

**PROTECTION AGAINST THE IPR HOLDER
IMPORTED GOODS FROM IPR VIOLATION
(A Normative Study)**

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As property rights that have economic value which in Indonesian legal terms are placed as assets, IPR must be protected wherever the objects are located. That right will continue to follow and stick to the place where it is, as the incarnation of the principle of *droit de suite* or *zaaksgesvolg*. That is why goods resulting from IPR violations that are produced or marketed must be prevented from entering the customs area of a country. Indonesia has a law that regulates it. Both those regulated in the IPR laws and regulations as well as those regulated in the Customs Act. But the problem is, in addition to the norm that the law does not side with the IPR owner, also when the law is implemented, what the Act originally intended, namely to protect the legal interests of the IPR owners, did not materialize. The IPR holder or owner is forever harmed. By using the normative research method, it can be concluded that the current positive law of Indonesia, both the IPR legislation and the Customs Act do not favor the legal interests of the owner and holder of the IPR.

Key Word: Passenger Carry-Ons, Customs Areas, Intellectual Property Rights, IPR Violations.

A. Introduction

As material rights resulting from human creativity, Intellectual Property Rights (IPR) are rights inherent in the creator (copyright), inventor or inventor (Patent), designer (industrial design) and owner or user (Brand), plant breeders (Plant Variety) designing (Integrated circuit layout design).¹ That right is an immaterial material right, an intangible capital. That right will stick with it and will follow wherever it is (*droit de suite* or *zaaksgesvolg*).²

Therefore, every subject who owns IPRs can demand restoration of their rights in the event of a loss in the event of taking or exploiting IPRs without the owner's permission and the State is given the authority to protect IPR owners to take preventive and repressive actions for violations or crimes against IPR. Especially for goods resulting from violation of IPR that are traded through the import and export channels, there are rules which are basically aimed at protecting IPR owners³. There are several kinds of actions that can be taken, for example, suspension of release of the said goods through the Customs and Excise Office. However, there are items that are suspected of being the result of IPR infringement which are exempted from suspension of release of goods. This is where it opens up loopholes and

opportunities for goods resulting from IPR violations to finally arrive in the hands of consumers.

In fact, this law does not fully favor the interests of the IPR owner or holder. This law opens a wide gap of "violations" of IPR, because even though the product of goods is the result of violation of IPR if it is categorized as passenger luggage, the customs and excise authorities have no right to hold it. Only if there is a request from the IPR holder or owner can the goods be processed or detained.

The reason for customs and excise is very simple, namely because these goods are used and used for their own purposes, not for commercial purposes. This law contradicts the principles and principles of civil law, that the property rights will be protected, not determined by the value of the object of goods or on the basis of their use and use. To what extent are the boundaries of commercial interest intended? Are not the number of goods produced without the permission of the IPR owner or holder in their country of origin? Only because later the goods were purchased from the country of origin and then carried by passengers into Indonesian territory which was categorized as passenger goods, did the Customs and Excise authorities not have the authority to detain them.

B. Problems

Based on the description above, there are problems that are the object of study in this study, namely;

1. Is normatively, the existing laws and regulations are sufficient to provide protection for IPR holders for goods resulting from IPR violations that enter the customs territory of the Republic of Indonesia?
2. What is the role of the Directorate General of Customs and Excise in preventing the flow of goods resulting from violations of IPR entering the customs territory of the Republic of Indonesia?
3. What is the policy of Indonesian law politics in anticipating goods resulting from IPR violations entering the customs territory of the Republic of Indonesia?

By using normative research methods, this research tries to find answers through synchronization analysis of various positive legal regulations related to the above problems.

C. Conceptual Framework

What is declared with Intellectual Property Rights are exclusive rights granted by the State, namely in the form of immaterial material rights which include; Copyrights, Patents, Trademarks, Industrial Designs, Plant Variety Protection and Layout Designs of Integrated Circuits.

What is meant by import is the activity of bringing goods into the customs area originating from abroad, which in the context of this paper are goods that are protected products based on IPR.

What is meant by customs area is an area with certain boundaries at seaports, airports, or other places designated for the traffic of goods which is fully under the supervision of the Directorate General of Customs and Excise.

What is meant by Customs Area is the territory of the Republic of Indonesia which includes land areas, airspace, air space above it, and certain places in the Exclusive Economic Zone and Continental Shelf.

What is meant by Temporary Suspension is a temporary suspension of the release of imported or exported goods from the Customs Area which is suspected of being a violation or originating from a violation of IPR.

What is meant by deterrence of goods is an administrative action to delay the release, loading and transportation of imported or exported goods until customs obligations are fulfilled.

