



Economic and Legality Aspects of Imitation Brands

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Abstract

This article is a literature review that focuses on the study of imitation brand of product from the economic and legal aspects. In today's business competition, the phenomenon of brand transgression often occurs. Brand transgression is a form of infringement of Intellectual Property Rights (IPR). Infringement of IPR on brands can be identified into four categories, namely: counterfeit brands, pirated brands, gray market products, and imitation brands. Although imitation brands are one type of IPR infringement, not all imitation brands violate IPR. The basic concept of imitation brand is the similarity in terms of the brand with the original brand, which is also implicitly similar in terms of quality/performance of the product. Therefore, this study is important to clarify the dichotomy so that it can provide scientific contributions, especially marketing science. The determination an imitation brand, including violating intellectual property rights or not, is based on the level of consumer confusion (likelihood of brand confusion) caused by the similarity of the brand.

Keywords: imitation brand, intellectual property rights, consumer confusion

1. Introduction

Increasingly intense business competition, marked by fiercer rivalry between products, demands a more creative role in marketing. The success of an innovative company has encouraged other companies to adopt imitation strategies which, according to Foxman et al. (1990), aim to position a new product close to a well-known product/brand. One popular imitation strategy is to imitate a successful brand. Imitation of a successful brand occurs along a continuum of physical product similarity at one end with an exact level of similarity (called counterfeit brands), and at the other end with no similarity at all, so a range of imitation strategies can be assessed for their legal validity. This continuum ranges from legitimate imitation of established brands to counterfeit forms that violate the law (Foxman et al., 1990). In the context of imitation brands, visual similarity benefits consumers when it can also be interpreted as similarity in benefits, not merely literal similarity in appearance. An imitation brand can be penalized by the court if the visual similarity is perceived merely as a way to mislead/confuse consumers about the product's quality or simply an attempt to ride on the fame of a well-known brand (Kohli & Thakor, 1997).

Imitation Brands as a Competitive Strategy

An imitation brand is a profitable marketing strategy based on leveraging similarities (in packaging, design, brand name, etc.) to facilitate consumer acceptance of a brand (d'Astous & Gargouri, 2001). Imitation branding focuses on copying a brand, not just the brand name, of a well-known product. As stated by Lai and Zaichkowsky (1999), imitation brands are intended to resemble the original brand, so they are given attributes similar to the original brand's properties (in terms of quality, performance, reliability, origin, etc.), resulting in brand generalization in the consumer's mind. This is expected to have a significant impact on brand attitudes and purchase behavior.

According to Foxman et al. (1990), imitation brand strategies may include package design, claims about product performance, or similar brand names. Essentially, imitation brands differ from counterfeit or pirated brands, as the latter copy the original product exactly in terms of brand name but are of inferior quality. Imitation brands are designed to resemble and make consumers think of the original brand, whereas counterfeit and pirated brands are designed to be the original brand and offer consumers a cheaper price (d'Astous & Gargouri, 2001).

Empirical evidence has proven consumer responses to brand similarity in the context of imitation brands. For instance, research by Loken et al. (1986) found that the more similarity perceived between two brands, the more consumers believed that those brands had similar quality. Thus, the physical appearance similarity between two brands is significantly related to consumer attitudes.

Consumer Attitudes toward Imitation Brands

Consumers speculate when assessing physical similarity, which then affects product evaluation and ultimately influences purchasing behavior. This speculation was demonstrated in research by Ward et al. (1986), where respondents, when given the opportunity to view various shampoo brands, rated those with similar packaging as



having similar quality and performance. They generalized the similarity in the physical appearance of packaging to the product contents. Ward et al. (1986) concluded that similarity leads to the equalization of quality and performance from the original brand to the imitation brand. Regarding this generalization, Lefkoff-Hagius and Mason (1993) noted that a common marketing assumption is that similar products will be liked by consumers. To build this understanding, it is assumed that the more similar the products, the lower the likelihood that consumers will prefer one product over another. This assumes that the relationship between consumer assessment of similarity and preference is the basis of the me-too imitation strategy (the ability of an imitation brand to substitute for the original brand). One characteristic for determining consumer attitudes toward a stimulus is the tendency to generalize one stimulus to another. This process, known as stimulus generalization, occurs when two stimuli are perceived as similar, allowing the effect of one stimulus to be substituted by the effect of another (Assael, 2004, p. 156). Stimulus generalization provides the theoretical basis for explaining why consumers react similarly to imitation brands resembling the original brand. Stimulus generalization forms the foundation of imitation: consumers will generalize the similarity between a product's external physical features and those of another product, and at the same time conclude that they are similar in quality or function (Zaichkowsky & Simpson, 1996). Based on this view, when consumers generalize an imitation brand with the original brand, they implicitly think that the imitation brand can substitute the original brand in fulfilling their needs.

