THE PRECAUTIONARY PRINCIPLE IN THE TRANSFER OF TRADEMARK RIGHTS BY NOTARIES

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ABSTRACT

Keywords: Identification and verification; notary; precautionary principle; Distribution of trademark rights.

The problem discussed in this research is implementing the precautionary principle of the Notary in knowing the applicant and the legal consequences of an authentic deed made by the notary who has not applied the precautionary principle in knowing the applicant. This research uses a juridical-empirical approach, analyzing a statute that applies to be used as a basis for solving problems. The informant is a notary in Yogyakarta City and is still active in the Regional Supervisory Council and Central Supervisory Council. The results of this study explain that the Notary in applying the Precautionary Principle begins with ensuring and checking the formal truth of the applicant. If it is deemed insufficient, then the notary should seek material truth to achieve the goal of the precautionary principle in getting to know the parties and minimize the possibility of problems in the future. Legal consequences if the notary does not apply the precautionary principle would be if a mistake comes from the parties towards the deed, then the deed can be degraded to a deed under the hand. If the notary is guilty, he or she can be held liable administratively, civilly, or criminally.

Introduction

Law is one of the means that everyone needs, especially in an economic system that has entered the era of globalization (Cantika, 2018). These legal needs are in the form of laws, clear legal regulations, and legal certainty and actions regarding firm law enforcement from law enforcement officials. One example of a law enforcement officer in the Civil field is a Notary. In this case, notaries act as General Officers or (Openbaar Ambtenaar) and are obligated to act professionally. Notaries represent the state in carrying out their duties and functions in making deeds as evidence, namely in authentic deeds. In terms of carrying out their duties, Notaries must be accessible without the influence of any party, including executive power (Jotyka & Suputra, 2021).

The right to a mark is an exclusive right granted by the state to the owner of a mark registered in the general register of marks and for a certain period by using the mark itself or giving permission to other parties to use it (Kasenda, 2017). The trademark owner registering his trademark is to get legal protection as the owner of the rights to a mark if the mark has been registered at the Directorate General of Intellectual Property Rights of the Ministry of Law and Human Rights of the Republic of Indonesia. A registered mark may be transferred to another party (Pramurti, 2018). In the case of rights transfer to the registered mark according to Article 41 paragraph (1) of Law Number 20.
According to Salim H.S, the elements contained in the Juridical understanding of a sale and purchase agreement according to Article 1457 of the Civil Code are:
1. The existence of legal subjects
2. Existence of an agreement
3. some rights and obligations arise.

A Brand sale and purchase agreement requires evidence that aims to obtain legal certainty and justice. So, Article 1867 of the Civil Code states that Proof by writing is done with authentic writings and with writings under the hand. As mentioned above, the person with the authority to make the authentic deed is a Notary (Fajri, 2020). However, in practice, the transfer of rights to registered marks only uses an agreement without an authentic deed made by a Notary (Putri & Valentina, 2022).

In this field of Intellectual Property Rights, the agreement with a transfer that must use a Notary Deed is Plant Variety Protection (PVP) and License only. However, in transferring rights to this mark, no special rules specifically regulate the transfer of rights to marks that must use a Notary Deed (Prajawati & Wisanjaya, 2023). So, that certainly raises doubts and legal uncertainty in the process of transferring rights to this brand. According to Rahmi Jened, the transfer of rights to the brand cannot only be done verbally but must use a Notary Deed because, in this case, there is a transfer of ownership rights.

The transfer of Intellectual Property Rights, including trademark rights, must be done by registration, not just recording it to the Directorate General of IPR in the general register of marks but must be announced in the official general gazette of the brand (BRM) and notified to the owner of the mark (Rahman, 2018). The purpose of registration of the transfer of rights to this mark is to have the force of application to third parties. The obligation to register the transfer of rights to this mark is intended for Legal Protection in order to realize adequate legal protection, especially for subsequent recipients of rights, and determine that the legal consequences that only apply after the transfer of rights to the mark are recorded in the General Register of Marks (DUM). This is intended to facilitate supervision and realize legal certainty (Hayuningrum & Roisah, 2015).

