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## The Legal Ramifications of Sexual Commodification in Trademark Usage in Indonesia

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Article	Abstract
<p><b>Keywords:</b> Marks and Geographical Indications; Sexual Commodification; Trademark rights.</p> <p><b>Article History</b> Received: Mei 15, 2023; Reviewed: Jan 19, 2024; Accepted: Jul 30, 2024; Published: Jul 31, 2024.</p> <p><b>DOI:</b> 10.28946/slrev.Vol8.Iss2.2911.pp318-334</p>	<p>The ownership of trademark rights is a fundamental component of industrial property rights within the broader spectrum of intellectual property law. Law Number 20 of 2016 concerning Marks and Geographical Indications, specifically Article 20, mandates that brand naming must not contravene state ideology, statutory regulations, religious morality, decency, or public order. This study seeks to critically examine and analyse trademarks deemed inappropriate because they violate existing legislative provisions. Certain trademarks utilised by business entities infringe upon societal standards of decency by engaging in sexual commodification. The research adopts a juridical-normative methodology, incorporating both legislative and conceptual frameworks. The legal materials examined include primary, secondary, and tertiary sources, which are qualitatively analysed to address the research questions. The findings reveal that sexual commodification in trademark naming, characterised by the exploitation of pornography, violates religious norms and societal decency. Therefore, such trademarks are not eligible for registration. Furthermore, any trademarks that have been registered and are found to contain elements of sexual commodification may be subject to revocation, as they conflict with state ideology, legislation, religious morality, decency, and public order.</p>

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### INTRODUCTION

Legal protection is an effort to achieve the state's goals as based on the preamble to the 1945 Constitution of the Republic of Indonesia, so the state must protect society in order to achieve prosperity<sup>1</sup>, including the state protecting Intellectual Property Rights, especially those relating to registered names or trademarks that do not violate the norms of decency that constitute the personality of the Indonesian nation and Eastern culture.

<sup>1</sup> Muchtar Anshary Hamid Labetubun, Rory Jeff Akyuwen, and Marselo Valentino Geovani Pariela, 'Perlindungan Pengetahuan Tradisional Secara Sui Generis Untuk Menyongsong Masyarakat Ekonomi Asean', *SASI*, 24.1 (2018), 1–10.

Trading is one of the areas of human life that involves livelihood in producing various commodities or products of work born from human intellectual ability. In production and sales, the characteristics that distinguish one product from another will greatly provide convenience for consumers to get to know one product with another. The characteristic that distinguishes one product from another product through labelling consisting of symbols, writings or images is what is known as the brand name. The distinctive features of a product can be introduced or known by others through the brand itself.<sup>2</sup>

A brand is a work in Intellectual Property Rights because it is a right to property resulting from human thought or intellectual ability. The field of IPR is divided into two rights, namely Copy Rights and Industrial Property Rights. Industrial property rights consist of Patents, Trademarks, Industrial Designs, Trade Secrets and Integrated Circuit Lay Out Designs.<sup>3</sup> IPR is divided into each category of Rights and aims to provide legal protection for every product produced through the results of human thought. Products made by a company that has the power to differentiate from other products show the identity and creativity of a company to be known by the public at large. In other words, businesses produce a product, hoping that the resulting product can attract consumers to buy it. Consumers will compete to get the product in various ways.<sup>4</sup>

Ownership of a brand is one of the industrial property rights in intellectual property rights, and it should be registered to receive legal protection per the procedures and provisions stated in Law Number 20 of 2016 concerning Trademarks and Geographical Indications. The trademark registration process can be carried out by the owner or right holder of the product, called the applicant, or through the applicant's proxy. After being registered with the Directorate General of Intellectual Property Rights (Ditjen IPR) and issuing a trademark certificate, starting from the date of issuance of the trademark, the applicant has obtained the rights to the trademark.<sup>5</sup>

A brand functions to guarantee the trade of a product or service containing good quality and reputation for consumers when the brand is used by consumers.<sup>6</sup> Legal regulations related to brands in Indonesia are currently regulated in Law Number 20 of 2016 concerning Marks and Geographical Indications. In Article 1 number 1 of the Law on Marks and Geographical Indications it is stated that “A brand is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, colour arrangement, in 2 (two) dimensions and/or 3 (three) dimensions, sound, hologram, or a combination of 2 (two) ) or more of these elements to differentiate goods and/or services produced by individuals or legal entities in goods and/or services trading activities.”

Based on the Trademark and Geographical Indications Law, brands are divided into two (2) types: trademarks and service marks. Article 1 Number (2) of the Trademark and Geographical Indications Law states that Trademarks are marks used on goods traded by a person or several

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<sup>2</sup> Yunus Marlon Lopulalan, Rory Jeff Akyuwen, and Marselo Valentino Geovani Pariela, ‘Hak Cipta Logo Yang Didaftarkan Sebagai Merek’, *TATOHI: Jurnal Ilmiah Hukum*, 1.1 (2021), 17–30.

<sup>3</sup> OK Saidin, *Aspek Hukum Hak Kekayaan Intelektual* (Jakarta: Rajagrafindo Persada, 2015), p. 16.

<sup>4</sup> Insan Budi Maulana, *Perlindungan Merek Terkenal Di Indonesia Dari Masa Ke Masa* (Bandung: Citra Aditya Bakti, 2010), p. 91.

<sup>5</sup> Andriana Krinawati, *TRIPs-WTO & Hukum HKI Indonesia* (Jakarta: Rineka Cipta, 2005), p. 12.

