



## Identifying, Preventing and Overcoming Trademark Bullying in Indonesia

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On the one side, trademark owners must be proactive in protecting their trademark from other trademarks to prevent their trademark from becoming generic. However, on the other side, it can cause negative effects for the community, especially trademark owners who are categorized as small business owners. The act of trademark owners excessively protecting their trademarks by accusing small businesses of violating their trademark is termed “trademark bullying”. This article's discussion will focus on a number of important goals. In addition, it will provide explanations and definition of trademark bullying, as well as identifying preventing and overcoming trademark bullying in Indonesia. It can be concluded that trademark bullying has occurred in Indonesia. The disputed issue is the use of a common word that the trademark owner considers an essential element of his/her trademark. To prevent trademark bullying that takes issue with the use of the common word of a brand, Indonesian government must start making regulations on descriptive fair use defense in order to provide legal certainty and healthy business competition. To be able to overcome trademark bullying, victims can try shaming the trademark bullies. It is considered quite effective and can make trademark bullies rethink in sending cease-and-desist letter or lawsuit against small business owners.

**Keywords:** Trademarks, Trademark Bullying, Indonesian Trademark Law, Intellectual Property, Genericide

Trademarks have important functions in the trade of goods and/or services. Trademarks work not only as an identifier of an item and/or a service but also as a sign that reflects the goodwill of a product and/or service.<sup>1</sup> Trademarks have an allure that can influence consumers to buy a product or service.<sup>2</sup> It is undeniable that trademarks have an important role in trading goods and/or services and business owners are fully aware that trademarks have strength and value.<sup>3</sup>

This important trademark function is the reason why brand owners struggle to protect their trademarks from infringement.<sup>4</sup> If someone uses the same brand or has another registered mark then it can cause confusion among consumers.<sup>5</sup> This justifies why trademark owners tend to be protective and actively protect their trademark rights. Trademark owners have the exclusive right to prohibit the use of the trademarks that have a high probability of making creating confusion with theirs. This exclusive right serves to protect the goodwill of the trademark owner.<sup>6</sup> Indonesia's trademark law rules that trademarks are private rights. This gives the trademark owner the exclusive right to initiate monitoring and to enforce their rights. Trademark owners are given the freedom to fight for their rights

and prevent other parties from violating their trademark rights.<sup>7</sup>

Though, the trademark owners are proactive in protecting their trademark from others to prevent their trademark from becoming generic. This is also one of the reasons that drive the aggressive behavior of the trademark bully is avoiding generic marks. If the trademark owner allows the act of imitation or the use of a trademark that has rights to the trademark, genericide will occur. Genericide is when a trademark loses its distinguishing power so it can no longer get protection for the trademark.<sup>8</sup> However, on the other side, it can cause negative effects for the community, especially trademark owners who are small business owners. The act of trademark owners excessively protecting their trademarks by accusing small businesses of violating their trademark is termed *Trademark Bullying*. The Trademark owner can sue the trademark that allegedly infringed his trademark.<sup>9</sup> Companies will always try to maintain and monopolize the market and take advantage of the law to achieve their goals.<sup>10</sup> Trademark bullying is one of the efforts to place a position in the trading market.<sup>11</sup>

Trademark Bullying is an unknown term for Indonesian people. However, legal scholarship and the media in several countries in the world especially in the United States have begun to pay more attention

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to the subject of trademark bullying. Simply defined, a trademark bully is a large corporation that attempts to halt behavior by individuals and small businesses that it views to be a threat to its intellectual property, even if its legal claims against these other parties are false or non-existent.<sup>12</sup> Trademark bullying is growing rapidly in the United States that caused the USPTO (The United States Patent and Trademark Office) make a special report on Trademark Suppression.<sup>13</sup> Based on real cases and data in the field, it was found that trademark bullying is an important issue in the United States.<sup>14</sup>

Seeing the growing discussion about trademark bullying, this paper will focus on the phenomenon of trademark bullying in Indonesia. Has there been a phenomenon of trademark bullying in Indonesia? How to identify trademark bullying in Indonesia? and how to prevent and overcome trademark bullying in Indonesia?

