

First To File Principle in Goto Brand Dispute Settlement (Case Study: PT. Terbit Financial Against Gojek and Tokopedia)

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Abstract

The research with the title First To File principle in the resolution of GOTO brand disputes aims to find out how the dispute resolution against trademarks should use the First To File principle. This article uses normative legal research with a legal and conceptual approach. Trademark registration in Indonesia adheres to a constitutive system, as stated in Article 13 of Law Number 20 of 2016 concerning Marks and Geographical Indications where the applicant whose application is submitted first and registered first, then that party is entitled to the protection of the mark. However, in practice there are not a few disputes that arise due to the similarity of naming the brand. However, in practice, there are many disputes that arise due to similarities in naming brands or similarities in essence. Therefore, it is necessary to have legal certainty for rights holders who have registered their trademarks first.

Keywords

Merger; brand; first to file



I. Introduction

Various aspects of life such as transportation and trade are increasingly easy to use, of course, with the development of information technology. In the era of digitalization as it is today, various digital platforms are familiar to the public and even embedded in daily life, various applications used by the public such as Gojek and Tokopedia in terms of traveling, ordering food, or buying products needed at home can be done only by just hold your hand through both applications. The development of the business chart is also increasing. So that every company that participates in the business sector must continue to race to accelerate its business fields that have the potential to generate advantages in the destination market. Even at this moment, In this case, Gojek and Tokopedia are following the very strong current of globalization by carrying out a strategy to deal with very tight business competition. On May 17, 2021 ago, Gojek and Tokopedia joined forces to make new breakthroughs. However, the collaboration between the two companies resulted in a new entity called GoTo. In the sense that the two largest startups in Indonesia, namely Gojek and Tokopedia, merged two companies and gave birth to a new company called GoTo, this is known as a merger.

Merger based on Law Number 40 of 2007 concerning Limited Liability Companies is a legal act carried out by one or more companies to merge with another existing company which results in the assets and liabilities of the merging company being transferred by law to the company that accepts the merger and furthermore, the legal entity status of the merging Company ends by law. Of course, the impact resulting from the merger of the two companies brings positive and negative things, from a positive point of view, the convenience offered by the two digital platforms will be further enhanced in the future. However, the bad thing is that the result of the merger of the two largest companies in Indonesia makes it difficult for other business people who want to compete in this

business competition. Due to the merger of these two large companies, it gave birth to a company that is quite competitive in the global market trading sector.

This intense business competition makes competitors who participate in it compete to market their products and attract attention, of course, one of the things that needs to be done to market products such as goods and/or services is to give a name or what is known as a brand. From these brands, companies can trade their products with a branding or characteristic that describes the company's goods and/or services. So that a company can be distinguished from another based on its brand.. The nature of the registration of a registered mark, which means that only a registered mark will have legal protection, as opposed to a trademark that is not protected by law. The concept of obtaining a mark in the constituent registration system is "first to register", meaning that whoever registers first gets accepted regardless of whether the registrant is actually using the mark for business purposes. It is also to protect against counterfeiting, cheating, or copying someone else's property.

As a result of the merger, Gojek and Tokopedia used a brand called GoTo where this brand was used for a new company resulting from the merger of Gojek and Tokopedia, then there were problems after the brand was used. The marks used by Gojek and Tokopedia are alleged to have been used and registered by PT. Published Financial Technology with registration Number IDM00085218 class 42 dated March 10, 2020. Then PT. Terbit Financial sued Gojek and Tokopedia for violating trademark rights. The two companies were reported under Article 100 paragraph 2 and/or Article 102 of Law No. 20 of 2016 concerning Marks and Geographical Indications.

Brand disputes that arise due to the use of a brand called GoTo. PT. Terbit Financial Technology uses the GoTo brand and gets its rights as a registered mark until the expiration date on 10-03-2030, as for the letters used by PT. Terbit Financial Technology uses capital letters and uses a dark green color, then there is a red arrow to the right on the last o, while the GoTo brand used by Gojek and Tokopedia uses all lowercase letters in bright green according to the colors of the two companies. .