<sup>6</sup> Rahmi Jened, *Hukum Merek Dalam Era Global Dan Integrasi Ekonomi* (Jakarta: Prenada Media Group, 2015), p. 3.

people together or as a legal entity to differentiate them from similar goods. Meanwhile, Article 1 number (3) states that Service Marks are Marks used for services traded by a person or several people together or as a legal entity to differentiate them from similar services. In this research, the author focuses on naming trademarks.

Branding products, such as goods and services, have three benefits: 1). Badge of origin is an important right in trade that becomes a link between goods, services and people who own the brand with the origin of the goods; 2). A piece of personal property is the brand owner's right to sell the brand because it is an asset with economic value; 3). Cultural resource is a brand can be a culture or hallmark of a country.<sup>7</sup> Article 20 of Law Number 20 of 2016 stated that “marks must not conflict with state ideology, statutory regulations, religious morality, decency or public order; is the same as relating to or only mentioning goods and/or services for which registration is requested, contains elements that can mislead the public about the origin, quality, type, size, kind, purpose of use of goods and/or services for which registration is requested or is the name of a protected plant variety for similar goods and/or services; contains information that is inconsistent with the quality, benefits or efficacy of the goods and/or services produced; has no distinguishing power; and/or is the common name and/or symbol of public property.”

Furthermore, Article 67 letter P Regulation of the Food and Drug Supervisory Agency Number 31 of 2018 concerning Processed Food Labels prohibits business actors from including statements, information, writing, images, logos, claims, and/or visualisations that create images/perceptions that conflict with the norms of decency, ethics or public order. In practice today, many trademarks need to be more suitable because they contradict the provisions of existing legislation. The trademark used by business actors is contrary to the norms of decency and decency in society because it contains sexual commodification. This is due to the legal culture of the community in terms of business actors to have legal awareness in carrying out business activities based on the provisions of applicable legislation<sup>8</sup> including trademark naming.

Efforts for legal protection related to state objectives as mandated in the preamble to the 1945 Constitution of the Republic of Indonesia, that the state must protect in order to realise prosperity for society,<sup>9</sup> including how the state can protect the field of IPR, especially with the naming of trademarks that do not conflict with the norms of decency, which is the identity of the Indonesian nation and Eastern culture.

Some naming of trademarks is contrary to the prevailing laws and regulations because it contains sexual commodification, namely the brand “Ko&Thol” which stands for menthol Coffee owned by Instagram celebrity Lucinta Luna. If played on, the brand can bear the same meaning as the male genitals. In addition, there are also snack products with the brand *bikini*, which stands for present vermicelli products. This bikini trademark is controversial because the trademark image is of a woman wearing a bikini, and the phrase “squeeze me” is used to describe it. There is also a milk drink product with the brand *Moo Nenen* in Depok City.

<sup>7</sup> Rika Ratna Permata and Muthia Khairunissa, ‘Perlindungan Hukum Merek Tidak Terdaftar Di Indonesia’, *Jurnal Opinio Juris*, 19.2 (2016), 68–95.

<sup>8</sup> Muchtar Anshary Hamid Labetubun, ‘A Legal Awareness of Copyright on Regional Song Creators’, *International Journal of Law Reconstruction*, 5.1 (2021), 49–61 <<https://doi.org/10.26532/ijlr.v5i1.15406>>.

<sup>9</sup> Labetubun, Akyuwen, and Pariela.

The Pornography Law explains that there are 3 (three) characteristics inherent in forms of pornography, namely: 1) contains obscenity; 2) sexual exploitation; 3) violates the norms of decency in society.<sup>10</sup> So, the naming of the brand above clearly shows that there has been a process of commodification of things that smell of decency with pornographic elements carried out by the brand owner to attract public attention. However, societal norms must be upheld, especially those related to morality. As a civilised nation that upholds religious values, moral norms must be implemented simultaneously. Discovery of brands that violate decency norms with pornographic elements this research aims to focus on law enforcement against trademarks that violate decency norms with pornographic elements and the legal consequences of using trademarks that contain sexual commodification.

## RESEARCH METHODS

This research applies normative legal research methods. Normative Legal Research, also known as Library research, analyses document studies using secondary data such as statutory regulations, court decisions, legal theory, and the opinions of experts in law.<sup>11</sup> The approaches used in this research are conceptual and statutory. A conceptual approach explains specific concepts related to the terms to be researched and/or described in one piece of writing. Meanwhile, the statutory approach (statutory approach) is an approach to legal products, and the conceptual approach is research into legal concepts such as legal sources, legal functions, legal institutions, and so on.<sup>12</sup> The sources of legal materials used in this research are: a) Primary Legal Materials; namely the main and binding legal material consisting of statutory provisions, namely:<sup>13</sup> "Republic of Indonesia Law Number 44 of 2008 concerning Pornography"; "Law of the Republic of Indonesia Number 20 of 2016 concerning Marks and Geographical Indications"; "Food and Drug Monitoring Agency Regulation Number 31 of 2018 concerning Processed Food Labels". b) Secondary legal materials are legal materials that can explain primary legal materials in the form of expert opinions and literature books. c) Tertiary legal materials are legal materials used to complement the primary and secondary legal materials used in this research.