In practice, the transfer of marks with this registered agreement, in my opinion, has not achieved an apparent legal certainty both on the part of the seller and buyer of the mark, as for examples of cases that have occurred in Indonesia in terms of transferring rights to registered marks using brand sale and purchase agreements, namely in the case of transferring rights to the Sariwangi tea brand where the brand of Sariwangi tea was transferred to Unilever Indonesia in 1989 by the owner of Sariwangi tea at that time (Oktiani, Nurhidayati, Ramadhayanti, Safria, & Arifin, 2023). Based on this brand sale and purchase agreement, Unilever Indonesia has the right to use the Sariwangi brand from the previous brand owner.

Meanwhile, regarding the production process, licenses, trade secrets, and so on remain the previous owner's property, Sariwangi. However, the transfer of the Sariwangi brand still has legal problems related to the sale and purchase agreement. Because in practice, the transfer of rights to the Sariwangi registered mark has not been carried out using an authentic deed made by a Notary, so there is no legal certainty, such as in terms
of Plant Variety Protection (PVP) and Licenses, so it cannot get legal certainty and also valid evidence. Moreover, at the time of the trial, it can not be used as authentic evidence of the mark's legal owner.

Based on the previous background description, the problem can be formulated:

1. How do I transfer rights to a registered mark through a sale and purchase agreement according to Law Number 20 of 2016 concerning Marks and Geographical Indications?
2. What is the role of Notaries in transferring rights to registered marks based on Law Number 20 of 2006 concerning Marks and Geographical Indications?

Research Methods

This type of research uses Normative legal research methods. This Normative research is legal research based on literature. According to Bambang Waluyo, Normative law research focuses on literature and document studies; which of the two sources is aimed only at written regulations or other legal entities? Such as collecting secondary data in the form of secondary, permanent, and tertiary legal materials.

The approach is legal. The legal approach is an approach that is done by reviewing the rules of law (Legislation) and regulation about the problem or issue under discussion. For the legal approach, we will learn the consistency and suitability between one Law and another or between regulation and Law.

In this study, the type of normative legal research is used, the object of research, namely, the substance of law or norms to examine the quality of legal norms with various related legal theories and with ideal parameters (legal essence), namely, justice, expediency, and certainty which are mainly related to the rules for doing deeds, the nature of deeds and the rights and obligations of Notaries based on the UUPJN.

The problem approach uses the statutory approach method. (statute approach) which is carried out by reviewing all laws and regulations related to legal issues being handled and the conceptual approach, which moves from the views and doctrines that develop in legal science. Preparation of research proposals, as previously explained, aims to analyze the validity of the deed made for the trademark that is still being applied for and also the legal consequences for notaries if the trademark application is not registered in the General Register of Trademarks so using the approach of the Law, the relevant rules used to help answer legal issues will be examined, namely UUJN, UUPJN, BW (Burgelijk Wetboek), the Law on Marks and Geographical Indications and laws and regulations related to the Notary Office. The conceptual approach in this study is carried out by reviewing law books and journals so that legal understandings, concepts, and principles related to the legal issues studied will be found.

Results and Discussion

Transfer of rights to registered marks through a sale and purchase agreement according to Law Number 20 of 2016 concerning Marks and Geographical Indications
Based on the above provisions, especially Article 16, paragraph (1) letter e of the UUJN, a notary must provide services per statutory provisions unless there is a reason to refuse it. This rule implies that as long as the regulation regulates legal acts as permissible, the notary must record the legal act in an authentic deed when requested by the complainants. One of the legal acts that can be requested for recording and documented in a notarial deed is transferring one's rights to another party. Transfer of rights is a legal transfer of one party's property rights to another party preceded by certain circumstances or agreements justified by law. According to the Civil Law system, a transfer or transfer of rights consists of two parts: I. "obligatoire overeenkomst," which is an agreement aimed at transferring rights, such as a sale and purchase agreement or exchange.