Law Number 20 of 2016 MIG chapter XV regulates Dispute Resolution. This includes provisions for cases of trademark infringement, procedures for a commercial court lawsuit, cassation, procedures for implementing decisions, and alternative dispute resolutions. In the Supreme Court Regulation, mediation is not required for the settlement of trademark disputes, however in the MIG Law, alternative settlements are still regulated. In Indonesia, brand issues are solved in one of two ways; either non-litigation or by bringing the case to the Commercial Court.

Therefore, the author sees an imbalance in the application of the First To File principle in Indonesia. There are still many brand disputes that occur regarding the similarity in essence. In Article 21 Paragraph (1) of the MIG Law, what is meant by equality is basically the similarity caused by the presence of a dominant element between one brand and another, giving rise to the impression of similarity, in the form of form, placement method, method of writing or a combination of elements, as well as the similarity of speech sounds contained in the brand. Therefore, the author feels that it is very necessary to have legal certainty over the trademarks that have been registered beforehand so that trademark disputes over equality basically do not occur again and for previous trademark holders to get protection for the trademarks used.

II. Research Method

This legal research uses normative law. According to Soerjono Soekanto, normative juridical is legal research conducted through examination of library sources or secondary data. Normative legal research is also called normative juridical research, which is a type of research that examines the quality of legal norms by using written laws or other legal documents.

Data collection is done by referring to the sources of Literature Studies both printed and digital. Sumber Pustaka is a law book or other book that is selected based on the relevance of the library source to the topic discussed. Digital sources are sources that can be accessed online and come from journals and articles. The selection of digital sources is carried out by looking at the relevance of the discussion and the credibility of the referral source provider.

The law approach and the concept approach are the two approaches used in this research. The statutory approach is used to see all statutory regulations relating to the legal research carried out. A conceptual approach that focuses on mastering concepts correctly so that there are no conceptual errors (misconceptions). Currently the analysis is focused on trademark disputes involving the First to File principle, which should provide legal certainty to former registrants and ensure that their marks are protected.

III. Result and Discussion

3.1 How the use of the First to File principle and the similarity principle are the reasons for the acceptance of the trademark registration

The mechanism for registering a mark and securing its rights is regulated in Law Number 20 of 2016 concerning Marks and Geographical Indications. Trademark law follows a constitutive system or the First To File principle, where exclusive rights to trademarks are granted by the state through a registration process. In other words, in the constitutive system, registration is required before using a mark. And vice versa if there is a mark that does not go through the registration process, it will not get legal protection for the mark used. "Rights to Marks are exclusive rights granted by the state to owners of registered Marks for a certain period of time by using the Mark themselves or giving permission to other parties to use them" according to Article 1 point 5. The owner of a registered mark is the only one who has the right to the mark, and other parties who wish to use the mark must respect that right. The right to the mark is guaranteed if the mark has been registered, according to Article 3. As a result of the constitutive system which is also known as the First To File principle, the party who first registers the mark gets trademark protection and legal certainty over the registered mark. In other words, registering a trademark gives the right to use it.

The First To File principle in the constitutive system, which states that a registered mark has met all the requirements and is also the first to register, because not all trademarks can be registered. The registered owner also has exclusive rights, and in the event of a dispute it will be easier for the registered mark owner to show valid evidence than trademark ownership in the form of a certificate issued by the Directorate General of Intellectual Property Rights (DJKI), the certificate itself proving as the first owner of the brand. So that the owner of a mark that is not or has not been registered will have difficulty showing that he is the first owner because he cannot show authentic evidence to the Court. Furthermore, trademark protection will be limited to registered trademarks, including

domestic and international marks. The legal protection is in the form of preventive and repressive measures. Preventive protection is provided through trademark registration, while repressive protection is provided through civil or criminal lawsuits in the event of a trademark dispute.

The sub-directorate of trademark inspection of the Directorate General of Intellectual Property (DJKI) is an Indonesian entity authorized to review trademark registrations. Examination of registered trademarks must be carried out carefully in carrying out the examination, such as the first thing that must be done to find information relevant to registered marks. In addition, the Sub-Directorate of Mark inspection must pay attention to the registration requirements set forth in the laws and regulations on trademark registration. The regulation on trademark registration is contained in Law Number 20 of 2016 concerning Marks and Geographical Indications and Regulation of the Minister of Law and Human Rights Number 67 of 2016 concerning Marks.

