

PUBLIC DOMAIN AS INDONESIA'S TRADEMARK LAW IN THE UTILITARIAN'S PERSPECTIVE

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Abstract: Indonesia's Intellectual property rights encompass trademarks' protection, copyrights, patents, geographical indications, industrial designs, circuit layout designs, and trade secrets, including aqua, the botol, and ecoprint, which use generic words and non-distinctiveness and disturb public order. Ecoprint became a public domain in 2001. However, it was approved as a trademark of products by the DGIPR in 2019 and protected by the law, allowing it to reap the economic benefits. The research problem is: How is the public domain of ecoprint used by trademarks being reviewed in positive Indonesian law from the perspective of utilitarian theory? The research uses a normative descriptive method with a conceptual approach and a comparative approach from secondary data, primary and secondary legal materials, and is analyzed using Jeremy Bentham's theory of utility, "the greatest happiness from the greatest number, namely through the provision of livelihood, abundance, security, and equality." The results indicate that Indonesian law does not explicitly manage the public domain as an intellectual property right that provides direct benefits to the community. The public domain becomes a trademark, creating incentives only for trademark owners instead of the community. IPR should cover the public domain to ensure incentives that benefit the wider welfare, including MSMEs.

Keywords: Public, Domain, Trademark, Ecoprint, Utilitarian.

INTRODUCTION

Intellectual property rights (IPRs) are intangible assets over which the owner holds temporary exclusive rights for a specified length of time. IPR occurs when someone conveys their ideas in the form of tangible or intangible works, yet it is an intangible right (Moore, 2019). IPR's exclusive rights are intimately tied to a country's economic growth in which IPR protection is a benchmark in the investment climate. Therefore, while IPRs can be a powerful tool for economic growth, especially in the micro sector, they require careful management and strategic planning to fully realize their potential benefits. (Farah Widyanti, 2022) The importance of this research is in the use of trademark rights that do not infringe on the public domain, as the public domain is not regulated in Indonesian law, which could be harmful to society. In this study, the author examines the significance of the public domain in relation to trademarks rights, as several trademarks' rights, such as the ecoprint public domain and the ecoprint trademarks rights issued by the Director General of Intellectual Property Rights of Indonesia (DGIPR) for the ecoprint trademark, rely on it. Although eco-print is well-known, the term "eco" is used to refer to products that are ecologically beneficial. An ecoprint has been in the public domain since its inception in 2001.

India Flint, renowned for her innovative work in textile art, has made significant contributions to the field of natural dyeing with her development of the Ecoprint technique. Her approach involves the use of organic materials such as eucalyptus leaves, which are known for their dye-producing properties when boiled. Flint's experimentation extends to various natural elements, including silk cloth, Lavivia eggs, kitchen spices, and onion skins, which she skillfully bundles to create unique patterns and hues on fabric. This sustainable method not only reflects Flint's deep respect for the environment but also her commitment to integrating nature's palette into the realm of art. Her teachings at the South Australian School of Art have inspired a new generation of artists and designers to embrace ecologically responsible practices in their creative endeavors. Flint's work stands as a testament to the beauty and versatility of natural dyes, encouraging a harmonious relationship between art and the natural world. The decision to include experimental results in a postgraduate

research thesis rather than patenting them can have significant implications. In the case of India Flint, who is renowned for her work with ecoprints, this choice allowed her innovative techniques to become part of the public domain, making them accessible to artists and designers worldwide. By outlining her methods in her books, "Second Skin" and "Eco Color," and teaching them globally, Flint has had a profound impact on the field of natural dyes and sustainable art practices. Her approach exemplifies a commitment to sharing knowledge and fostering a community of practice that can benefit from open access to creative methodologies. This ethos aligns with the principles of many artistic communities that value collaboration and the free exchange of ideas over exclusivity (India, 2001).