The study applies a qualitative research method by content analysis research design to focus on the trademark bullying in Indonesia. Document analysis was used to collect data from books, publications, journals, case reports, and other resources related to trademark bullying to incorporate both primary and secondary data sources, including papers and journals from electronic sources, books, and court cases. The approaches used to analyze the data under this qualitative research are analytical, deductive, and inductive. Analytical is the purpose to look at an issue more closely and in-depth for example: What is trademark bullying? The deductive method was used to conclude the subtopic mostly by doing some predictions upon which is deduced from trademark law theory and trademark bullying definition by scholars and practitioners.

### **Trademark Bullying**

Trademark bullying generally involves brand owners whose businesses are large and multinational and brand owners who have just started their business or can be said to be small businesses. Hence, the trademark bully and victims of trademark bullying can be analogized as David and Goliath. Trademark Bully will ask the victims to change the trademarks they own with unfounded reasons or claims. They will initially send cease and desist letter to the victim and threaten to take the matter to court if the victim does not comply with the bully's trademark request. Due to the victim's ignorance and limited knowledge, the victim will choose to surrender rather than defend their rights through litigation.<sup>15</sup>

The pattern of trademark bullying starts with a cease-and-desist letter sent by brand owners whose brands are already known to the public to individuals or business actors with similar brands. The content of the letter asks for the cessation of all forms of use of the trademark considered infringing and if they insist on continuing the use, the owner of the trademark will take litigation measures.<sup>16</sup> Internet technology makes it easier for bully traders to track and find brands that have similarities to their own. In the United States, Trademark Bully obtains information about brands that they want to target through the USPTO website,<sup>15</sup> while in Indonesia information about these trademarks can be tracked on the Intellectual Property Database Website (<https://pdki-indonesia.dgip.go.id>). Victims of trademark bullying are generally small business actors who have just registered their trademarks and have limited knowledge and resources. In general, the pattern of trademark bullying is as follows:<sup>17</sup>

- (i) Trademark bullying involves both entities. The perpetrators of trademark bullying are generally large or multinational companies and victims of trademark bullying are small business actors who do not have adequate finances to hire professional legal services.
- (ii) Trademark bullies, namely large or transnational companies, will send cease and desist letters to victims of trademark bullying, namely small business actors.
- (iii) Trademark bullies threaten and intimidate the victims of trademark bullying that if their request is not fulfilled, they will take litigation. Their general request is to stop all use of the trademark bully victim's trademark and pay compensation to the trademark bullies.
- (iv) Victims of trademark bully are given the choice to fight through litigation or surrender and fulfil the trademark bully request. Victims who do not have sufficient resources to fight in litigation will think that giving up is the most reasonable option compared to fighting the trademark bully.

Trademark bullying generally involves brand owners whose businesses are large and multinational as well as brand owners who have just started their business or can be said to be small businesses, thus, the trademark bully and victims of trademark bullying can be analogized as David and Goliath. Trademark Bully will ask the victim to change the brand they own with unfounded reasons or claims. They will initially send cease and desist letter to the victim and

threaten to take the matter to court if the victim does not comply with the trademark bully request. Due to the victim's ignorance as well as limited knowledge and resources, the victim will choose to surrender rather than defend their rights through litigation.<sup>15</sup> The victims think that litigation in Indonesia will cost a huge amount of money.

### Trademark Bullying in Indonesia

From the explanation of the bullying trademark above, it can be seen that several cases in Indonesia have a similar pattern that is commonly carried out by the bully trademark. The cases are *Holiday Inn v Holiday Resort Lombok*, *Sony v Sony-ak.com*, *Kopitiam v Kok Tong Kopitiam* and *Geprek Bensu v Bensu*.

#### *Holiday Inn v Holiday Resort Lombok*<sup>18</sup>

The owner of the Holiday Inn trademark disputed the use of the word *Holiday* contained in the Holiday Resort Lombok trademark and argued that the Holiday Resort Lombok trademark infringed the Holiday Inn trademark (Fig. 1). The case started with a lawsuit to cancel the trademark of Sis Continents Hotels, Inc., the owner of the Holiday Inn and Holiday Inn Resort trademarks, both of which are registered as class 16 marks protecting hotel services. The lawsuit was filed against the owner of the Holiday Resort Lombok trademark, namely PT Lombok Seaside Cottage which is registered in the same class as the Holiday Inn and Holiday Inn Resort trademark.

