian people to master and develop technology in general. So based on the provisions of Article 42 paragraph (2), the criteria consist of:

a. Contains provisions that can cause adverse effects on the Indonesian economy.
b. Contains restrictions that can hinder the workability of the Indonesian people in mastering and developing technology.

Those provisions are more or less confusing, related to the provisions of the limitations in question; it is not explicitly explained what type of restrictions are meant by this law so that a trademark can be licensed.

In Government Regulation no. 36 of 2018 about the Recording of Intellectual Property Rights License Agreements, there is a provision states the License Agreement is prohibited from containing provisions that can harm the Indonesian economy and Indonesia's national interests; contains restrictions that hinder the ability of the Indonesian people to transfer, control, and develop technology; result in unfair business competition; and/or; contrary to the provisions of laws and regulations, religious values, morality, and public order.

Those provisions also do not explain in detail the terms of the limitation referred to as a basis for entering into a license agreement. Again, this creates confusion in interpreting and understanding which provisions are meant to limit competition in brand licensing agreements to hinder competition.

As for the criteria based on the American trademark law, which is closely related to quality control, the trademark license agreement imposes responsibility on the licensor to control the quality of goods from production to marketing. Although the rules regarding quality control obligations are not explicitly stated in the trademark rules in the European Union, these provisions regarding quality control are also justified. The European Court conveyed that the licensor can control the quality of the product to be made by the licensee by including a quality clause in the license agreement. The licensor can then develop a clause that requires the licensee to fulfil specific requirements so that the trademark has the same quality that the licensor wants.

Related to quality control, several clauses are deemed necessary in the license agreement as a guarantee of the quality of a trademarked product. However, it should be noted that even if these clauses are permitted by law, the licensor must also pay attention to the applicable business competition rules so that the license agreement does not cause the abuse of trademark rights, which can lead to unfair business competition. The provisions in question are not explicitly stated in the legal framework for trademark law. However, the development of cases described below shows that the provisions referred to refer to business competition rules, which will be discussed in detail in the following indicators.

As in principle, the rule of law is formed to achieve the purpose of the law itself, the absence of a detailed explanation of the provisions of the restrictions referred to in the trademark law in Indonesia creates uncertainty, so this is not in line with what was expressed by Gustav Radburch regarding the purpose of the law. So the provisions of Article 42 (6) of the Law on Marks and Geographical Indications need to be reviewed and reformulated. Although cases of misuse of trademark licenses have never occurred in Indonesia, the illustrations of cases discussed in the following indicators can at least illustrate that a trademark can be licensed by requiring the licensor to control the quality of the licensed trademark product create a more competitive business that protects consumers from fraudulent actions. Quality control provisions in trademark license agreements that apply in America and the European Union may also be applied in Indonesia to realise efforts to balance rights holders' interests and business competition.

3.2 Abuse of Exclusive Rights Criteria of Mark Holders in License Agreements Under the Rules of Business Competition Law

As discussed above, related to quality control in the granting of trademark licenses to avoid public confusion about trademarks, here are some clauses related to quality control in trademark licensing agreements which in practice allow misuse of trademark licensing.

a. Territorial Protection, Exclusive License

1. Exclusivity in Trademark Licensing

Territorial exclusivity is a license agreement in which the licensor grants the licensee exclusive rights to produce and sell products in a particular area. The granting of a mana license is carried out when the licensor agrees not to grant similar rights to others in the same area, while the licensor himself has the right to produce and sell products in that area. The licensor also agrees not to produce their goods in the licensee's territory with an exclusive license.

In Europe, such a provision does not necessarily violate the prohibition under Article 81(1), although in principle, this provision is considered a violation. In the decision of the case of The Agreement of Davide Campari – Milano SpA, the Commission stated, as stipulated that 'exclusive trademark license is a limitation of competition under the provisions of Article 81(1) EC Treaty, because the exclusive rights granted to the licensee prevent the licensor from entering into a contract with another party, prevent it from making the product and cause the licensor to lose the freedom and profits derived from trading activities. However, in the end, the Commission excluded the agreement (which was made by Davide Campari-Milano SpA and the respective parties in the Netherlands, Germany, France, Belgium, Luxembourg and Denmark) because it fulfilled the conditions set out in Article 81(3), where an agreement entered into and concluded by the parties regarding the use of the licensor's trademarks for the manufacture of alcoholic beverages and for producing its alcoholic beverages in the agreed territory, contributing to increased production and distribution of products, centralizing sales efforts and making it possible to develop existing factories and build factories new by each licensee.

Thus, to determine whether certain territorial protections violate Article 81(1), it is necessary to examine its effect on the market further. Therefore, each situation needs to be carefully considered regarding all the circumstances accompanying a license agreement.