Customs and Excise officers are employees of the Directorate General of Customs and Excise who

are appointed in certain positions to carry out certain tasks based on the Customs Law.

What is meant by IPR owners are IPR owners or holders based on the statutory regulations in the field of intellectual property rights.

D. Discussion

1. Goods resulting from IPR infringement that enter through the port.

To produce intellectual works of creators for copyright, inventors for patents, trademark owners who have spent money on promotions and introducing their products, and often have to spend time, thought, effort and even money. That is why in IPR, there are economic rights known as intangible capital, intangible assets or intangible objects as objects of assets. A right which is called an exclusive right is attached to the creator and discoverer. Other people without the author's or inventor's permission cannot use it.

The meaning of exclusive rights must of course be interpreted broadly, not being able to use it means that talk is also allowed to gain business benefits without sharing with owners and inventors. If that is the case, the State must be present to guard and protect this exclusive right. Guarding and protecting includes preventing others from taking actions that benefit themselves without sharing with the owner or copyright holder or the inventor of the patent rights or the owner of the trademark rights. Apart from preventing, the State must also apply strict legal sanctions for violators of these rights. Besides being intended for preventive purposes, tapoi is also intended as a goal of "mental and moral education:" so that other people do not follow the actions of those who violate these rights.

Evidence of the presence of the State will also be visible, when the products resulting from IPR violations will cross the borders of a country. The state must prevent violations of these rights.

In practice, we have witnessed many copyright infringements, patent infringers, trademark infringers that are easily done by someone to get profit from other people's "efforts" to get the IPR. Especially for products that are consumed individually and can be made through home industry activities or handicrafts. For example, products such as bags, shoes, watches are known as quality 1 (KW 1), quality 2 (KW2) or quality 3 (KW3). When the goods are purchased in the country of origin, then brought into the territory of Indonesia, because it is included as luggage, the Customs and Excise officers at the port do not have the authority to: "detain": the goods resulting from the violation. Even though,

The absence of detention for goods that violate IPR and even justifying entry without inspection like other legal items, causes such practices to flourish. Every day hundreds of packages of goods resulting from IPR violations with various brands enter through Indonesian airports and seaports. So it is not uncommon for us to get products containing IPR that are sold at low prices, such as Video Compact Disc (VCD) and Digital Versatile Disc (DVD) which are sold at a price of IDR 10,000 for 3 (three) pieces. Perfume products under the Chanel Brand, Hermes, Bag products with the Louis Vuitton Brand, shoes products with the Bally Brand, Salvatore Ferragamo and even watches with the Rolex brand at prices 10 times cheaper or below the original product price.

Even outside of our luggage, we also find products that are protected by patents, such as medicinal products, lubricating oils, electronic products, watches, which are often found on black markets in various countries. Indeed, it is possible for these goods to be manufactured and counterfeited in the country or their entry through uncontrolled sea routes.

2. IPR Violation Items According to the Perspective of IPR Legislation.

2.1. Copyright Law Perspective

The right to file a civil suit for infringement of Copyright and / or Related Rights does not reduce the Rights of the Creator and / or Related Rights owners to sue criminally.⁴

At the request of the party who feels aggrieved due to the implementation of Copyright or Related Rights, the Commercial Court may issue a temporary ruling to:

- a. prevent the entry of goods suspected to be the result of infringement of Copyright or Related Rights into the trade route;
- b. withdraw from circulation and confiscate and keep as evidence relating to the violation of Copyright or Related Rights;
- c. securing evidence and preventing its disappearance by the offender; and / or
- d. stop violations in order to prevent greater losses.⁵

An application for a provisional determination is submitted in writing by the Author, Copyright Holder, Related Rights owner, or their Proxy to the Commercial Court by fulfilling the following requirements:

- a. attach proof of ownership of Copyright or Related Rights;
- b. attach initial instructions for violations of Copyright or Related Rights;

- c. attach clear information regarding the goods and / or documents requested, sought, collected, or secured for evidentiary purposes;
- d. attach a statement of concern that the party suspected of violating Copyright or Related Rights will lose evidence; and
- e. pay a guarantee whose amount is proportional to the value of the goods to be subject to temporary determination.

The application for a provisional court order shall be submitted to the head of the Commercial Court in the jurisdiction where the goods alleged to have been the result of violation of Copyright or Related Rights were found.⁶ An application for a provisional determination must meet the following requirements:

- a. attach proof of ownership of Copyright or Related Rights;
- b. attach initial instructions for violations of Copyright or Related Rights;
- c. attach clear information regarding the goods and / or documents requested, sought, collected, or secured for evidentiary purposes;
- d. attach a statement of concern that the party suspected of violating Copyright or Related Rights will lose evidence; and
- e. pay a guarantee whose amount is proportional to the value of the goods to be subject to temporary determination.