## ANALYSIS AND DISCUSSION

### Arrangements For Cancellation of Registered Marks That Contain Sexual Commodification as An Element of Decency

Trademark owners who register a trademark application must fulfil the requirements of the trademark registration application. The requirements for a trademark registration application can be seen in Article 5 letter (a) of Law Number 15 of 2001 concerning Marks, which states that a mark cannot be registered if the mark contains: Contrary to applicable laws and regulations, religious morality, decency, or public order. The same thing is in Law Number 20 of 2016 concerning Marks and Geographical Indications Article 20 letter (a) regarding the requirements for a trademark registration application, which states that a trademark cannot be registered if: it is contrary to state ideology, statutory regulations, morality, religion, decency, or public order.

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<sup>10</sup> Adami Chazawi, *Tindak Pidana Pornografi* (Jakarta: Sinar Grafika, 2016), p. 9.

<sup>11</sup> Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajawali Pers, 2016), p. 118.

<sup>12</sup> Johnny Ibrahim, *Teori Dan Metode Penelitian Hukum Normatif* (Malang: Bayu Media Publishing, 2008).

<sup>13</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2006), p. 143.

Judging from the explanation above regarding marks that cannot be registered, there is a significant difference between Article 5 letter (a) of Law Number 15 of 2001 concerning Marks and Article 20 letter (a) of Law Number 20 of 2016 concerning Brands and Geographical Indications. In Article 20, letter (a) of Law No. 20 of 2016 concerning Marks and Geographical Indications, there is an additional element regarding marks that cannot be registered. This can be seen in Article 20 letter (a), which was added regarding contrary to state ideology.

Trademarks that have been registered with the "Directorate General of Intellectual Property Rights" can be cancelled in the General Register of Trademarks. Cancellation of a registered mark can be applied if the registered mark conflicts with the terms of the mark registration application and does not have good faith. Bad faith here means that the applicant for trademark registration can be suspected that in registering his trademark, he has the intention of imitating, plagiarising, or following another party's trademark for the sake of his business interests, which creates conditions for unfair, deceptive or misleading business competition, as stated in Article 21 paragraph (4) Law of the Republic of Indonesia Number 20 of 2016 concerning Marks and Geographical Indications.

Provisions in Article 61 of Law Number 15 of 2001 concerning Trademarks state that removal of trademark registration can be carried out at the initiative of the Directorate General or based on a request from the owner of the trademark concerned. Then, in Article 63 of Law Number 15 of 2001 concerning Trademarks, it is stated that the deletion of a trademark registration can also be submitted by a third party based on the Commercial Court decision. It can be said that there are 3 (three) ways to delete a registered mark as regulated in Law Number 15 of 2001 concerning Marks, namely: on the initiative of the Directorate General of Intellectual Property Rights, by the brand owner himself, and from a third party.

Article 61 paragraph (2) of Law Number 15 of 2001 concerning Trademarks stipulates that deletion of trademark registration on the initiative of the Directorate General of Intellectual Property Rights can be carried out if: a) The mark has not been used for 3 (three) consecutive years in the trade of goods and/or services from the date of registration or last use, unless there is a reason acceptable to the Directorate General, or b) the Mark is used for a type of goods and/or services that is not by the type of goods or services for which registration is requested, including the use of a Mark that does not match the registered Mark.

Explanations related to marks that have not been used for 3 (three) consecutive years in the trade of goods and/or services starting from the date of registration or last use, namely, the mark cannot be used for 3 (three) consecutive years either by the owner of the registered mark or other parties who will use the mark. After the specified period has passed, the same mark can be used in the trade of goods and/or services; what is meant by the same mark is the mark has been registered, and the mark has been removed. Then, what is meant by final use is the use of the mark in the production of traded goods and/or services when the last use starts from the last date of use, even though the goods in question are still circulating in the community.

Marks are used for types of goods and/or services that do not match the type of goods and/or services for which registration is requested. The word inappropriate means incompatibility in use, which includes inconsistency in the form of writing words or letters or incompatibility in using different colours. So, the incompatibility of the application for trademark registration with the time of use of the trademark. For example, in an application for trademark registration, the

trademark owner registers the trademark with red writing, and then, in practice, the writing used on the trademark is yellow; something like this can be cancelled because it does not match what the trademark registration application is for.

So, brand deletion is a sanction if the brand is not used for 3 (three) consecutive years or is used inappropriately. Related to the provision of non-use for 3 (three) consecutive years from the date of registration or last use is the use of the mark in the production of traded goods and/or services. The time of last use is calculated from the last use date, even though the goods in question are circulating in the community after that.<sup>14</sup> Based on these provisions, the not used should be calculated as 3 (three) years from the last use of the mark in the trade of goods and/or services. However, in practice, law enforcement needs to properly understand this.

Deletion of a trademark registration carried out on the initiative of the Directorate General of Intellectual Property Rights does not preclude the opportunity for the trademark owner to maintain his or her rights to the trademark to be abolished, for the deletion of a registered trademark on its initiative is not included in Law Number 15 of 2001 concerning Marks regarding the requirements. The provisions of Law Number 15 of 2001 concerning Trademarks, on the one hand, still need an explanation regarding brand deletion. It does not explain what elements can be carried out by brand deletion at the initiative of the Directorate General of Intellectual Property Rights because what is stated in brand deletion at the initiative of the Directorate General of Intellectual Property Rights in Article 61 paragraph (2) is not states that brand deletion can be carried out if it contains an element that is contrary to religious morality.