According to Foxman et al. (1990), when several products are similar in appearance, people are more likely to generalize attributes from one brand to another. In other words, the physical appearance of a product/brand influences perceptions of brand performance and quality. Furthermore, visual similarity between brands significantly affects consumer attitudes toward those brands (Loken et al., 1986).

2. Literature review

Brand

According to Rosen and Alpert (1994), a brand is a brand name or design used to identify and differentiate a product. A brand helps consumers recognize the source of a product and reduces confusion about the product. Any product or service can have a brand, which not only serves as product identification but can also identify a specific company. Rights to a brand extend not only to ownership but also to its use. The American Marketing Association (in Kotler & Keller, 2006, p. 256) defines a brand as a name, term, sign, symbol, design, or a combination of these elements, intended to identify the goods or services of one seller or group of sellers and to differentiate them from those of competitors. The differences a brand creates compared to another brand, according to Kotler and Keller (2006, p. 256), may be functional, rational, or tangible linked to product performance or they may be symbolic, emotional, or intangible, related to what the brand represents.

Brand as Intellectual Property Rights

According to Loken et al. (1986), some imitation brands are legal while others are illegal. Illegal imitation brands fall within the scope of trademark infringement as defined by the Lanham Act or other regulations related to unfair trade practices. Trademark infringement is one form of violation of Intellectual Property Rights (IPR). Cohen (1986) stated that the Lanham Act, or The Trademark Act of 1946, aims to protect consumers from potential confusion. According to Loken et al. (1986), one potential impact of brand imitation is brand confusion, which occurs when consumers purchase an imitation brand believing it to be the original, thus misidentifying the brand's source of origin and identity. Miaoulis and D'Amato (1978) also argue that the core issue related to trademark infringement centers on the likelihood of brand confusion. IPR violations can be categorized into four types: counterfeit brands, pirated brands, grey market products, and imitation brands (Lai & Zaichkowsky, 1999). Counterfeit brands are exact copies (100%) of the original brand, made to deceive consumers into believing they are genuine, even though they are actually inferior (Lai & Zaichkowsky, 1999; McDonald & Roberts, 1994). Pirated brands are also exact copies of the original, but are produced with the understanding that buyers know and realize they are fake. They are sold at much lower prices than the original brands (Lai & Zaichkowsky, 1999; McDonald & Roberts, 1994). Consumers of pirated brands typically know the seller is breaking the law, and sellers explicitly inform buyers they are selling pirated goods (Grossman & Shapiro, 1988).



Grey market products are goods manufactured by a company contracted by the brand owner but produced in quantities exceeding the contractual agreement, and then sold illegally as overruns (McDonald & Roberts, 1994). These overruns are sold without royalty payments. For example, garments produced beyond the agreed contract capacity and sold independently. Imitation brands are not identical to the original brand but are similar in brand name, form, or meaning to the well-known brand they imitate. For example, Germany produces paper handkerchiefs under the brand Tempo, which in Asia must compete with similar brands such as Tango, Tinpo, and Temgo (Lai & Zaichkowsky, 1999).

Imitation Brands

According to Foxman et al. (1990), imitation brand strategies involve some or all elements of the marketing mix and can be applied along a continuum of similarity. Imitation brands not only copy the shape and size of packaging of well-known brands but also the style of printed labels, layouts, colors, or other visual cues. The aim of imitation brand creators is to position their products close to more famous brands (usually market leaders) by mimicking their packaging design. Imitation brands are designed to resemble and make consumers think of the original brand, whereas counterfeit and pirated brands are designed to be the original brand and offer lower prices to consumers (d'Astous & Gargouri, 2001). Foxman et al. (1992) state that consumer brand confusion involves one or more errors in brand inference, leading consumers to unconsciously form inaccurate beliefs about the attributes or performance of an unknown product based on the attributes or performance of a well-known product. Therefore, the primary test for IPR infringement is the likelihood of consumer brand confusion. Howard et al. (2000) state that, legally, the likelihood of confusion arises from similarities in the brand's appearance (sight), pronunciation (sound), and meaning (meaning).