The idea of good faith is very important and serves as a guide for registrants in terms of trademark registration. This requires acting in good faith and honesty when registering a trademark without violating the rights of others to use the mark. And for parties who wish to register their trademarks with bad and bad intentions, this cannot be done to register the trademark. If there is a mark which has already applied for registration and is identical with the mark in question in theory or in general or in whole with the mark in question, the application for the mark must be rejected. The latest trademark law, namely Law Number 20 of 2016 concerning Marks and Geographical Indications, regulates bad things in this case trademark registration. Article 21 paragraph (3) reads: "An application is rejected if it is submitted by an applicant with bad intentions".

Basically why the brand is so important, among others, aims to be a differentiator for consumers who want to buy products from each other. This is to avoid consumer confusion when choosing the product they want to buy, if there is a similarity in product name it will be a problem for consumers who are accustomed to buying a product in one brand but it turns out that the brand is also used by other products, resulting in ambiguity and can happen. public deception regarding a brand that people are familiar with but there are individuals who deliberately use a brand with the same name.

Therefore, in addition to registered trademarks having exclusive rights for applicants who register for the first time (First to File principle), registered trademarks also get protection against other trademarks that have similarities with the registered trademark owner. This is regulated in Article 21 paragraph (1) of the Law on Marks and Geographical Indications, which defines "similarity in essence" as the presence of a dominant element between two Marks so as to give the impression of an impression of similarity such as form, placement method, method of writing, or a combination between elements, as well as the similarity of speech sounds contained in the Mark. Furthermore, the article explains that if a registered mark is in principle or in its entirety the same as a well-known mark belonging to another party on similar goods and/or services, the following factors must be taken into account; public knowledge about the mark in the relevant field, reputation is obtained through vigorous and massive promotion, investment in several countries in the world, and proof of trademark registration in several countries. However, if these factors are deemed insufficient, the Commercial Court may request an impartial institution to conduct a survey of the mark in order to determine whether the mark is well known or not.

According to the permanent jurisprudence of the Supreme Court of the Republic of Indonesia No. 279 PK/Pdt/1992, a mark can be judged to be the same in principle or in its entirety as another mark if there are:

- Equation of form (similarity of form);

- Equation of composition (similarity of composition);
- Equation of combination (similarity of combination);
- Equation of elements (similarity of elements);
- Sound similarity (sound similarity);
- Speech similarity (phonetic similarity); or
- Similarity in appearance.

The existence of an element of similarity as described above can cause similarities to previously registered brands, so that it can be confusing and misleading for consumers. In addition, losses are also obtained for the party who owns the registered trademark in the event of a trademark infringement and can also be an advantage for those who take advantage of other people's trademarks, but this method is very unusual and very detrimental to the victim.

According to article 76 paragraph (1) of the Law on Marks and Geographical Indications, if there are similarities with registered marks or well-known marks as referred to in Article 20 and Article 21 of the MIG Law, the mark can file a case for cancellation.

Although well-known marks do not go through the registration process first, well-known brands still get protection, despite the fact that Indonesia follows the First to File principle, well-known marks will still be protected as long as it can be proven that other companies are trying to register their marks properly.

So in the discussion above regarding the First to File principle and the similarity principle, the author argues that in Indonesia the First To File principle applies to registering a trademark in which the previously registered trademark will get exclusive rights and also protection in the event of a trademark dispute where the registered mark will be easier to obtain. prove that the mark is more entitled by showing authentic proof of registration. However, this is contradictory because well-known marks also receive protection even without prior registration. And to determine the equation in essence is also not easy,

The purpose of the inspection at the time of trademark registration as well as regulations related to the elements of equality are basically to prevent disputes over trademarks. So every mark that wants to be registered must go through an administrative inspection process at the Directorate General of Intellectual Property Rights (DJKI), and applicants who want to register their mark can check on the official DJKI account to find information regarding the mark that they want to register has been registered by another party or not. Equality in principle elements will also be used in substantive judgments to prevent applicants from registering their trademarks in bad faith.

However, the author continues to observe many brand conflicts with similar essence to well-known businesses, one of which is the author's title this time. As a result, the application of the element of equality in principle, as regulated in Law Number 20 of 2016 concerning Marks and Geographical Indications and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 12 of 2021 concerning Registration of Marks, has not been fully implemented in practice.