On the other hand, Law Number 20 of 2016 concerning Marks and Geographical Indications also explains the elimination of registered marks whose marks have been recorded and announced in the Official Brand Gazette, as in Article 72 paragraph (5) of the Law Republic of Indonesia Number 21 of 2016 concerning Brands and Geographical Indications. Removal of a registered mark can be submitted by the brand owner to the Minister and submitted by an interested third party. It can also be carried out on the initiative of the Minister, as in Article 72 paragraph (7) of Law of the Republic of Indonesia Number 21 of 2016 concerning Marks and Indications Geographical, that removal of a registered mark at the initiative of the Minister can be carried out if: a) It has similarities in essence and/or in its entirety to a Geographical Indication; b) Contrary to state ideology, laws and regulations, morality, religion, decency and public order, or c) Has similarities in its entirety with traditional cultural expressions, intangible cultural heritage, or names or logos that have been passed down from generation to generation. Based on Article 72 paragraph (2) of Law Number 20 of 2016 concerning Marks and Geographical Indications what is meant by contrary to decency is committing acts of displaying nudity, genitals and sexual activities that are contrary to living values in society.

The formulation of the provisions of this explanation is implemented to prevent commotion among religious communities.<sup>15</sup> Only Law Number 20 of 2016 provides a broader explanation regarding contrary to decency. Law Number 15 of 2001 does not explain the criteria for contrary

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<sup>14</sup> Rahmi Jened, *Hak Kekayaan Intelektual Penyalahgunaan Hak Eksklusif* (Jakarta: Prenada Media Group, 2010), p. 305.

<sup>15</sup> Agung Indiryanto and Irmie Mela Yusnita, *Aspek Hukum Pendaftaran Merek* (Jakarta: Raja Grafindo Persada, 2017), p. 85.

to decency. An explanation has been added in Law Number 20 of 2016 to make it easier for parties or officials to interpret what can be said to be a brand that is contrary to decency.

Furthermore, there is a trademark violation contrary to the terms and conditions of the trademark registration application. In that case, it will certainly cause consumers or the public to feel losses. As the aggrieved party, of course, the public will prevent and reject the registered mark by asking the competent authorities to withdraw the registered mark that is infringing. Acts of trademark infringement, apart from being regulated in the Trademark Law, can also be subject to sanctions that can be reviewed under criminal, civil, and administrative law.<sup>16</sup>

For any implementation that is proven to violate a registered trademark, the Directorate General of Intellectual Property Rights, under the supervision of the Minister of Law and Human Rights (Ministry of Law and Human Rights), will withdraw the trademark certificate, which can take the form of brand deletion or brand cancellation. Suppose a brand that is proven to conflict with the requirements of the trademark registration application is removed. In that case, the brand owner and even other parties or the public can apply for deleting the registered mark to the Minister.

The procedure for deleting a registered mark is not included in Law Number 15 of 2001 concerning Marks. Article 65 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications only states that the Directorate General carries out the deletion of a trademark registration by crossing out the relevant mark from the General Register of Trademarks by providing a note of the reason and date of the deletion and providing written notification to the owner. There are unclear regulations regarding the mechanism for removing a registered mark. On the other hand, the provisions of Article 72 paragraphs (8) and (9) of Law Number 20 of 2016 concerning Marks and Geographical Indications explain that before carrying out deletion, the minister must request recommendations regarding the deletion of the registered mark from the Mark Appeal Commission. Then, the Trademark Appeal Commission recommended the deletion of the mark to the minister. This is not explained in Law Number 15 of 2001 concerning mechanisms for deleting registered marks.

In connection with the brand deletion procedure above, if there is a registered mark that is subject to brand deletion and the brand owner objects to the provisions of Article 61 paragraph (5) of Law Number 15 of 2001 concerning Marks which regulates procedures for submit an objection to the removal of the mark. This article states that if the trademark owner objects to the decision to delete the trademark registration, he can submit it to the Commercial Court. Any challenge, it can only be filed to the appeal court. This is different from Law Number 21 of 2016 concerning Marks and Geographical Indications Article 73 which states that brand owners who object to the decision to delete a registered mark at the initiative of the Minister can file a lawsuit through the State Administrative Court. Parties who object to the decision of the State Administrative Court can only submit an appeal to the Supreme Court.

### **Using of Trademarks Which Contain Sexual Commodification**

Regarding creativity and innovation, business actors need to adjust to the development of the business world to create unique products to compete and attract market interest. Creating a

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<sup>16</sup> Muhammad Djumhana and R. Djubaedillah, *Hak Milik Intelektual, Sejarah, Teori Dan Prakteknya Di Indonesia* (Bandung: Citra Aditya Bakti, 2009), p. 93.

healthy trade activity climate with products owned to compete in the market cannot be separated from the elements of intellectual work owned by businesses, both legal entities and individuals. The result or form of intellectual work is then used in promotional activities, distribution, and advertising of products, goods, and services. Intellectual work is then called intellectual property rights. Intellectual property rights result from human thinking ability that departs from ideas incarnated as creation or invention. The idea is attached to an abstract intellectual predicate.

However, there are similarities between copyright, patent, and trademark rights in terms of the nature or form of the rights, namely rights to intangible objects.<sup>17</sup> Keith E. Maskus concluded that intellectual property rights can be important and positive in economic development.<sup>18</sup> Even among poor countries, intellectual property rights can be an important condition for business improvement, as long as the field is built and accompanied by appropriate collateral policies—which he says is an essential challenge as economies adopt stronger IPRs under the new global system.