After fulfilling these requirements, the new Commercial Court Clerk can be allowed to record the application and is obliged to submit the application for a provisional determination within 1x24 (one time twenty four) hours to the head of the Commercial Court. Within a period of 2 (two) days from the date of receipt of the application for provisional determination, the head of the Commercial Court shall appoint a Commercial Court judge to examine the application for a provisional determination. Within 2 (two) days from the date of appointment, the Commercial Court judge decides to grant or reject the application for a provisional decision. In the event that the application for a provisional ruling is granted, the Commercial Court judge issues an interim court ruling. The provisional court order is notified to the party subject to court interim decision within 1x24 (one time twenty four) hours. In the event that the application for a provisional determination is rejected, the judge of the Commercial Court will notify the applicant for the provisional determination along with the reasons.⁷ In the event that the Commercial Court issues an interim court ruling which is granted by the Commercial Court judge, the Commercial Court will subsequently summon the party who is subject to a provisional ruling within a maximum period of 7

(seven) days from the date of issuance of the provisional ruling for questioning. A party who is subject to a provisional determination can submit information and evidence regarding Copyright within a maximum period of 7 (seven) Days from the date of receipt of the summons. Within a maximum period of 30 (thirty) days from the date of issuance of the provisional ruling, the Commercial Court judge decides to uphold or cancel the provisional court order. In the event that the provisional court ruling is strengthened:

- a. the security deposit that has been paid must be returned to the applicant for determination;
- b. the applicant for the determination can file a claim for compensation for copyright infringement; and / or
- c. the applicant can report Copyright violations to the investigating officers of the State Police Republic of Indonesia or civil servant investigating officers.

In the event that the provisional court order is canceled, the security deposit that has been paid must be submitted to the party who is subject to the provisional determination as compensation for the provisional determination.⁸

Copyright is an immaterial property right and is a material right. In terms of Law No. 28 of 2014 that copyright consists of moral rights and economic rights. In the perspective of criminal law, material rights that have economic value are assets. If the property is "disturbed", then the person who interferes is included in the category of legal subject who has committed a crime or violation of assets that is distinguished from a crime against morality, a crime against honor or a crime against the soul of another person. Copyright Law No. 28/2014 places crimes against copyright as crimes against property or crimes against property.

If we look closely, copyright protection is an immaterial property right (which contains economic rights), it can be traced back that copyright is a property right for the creator, or a license right for those who get a license or lease rights for those who get lease rights (rental rights). In civil law terminology, property rights guarantee the owner to enjoy freely and may also take legal action freely against his property. The object of property rights can be in the form of copyright as immaterial property rights. Regarding copyright, the creator or the right holder can transfer the entire or part of the copyright to another person, by means of inheritance, gift or testament or by other means,

This proves that copyright is a right that can be owned, can be the object of ownership or property rights and therefore the terms of ownership apply,

both regarding how to use it and how to transfer the right. All these laws will provide protection in accordance with the nature of these rights. It can also be understood that the protection provided by the law against copyright is to stimulate or stimulate the activities of creators to continue creating and be more creative. The birth of a new creation or an existing creation must be supported and protected by law. This form of protection is confirmed in the law by placing criminal sanctions against people who violate copyright by violating the law.

In criminal enforcement against criminal acts of copyright, there are two institutions that can carry out investigations, namely: Officials of the State Police of the Republic of Indonesia and certain Civil Servant Officers within the ministry that carry out government affairs in the field of law who are given special authority as investigators. as referred to in the Law which regulates criminal procedural law to carry out investigations of Copyright and Related Rights crimes. The investigator's authority is given, including:

- a. examination of the accuracy of reports or information relating to criminal acts in the field of Copyright and Related Rights;
- b. examination of parties or legal entities suspected of committing criminal offenses in the field of Copyright and Related Rights;
- c. request information and evidence from parties or legal entities in connection with criminal offenses in the field of Copyright and Related Rights;
- d. examination of books, records and other documents relating to criminal offenses in the field of Copyright and Related Rights;
- e. search and examine places where evidence, books, records, and other documents are suspected of relating to criminal offenses in the field of Copyright and Related Rights;
- f. confiscation and / or cessation of circulation of court permits for materials and goods resulting from violations which can be used as evidence in criminal cases in the field of Copyright and Related Rights in accordance with the Criminal Procedure Code;
- g. request for expert information in carrying out investigative duties on crimes in the field of Copyright and Related Rights;
- h. request for assistance from related agencies to carry out arrests, detention, determination of wanted lists, prevention and detention of perpetrators of criminal offenses in the field of Copyright and Related Rights; and
- i. termination of investigation if there is insufficient evidence of criminal offenses in the field of Copyright and Related Rights.