2. Particular Circumstances as a Basis for Violation of Competition Rules

An analysis of the commission's decisions on copyright and trademark agreements shows how certain circumstances are assessed on a case-by-case basis. In the case of Moosehead/ Whitbread, the agreement on behalf of Moosehead (a Canadian brewer) granted Whitbread (a British brewer) the sole and exclusive right to produce, promote, market, and sell beer produced under the Moosehead trademark in a licensed territory, using Moosehead's know-secret. In order to ascertain whether the agreement falls within the provisions of Article 81(1), it is not sufficient to consider the wording of the license agreement. In the first analysis, the commission stated that the exclusive trademark license for the production and marketing of beer and the prohibition of active sale outside of certain territories violated the provisions of Article 81(1), as it excluded third parties (i.e. five other major UK brewers) from use as licensees. The Moosehead trademark, and restricting Whitbread from selling the product in other markets within the shared market. However, the commission later excluded the licensing agreement under Article 81(3) because the features of the British beer market were as follows: Most beer in England is sold in liquor-licensed taverns; and to achieve substantial sales of a new beer, sellers need to have access to several stalls; but the majority of these taverns are bound by contracts to buy beer from just one brewer; Therefore, foreign brewers need to get help from large national brewers to enter the UK market. Thus, the agreement between Moosehead and Whitbread contributes to an increase in beer production and distribution, as the product no longer needs to be imported from Canada, which reduces transportation costs, will also benefit from Whitbread's distribution network, and will also provide consumers with a wide choice of products.

b. Quality Control, Manufacture and Marketing of Products

The Commission fully recognizes the importance of quality control in trademark licensing agreements. In Campari's decision, there is a clause that limits the manufacture of products only to plants that can maintain their quality, as well as an obligation for licensees to follow instructions for granting licenses relating to the manufacture and quality of materials deemed following the provisions of Article 81 (1). It should be noted that although the commission found territorial protection and an obligation on the licensee not to handle competing products during the term of the license agreement to limit competition in Article 85(1), and based on the special nature of the product granted the exceptions granted in Article 81(3), at the same time it is deemed appropriate that such provisions do not cover restrictions arising from the quality of the product. However, the licensee's obligation to supply specific customers is not their product but the original product of the licensor itself, otherwise limiting competition. This clause is justified on the grounds of marketing and maintaining the same original taste for products provided to customers who are usually required to frequently move from one region to another, then excluded on the basis of the provisions of Article 81 (3).

The same rationale was adopted in the Moosehead/Whitbread case, where the British licensee agreed to comply with the Canadian licensor's specifications relating to beer quality and the type and quality of raw materials.

Because of this decision seems justified that quality control and restrictions relating to the maintenance of the same product characteristics are usually by competition regulations. However, these restrictions must respect the principle of proportionality; as demonstrated in the case of Campari, the case of control measures should not exceed the limits of reasonable quality control requirements

In trademark licensing agreements, sometimes the licensor imposes on the licensee manufacturing standards and the licensor's right to inspect product samples and inspect the licensee's manufacturing facilities. Although the obligation limits the licensee's freedom, it does not fall under Article 81(1) prohibition, as it guarantees product uniformity and quality. It seems unlikely that the trademark holder would license his rights without such a clause.

Licensees may also be bound to achieve specific sales levels; failure to do so may result in contract termination. In addition, he or she may be required to spend a minimum amount on advertising the product, and such advertising is usually subject to the licensor's control. These provisions are not detrimental to competition in the market, so that they can be excluded from the prohibition of Article 81 (1).

c. Product Binding Clause

This provision places an obligation on the licensee to purchase exclusively from the licensor certain products or materials necessary to exploit the licensed technology. Such binding clauses are considered anti-competitive and are included in the prohibition of Article 81 (1) of the EC Treaty because the licensor prevents the licensee from obtaining supplies from other parties, perhaps on more favourable terms. However, it should be borne in mind that such obligations are often the only way to meet specified production standards and help achieve the desired product quality.

The European Commission in Campari's decision stated that the licensee's obligation to purchase certain secret raw materials (a secret mixture of herbs and dyes) from the licensor is by Article 81 (1). Similarly, an exclusive purchase obligation regarding yeast (Moosehead/Whitbread) is excluded from the provision. It is necessary to ensure technically satisfactory exploitation of the licensed technology and identity between Moosehead-produced beers Whitbread-manufactured products. However, it is clear that in the same way as in quality control restrictions, the parties must observe the principle of proportionality to avoid confusion with competition rules.