From the statement of Keith E. Maskus clear existence of intellectual property rights give a strong influence in building business and even the economy of the country, considering the intellectual property rights are said to be intangible assets (intangible assets)<sup>19</sup>, in doing and building business in addition to business actors must know the target market and also vigorous promotion, but the important aspect must use creativity by providing the uniqueness of the product either from product packaging, logo or trademark attractiveness.

According to Robert P. Merges, consumers strongly associate trademarks with the producer's product when advertising is effective. The trademark comes to embody all of the firm's informational investments. In other words, the existence of a brand can give an idea of the origin of the product and make it easier for consumers to identify a brand and its relationship with a company or owner of a particular trademark.

Economic growth goes hand in hand with the growing demand for product variety, so it is necessary to produce more new companies and new products in the market. This increase in competitiveness also encourages using intellectual property rights, including trademarks, to persuade and build a reputation value in the market. The brand is one of the most important parts of trading activities, as the identity and origin of the product provide a representation of product quality.

This is what makes the company that owns the brand so enthusiastic about carrying out massive promotions to attract public attention by naming the brand with a sexual tinge. Issues of sexuality cannot be separated from the process of commodification.<sup>20</sup> Business actors who use signs or brands with words, images and combinations are unique and even have connotations containing sexual commodification.

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<sup>17</sup> Sulastris Sulastris, Satino Satino, and Yuliana Yuli W, “Perlindungan Hukum Terhadap Merek (Tinjauan Terhadap Merek Dagang Tupperware Versus Tulipware),” *Jurnal Yuridis* 5, no. 1 (2018): 160–72, <https://doi.org/10.35586/v5i1.321>.

<sup>18</sup> Achmad Zen Umar Purba, *Perjanjian TRIP's Dan Beberapa Isu Strategis* (Bandung: Alumni, 2022), p. 58.

<sup>19</sup> Edy Santoso, *Pengaruh Era Globalisasi Terhadap Hukum Bisnis Di Indonesia* (Jakarta: Kencana Prenada Media Group, 2018), p. 121.

<sup>20</sup> Dani Fadillah, “Komodifikasi Seksual Dalam Kepentingan Ekonomi Portal Berita Online,” *Informasi* 45, no. 2 (2015): 155–62, <https://doi.org/10.21831/informasi.v45i2.7990>.



Karl Marx said that commodification made everything mutually measurable in two books of equal value with one suit. Unfortunately, it has its price. Bourgeois society, in short, reduces human values to economic values and homogenises the differences that should be characteristic of everyday life.<sup>21</sup> Karl Marx's explanation of commodification further emphasises that various elements of sexuality can be exchanged to become an economic value that has a very high selling value. One element of sexuality that experiences commodification is the body and vulgar words. It is not uncommon for sexual matters to be paralleled with certain characters who have many fans.

According to Joli Jensen, literature on fan groups is haunted by images of deviance. Fans have always been characterised (referring to the term's origin) as potential fanatics. Fan groups are seen as having excessive behaviour bordering on insanity. Jensen points out two typical types of fan pathology: the obsessed individual (usually men) and the hysterical crowd (usually women).<sup>22</sup> As stated by Vincent Mosco, commodification is described as a way for business actors to bring about the accumulation of their business goals, or it can also be described as a change in function or use value into exchange value, and currently there are many forms of commodification that have emerged in the development of human life.<sup>23</sup>

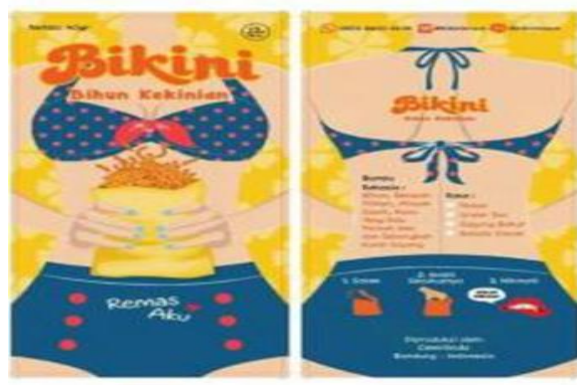
In the commodification thinking framework by these experts, it is possible that the presence of elements of pornography in a trademark can further attract market interest and consumer curiosity about the identity of a product. It is not clear why businesses use the trademark with sexual commodification because of a lack of socialisation about the use of the trademark or deliberately doing sexual commodification on the trademark to increase the selling value. However, the obvious use of the trademark by using sexual commodification has been distorted and contrary to decency and even categorised as a trademark that cannot be listed.

Efforts to reap profits from food traders are carried out in many ways. One of them is sexual. Business actors create brands with words and images that are unique, current or even eccentric. Some of them think this attracts more of the consumers' curiosity, so they want to buy the product. Some of these brands contain pornographic elements indirectly or implicitly. Some brand naming is contrary to the prevailing laws and regulations because it contains sexual commodification.

Figure 1. Coffee “Ko&Thol”



Figure 2. Snacks Brand “Bikini”



<sup>21</sup> Peter Beilharz, *Teori-Teori Sosial* (Yogyakarta: Pustaka Pelajar, 2005), p. 275.

<sup>22</sup> John Storey, *Cultural Studies Dan Kajian Budaya Pop: Pengantar Komprehensif Teori Dan Metode* (Yogyakarta: Jalasutra, 2010), p. 157.

<sup>23</sup> Vincent Mosco, *The Political Economy of Communication* (London: Sage Publications Lt, 2009), p. 129.

