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CRIMINAL LAW ASPECT OF IMPORTING COUNTERFEIT BRANDED FASHION PRODUCTS

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ABSTRACT

World trade is very important for the stability of a country. One of the efforts to meet the needs of a country is by importing product. However, many activities for the import of counterfeit branded product costs a loss to the brand rights owner or brand rights holder and also affect the domestic industry, one of them is in the fashion sector. This research is to provide information regarding the criminal law aspect of importing counterfeit branded fashion products. This type of research was the legal research or normative research through statue approach, conceptual approach, and case analysis. The prohibition criminal law aspect regarding counterfeiting of brand was mainly regulated in the Brand Law precisely in Article 90, and Article 91 of the Brand Law while Article 94 of the Brand Law regulated the prohibition of trade for brand infringement result. Article 90 of Brand Law gave a maximum penalty of imprisonment for 5 (five) years and/ or maximum fine of Rp. 1,000,000,000.00 (one billion rupiah) and Article 91 gave a maximum penalty of imprisonment for 4 (four) years and/ or maximum fine of Rp. 800,000,000.00 (eight hundred million rupiah).

INTRODUCTION

Society lifestyles nowadays is considered to be increasingly consumptive, this is supported by Septiana, (2013) who argues that people around the world always want to meet their needs besides the basic needs of eating or drinking, this behavior is called consumptive behavior. Today it can be said that no country in the world is able to separate itself from other countries, especially in meeting their needs (Arunachalam, 2010 in Nur Linda Sari, 2013). The emergence of various strategies is used to improve the Indonesian economy through domestic and foreign investors (Prihandono, 2014). Auditors or independence are tools for stabilizing state finances (Nasution & Östermark,

2013). One of methods to improve sales tactics is by taking goods from abroad or import activities.

Import value in Indonesia is influenced by foreign exchange reserves or state income, inflation and foreign exchange reserves have a positive and significant effect on import, in contrast to the exchange rate, it has no significant effect on import (Nur Linda Sari, 2013). Import activity is legal activity, thus a lot of original branded goods or products that are obtained directly from abroad, in which all the goods which are produced have good quality, but with that super quality, it is not comparable to the tax price and the sale price obtained when it arrives in the country (Farizky & Satyantini, 2019). Local seller try to buy imported goods whose quality is still good but the brand is not original or counterfeit. Counterfeit imported goods has spread in various regions in Indonesia, the goods which most often counterfeit tis Fashion products. Brands of fashion products are currently experiencing large business competition with competitive quality (Kim & Sullivan, 2019). Foreign brands which are in interest in Indonesia, for example Nike, Adidas, Kickers, and Crocs shoes. Besides fashion products, other products are also prone to be counterfeited.

Based on *Masyarakat Indonesia Anti-Pemalsuan/ MIAP* (Indonesian Anti-Counterfeiting Society) survey in 2014, it was noted that the commodity of clothing, printer ink, leather goods, and software were the most widely circulated counterfeit products in Indonesia. In addition, products that are prone to be counterfeited are automotive spare parts and oil (Kusuma & Vitasari, 2017). Then, there are also other products such as vaccines, medicines, clothing, furniture, and others.

The country with developed economy such as the United States also finds the practice of importing counterfeit products which is similar to Indonesia. In 2013, the US' Customs and Border Protection officer (CBP) confiscated counterfeit Hermes branded bag and two container packages containing more than 1,500 other counterfeit branded bags. The bags which sent from China were confiscated at the port of Long Beach, Los Angeles (Cuvi, 2016).

The legal rule is definitely carried out, within a country there needs to be legal rule to harmonize the economic situation with the legal state (Niyobuhungiro, 2019). Relating to the import activity, Indonesia has enacted the Law Number 10 of 1995 concerning Customs. However, because the Law Number 10 of 1995 is not appropriate with customs administration, then the Law No. 17 of 2006 concerning Amendment to Law Number 10 of 1995 concerning Customs has been established.