In carrying out investigations, civil servant investigators may request assistance from investigators of the Indonesian National Police. Civil servant investigators inform the commencement of investigations to public prosecutors and investigators of the Indonesian National Police. The results of investigations that have been carried out by civil servant investigators are conveyed to the public prosecutor through investigating officers of the Indonesian National Police.⁹

In the process of examination at the level of investigation, prosecution, and examination in court for evidence, information and communication technology can be used. Information and communication technology can be in the form of electronics and / or electronic documents and it can be accepted as valid evidence by referring to the relevant laws and regulations.¹⁰

Any person who without rights does an act of eliminating, changing, destroying, destroying, eliminating or rendering the technology control facilities used as protection for works or related rights products as well as protection of copyright or related rights, against management information or copyright electronic information. those intended for commercial purposes, shall be punished with imprisonment of up to 2 (two) years and / or a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah). Such an act is not considered a criminal act if it is done for the sake of state defense and security, as well as for other reasons in accordance with the provisions of laws and regulations, or there is another agreement made by the creator with another party that allows the act to be carried out.¹¹

Everyone who without the rights and / or without the permission of the Author or the copyright holder violates the economic rights of the Creator, including:

- a. translation of Works;
- b. adapting, arranging, or transforming Works;
- c. performance of Creation;
- d. Communication of Creation;

those used for commercial purposes shall be punished with imprisonment of up to 3 (three) years and / or a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah).

Everyone who without the rights and / or without the permission of the Author or the copyright holder violates the economic rights of the Creator, including:

- a. publishing of works;
- b. Reproduction of works in all their forms;
- c. Distribution of Works or copies thereof;
- d. Announcement of Works;

used commercially, shall be punished with imprisonment of up to 4 (four) years and / or a

maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Especially for actions that fulfill the elements without rights or without permission to commit acts of piracy for the economic rights of the creators, which include:

- a. publishing of works;
- b. Reproduction of works in all their forms;
- c. Distribution of Works or copies thereof;
- d. Announcement of Works;

shall be sentenced to imprisonment for a maximum of 10 (ten) years and / or a maximum fine of Rp.4,000,000,000.00 (four billion rupiah).¹²

There is a new provision contained in Law no. 28/2014 which was not found in the previous law, namely about the criminal threat against the manager of a trading place that markets copyright and / or rights related to the results of violations or acts against the law in any way.¹³ Regarding that incident, Law no. 28/2014 threatens the manager of the trading place with a maximum penalty of IDR 100,000,000.00 (one hundred million rupiah).¹⁴¹⁵

Everyone who without rights violates economic rights includes actions:

- a. Broadcasting or communication of Performers' performances;
- b. The fixation of the show that hasn't been fixed;
- c. the provision of fixation shows that can be accessed by the public.

Those used commercially are punished with imprisonment of up to 3 (three) years and / or a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah).

Everyone who without rights violates economic rights includes actions:

- a. Reproduction of the fixation of the performance in any way or form;
- b. The distribution of fixations of performances or copies thereof;

who are used commercially, shall be punished with imprisonment of up to 4 (four) years and / or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Every person who fulfills the elements of a crime against copyright includes;

- a. Reproduction of the fixation of the performance in any way or form;
- b. The distribution of fixations of performances or copies thereof;

committed in the form of piracy shall be punished with imprisonment of up to 10 (ten) years and / or a maximum fine of Rp. 4,000,000,000.00 (four billion rupiah).¹⁶

Every person who deliberately and without rights violates the economic rights of leasing to the

public on a copy of the Phonogram that is used commercially will be punished with imprisonment of up to 1 (one) year and / or a maximum fine of Rp. 100,000,000 (one hundred million rupiah).

Anyone who knowingly and without right commits a violation of economic rights which includes:

- a. reproduction of the Phonogram in any way or form;
- b. distribution of the original or a copy of the Phonogram;
- c. the provision of phonograms with or without cables that can be accessed by the public.

Those used commercially, are punished with imprisonment of up to 4 (four) years and / or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Every person who fulfills the elements of a criminal act in the form of piracy, will be punished with imprisonment of up to 10 (ten) years and / or a maximum fine of Rp. 4,000,000,000.00 (four billion rupiah).¹⁷

Anyone who knowingly and without right commits a violation of economic rights which includes the following actions:

- a. Reruns of broadcasts;
- b. Broadcast communication;
- c. Broadcast fixation; and / or
- d. Broadcast fixation doubling.