Meanwhile, in America, this provision may be against the law by looking at the economic power possessed by the brand holder. The court determines if the IPR holder supplies a license for a product that does not contain IPR as part of the licensed IPR.

Moreover, in Indonesia, provisions like this are allowed while still giving consumers a choice to buy only one product. Product binding accompanied by the obligation for the licensee to sell the product to consumers so that consumers cannot buy just one product can be considered a form of abuse.

d. Price Restriction Clause

In the United States, provisions regarding vertical or horizontal price restrictions violate the provisions of the Sherman Act Article 1. This provision can be seen in the illustration of the Sealy case decision, in the Supreme Court explicitly stating that "restraint…of the resale price of a trademarked article, not otherwise permitted by law, cannot be defended as ancillary to a trademark licensing system". The Supreme Court also added that territorial restrictions in trademark licensing are unlawful if such restrictions are accompanied by price-fixing.

In Europe, this provision is at the top of the blocklist, so it is clearly within the scope of the prohibition under Article 85 (1). In addition, the Commission has systematically refused to exclude the provision of price restrictions from the scope of Article 85 (3).

e. No Challenge Clause

This provision requires the licensee not to challenge the validity of these rights. The rationale behind such an obligation is that the licensee is best positioned to demonstrate that rights do not have specifically required characteristics.

Since the past times, both the Commission and the Court held that non-challenge clauses were against the public interest, limited the licensee's freedom, and included Article 81(1). The first published decision in which the Commission analyzed a non-challenge clause relating to a trademark was Moosehead/Whitbread. The Commission held that a trademark clause without such a challenge did not automatically fall within the scope of Article 81(1). Whether the obligation violates the provisions in question depends on the particular economic context. Concerning trademarks, a no-challenge clause can constitute a considerable limitation on competition if the use of a particular trademark is an essential requirement for a company entering or competing in a particular market. Because brand ownership only gives the holder the exclusive right to sell the product under that name, others are free to sell the product under a different brand. Only the use of well-known trademarks, a significant barrier to any other company, can be a sizable barrier to competition. In the ruling in question, as the Moosehead trademark is relatively new to the licensed territory, its maintenance would not constitute a meaningful opportunity for other companies to enter or compete in the UK market.

This suggests that a no-challenge clause is not necessarily unlawful but that all circumstances should be considered, including situations in specific markets.

f. Teritorial Resale Restriction

This provision makes it possible for the licensor to personally agree not to use the trademark in that region and to prevent any licensee from using the trademark in another licensee's exclusive territory, i.e. from selling directly in that region.

As has been seen, the licensor can no longer use infringement legal remedies to prevent any national licensee from invading the national territory given to other exclusive licensees. Therefore, to fulfil this promise to one licensee, the licensor must request from the other licensee an agreement not to export directly to the territory of the first licensee. There is a market share between the licensor and between the licensees in such cases and can be traced to the agreement system. The division of the market between the licensor and the licensee is visible if the licensor, in exchange for a promise not to compete with the licensee in their territory, makes a proper promise from the licensee that they will not sell in the reserved territory. However, as the case of American law exemplifies, such restrictive schemes should not be automatically prohibited. In both the Sealy and Topco cases, the United States Supreme Court categorized the territorial sales restrictions as horizontal agreements. As a result, the court ruled that they violated the provisions of Section 1 of the Sherman Act. Both cases involve a licensing company owned and controlled by the licensee. However, if the licensee has a relationship with an independent licensor entity, the territorial sale restriction generally qualifies as a vertical restriction. It will be reviewed according to the *Rule of Reason* approach in such cases.

Thus, the criteria above indicate that the trademark license agreement is also capable of causing abuse in terms of determining clauses related to quality control so that its implementation is subject to the scope of Article 81 (1) of the EC Treaty for European Union countries, and the Antitrust Guidelines for the Licensing of Intellectuals. Property Rights for the United States. The cases related to the alleged abuse of the exclusive rights of the brand holders in the license agreement above show that the issue of the license agreement in the context of business competition is an empirical matter, thus to determine whether the license agreement violates the provisions of business competition or not it must be studied based on the facts behind it and the effects—anti-competitive effects caused by market conditions.

IV. Conclusion

The criteria for abuse of the exclusive rights of the brand holder in the license agreement based on the rules of trademark law are closely related to its objectives to protect consumers from fraud and protect fair competition, as can be seen from the provisions on quality control limits based on competition rules. Furthermore, based on the rules of competition law, the criteria for abuse of exclusive rights of brand holders in the context of a license agreement consist of exclusive licenses, quality control, product production and marketing, product binding clauses, price restriction clauses, non-challenge clauses, and territorial resale restrictions.

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