The rampant import of counterfeit products in various countries costs a loss to the country and the brand rights holder themselves, therefore that action must be eradicated and cracked down (Gamso, 2019). In conducting legal enforcement relates to the import of counterfeit products, the legal enforcement officials can use more than one laws and regulation to minimize

the loopholes in getting away the cases which relate to the import of counterfeit products (Falk et al., 2013). The purpose of this research is to analyze the import of counterfeit products, especially fashion product that has criminal implications based on the laws and regulations in Indonesia.

RESEARCH METHODS

The type of this research was legal research or normative research. This research referred to the authoritative primary legal materials which meant that they have authority (Lawson & Manning, 2002). The problem approach which used in this research was the statute approach, conceptual approach, and case analysis.

Case analysis was carried out by analyzing the cases that related to legal issues in this research. The case was based on the facts from the incident that occurred in the society today regarding the import of counterfeit products and accountability for the perpetrator of criminal acts. The cases which related to the research were analyzed based on the laws and regulations and the legal concepts (Ayres et al., 2003).

Legal material or sources which used was: the Criminal Code (Criminal Law Code), the Law No. 15 of 2001 concerning Brand, the Law No. 17 of 2006 jo Law No. 10 of 1995 concerning Customs and the Law No. 7 of 2014 concerning Trade.

RESULT AND DISCUSSION

Counterfeiting According to the Criminal Code

Before discussing the import of counterfeit products, it should be known in advance that what was meant by counterfeiting can generally be seen in Article 263 paragraph (1) of the Criminal Code Hulu, (2016), namely:

Anyone who improperly makes or counterfeits a letter that can give rise to rights, commitments or debt cancellation, or which is intended as evidence of something, with the intention to use or order others using the letter as if the content is true and not counterfeited, threatened, if such use can costs losses, due to counterfeiting of the letter, with a maximum imprisonment of six years.

It was regulated in Article 263 of the Criminal Code relating to counterfeiting letters. Counterfeit concept that could be taken from Article 263 of the Criminal Code was "improperly making", in which the activity could give rise to rights, commitment or debt cancellation, or which was intended as the evidence of something. Therefore, counterfeit essentially was making something improperly that could give rise to rights, commitment or debt cancellation, or which was intended as the evidence of something, with the intention of influencing and engaging the others to use it as if the contents was true and not counterfeited.

Prohibition of Importing Counterfeit Branded Fashion Products According to the Law

According to Article 1 number 1 of Law No. 15 of 2001 S Sitorus, (2014) concerning brand, brand was a sign in the form of image, name, word, letters, numbers, color arrangement, or combination of these elements which had distinguishing features and were used in trading activity of goods or services. Brand could be seen as the identity of the producer and service provider because the brand whose they made was an identification sign of the products or services which offered and known by the user (Asnawi et al., 2018). Brand was a legal definition that provided protection and remedies if a trademark was used by a party that did not have the authority to do so.

Based on the type of trade, brand was generally divided into two, namely trademark and service mark. Article 1 number (2) of Law Number 15 of 2001 concerning Brand explained that the meaning of trademark was a brand used on goods which traded by someone or some people jointly or the legal entity to differentiate from the other similar goods. Whereas the meaning of service mark could be found in Article 1 number (3) of Law Number 15 of 2001 S Sitorus, (2014) concerning service mark, that was, a brand used on services which traded by someone or some people jointly or the legal entity to differentiate from the other similar services.

The Law Number 15 of 2001 concerning Brand has been adapted from the WTO Agreement, especially TRIPs, because Indonesia has ratified TRIPs with the Law Number 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization and was obliged to regulate itself regarding the brand on Indonesian national law (Agreement, 2006). Besides the common brands, there was also known the term well-known brand. Well-known brand was adapted from TRIPs in Article 16.3 which regulated that:

Article 6 bis of the Paris Convention (1967) shall apply, mutatis mutandis, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

The regulation of well-known brand in the national law could be found in Article 37 paragraph (2) of Law No. 15 of 2001 concerning Brand. In this article, it was explained that the application for registration would be rejected if the brand being applied was similar to someone else's well-known brand. The measurement for the well-known brand itself according to the explanation in Article 6 paragraph (1) letter b of Law No. 15 of 2001 concerning Brand with due regard to the society regarding the brand in the relevant business fields.