Those used commercially, are punished with imprisonment of up to 4 (four) years and / or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Every person who fulfills the element of the act of multiplying broadcast fixation committed with the intention of piracy, will be punished with imprisonment of not more than 10 (ten) years and / or a maximum fine of Rp. 4,000,000,000.00 (four billion rupiah).¹⁸

In more detail, all criminal incidents related to copyright infringement crimes can be detailed in the following table.

One thing that is interesting from Law no. 28 of 2014 is to place the entire series of criminal acts in this law categorized as complaint offenses.¹⁹ This means that investigators no longer have the authority to carry out investigations without complaints from the creator or the party who receives rights from the creator. Of course, it is hoped that better protection aspects from the previous law cannot be fulfilled, even though the articles that ensnare the perpetrators of copyright crimes are much broader and the threat of punishment is also much heavier than the previous law.

2.2. Trademark Law Perspective.

The Trademark Law referred to here is Law no. 20 of 2016, concerning Brands and Geographical Indications. This Law makes the qualifications for the criminal act of Mark into two qualifications. First, a criminal offense that qualifies as a criminal offense (*misdrijven*) as regulated in article 100 which can be seen from the punishment specified in it, namely being punished with imprisonment and / or a fine. The two crimes that are included in the qualification of offenses (*overtreding*) are punishable by imprisonment and fines, as regulated in Article 102 of Law No. 20 of 2016. The criminal threat contained in Article 100 of Law no. 20 of 2016, reads as follows:

- (1) Any person who without rights uses the same Mark in its entirety as the registered Mark of another party for similar goods and / or services produced and / or traded, shall be punished with imprisonment of up to 5 (five) years and / or a maximum fine. Rp. 2,000,000,000.00 (two billion rupiah).
- (2) Any person who unlawfully uses a mark which is similar in essence to a registered mark belonging to another party for similar goods and / or services produced and / or traded, shall be punished with imprisonment of up to 4 (four) years and / or a maximum fine. Rp. 2,000,000,000.00 (two billion rupiah).
- (3) Every person who violates the provisions as intended in paragraphs (1) and (2), whose type of goods causes health problems, environmental disturbances, and / or human death, will be punished with imprisonment of up to 10 (ten) years and / or a fine. a maximum of IDR 5,000,000,000.00 (five billion rupiah).

The provision of Article 1 paragraph (3) raises separate legal issues which cause confusion. Criminal acts punishable by the provisions of Article 100 paragraph (1) and (2) clearly qualify as a criminal act. However, when paragraph (3) adds the norm that the goods produced cause health problems, the environment and human death, this offense is clearly not included in the realm of trademark law. The trademark itself cannot be given as a distinguishing mark for the product of goods which, among others, is against public order and the law (*vide* Article 20 of Law No. 20 of 2016). Therefore, it is unlikely that a person will be able to use a Mark for goods threatened by Article 100 paragraph (3). If the intention of the legislators being made is a product that can cause health problems, the environment and even cause death, but then uses a registered trademark owned by another person, it is sufficient that it is regulated by environmental laws, health laws, and other laws in which there is a criminal threat. If the product is found

to be produced by the perpetrator even though he uses a registered trademark owned by another person, then he cannot be qualified as the person who committed the Trademark Crime. This is because the owner of a registered mark will certainly not produce goods that are different from the goods for which the trademark registration is requested. This means that the goods produced by the actor are not the goods referred to by the trademark owner at the time of registration. It is sufficient that it is regulated by environmental laws, health laws and other laws in which there is a criminal threat. If the product is found to be produced by the perpetrator even though he uses a registered trademark owned by another person, then he cannot be qualified as the person who committed the Trademark Crime. This is because the owner of a registered mark will certainly not produce goods that are different from the goods for which the trademark registration is requested. This means that the goods produced by the actor are not the goods referred to by the trademark owner at the time of registration. It is sufficient that it is regulated by environmental laws, health laws and other laws in which there is a criminal threat. If the product is found to be produced by the perpetrator even though he uses a registered trademark owned by another person, then he cannot be qualified as the person who committed the Trademark Crime. This is because the owner of a registered mark will certainly not produce goods that are different from the goods for which the trademark registration is requested. This means that the goods produced by the actor are not the goods referred to by the trademark owner at the time of registration. If the product is found to be produced by the perpetrator even though he uses a registered trademark owned by another person, then he cannot be qualified as the person who committed the Trademark Crime. This is because the owner of a registered mark will certainly not produce goods that are different from the goods for which the trademark registration is requested. This means that the goods produced by the actor are not the goods referred to by the trademark owner at the time of registration. If the product is found to be manufactured by the perpetrator even though he uses a registered trademark owned by another person, then he cannot be qualified as the person who committed the Trademark Offense. This is because the owner of a registered mark will certainly not produce goods that are different from the goods for which the trademark registration is requested. This means that the goods produced by the actor are not the goods referred to by the trademark owner at the time of registration.