In this case, the plaintiff disputed the word *Holiday* contained in the Holiday Resort Lombok trademark, according to the owner of the Holiday Inn trademark, the word *Holiday* is an essential part of the trademark owner of the Holiday Inn trademark, the owner of the Holiday Inn trademark argues that the use of these trademarks by the defendant, which contains the word *Holiday* which in word and sound is the same as *Holiday*, which is an essential part of the Holiday Inn trademarks, may give the impression to the general public as if the defendant's trademark and products



Fig. 1 — Holiday Inn Trademark and Holiday Resort Lombok Trademark

came from the plaintiff, or have a close relationship with the plaintiff.

This case was finally decided by the Central Jakarta Commercial Court by rejecting the plaintiff's lawsuit, namely the owner of the Holiday Inn brand with the consideration that:

*"Holiday is a general word, not an individual property and everyone can use it after being associated with other words such as the Petitioner using "Holiday Inn Resorts", the Respondent using Holiday Resorts Lombok". "Holiday" from a foreign language cannot be monopolized and used as a brand; It is true that all common words can be used as trademarks, but words that have become public property that have a special meaning/certain meaning cannot be used as trademarks and cannot be monopolized."*

Holiday Inn party did not satisfy with the decision so they filed an appeal to the Supreme Court, but the Court rejected the appeal on the grounds that:

*"That the reasons for the appeal from the Cassation Petitioner cannot be justified, because the Judex Facti (District Court) was not wrong in applying the law because of the considerations and decision of case No. 41/merek/2010/PN.Niaga.Jkt.Pst has been implemented in accordance with the applicable laws and regulations because the word Holiday is a general word, thus, it is not an individual property and everyone can use it after being associated with other words such as the Petitioner using "Holiday Inn Resorts", Respondent uses "Holiday Resorts Lombok."*

#### *SONY v SONY-ak.com*

The owner of the SONY sued SONY Arianto Kurniawan who is the owner of the website with the domain name SONY-ak.com. SONY considers that SONY Arianto Kurniawan has violated the SONY trademark and registered his domain name in bad faith because it aims to pass off the SONY trademark (Fig. 2).<sup>19</sup> SONY Arianto Kurniawan argued that the



Fig. 2 — SONY Trademark and SONY AK logo in sony-ak.com website

use of the domain name was purely in good faith without any intention to boost the fame of the SONY trademark. The domain name SONY-ak.com is an abbreviation of its name, namely SONY AK: SONY Arianto Kurniawan finally garnered support from internet users in Indonesia.<sup>20</sup> Observers also argue that it is difficult for SONY to win against SONY Arianto Kurniawan.<sup>21</sup> The SONY trademark owner's attorney then sent a cease-and-desist letter as:<sup>22</sup>

*“Our client is aware that SONY Arianto Kurniawan has used the domain name <http://www.sony-ak.com>, which uses the trademark "SONY" for matters relating to networking sites and information technology knowledge centers (internet, network programs, databases, operating systems and knowledge management). The domain name <http://www.sony-ak.com> is visually similar in its entirety and resembles the "SONY" brand. Our client believes that under the Trademark Law, the use of the "SONY" mark constitutes an infringement of the rights to our client's "SONY" brand, SONY CORPORATION. Moreover, the domain name is used by SONY Arianto Kurniawan for services protected in the registration of our client's "SONY" trademark as we have described in the item above.*

*Our client believes that the use of the "SONY" trademark in your domain name and website creates a false impression to the public and gives the public the impression that your domain name or website is the same as our client's domain names, when in fact it is not same. This wrong view, of course, can result in loss to the business and reputation of our clients.*

*Our client, SONY CORPORATION, is very concerned about the possible infringement of its "SONY" trademarks and stands ready to protect their rights in Indonesia and against the reputation of its "SONY" trademarks. Our client, SONY CORPORATION, never hesitates to take legal steps in upholding its brand rights and remains consistent in taking action against any infringement of its trademarks in Indonesia.”*