The trademark Ko&Thol” in Figure 1 stands for menthol Coffee and is owned by *selebgram* Lucinta Luna. The trademark, if played on, can bear the same meaning as male genitals. Snack products with the trademark “*bikini*” stand for the present vermicelli products. This *bikini* trademark is controversial because the trademark image is a woman wearing a *bikini*, and there is the phrase “squeeze me.”

Both trademarks above fall into the trademarks not registered with the Director General of IPR category. This means that, until now, these products by business actors are still traded but have yet to be registered with the Director General of IPR. In addition to the two products above, searching the database of trademarks in the database of intellectual property (PDKI) at the Directorate General of Intellectual Property (from now on abbreviated DJKI), the author found many examples of brands that contain elements of pornography (see Table 1).

**Table 1: The brands that contain elements of written pornography**

<p>Trademark <i>Master ngocok</i>+logo in class 29 with registration number IDM000920001 to protect the type of goods and/or services milk-based beverages, almond milk-based beverages and others.</p>	
<p>Trademark <i>ngocok sendiri or dikocokin?</i> in class 30 with registration number IDM000840110 to protect the type of goods and/or services of coffee-based beverages.</p>	
<p>Trademark <i>Mr. Coli Cocol ikan</i> in class 29 with registration number IDM000856216 to protect kinds of goods and/or services snacks mainly consist of meat, fish, poultry or vegetables</p>	
<p>Trademark <i>Warung Nenen</i> in class 43 with registration number IDM000637674 to protect the type of goods and/or services of Fresh Milk Tavern</p>	
<p>Trademark <i>Moo Nenen Nenen Disini Lebih Enak daripada Nenen Ditangga</i> in class 29 with agenda number D002016004758 to protect the type of goods and/or beverage services with the basic ingredients of pure cow's milk, milk in packaging</p>	
<p>brand <i>Lonte: Lontong Sate</i> in class 43 with agenda number JID2021005876 to protect the type of goods and/or services restaurant</p>	

*Source: Intellectual property database of Director General of IPR.*

The above trademarks seem unique and attract attention by containing elements of pornography that should be categorised as brands that cannot be listed in the trademark act and Geographical Indications. However, in fact, the brand examiner at the DJKI office has a different view by making these trademarks registered and widely known by the Indonesian people. From the above evidence, it turns out that many trademarks contain elements of pornography but, by the Director General of IPR, are accepted as a brand that distinguishes the product from other products. This means that by the Director General of IPR, the mark is considered natural and legally accepted as a registered mark.

All human works are in the form of writing, photographs, drawings, paintings, and so on, which violate the norms of decency or religion which have the energy of intimate stimulation and are not suitable for sexual maturity at a certain age and can disturb the norms of civil decency of society. As a consequence, it is not different from pornography, which is intended to be disseminated.<sup>24</sup> Regulations regarding pornography in Indonesia are regulated in Law Number 44 of 2008 concerning Pornography Article 1 states that figures are images, sketches, illustrations, photos, writings, sounds, sounds, moving images, animations, cartoons, conversations, body movements, or forms of messages others through various forms of communication media and/or public performances, which contain obscenity or sexual exploitation that violates the norms of decency in society. Pornographic elements whose objects are images, sketches, illustrations, photos, writing, sounds, sounds, moving images, animations, cartoons, conversations, body movements or other forms of messages provided that these objects contain obscenity or sexual exploitation which violates the norms of decency in public which are then carried out through various forms of communication media and/or public performances. If pornographic elements are connected to a brand that contains pornography, of course one of the brands is an image containing obscenity and then publicity through online or offline marketing to market the product. This can be said to mean that the brand has violated decency and fulfils the elements of being a brand that contains pornography.

Pornographic elements are often used in products to attract and increase popularity so that consumers are interested. Even though it refers to the definition of pornography, what is categorised as an element of pornography violates the norms of decency in society. Therefore, the author believes that as long as pornographic objects are used in the product and do not show genitals, nudity or sexual violence, but as long as it violates the norms of decency, then this condition is still said to be that the product contains pornographic elements and violates decency.

Brands have an important role as a sign to distinguish a product from other products for similar or dissimilar goods circulating in national and international marketing and/or trade activities. It is clear that with advertising and promotions, the economic value of the brand becomes increasingly higher in the eyes of consumers. As one of the important assets of business actors, brands play an important role in trading activities as the distinctive characteristics of a product.

Based on the Pornography Law, the government can prevent the creation, dissemination and use of pornography by disconnecting networks including blocking pornography via the internet,

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<sup>24</sup> Retno Astuti, "Analisa Hukum Penggunaan Unsur Pornografi Terhadap Merek Terdaftar," *JISIP: Jurnal Ilmu Sosial Dan Pendidikan* 6, no. 2 (2022): 3696–3704, <https://doi.org/10.58258/jisip.v6i2.2935>.

carrying out supervision, carrying out coordination cooperation with various parties both from within and outside the country and developing an educational information system in the context of prevention pornography. Unfortunately, the definition of pornography in the Pornography Law has a narrow scope and pornography must be realised explicitly. Suppose it is related to the issue of brand taglines containing pornographic elements on social media. In that case, this cannot be followed up, considering that the content was created separately (brand, tagline, short video), so it does not show any explicit elements. However, from a consumer's point of view, it can be seen that there is implicit pornography.