Furthermore, the provisions for criminal acts on marks that qualify for criminal offenses are

contained in Article 102 of Law no. 20 of 2016, as follows;

Any person who trades goods and / or services and/or products which is known or should be suspected of knowing that the said goods and / or services and / or products are the result of a crime as referred to in Article 100 and Article 101 shall be sentenced to a maximum imprisonment of 1 (one) year or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah).

It must also be noted that the criminal threats contained in Article 100 are cumulative, while the criminal threats contained in Article 102 are alternative. In addition to the threat of imprisonment for the perpetrator, the cumulative criminal threat is also subject to the threat of punishment in the form of a fine, while the alternative punishment is imprisonment or a fine. Apart from that, it is necessary to understand that criminal decisions do not diminish the rights of registered mark owners to file claims for civil compensation. Criminal charges according to their objectives are of course intended to deter the perpetrator (preventive purposes) and other people not to follow his actions. Meanwhile, the civil suit is more about restoring the rights of the Mark owner who was harmed due to the violation of the mark. So, the value of the lawsuit depends on the amount of loss suffered by the registered mark owner. Claims for compensation are not only in the form of compensation in material form but also in the form of demands for immaterial compensation.

Investigators in criminal cases of Trademarks, in Law no. 20 of 2016, are determined as;

1. Police investigating officers of the Republic of Indonesia, and
2. Certain Civil Servant investigating officers within the Ministry that carry out government affairs in the field of law (in this case the Ministry of Law and Human Rights-RI) are given special authority as investigators as referred to by the Law which regulates criminal procedural law (in this case the Book Criminal Procedure Law, Law No.8 of 1981), to conduct investigations into criminal acts of Mark.

The investigator has the authority in criminal offenses in the field of marks;

1. Checking the accuracy of the report or statement;
2. Examining the person suspected of having committed the act;
3. Request information and evidence from the person suspected of having committed the act;
4. Checking books, records and other documents relating to the crime;
5. Delayed and examined the place where evidence, books, records, and other documents were found

- relating to the criminal act;
6. Confiscate materials and items resulting from the alleged violation which can be used as evidence in the case;
 7. Request expert information in the context of carrying out investigative duties;
 8. To request assistance from relevant agencies to carry out arrests, detention, determination of search for person registration, and prevention of perpetrators who are suspected of having committed these crimes;
 9. Stop an investigation if there is insufficient evidence of the non-existence of the crime.

In carrying out investigations conducted by civil servant investigating officers, he or she may ask for assistance from investigators of the Indonesian National Police. Of course this is intended to accelerate and run the investigation process smoothly. Similar to investigations conducted by officers of the Indonesian National Police, investigators of Civil Servant Officers must also notify the Public Prosecutor (in this case the Republic of Indonesia Attorney). Especially for investigations conducted by Civil Servant Investigating Officers, a copy of the notification letter must be submitted to the investigating officer of the State Police of the Republic of Indonesia. The results of investigations conducted by Civil Servant Investigating Officers are conveyed to the Public Prosecutor through the Investigating Officer of the State Police of the Republic of Indonesia, vide Article 99 of Law no. 20 of 2016.

Furthermore, regarding the criminal provisions in each offense stipulated in Law no. 20 of 2016 is the right of the state. This means that trademark owners may not carry out or enforce the law in their own way. It often occurs in the midst of people's lives, a party who feels aggrieved for the actions of someone who, according to him, has committed forgery or passing off of a registered trademark he owns, then immediately goes to the field and executes the products using the brand in question. . The act is included in the category of eugenrichting or "taking justice into your own hands". Such acts are also included in the qualifications of a criminal act. By kafrena it is in criminal law enforcement,

Therefore, the enforcement of criminal law in the field of marks is also intended as evidence that the right of a mark has the characteristics of material rights (zaakenrecht) in the form of rights (rechten) which have the nature of absolute rights which can be defended against anyone who interferes with these rights under the protection of the state. . Of course, as the vanguard that will protect it are the instruments that are given the authority of the state, namely the

investigator, public prosecutor and judge who will try the criminal act. Unauthorized parties who try or interfere with these rights will be subject to criminal penalties.

Apart from that it should also be understood that the criminal (material) provisions referred to in Law no. 20 of 2016 is a provision that is *lex specialis*, namely a criminal provision that is regulated outside the Criminal Code. However, all of the provisions contained in Chapter I to Chapter VIII Book I of the Criminal Code also apply to acts which are punishable by other statutory provisions, unless the law stipulates otherwise, vide Article 103 of the Book of Law. -Law Criminal Law.