Then SONY Arianto Kurniawan made defence points regarding the ownership of the domain name Sony-ak.com as:<sup>23</sup>

- *"I registered the domain sony-ak.com because it started with my name "Sony" from Sony, my first name, "-ak" stands for my last name "Arianto Kurniawan".*
- *I have registered the domain since July 28, 2003 ([www.whois.sc/sony-ak.com](http://www.whois.sc/sony-ak.com))*

- *I fill sony-ak.com with my personal writings, because my competence is in IT and my hobby is writing, and I like knowledge sharing, so I write everything about IT in that domain.*
- *I have labelled the sony-ak.com site as Sony AK Knowledge Center because it is my personal knowledge sharing medium with all online readers around the world.*
- *Sony AK Knowledge Center contains the word SONY but Sony AK Knowledge Center is not a trademark.*
- *Sony AK Knowledge Center is not a legal entity and I also have no intention to create a legal entity for the label.*
- *Sony AK Knowledge Center is also not an organization and does not make any profit.*
- *The Sony AK Knowledge Center is also not related to the products of "SONY Corporation" Japan, although in your letter it mentions that the 41st class business (regarding education) may be related to our content, but from the bottom of my heart there is no intention to intentionally "passing off" the name SONY Corporation.*
- *I have not done any promotion since this site was founded in 2003, at most everything starts from the internet and search engines.”*

#### **KOPITIAM v KOK TONG KOPITIAM<sup>24</sup>**

Abdul Alex Soelystio registered a KOPITIAM trademark on 18 October 1996 with trademark registration number IDM00030899 from the Ministry of Law and Human Rights of the Republic of Indonesia. The KOPITIAM brand is characterized by the use of large letters in orange. Then Abdul Alex maintained his trademark rights and challenged another trademarks on 14 March 2005. The defendant was Paimin Halim who registered his coffee shop on 4 December 2006 under the brand name KOK TONG KOPITIAM. Paimin's cafe features the KOK TONG KOPITIAM brand, and the word Kopitiam is the identity that the cafe is a coffee shop (Fig. 3).



Fig. 3 — KOPITIAM and KOK TONG KOPITIAM Trademarks

Abdul Alex Soelystio, as the owner of the KOPITIAM trademark challenged the registration of the KOK TONG KOPITIAM trademark registered by Paimin Halim. Abdul Alex Soelystio then filed a trademark cancellation lawsuit at the Commercial Court against the KOK TONG KOPITIAM trademark on the basis of similarity in principle between KOPITIAM trademark and KOK TONG KOPITIAM trademark.

The dispute between KOPITIAM and KOK TONG KOPITIAM continues to the level of judicial review at the Supreme Court. The Panel of Supreme Court Judges at the judicial review had issued a decision in favour of the KOPITIAM trademark owner based on the following considerations:

*“Whereas in the memorandum of review submitted by Paimin Halim the definition of “KOPITIAM” has been discussed at length. According to the Petitioner (Paimin Halim), the definition of “KOPITIAM” is a “Coffee Shop”. The word KOPITIAM which means “Coffee Shop” is a people’s right that must be protected and cannot be registered as a trademark.*

*Whereas “KOPITIAM” is not a common word, not commonly used in daily conversation, so “KOPITIAM” is not a public property (Article 5 letter c in conjunction with Article 5 letter D of Law No. 15 of 2001);*

*That this is in accordance with the statement of expert Ahmat Hasan, who explained that general words are all words that are commonly used in everyday conversation;*

*Whereas the KOK TONG KOPITIAM mark belonging to the Petitioner for Judicial Review has similarities in principle with the KOPITIAM mark belonging to the Respondent for Judicial Review;*

*Whereas the Petitioner for the Judicial Review has registered the KOK TONG KOPITIAM mark in bad faith, because he wants to ride the success of the KOPITIAM mark belonging to the Respondent for the Review.”*