Miaoulis and D'Amato (1978) suggest that, to decide on infringement, courts need to understand what happens in consumers' minds, how they react to the two brands, and whether they feel deceived. For courts, the strongest evidence of brand infringement is proof that an imitation brand has created consumer confusion meaning consumers have been misled or deceived. To resolve such cases, the original brand owner can present evidence showing that consumers have been deceived buying an imitation brand while believing it to be the original. Consumer confusion can be measured by testing consumer expectations of a brand and the extent to which those expectations are supported. When a consumer's expectations of one brand are based on another brand they have seen or heard of, the level of such expectations determines the degree of confusion. Although the likelihood of confusion is an indicator of IPR infringement, in many cases, even a high likelihood of confusion is not deemed infringement especially for generic names of a product or service (e.g., aspirin, paracetamol), which are not considered brands and thus cannot be protected. Generic names belong to the public domain and are free for anyone to use (Kohli & Thakor, 1997). Furthermore, several factors complicate the development of evidence for consumer confusion. First, consumers who admit they were deceived may be reluctant to report it. Second, those who are confused may not realize they purchased a non-original brand, making them unwilling to testify for the original product. Third, consumers satisfied with the non-original brand they purchased may feel their confusion is reduced.

According to Kohli and Thakor (1997), imitation brands are categorized as IPR infringements based on their potential to cause consumer confusion. This consideration is a basic principle used by courts to decide whether an imitation brand infringes a trademark. Courts often use seven criteria to determine the likelihood of consumer confusion with an imitation brand. If an imitation brand meets all seven criteria, it is considered illegal because it constitutes IPR infringement. The seven criteria are (1) Degree of similarity between brands in appearance and the impressions they create. (2) Similarity of products. (3) Scope and extent of use. (4) Degree of perceived concern. (5) Strength of the plaintiff's case. (6) Actual degree of consumer confusion. (7) Intent of the infringer. All criteria are compensatory or mutually reinforcing. For example, when a company wishes to use the brand name Sharp for clothing products, it may be allowed, even though Sharp is a well-known brand in the electronics industry. In this case, criteria 2 and 5 play an active role, so not all seven criteria are fulfilled. Although the brand name is identical, the products are clearly different, and the plaintiff (Sharp Electronic) does not have distinctiveness over the brand name in this category.



A company can stand strong if it has a highly distinctive mark. For example, Samsung and Kodak are brands with strong distinctiveness, which grants them stronger protection when another company tries to use their names.

3. Findings

Trademark Protection in Indonesia

In Indonesia, trademarks and their protection mechanisms are regulated under specific legislation, as trademarks are considered to have high economic value. This is stipulated in Law No. 15 of 2001 on Trademarks. Article 1 paragraph (1) of Law No. 15 of 2001 defines a trademark as a sign in the form of a picture, name, word, letters, numerals, color arrangement, or a combination of such elements that has distinguishing power and is used in trade activities for goods or services. From this definition, a trademark is a sign used to distinguish goods or services of the same type produced or traded by one party from those of another, which has distinguishing features and serves as a guarantee of quality, used in the course of trade in goods or services. One of the preventive legal protection measures for trademark rights is trademark registration, which can be used to determine the party entitled to the trademark. The system for determining trademark rights varies from country to country, depending on the system adopted by each nation. Currently, there are two common systems: the Constitutive System and the Declarative System.

The Constitutive System grants trademark rights upon registration.

The Declarative System grants trademark rights to the party who first uses the mark, even if it is not registered. Trademark protection in Indonesia follows the Constitutive System as stipulated in Law No. 15 of 2001, which states that rights to a trademark arise from registration. Article 3 of the law states that Trademark Rights are exclusive rights granted by the state to the registered trademark owner in the General Register of Marks for a certain period, enabling them to use the mark themselves or grant permission to others to use it. Law No. 15 of 2001 also provides legal protection for trademarks consisting of signs in the form of pictures, names, letters, numerals, color arrangements, or combinations of such elements with distinguishing power and used in trade of goods or services. These signs must have sufficient distinguishing power from signs used by other companies to differentiate from similar products. A trademark is protected for 10 years from the date of registration and can be renewed thereafter. In addition to Law No. 15 of 2001, other laws related to Intellectual Property Rights (IPR) protection in Indonesia include Law No. 19 of 2002 on Copyright, Law No. 14 of 2001 on Patents, and Law No. 30 of 2000 on Trade Secrets. These IPR laws essentially grant full rights to inventors or right holders to transfer their rights to anyone, either for exploitation or usage with their consent.