3.2 How should the trademark dispute resolution between PT. Publishing Financial Technology with Gojek and Tokopedia?

In 2021 ago, PT. Karya Anak Bangsa (Gojek) and Tokopedia announced that the two largest startup companies in Indonesia officially merged and gave birth to a new subsidiary called "GoTo". Merger and takeover of daitur in Article 109 point 1 of Law Number 11 of 2020 concerning Job Creation, which amends article 1 of Law Number 40 of 2007 concerning Limited Liability Companies. Merger is an act where one or more companies

merge with another company, which results in the transfer of assets and liabilities of the merging company due to the laws and regulations of the receiving company, and the legal entity status of the merging company then ends by law. The name GoTo itself comes from the acronym Gojek and Tokopedia, as well as the expression gotong royong which represents the spirit that unites the two.

But now the name "GoTo" belonging to Gojek and Tokopedia is being disputed in court, Gojek and Tokopedia are being sued by PT. Published Financial Technology worth Rp 2.08 Trillion and also rejected the application for registration of the "GOTO" mark or all its variations submitted by the defendant. The dispute arose due to the use of the "GOTO", "goto", "goto financial" brands which are essentially the same as the plaintiff's "GOTO" brand. The plaintiff's "GOTO" mark has been registered and has a protection period of up to 2030 with registration number IDM000858218 class 42. The plaintiff's brand uses all capital letters in dark green and has an arrow to the right in red. Meanwhile, Gojek and Tokopedia registered several brands with the same elements, including "GOTO", "goto", and "goto financial". for the first registered mark "GOTO" uses capital letters in its entirety in black, then "goto" uses lowercase letters in whole with a bright green color like the color on the Gojek logo,

Starting as a result of investors who did not intend to invest in PT. Published Financial worth Rp 150 billion, due to news related to the merger of Gojek and Tokopedia and using the name "GoTo". It turned out that the plaintiff had already sent a subpoena previously, essentially to stop the use of the mark. But in the end there was no answer from the summons and PT. Terbit Financial lost its investors. In the end, this matter was brought to court and sued to the Central Jakarta Commercial Court.

In Indonesia, we follow the First to File system, where previously registered trademarks have exclusive rights and receive trademark protection. Then the Law on Trademarks and Geographical Indications regulates the similarities in essence, which the author has explained in the first problem formulation. A mark based on Article 1 number 1 of Law Number 20 of 2016 concerning Marks and Geographical Indications is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color composition, in 2D (dimensional) and/or 3D forms. (dimension), sound, hologram, or a combination of 2 or more of these elements to distinguish goods and/or services produced by persons or legal entities in goods and/or services trading activities.

Article 21 of the MIG Law explains that the reason for an application for registration of a mark will be rejected if it has similarities in principle or in its entirety, with:

- a) A registered mark belonging to another party or previously requested by another party for similar goods and/or services;
- b) Well-known marks belonging to other parties for similar goods and/or services;
- c) Well-known marks belonging to other parties for goods and/or services of a different kind that meet certain requirements; or
- d) Geographical indication registered.

This article stipulates that if a trademark that is submitted has similarities with a previously registered mark, it will be rejected, considering that the owner of the registered mark has exclusive rights. Pre-existing rights are the cause of rejection of registration or deletion of marks. Why is it called "relative reasons", because the validity of a brand which is essentially the same or as a whole with a pre-existing brand, with a well-known brand, or Geographical Indications still has to be tested first. This article shows that if the application for a mark is rejected, the previous holder of the right to the mark will receive legal clarity and protection.

Based on the case study that the author took, the "GoTo" brand dispute has similarities in essence and one of the brand class applications submitted by Gojek and Tokopedia is in the same brand class, namely class 42 classification for research, technology, design services related to; industrial research and analysis services; design and development of computer hardware and software.