**GEPREK BENSU v BENSU<sup>25</sup>**

“GEPREK BENSU” trademark is owned by a well-known actor in Indonesia, named Ruben Onsu, while the “Bensu (Bengkel Susu)” trademark is owned by a small businessman named Julius Jessy Handalim. Ruben Onsu's GEPREK BENSU was established on 17 April 2017, while Jessy Handalim's BENSU trademark was registered on 3 September 2015 (Fig. 4). In this case, the owner of the GEPREK

BENSU trademark was suing the owner of the BENSU trademark because there is a similarity with his own trademark. The GEPREK BENSU party argued that Jessy Handalim had registered his trademark in bad faith. The definition of "bad faith" in Law No. 20 of 2016 on Trademarks and Geographical Indications is: "An applicant with bad faith" is an Applicant who is reasonably suspected in registering his mark having the intention to imitate, plagiarize, or follow the mark of another party for the sake of his business, causing conditions of unfair business competition, deceiving, or misleading consumers.<sup>26</sup>

This dispute was finally resolved through the Court. The Court (Case No. 48/PDT.SUS/Merek/2018/PN.Niaga.Jkt.Pst.) decided that Geprek Bensu's claim was rejected because there was an error in the inclusion of the Directorate General of Intellectual Property as a co-defendant, even though it should have been listed as a defendant. Therefore, Geprek Bensu choose to negotiate with Bensu trademark owner to transfer their trademark rights to Ruben Onsu as the owner of BENSU brand which is his famous nickname.<sup>27</sup>

**Preventing and Overcoming Trademark Bullying in Indonesia**

**Cancellation and Trademark Infringement in Indonesia**

There are several factors to be considered to conclude that whether the mark to be registered violates a registered mark. In Indonesia, applications for trademark registration will go through a substantive examination as regulated in Article 23 Law no. 20 of 2016 on Trademarks and Geographical Indications. The substantive examination will check whether the mark to be registered meets the requirements for trademark registration. In Article 21 Law No. 20 of 2016 on Trademarks and Geographical Indications regulates the rejection of applications for trademark registration if the mark has similarities in principle or in whole with: A registered mark



Fig. 4 — GEPREK BENSU and BENSU Trademarks

belonging to another party or previously requested by another party for similar goods and/or services; Well-known marks belonging to other parties for similar goods and/or services; Well-known marks belonging to other parties for goods and/or services of a different kind that meet certain requirements; or Registered Geographical Indications.

To discuss the prevention of trademark bullying in Indonesia, it is necessary to understand the rules regarding filing a lawsuit for cancellation and trademark infringement in Indonesia. The resolution of trademark disputes in Indonesia is based on the similarities between the two trademarks. Two conditions are prohibited in Indonesia, namely, similarity in principle and similarity in entirety.

Basically, the similarity in principle that is regulated in Indonesian Trademark Law is not the same as the likelihood of confusion. This can be seen from the explanation Article 21 Paragraph 1 Law No. 20 of 2016 on Trademarks and Geographical Indications which follows: "Similarity in principle" is the resemblance caused by the presence of a dominant element between one brand and another so that it gives the impression of similarity, whether in form, placement method, writing method or combination of elements, as well as the similarity of speech sound, contained in the trademark.

It can be seen that the element used to determine whether or not there is trademark infringement in Indonesia solely looks for similarities and differences between the two trademarks in dispute. The resolution of trademark disputes usually focuses solely on whether the two trademarks in question are identical or has similarity.<sup>28</sup> If the two marks do not have the similarity in entirety or similarity in principle, the lawsuit for the cancellation of the mark or infringement of the mark will not be granted by the Court. Indonesia also does not regulate trademark dilution. Indonesia only recognizes the protection of well-known marks from the similarity in entirety or similarity in principle of different classes of goods and/or services. The protection is regulated in Article 21 Paragraph 1 Letter c. Law No. 20 of 2016 on Trademarks and Geographical Indications: "Well-known marks belonging to other parties for different goods and/or services that meet certain requirements."