Intellectual Property Rights in the Perspective of Islam

Historically, international IPR agreements spearheaded by the Western world have existed for over a hundred years, evolving with the times. IPR emerged in Western societies, which tend to measure all things in material terms. Institutions were established to patent inventions, granting registrants the right to receive royalties from anyone licensed to produce or use their inventions. In Islamic history, IPR was initially unknown because the philosophy of inventors and creators especially authors of great works in Islam was solely to seek the pleasure and reward of Allah. Material gain or wealth was never the primary goal. Consequently, in classical Islamic jurisprudence, IPR was not recognized as a form of ownership related to financial wealth. In fact, the more their works were copied or imitated, the prouder they became, as it increased their rewards in the hereafter. This also provided psychological satisfaction. Their work was far removed from monetary motivation, as scholars and scientists had primary occupations such as merchants, farmers, and others, without making their works a source of income. Over time, this perception shifted within Muslim societies. Today, IPR is recognized as a type of property in which the creator holds full rights, and it may be traded as a commodity. Such recognition has been formalized by various Islamic jurisprudence bodies, such as the Islamic Fiqh Academy under the Organization of Islamic Cooperation (OIC). In Decision No. 5, adopted at its 5th Conference in Kuwait, December 10–15, 1988, the academy outlined the following: Names, addresses, trademarks, literary works, creations, and innovations are exclusive rights of their owners. In modern society, such rights have recognized economic value, as people treat them as assets. Ownership of these rights is protected under Shariah, and no one may infringe upon them.

Owners of names, addresses, and trademarks may sell or transfer ownership to others for material compensation, provided there is no element of uncertainty, fraud, or forgery involved, considering that these have become forms of



material wealth. Copyrights of literary works, creations, or innovations are protected by Shariah. Owners have full authority over them, and they may not be infringed. Thus, falsifying intellectual property rights or trademarks in any way that misleads the public into thinking they are original brands is prohibited under Islamic law. Such actions constitute lying, forgery, and fraud. Moreover, they harm society and involve unlawfully consuming another person's property.

Intellectual Property Rights in the Perspective of Culture

According to McDonald & Roberts (1994), IPR violations flourish in Asia due to cultural differences in understanding morality and life values between the West and the East (Asia). Western and Eastern cultures differ in their concepts of ownership. Traditionally, Asian culture emphasizes prioritizing collective interests, with individuals obliged to contribute their abilities for the benefit of society (Lai & Zaichkowsky, 1999). Thus, new ideas or discoveries are often regarded as accessible or usable by anyone (Jacobs et al., 2001). Conversely, IPR reflects the values of Western nations in general. Many Asians view IPR as a Western attempt to maintain monopolies over trade—from technology and product manufacturing to marketing (Alback, 1988).

4. Conclusion

Based on the above literature review, it can be concluded that:

- a. Trademark is a form of Intellectual Property Rights (IPR) that is legally protected and has economic value; therefore, everyone must acknowledge it. One form of such acknowledgment is refraining from committing violations against these IPRs.
- b. Trademark IPR violations can be identified into four categories: counterfeit trademarks, pirated trademarks, grey market products, and imitation trademarks. Although imitation trademarks are one type of IPR violation, not all imitation trademarks infringe upon IPR. The basic concept of an imitation trademark is its similarity to the original brand, which implicitly also resembles the quality/performance of the product. The criterion for determining whether an imitation trademark constitutes an IPR infringement is based on the degree of consumer confusion (likelihood of brand confusion) arising from the similarity of the mark.
- c. Islam also recognizes trademark copyrights as a form of IPR that is regarded as property and has economic value. The position of the inventor or creator is the same as ownership of other property, meaning it can be inherited, bequeathed, transferred, or traded.

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