A trademark right can be infringed if a mark is used without the prior consent of the owner of the right to the mark or without a license being granted to the infringer of the trademark rights. The absence of a license means that the holder of the registered mark has not issued a license for the infringement of the mark. Infringement of a trademark arises as a result of individuals who are not the owners of a trademark using the trademark in such a way that it creates confusion among the public about it. A license agreement is the emergence of an agreement that is given by the owner of the previous right to a mark to another party who wants to be licensed for a certain period of time and with certain restrictions, not the transfer of rights to a mark. In addition, a license agreement is also needed so that other parties get permission to use a registered mark and their actions do not violate the trademark rules. Mark infringement is considered a criminal act and the party is suspected of having bad intentions by riding, imitating, and plagiarizing the fame of a brand for its business interests which can result in losses for the party who owns the registered mark, this condition also creates unfair business competition and misleads consumers.

Then the protection of well-known marks, even though they have not been registered, still gets protection, but it must be explored further regarding whether the mark is categorized as a well-known mark or not. Regarding well-known marks, it is regulated in the 2016 Trademark Law, in which well-known marks are also used as a benchmark for trademark registration, so that the party applying for the mark may not have similarities in principle or in general with well-known marks for similar or dissimilar goods and/or services. The Trademark Law also stipulates the criteria for well-known marks, namely requiring that public awareness of well-known marks and their reputation be widely encouraged, with money invested in many countries, proof of registration in several countries, and if this is still lacking, an independent survey will be conducted which impartially by the relevant institutions. However, this provision is considered to be less specific because it does not explain further regarding how to measure public awareness of well-known brands, how to determine the reputation of well-known brands, and how much evidence is required for registration in several countries. This section is considered to be lacking in detail so that when a dispute occurs, the adjudicating court needs to review concretely regarding the popularity or not of a trademark.

Several decisions of the Supreme Court in the case of the IKEA brand dispute also mention the criteria for well-known brands including; Supreme Court decision number 274 PK/Pdt/2003 trademark has been registered and has stores in several countries that can be found, long term of brand, quality brand reputation; The Supreme Court's decision number 1468 K/Pdt/1991 has exposed brands even to transnational boundaries, brands have been registered in several countries in the world so that they have been exposed beyond their national borders.

So the author believes that GoTo owned by Gojek and Tokopedia has not been categorized as a well-known brand, because the brand was just inaugurated and registered last year and is still in the process of being a new subsidiary under the umbrella of Gojek and Tokopedia, even though the public is no stranger to Gojek and Tokopedia but they are know the brand individually not with their subsidiaries. Then also this case is still ongoing

in court and whether later the application for the trademark will be rejected or vice versa the plaintiff's application by PT. Rejected publication

If according to the regulations in Indonesia, the First to File system applies, which means PT. Terbit Financial as the first owner of the use of the GoTo brand and is entitled to the rights to the brand and protection. Which is the protection against equality in essence in the use of the GoTo brand and if the brand is compared between those of PT. Terbit Financial with Gojek and Tokopedia have similarities in the sound of GO-TO, so even if there are differences in the style of the letters used, it will still be read as GO-TO. Then in the registered classes, one of them is in the same class, namely class 42.

IV. Conclusion

Based on this, it can be concluded that based on Law no. 20 of 2020 concerning Marks and Geographical Indications, the trademark registration system in Indonesia adheres to a constitutive First To File principal, whereby the first trademark registrant gets protection and exclusive rights to the mark. And also for registered marks, it will be easier to collect authentic evidence in the event of a trademark dispute. Naming in a brand can be a dispute if there is a resemblance, in the Trademark Law the principle of similarity is known, namely equality in essence. This is because if there are similarities between one brand and another, it will cause confusion for consumers, and also for registered brands first, of course, they will experience losses due to the brand being used by other people. It should be for those who want to create a brand to pay more attention to whether someone already uses it or not. And if you want to use the mark, you are expected to get permission in advance for the holder of the right to the mark.

In this case, a brand violation was found, namely the similarities in principle to the GoTo brand from both parties. And if you look at the Law it is clearly written that Indonesia adheres to the First to File principal, then the original registrant of the mark should be given legal certainty and protection of trademark rights. Although there are categories of well-known brands that can also get protection, it still has to be proven in several categories that state whether the brand is famous or not. An application for registration of a mark can also be rejected if the mark to be registered is essentially the same as the previous registered mark, especially if the mark does not get permission to be used by the holder of the right to the first mark.

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