#### **Absence of Descriptive Fair Use Defense in Indonesia and Trademark Bullying**

From the cases that occurred in Indonesia, it can be concluded that the disputes that occur are due to

problems with the use of words that are considered by the Indonesian people as common words, while for the owner of the trademark that common word is part of the trademark that must be protected. Until now, Indonesia has no regulations regarding fair use in its trademark law. This is a weakness and a gap for the trademark bully to monopolize a common word. This can be seen from Holiday Inn's claim that the word *Holiday* is an essential part of its trademark. The KOPITIAM party wants to monopolize the word *KOPITIAM* when it should not be registered as a trademark because it is a descriptive word. The owner of the *SONY* brand who wants to monopolize the word *SONY* by suing all brands using the word *SONY*. The owner of the famous name Ruben Onsu, who is known by the nickname *BENSU*, wants to monopolize the word *BENSU*, hence suing all kinds of brands that contain the word *BENSU*, even though *BENSU* is actually an abbreviation of *Bengkel Susu*.

If these acts of monopoly are allowed to continue, the people will no longer be able to use common words since they would all be registered as trademarks. This is combined with the common bully strategy of intimidating small business owners. Small business owners may choose to give up rather than continue fighting trademark bullies due to ignorance and a lack of sufficient legal support. Therefore, Indonesia should consider regulating the descriptive fair use defense. As a comparison, trademark law in the United States supports a healthy business competition climate by providing protection for the goodwill of the brand owner and also providing protection for competitors or other brand owners to use other party trademarks descriptively.

#### **Shaming Trademark Bullies in Indonesia**

There are a variety of current defence methods instead of pursuing trademark action, including shaming. Shaming is just one of the modern defence tactics companies use instead of pursuing trademark litigation. Most companies use this strategy to inform the public of a bullying company. If the company continues such behavior, it may lose consumer loyalty or disassociation with the brand and, in turn, lose goodwill.<sup>29</sup> The victim of trademark bullying could employ this strategy to inform the public about the bully company. If the corporation continues the bullying, it risks losing consumer loyalty or disassociation from the brand, as well as goodwill.<sup>30</sup>

The advent of internet technology and social media make it is easier to shame bullies. Victims of

trademark bullying can publish on social media about the cease-and-desist letters they receive from trademark bullies. They can create a public conversation that transforms intellectual property owners into “bad guys” simply for enforcing their own rights.<sup>31</sup>

One example of effective shaming was done by Marx Bros in 1945 in the United States. Marx Bros got the idea to promote their latest film *A Night in Casablanca*. They learned that legal department of Warner Bros were trying to find information about their movie. Marx Bros then fabricated a lawsuit from Warner Bros that asked Marx Bros to change the title of the movie. Subsequently, Marx Bros made a letter of defense that contained some of the following: “... You claim you own *Casablanca* and that no one else can use that name without their permission. What about Warner Brothers — do you own that, too? You probably have the right to use the name Warner, but what about Brothers? Professionally, we were brothers long before you were...”<sup>32</sup> Marx Bros. finally gained support from the public because of the publication of the letter in the newspaper.<sup>33</sup>

This method can be said to be quite effective in Indonesia because Indonesians are known for their culture of *gotong royong* (mutual cooperation) and high solidarity. This shaming method was once carried out by blogger Sony Arianto Kurniawan who gathered support in a Facebook group entitled “Sony, Don't Take My Friends' Names!”. Recorded members in the group reached 5,800 people after the cease-and-desist letter submitted by Sony Corp. It doesn't stop there; the community also threatens SONY Corp by making threats of a boycott of SONY trademarked products.<sup>25</sup>

## Conclusion

It can be concluded that trademark bullying has occurred in Indonesia. The elements of trademark bullying are trademark bullies are large companies or multinationals and the victims of trademark bullying are small business actors. The disputed issues are the use of a common word that the trademark owner considers an essential element of his trademark while for victims of trademark bullying, the general word should not be protected by trademark law, therefore the public freely use that common word. To prevent trademark bullying that takes issue with the use of the common word of a brand, Indonesian government must start making regulations on descriptive fair use defense in order to provide legal

certainty and healthy business competition. To be able to overcome trademark bullying, victims can try to shame the trademark bullies that are quite effective and can make trademark bullies rethink in sending cease and desist letter or lawsuit against small business owners.

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