The validity of a causal stelsel, namely whether or not the transfer of property rights is valid, depends on the validity or absence of the obligatory agreement. II. "zakelijke overeenkomst" i.e. transfer or transfer of rights themselves. In this case, what is important is the transfer or transfer of names when buying and selling immovable objects, such as houses, land, and so on.2 The transfer of rights can be done in 2 ways, namely: I. "binder title" is the acquisition of rights based on the transfer of rights specifically, one by one from one person to another, for example, buying and selling, giving, exchanging, and so on. II. "Algemene title" is the acquisition of rights in general and not specified one by one, for example, inheritance or marriage with a mixture of property (boedelenging).

The transferor loses the right to control the object because his property rights have been transferred. Thus, according to the Nemoplus Principle, a person cannot transfer rights beyond what is rightfully his/her, and usually, the owner who has the authority to control the thing is the owner.

Article 584 BW that: "Title to a property cannot be obtained by any other means, but by ownership, by attachment, by expiration, by inheritance, either by law, or by will, and by appointment or surrender based on a civil event to transfer property, made by a person entitled to exercise liberty over the property."

Compared to other property rights, those entitled can enjoy complete control freely. The relationship between objects and property rights is solely because of economic value; if an object has economic value, it will be pursued to obtain its property rights. An object can be used as an object of transaction when it meets two (2) conditions: the object concerned must have economic value, and its property rights can be transferred. Property rights are attached to an object, whereby Article 499 BW states that: "according to the understanding of the Law called property is, every item and every right that property rights can control." The types of objects in general are by BW, namely Tangible and intangible (Article 503 BW) and Movable and immovable (Article 504 BW). Essential types of classification are:

Intellectual property is philosophically a property (property); the theory was put forward by John Locke, who was influential in the country's Common Law System, and Hegel, who was influential in the country's legal tradition of the Civil Law System. Intellectual property is divided into two major parts, namely:
1. Copyright (copyright)
related to literary works and artistic creations, for example, books, music, paintings and sculptures, films, and technology (computer programs and electronic data). In other words, copyright is the authors' rights.

2. Hak Industri (Industrial Property).

This term is known at the Paris Convention; there are various types, including:

1. Patent
2. Brand
3. Industrial Design
4. DTLST
5. PVT
6. Trade Secrets

One of the intellectual property protections is the Brand, which is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, and color arrangements, in the form of 2 (two) dimensions and 3 (three) dimensions, sounds, holograms, or a combination of 2 (two) or more of these elements to distinguish goods and services produced by people or legal entities in the trade of goods and services by those listed in Article 1 point 1 of the Trademark Law Number 20 of 2016 concerning Brands and Geographical Indications.

Trademark rights are special rights, which are basically exclusive and monopoly and are only exercised by the rights owner. In contrast, others cannot use them without the owner's permission. To Article 1 point 5 of Law Number 20 of 2016 concerning Marks and Geographical Indications: "Trademark rights are exclusive rights granted by the state to registered Brand owners for a certain period by using the Mark itself or giving permission to other parties to use it."

When a mark has been approved for registration, the owner of the registered mark has the exclusive right to use the registered mark. Such rights shall be:

1. The right to use the mark;
2. The right to enjoy exclusive rights; no other party uses the mark either in whole or in essence equality for similar goods and services;
3. The right to permit and authorize others to use the mark;
4. Right to prohibit others from using the mark
5. The right to pledge the mark;
6. Right to investment;
7. Right to transfer registered mark;
8. The right to divert on the heirs.

The role of Notaries in transferring rights to registered marks based on Law Number 20 of 206 concerning Marks and Geographical Indications

One of the exclusive rights of trademark holders is the right to transfer rights regulated in Article 41 paragraph (1) of Law Number 20 of 2016 concerning Marks and Geographical Indications: "Rights to marks can be transferred or transferred through a. inheritance, b. will, c. endowment, d. grant, e. Agreement, f. Or any other cause permitted by law as stated."
The right to the mark is only obtained after it is registered by Article 3 of Law Number 20 of 2016 concerning Marks and Geographical Indications, meaning that property rights to the mark are obtained when the mark is registered in the general register of marks so that it can be transferred. However, there are further arrangements related to the rights transfer in Article 41, paragraph (8) of Law Number 20 of 2016 concerning Marks and Geographical Indications. The transfer of rights to marks, as referred to in paragraph (1), can be carried out during the trademark registration application process. This means that marks still in the application process can be transferred to other parties, while the mark is still likely to be rejected, so the applicant does not get the right.