Therefore, this provision also applies to criminal provisions in the field of Marks. For example, regarding the exemption of punishment, attempts to commit a criminal act, collective action in committing a criminal act / *deelneming*, helping to commit a crime, and so on. This includes the category of offense, whether it is included in the category of complaint offense or regular offense.

Law No. 20 of 2016 classifies the offense in this Mark crime as a complaint offense, vide Article 103, Law no. 20 of 2016. Therefore, there is a triap of suspicion about the existence of a criminal act on the mark, an investigation can only be carried out if there is a complaint from the injured party or the party who objects to the use of the mark. In contrast to ordinary offenses, without any complaints from the injured party or other parties who object, the investigator can directly carry out the investigation process. That is why there are many products that use registered trademarks owned by other people, even well-known brands. Investigators cannot immediately carry out investigations, because there are no complaints from registered Mark holders or well-known trademark holders. Finally, many of us find products that use other people's well-known brands that are traded on the open market, such as the Lanvin, Bally, Christian Dior, Hermes, Salvatore Ferragamo brands and so on. In markets and various Super Markets and Malls, these products are sold which are known as KW-1, KW-2 and KW-3, to indicate that the product is not produced by an official company as a registered trademark holder.

2.3. Customs Law Perspective

Several preliminary studies that we conducted found that the products of IPR violations were produced domestically, but not a few were imported through legal import mechanisms, but the object was illegal. Illegal because the products are manufactured in violation of the provisions of the IPR legislation.

The question is, why do products of IPR infringement pass through the trade traffic? Are the existing regulations not sufficient to protect IPR ownership?

Articles 54 to 64 of Law no. 10 of 1995 concerning Customs, as amended by Law No. 17 of 2006 which regulates the traffic of goods resulting from violations of IPR through imports and exports which is then strengthened by Government Regulation No. 20 of 2017 concerning Control of Imports or Exports of Goods Suspected of Being or Deriving from Intellectual Property Rights Violations

Article 54, Law no. 10 of 1995 concerning Customs, as amended by Law No.17 of 2006 which regulates the traffic of goods resulting from violations of IPR through imports and exports, reads;

At the request of the owner or holder of the right to a trademark or copyright, the head of the commercial court can issue a written order to the customs and excise officer to temporarily suspend the release of imported or exported goods from the customs area which, based on sufficient evidence, is suspected to be the result of infringement of trademarks and copyright. protected in Indonesia.

Furthermore, Article 7 of Government Regulation no. 20 of 2017 concerning Control of Imports or Exports of Goods Suspected of Being or Coming From the Result of Violation of Intellectual Property Rights reads;

- (1) Customs and Excise Officials can take precautions for imported or exported goods that are suspected of being or originating from the result of infringement in the form of Mark or Copyright.
- (2) Customs and Excise officials who find imported or exported goods that are suspected to be or originate from a violation of IPR in the form of a Mark or Copyright, must notify the owner or right holder based on sufficient evidence.
- (3) (2) Sufficient evidence as intended in paragraph (2) is obtained from Customs and Excise Officials during customs inspection or intelligence analysis.
- (4) (2) The owner or right holder must provide confirmation to file a request for suspension order within a long period of 2 (two) days after the notification date.
- (5) In the event that the owner or right holder provides confirmation as referred to in paragraph (4):
 - a. Owners or Rightsholders must:
 1. prepare administrative requirements for filing a request for adjournment to the Chairman of the Court;

2. submit a guarantee for operational costs to the customs and excise official of Rp. 100,000,000 (one hundred million rupiah) in the form of a bank guarantee or guarantee from an insurance company; and

3. filing a request for adjournment through an application to the Chairman of the Court, within a maximum period of 4 (four) working days, since the confirmation of the owner or right holder; and

- b. Customs and Excise officials can provide a summary of imported or exported goods that are suspected of being or originating from the results of infringement of IPR in the form of trademarks or copyrights to fulfill the requirements for a suspension request through an application to the chairman of the court.

This provision does not apply to passenger luggage and goods sent by post or entrusted services that are not intended for commercial purposes, or imported goods that are continued or transported to destinations outside the Customs Area, but for the latter, control is exercised by Customs officials and Customs excise by sending a notification letter to the customs official in the destination country.

What we want to see is, the government has not fully been able to independently enforce the law to protect the rights of IPR owners or holders. Guarantee of Rp. 100,000,000, - (one hundred million rupiah) is also considered burdensome to the holder or owner of IPR.