Prevention carried out by the government is to refuse registration of marks that contain elements of morality. If a mark containing elements of morality is already registered, the Minister must request a recommendation to delete it. This is because consumers see the brand as closely attached to one unit, which is a distinguishing characteristic of the product being offered to businesspeople. The brand “*Ngocok Es Kopi*” with the logo “*Tangan Ngocok Gelas Kopi*” passed the registration at DJKI, even though if you look at it as a whole, including the logo, the product has implicit references to pornographic acts and is still operating in society. So, the law must be able to move faster than changes in society; as Roscoe Pound said, the law is a social engineering tool, and the law must be viewed as a system.

Departing from R. Subekti's opinion that a system is an orderly arrangement or record, a whole consisting of parts that are related to each other arranged according to a plan or pattern resulting from a thought to achieve a goal. In a good system, there should be no duplication or overlap between certain parts.<sup>25</sup> Sudikno Mertokusumo explained that law is a system which means that law is an order and a complete unity consisting of parts or elements that are closely related to each other. The legal system is a unity consisting of elements that interact with each other and work together to achieve the goals of that unity. A legal system that moves as if it were circular and connected to each other without any gaps that could create obstacles in the operation of law in a system. In order to achieve and move a legal system, then C.F.G. Sunaryati Hartono believes that an organisation is needed that is based on certain principles,<sup>26</sup> in other words, in the era of digitalisation, legal regulations related to brands containing pornographic elements on social media must be integrated into one unit and not overlap.

Back again to the formulation of Article 20 of the trademark act and geographical indications as the author has described earlier which is also associated with the pornography law, then according to the author, all these marks should be rejected because they violate religious values, decency and decency because they contain elements of pornography through the words used that can attract a person's lust.

### **Legal Consequences of the Using Trademarks Containing Sexual Commodification**

Brands are one part of the form of intellectual work that has an important role in the smooth and increasing trade of goods or services in trade and investment activities that occur in the current

<sup>25</sup> Rocky Marbun, “Grand Design Politik Hukum Pidana Dalam Sistem Hukum Pidana Indonesia, Berdasarkan Pancasila Dan Undang-Undang Dasar Republik Indonesia 1945,” *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 1, no. 3 (2014): 558–77, <http://jurnal.unpad.ac.id/pjih/article/view/7095/3324>.

<sup>26</sup> Marbun.

development of globalisation.<sup>27</sup> Brands have an important role in sales because consumers often associate the quality or reputation of goods and services with certain brands. Brands must also have sufficient differentiating characteristics, meaning having the power to differentiate goods or services from other companies' products.<sup>28</sup> Through brands, people, as consumers, will easily recognise a particular company's products.

Rights to a brand are obtained after the registration process is carried out, not all marks that apply for registration will be accepted. There are limitations to trademarks whose registrations can be accepted.<sup>29</sup> There is a brand phenomenon that using elements of pornography or violating decency has the potential to cause moral disintegration in society, especially among the young generation who are always curious. From the perspective of trademark regulations, Article 20 letter (A) of the trademark act and Geographical indications says that the trademark cannot be registered if it is contrary to the state ideology, legislation, morality, religion, decency, or public order.

Nevertheless, trademarks that contain elements of pornography, such as the example of trademarks *ngocok sendiri atau dikocokin?* and *Warung Nenen*, can be listed in the database of the DJKI trademark. Elucidation of Article 20 letter (A) of the law on Marks and Geographical Indications explains that what is meant by contrary to public order is not in line with the existing regulations in society that are comprehensive, such as offending the feelings of the community or group, offending the politeness or general ethics of the community, and offending the peace of the community or group. It is also included in the definition of conflict with public order is bad faith.<sup>30</sup> Therefore, the trademarks, as mentioned earlier, should not be registered because they offend the common decency or ethics of the public. However, it becomes contradictory as to why trademarks that have negative connotations and contain sexual commodification can be registered.

A trademark cancellation lawsuit may be filed for registered trademarks that contain this sexual commodification. Interest parties may file a lawsuit for cancellation of a registered mark on the grounds of Article 20 and/or Article 21 of the Act on Trademarks and Geographical Indications. A trademark that contains elements of pornography is categorised as a brand that cannot be listed because it is contrary to public order.

Please note that Article 76 paragraph (1) of the Act on Trademarks and Geographical Indications states that interested parties include registered trademark owners, prosecutors, foundations/institutions in the field of consumers, and assemblies/religious institutions. Therefore, only interested parties, per the explanation of Article 76 paragraph (1) of the law on Marks and Geographical Indications, can file a lawsuit for cancellation of a mark in the context

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<sup>27</sup> Rahmadia Maudy Putri Karina and Rinitami Njatrijani, "Perlindungan Hukum Bagi Pemegang Hak Merek Dagang Ikea Atas Penghapusan Merek Dagang," *Jurnal Pembangunan Hukum Indonesia* 1, no. 2 (2019): 194–212, <https://doi.org/10.14710/jphi.v1i2.194-212>.

<sup>28</sup> Iffan Alif Khoironi, "Implementasi Pendaftaran Merek Sebagai Bentuk Perlindungan Hukum Pada Home Industry Eggroll," *Unnes Law Journal* 2, no. 2 (2013): 129–36, <https://doi.org/10.15294/ulj.v2i2.2273>.

<sup>29</sup> Rakhmita Desmayanti, "Tinjauan Umum Perlindungan Merek Terkenal Sebagai Daya Pembeda Menurut Prespektif Hukum Di Indonesia," *Jurnal Cahaya Keadilan* 6, no. 1 (2018): 1–21, <https://doi.org/10.33884/jck.v6i1.874>.