For marks that are still being applied for, then the rights to the mark have not arisen because the rights to the mark are obtained after the mark is registered, so if it is transferred to another party, it will pose a risk, especially the transfer of rights due to an agreement with the basis of the right to the trademark sale and purchase agreement. Trademark rights are intangible assets with very high economic value, which are the object of sale and purchase; the provisions of Article 1457 BW to Article 1540 BW apply as long as they are not explicitly regulated. Sale and purchase by Article 1457 BW is An agreement by which one party binds himself to deliver an object and the other party to pay the agreed price. If the transfer of trademark rights, primarily buying and selling, is carried out on the brand being applied for and during the application process, there are obstacles; the buyer will be harmed.

Transferring trademark rights must be accompanied by supporting documents, especially the basis of sale and purchase rights. Then, the documents are in the form of an agreement or deed of sale and purchase, and then the agreement or deed of sale and purchase is recorded in the trademark unum register and announced in the official brand gazette. The rights transfer does not legally affect third parties if it is not recorded. The process of transfer of rights occurs when the agreement or deed of sale and purchase is agreed upon by both parties, according to article 1458 BW: "The sale and purchase shall be deemed to have taken place between the two parties, immediately after which these persons reach an agreement on the property and the property even though the property has not been delivered, nor the price has not been paid."

Meanwhile, the recording carried out at the Directorate of Marks and Geographical Indications is not a registration but only a recording of notifications, so it has legal consequences for third parties, including the transfer of rights when the trademark application is also recorded. At the time the sale and purchase are carried out, the right has passed from the seller to the buyer, including the mark that is being applied for where the applicant under civil law does not have a basis for ownership to transfer rights because the mark has not been registered in the general register of marks. Problems occur when a trademark transfer has not been registered or recorded and an authentic deed is made before a Notary.

On the one hand, a Notary Officer cannot refuse to make such an agreement if it has fulfilled the legal conditions of the 1320 BW agreement and as long as it is not made up by law. Problems will arise when the deed of rights transfer to a mark that has not been
registered has been authentically made by a Notary Officer, but the mark is not registered in the General Register of Marks. Therefore, it is necessary to investigate further what the impact of making this Unregistered Trademark Transfer Agreement is before a Notary because if the mark really cannot be registered, it may result in the agreement becoming null and void, which will undoubtedly have consequences for Notaries who make the deed of Unregistered Trademark Transfer Agreement.

The notary's duty in making a deed of transfer of a mark that has not been registered is essential to ensure that the transaction and deed of transfer of the mark are valid and according to applicable laws and regulations. In addition, notaries also play a role in protecting intellectual property rights to transferred marks by ensuring that the deed of transfer of marks made has met the formal and material requirements stipulated by laws and regulations.

Conclusion

In making a deed of transfer of a brand that has not been registered, the notary plays a vital role. The notary must ensure that all documents and information the relevant parties provide are complete and correct. In addition, notaries must also ensure that the rights to the trademark to be transferred have been applied for but have not been registered with the Directorate of Brands and Geographical Indications, Directorate General of Intellectual Property (DJKI). After that, the notary must make a deed of transfer of the mark containing the identities of the parties, a description of the object of the transferred mark, and the terms and conditions of the transfer of rights. The notary must ensure that the deed of transfer of the mark made has fulfilled the formal and material requirements stipulated in the laws and regulations and provide a copy of the deed of transfer of the mark to the parties involved in the transaction. Notaries must also register (a record) the deed of transfer of marks to the Directorate of Marks and Geographical Indications, Directorate General of Intellectual Property (DJKI), to protect the intellectual property of the transferred marks. Thus, notaries are essential in ensuring the legality of transactions and protecting intellectual property objects of transferred marks. In addition, the notary needs to inform the parties involved in the transaction, namely the party who waived the right to the mark (the transferor) and the party who received the right to the mark (the receiving party), about the consequences that occur if the mark is not registered in the General Register of Marks so as not to conclude a lawsuit against the notary who did the deed itself.
Bibliography