The goods import was one of the trade mechanisms of Richardson, (2002) which provided a source of state income because every goods that entered

Indonesia must pay import duty, but this did not mean that every imported goods could enter Indonesia, there were the prohibition and restriction of goods that imported from Indonesia. Those which meant as the prohibition and/ or restriction of goods based on Article 1 number 1 of the Regulation of the Finance Minister Number 161/PMK.04/2007 concerning the Supervision towards the Import or Export of Prohibited and/ or Restricted Goods was a goods that prohibited and/ or restricted its importation and exportation into and from the customs areas.

The Regulation of the Finance Minister No. 224/PMK.04/2015 (Keuangan, (2015)) concerning the Supervision towards the Import and Export of Prohibited and/ or Restricted Goods, explained that the prohibited and/ or restricted import or export goods was a types of goods listed in the regulation concerning the prohibition and/ or restriction of import and/ or export, which was conveyed by technical agencies to the Minister in order to carrying out supervision by the Directorate General of Customs and Excise. This meaning replaced the old one in Article 1 number (1) of the Regulation of Finance Minister No. 161/PMK.04/2007 concerning the Supervision towards Import or Export of Prohibited and/ or Restricted Goods as the Government Regulation was revoked and replaced with Regulation of the Finance Minister Number 224/PMK.04/2015. However, in the Regulation of Finance Minister No. 224/PMK.04/2015 did not mention what types of goods was prohibited and/ or restricted. This Regulation of the Finance Minister formed a portal called the National Single Window which functioned as a provider of information regarding prohibited and/ or restricted import or export goods.

The act of importing counterfeit branded fashion products as a complaint offense

The complaint offense was divided into two namely, the absolute complaint offense and the relative offense complaint. Absolute complaint offense was an offense (criminal act) which could always only be prosecuted if there was a complaint, for example Article 284, 287, 293, 310 of the Criminal Code and others. While relative complaint offense was an offense (criminal act) which in normal circumstances was not a complaint offense, but only if it was carried out by certain relatives, as in Article 367 of the Criminal Code (Eliya, 2013).

A complaint offense In Articles of brand infringement is included in the form of absolute complaint offense because it has been clearly promulgated in Article 95 of the Brand Law, so that the requirement that there was parties who complain before the criminal act is applied to the perpetrators must be fulfilled. A complaint offense was regulated in Article 72-Article 75 Chapter VII of Book I of the Criminal Code. If related to the import of goods, then those which relevant to this matter was Article 74 paragraph (1) of the criminal code, Saputro, (2016) as follows: Complaints can only be submitted within six months since from the person who has the right to complain and was aware of a crime, if residing in Indonesia, or within nine months if residing outside Indonesia.

Within the Brand Law did not regulate regarding the further provisions of complaint offenses Article 90, 91, 94 of the Brand Law. Based on Article 72 of the Criminal Code which reads:

- (1) As long as the person affected by a crime may only be prosecuted for a complaint, and that person is not yet sixteen years old and was not an adult, or as long as he was under the custody caused by something other than waste, therefore the legal representative in the case of civil law has a right to complain;
- (2) If there was no representative, or the representative himself must be complained, therefore the prosecution is carried out on the complaint of the guardian of the supervisor or supervisor, or the assembly that becomes the guardian of supervisor or supervisor; and also could be possible be complained by his wife or a family in a straight line, or if there was no one, in the family that complaints in a line to a third generation.

If it was related to the import of counterfeit branded products, the party that can make the complaint was the party affected by the criminal act, therefore individuals or parties who are part of a corporation that has copy rights or the one who holds the rights to the counterfeited brand.