<sup>30</sup> Ahmadi Miru, *Hukum Merek* (Jakarta: Rajawali Pers, 2005), p. 85.

of a mark contrary to public order, including in that it contains sexual commodification. A lawsuit to cancel a mark with elements of violating public order can be filed indefinitely.

Apart from the provisions of the Trademark Act and Geographical Indications, the trade name listed on the product packaging is also contained in Article 10 letter (B) of the Drug and Food Control Agency Regulation Number 31year 2018 on processed food labels (hereinafter referred to as the BPOM regulation on processed food labels). Article 12 paragraph (1) letter (a) BPOM regulation processed food labels stated that: trade names cannot be used if the trade name contains the following elements that are contrary to the provisions of the legislation, religious morality, culture, decency, and/or public order.

These provisions clearly show that as long as the trade name violates decency and/or public order, it cannot be used. However, suppose the infringing trade name is used in trading activities. In that case, there is a sanction as the provisions of Article 67 letter (p) state that “business actors are prohibited from including statements, information, writings, images, logos, claims, and/or visualisations as follows: information that raises images/perceptions that are contrary to the norms of decency, ethics, or public order”.

Furthermore, the provision of administrative sanctions, as contained in Article 71 paragraph (1) of the BPOM regulation of processed food labels, states that any person who violates the provisions of this agency regulation is subject to administrative sanctions in the form of a) temporarily suspending activities, production, and/or circulation; b) food withdrawal from circulation by producers; and/or c) License revocation. Suppose it looks at it from another perspective, the definition of pornography in the Pornography Law is that the object is an image, sketch, illustration, photo, writing, sound, sound, moving image, animation, cartoon, conversation, body movement, or other form of message that contains obscenity or sexual exploitation that violates the norms of decency in society. Therefore, trademarks in the form of images, sketches, illustrations, photographs, and writings have the potential to be categorised as sexual commodification that contains pornographic elements.

Criminal provisions as Article 29 of the pornography act stated that “any person who produces, makes, reproduces, reproduces, disseminates, broadcasts, imports, exports, offers, sells, rents, or provides pornography as meant in Article 4 paragraph (1) shall be punished with imprisonment of at least 6 (six) months and at most 12 (twelve) years and/or a fine of at least Rp. 250,000,000 .00 (Two hundred and fifty million rupiah) and at most Rp. 6,000,000,000.00 (six billion rupiah).” From the above provisions, brands that contain elements of pornography have the potential to have criminal sanctions.

There is an expansion of the subject of law with the inclusion of the phrase every person so that it not only includes individuals (*persoon*) but also includes corporations in the form of legal entities (*rechtspersoon*) or non-legal entities. Article 40, paragraph (1) of the pornography act explains that if a criminal act of pornography is committed by or on behalf of a corporation, criminal charges and charges may be made against the corporation and/or its management. In Article 40, paragraph (7) it is also affirmed that “in the case of pornography crimes committed by the corporation, in addition to imprisonment and fines against its management, fines against the corporation are also imposed with the maximum criminal provisions multiplied by 3 (three) of the fines prescribed in each article in this chapter. In addition, the principal criminal corporation may be subject to additional criminal forms: a). freezing of business license; b).

revocation of business license; c). appropriation of wealth resulting from criminal acts; and d). revocation of legal entity status.

Based on the description above, the author would like to reiterate that the use and use of a trademark that violates the norms of religion, decency and decency in society, including if it contains sexual commodification, is actually contrary to the purpose of the legal protection of the brand itself. This means that how the trademark will be protected by law, while the trademark itself, in terms of its naming and the symbol or sign used, turns out to be contrary to the law. Based on what the author has stated earlier also that until now, there are still many brands that contain elements of pornography that circulate in society. As a result of the law that arises, of course, the mark should be when registered must be rejected. But the reality is that there is a brand that contains elements of pornography, but in the database of the Director General of IPR, it turned out to be a registered trademark.

Business actors are no longer concerned with moral values, religion, and decency in society; instead, they focus on the benefits or economic benefits that will be obtained. Business actors consider attracting consumers or users of goods and/or services to provide great material benefits, including attracting public interest through trademarks containing sexual commodification as their own attraction. Whereas there are legal consequences that have been regulated in the provisions on the trademark, both special regulations and those that intersect with the brand have expressly set about banning the existence of trademarks that contain sexual commodification by providing sanctions for those who violate the provisions. The sanctions are criminal and administrative.

## CONCLUSION

Trademarks that contain sexual commodification, even if they are done solely to gain the attention of potential consumers, ultimately have an impact on the decision to buy the product. Trademarks containing pornographic elements should not be registered because they are contrary to decency or public order. However, in reality, in e-search and the database of the Directorate of Intellectual Property, brands were found that contained pornographic elements such as *master ngocok+logo* in class 29, the *Mr Coli Cocol Ikan* brand in class 29 and the *Warung Nenen* brand in class 43. There is a question mark regarding the trademark examiner's consideration of granting trademark rights to brands that clearly violate decency or public order. Then, the legal effect on the use of trademarks that contain sexual commodification is if the mark has not been registered, then if registered, the trademark must be rejected. If the trademark has been registered, the sexual commodification mark can be removed if it has not been used for three years. Trademarks can also be cancelled with a note. If there is a lawsuit to the Commercial Court; in addition to being subject to civil sanctions such as the removal and cancellation of marks, marks containing sexual commodification can also be subject to criminal sanctions.

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