Not to mention the problem of passenger luggage and goods sent by post or courier services that are not intended for commercial purposes. This provision cannot be enforced at all, because the boundaries of commercial purposes carry a biased meaning. Many passengers of ships or airplanes, who travel every week with empty suitcases and their luggage return are filled with goods resulting from IPR violations, but because the goods are included in the category of passenger luggage, the goods are free to enter Indonesian territory. In Indonesia these goods are commercialized and continue to take place periodically and are untouched by the law. Many experiences of passengers on ships or planes entrusting goods to passengers, because they carry goods in many items,

On the other hand, there are also many forms of loss suffered by IPR owners or holders, because the goods are used for their own purposes, not for commercial purposes. However, if thousands of passengers carry out their own needs every day, the

loss could reach billions of rupiah as well. Moreover, the owner of IPR with the original product becomes disturbed in marketing their products for commercial purposes. Not to mention the matter of reputation and quality, which causes the value of its commercialization to degrade in the eyes of consumers.

E. Conclusion

1. Whereas normatively, existing laws and regulations related to customs have not been able to provide protection to IPR holders for goods resulting from violations of IPR that enter the customs territory of the Republic of Indonesia, because there is still wide open for IPR violators to distribute their products through consumers who buy their goods and then then enter the Indonesian Customs area as passenger luggage or as goods sent by post or courier service. Whereas normatively, the existing laws and regulations have not been able to provide protection to IPR holders for goods resulting from IPR violations that enter the customs territory of the Republic of Indonesia, because the nature of the offenses against Copyright and Mark infringement which are determined as Complaint Offenses, also slow down the process of protecting ownership IPR.
2. That the Directorate General of Customs and Excise is not sufficiently capable of preventing the flow of goods resulting from violations of IPR entering the customs territory of the Republic of Indonesia because normatively, the existing laws and regulations have not been able to provide protection to IPR holders for goods resulting from IPR violations entering the territory. Customs of the Republic of Indonesia, because of the nature of the copyright and trademark infringement offense which is determined to be a complaint offense which slows down the process of protecting IP rights ownership.
3. Whereas the policy of Indonesian Law Politics in anticipating goods resulting from IPR infringement entering the customs territory of the Republic of Indonesia still does not fully refer to the interests of the IPR owner or holder, because it is not easy for the owner to know that there are products of IPR infringement that have entered into the Indonesian Customs area or it is not easy for the customs officer to convey to the owner of the IPR that there has been a violation of the IPR for a product that enters the Indonesian Customs area.

Reference

- ¹ See OK.Saidin., *Legal Aspects of Intellectual Property Rights*, RajaGrafindo Persada, Jakarta, 2016.
- ² See further, Mariam Darus Badruzaman, *National Law System*, Alumni, Bandung, 2015.
- ³ Republic of Indonesia, Law no. 10 of 1995 concerning Customs which has been published in the State Gazette of 1995 No.75 and the Supplement to the State Gazette No. 3612 of 1995. This law is amended by Law No. 17 of 2006 regarding the Amendment of Law No. 10 of 1995 concerning Customs, which is published in the State Gazette of the Republic of Indonesia of 2006 No 93 and Supplement to the State Gazette Number 4661 of the State of 2006.
- ⁴ Ibid, Article 105.
- ⁵ Ibid, Article 106.
- ⁶ Ibid, Article 107.
- ⁷ Ibid, Article 108.
- ⁸ Ibid, Article 109.
- ⁹ Republic of Indonesia, Law no. 28 of 2014, *Op. Cit*, Article 110.
- ¹⁰ Ibid, Article 111.
- ¹¹ Ibid, Article 7, Article 52 and Article 112. What is meant by "technology control means" is any technology, device, or component designed to prevent or limit actions that are not permitted by an Author, Copyright Holder, Related Rights owner, and / or those prohibited by statutory regulations.
- ¹² Ibid, Article 9 paragraph (1) and Article 113.
- ¹³ Of course, this action is not only limited through the act of copying but also through downloading via the internet network and others.
- ¹⁴ Republic of Indonesia, Law no. 28 of 2014, *Op.Cit*, Article 10 and Article 114.
- ¹⁵ Ibid, Article 12 and Article 115. What is meant by "advertisement or advertising interest" is the loading of portraits, among others, on commercial used advertisements, banners, billboards, calendars, and pamphlets.
- ¹⁶ Ibid, Article 23 paragraph (2) and Article 116.
- ¹⁷ Ibid, Article 24 paragraph (2) and Article 117.
- ¹⁸ Ibid, Article 25 paragraph (2) and Article 118.
- ¹⁹ Ibid, Article 120. Further see OK. Saidin., *Legal Aspects of Intellectual Property Rights*, *op.cit.hal*.