Importer of counterfeit branded fashion products

The import of counterfeit branded fashion products is prohibited based on Article 380 paragraph (1) of the Criminal Code. The subject or perpetrator of the act is formulated in the formulation of Article 380 of the Criminal Code Churairah, Siregar, & Siregar, (2017) as "whosoever". In the formulation of laws and regulations as today the formulation of whoever was equated has the meaning of everyone. The Criminal Code did not admitted the legal entity as perpetrators, so perpetrators are individual who has an age that can be responsible and did not have an excuse for forgiveness. The intentional element was drawn from the phrase "on purpose". Criminal acts in this article are procedures or ways or efforts used to fulfill the objectives achieved.

In Article 380 paragraph (1) of the Criminal Code the methods used may be in the form of selling, delivering, offering, providing and importing counterfeit goods. These methods have the same goal thus to make others to believe that the goods was the original goods from the counterfeit goods. So that the criminal act in Article 380 paragraph (1) of the KUHP was intentionally selling handicrafts (one of the form was a fashion product) which the top has been given a counterfeit name or brand that has been placed.

Criminal Sanction

If it was known that the importer imported counterfeit products and counterfeiting the customs documents related to the import activity, then based on the Article 65, Article 66 of the Criminal Code that concurs us realist has

occurred. The main criminal threats to Article 90 and/ or Article 91 of Law no. 15 of 2001 concerning brand in the form of imprisonment for a maximum of 5 (five) years and/ or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah). While the threat of criminal Article 103 of the Customs Law in the form of imprisonment for a minimum of 2 (two) years and a maximum imprisonment of 8 (eight) years and/ or a fine of at least Rp 100,000,000.00 (one hundred million rupiah) and a maximum of Rp 5,000,000,000.00 (five billion rupiah).

Both of these criminal acts were carried out at different places and times and were considered as an individual act, then Article 65 paragraph (1) of the Criminal Code applied as: In the case of concursus realium in some acts that must be viewed as acts that are independent of each other, thus it became a number of crimes, which was threatened with the same main crimes, then only one criminal sanction was imposed. Thus, each action was a criminal act and two different acts, but the main criminal is the maximum number of crimes that was threatened against that act, but may not be more than the maximum of the heaviest criminal which is plus one third.

CONCLUSION

This research concluded that there were four laws and regulations including the Criminal Code, the Law No. 15 of 2001 concerning Brand, the Law No. 17 of 2006 jo Law No. 10 of 1995 concerning Customs, the Law No. 7 of 2014 concerning Trade which was used as a basis for analysis. Regulation relating to the import of counterfeit fashion products was regulated in the Criminal Code in Article 380 paragraph (1) of the 2nd Criminal Code. The regulation concerning the Prohibition of Counterfeiting Brand was regulated in Article 90 and Article 91 of Law No. 15 of 2001 concerning Brand, while the trade of counterfeit products that came from the violation results in Article 90 and/ or Article 91 was regulated in Article 94 of Law No. 15 of 2001 concerning Brand. Regulation relating to the import of counterfeit branded fashion products has not been regulated in the Law No. 17 of 2006 jo Law No. 10 of 1995 concerning Customs.

The regulation of the customs law was limited to the administration of document and notice, fee and procedure. The authenticity of imported products has not been regulated in the Customs Law. According to the Regulation of the Finance Minister No. 224/PMK.04/2015 concerning Supervision towards Import and Export of Prohibited Goods and/ or Restriction as a further regulation of goods that were prohibited from being imported in Article 51 Paragraph (2) of Law No. 7 of 2014 concerning Trade, products that came from brand violation result were not included in prohibited or restricted goods from being imported.

Criminal liability for importer of counterfeit fashion products based on the Article 90 of the Brand Law was imposed with a maximum penalty of imprisonment for 5 (five) years and/ or maximum fine of Rp. 1,000,000,000.00 (one billion rupiah) and Article 91 with a maximum penalty

of imprisonment for 4 (four) years and/ or maximum fine of Rp. 800,000,000.00 (eight hundred million rupiah).

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