The ecoprint technique was established in Indonesia in 2016, and it is now extensively adopted in many regions, one of which is to boost people's alternative income, allowing them to protect the environment in a sustainable manner while also ensuring that ecoprint materials remain available. Currently, many parties, including small and medium-sized businesses, employ this process to create fabric themes from natural dye raw materials. One example is the Pam Islands in Raja Ampat, which uses leaves, roots, and mangrove fruit as dyes and ecoprint processes to create cloth designs. (Konservasi Indonesia, 2022) Furthermore, there are entrepreneurs and craftsmen like Edita Rianti (Mutiara, 2022), Pintya Dwanita, Ayu Prateshi (Kiki, 2020), Siti Khufah (Dewi, 2023), Narsih Setiawan (Agus, 2019) dan Alfira Oktaviani (Zainal, 2023) as well as other local industries that utilize ecoprint techniques in Indonesia.

However, ecoprint word is used by two trademarks. One is an additive dye company that labels its products with the ecoprint trademark at the Director General of Intellectual Property Rights. Trademark rights are registered under registration number IDM000847890 first class 2019 with a list of chemical additives used in the manufacture of fabrics and textiles: stain prevention chemicals; textile brightening chemicals; color brightening chemicals for industrial purposes; textile impregnating chemicals; chemicals for the textile and fabric industry; waterproofing textiles; and coating textiles, fur, leather, and non-textile fabrics. IDM000847858 is classified as second-class fabric paint, fabric dye, garment dye, shoe dye, sepuan (dye), and textile dye. And the other is still in the process of applying for the ecoprint trademarks with application number DID2023118121 class 16 for printed material products that can be read by machines. At first glance, the appearance of the logo is different, but it uses the same word ecoprint, where the word is public domain. (DJKI, n.d.)

Intellectual property rights consist of seven types, namely copyright, trademark rights, patent rights, industrial designs, geographical indications, trade secrets, and integrated circuit layout designs, where the seven types of intellectual property rights have different functions and protections. Of the seven copyrights, this does not include protection for the public domain. Public domain is a work or product that is not protected by intellectual property rights (Razi, 2017) The theoretical framework employed is Jeremy Bentham's utilitarian theory. According to utilitarians, the primary goal of intellectual property rights is to maximize general welfare, which is defined as Benefits the greatest number of persons in a community and characterizes the principle of utility as bringing an object of creation to the greatest satisfaction and happiness at a particular period in a given civilization. Then, John Stuart Mill pointed out that utilitarianism is social welfare, which is described in universal intellectual property policies through incentive theory, agreeing on society's obligation to do what is referred to as good for the greatest number of individuals in a population to achieve the greatest good for the greatest number. (Paul, 2021)

Previous publications that explored the public domain differed slightly from trademark rights. In the public domain, Anshari Labetubun in his research entitled In the Dispute Settlement of Cancellation of Industrial Design Rights, public domain comes from industrial designs that are not registered and have passed the protection period, in industrial design products that do not have significant differences in form and aesthetic impression. (Labetubun, 2019) In the realm of book publication, the concept of the public domain is crucial as it comprises works that are no longer under copyright protection and are freely available for use by the public. Publishers can indeed release editions of public domain books and obtain copyright protection for those specific editions, provided they add new material or creative elements, such as annotations, illustrations, or introductions. However, it is essential to respect moral rights, which are a set of rights that protect the personal and reputational aspects of a work for the author. Even when a work falls into the public domain, moral rights, such as the right to attribution and the right to object to derogatory treatment of the work, may still be enforced where they are recognized by law. This ensures that the original authors' contributions are acknowledged, and their reputations are not tarnished by subsequent uses of their work. (Putra, 2020)

The issue of trademark similarity poses significant challenges in the realm of trademark rights, as highlighted by Wahyu Prabowo et al., It is a complex matter that can lead to confusion among consumers and potential infringement on intellectual property rights. To address these challenges, a collaborative approach involving both government law enforcement agencies and the public is essential. Such cooperation is aimed at establishing legal certainty and ensuring that trademark rights are respected and enforced in a

manner consistent with the principles laid out in the Indonesian constitution. This not only protects the rights of trademark owners but also upholds the integrity of the market and consumer interests. Establishing clear and effective trademark laws, alongside public education about intellectual property rights, can significantly contribute to resolving issues related to trademark similarities (Prabowo et al., 2023). Trademark registration is a critical step for trademark owners to safeguard their intellectual property and ensure their trademark's integrity. By officially registering a trademark, owners gain legal backing to prevent unauthorized use of their trademark by others. The research underscores the necessity for governments to fortify the legal framework governing trademarks, enhancing the registration process's efficiency. This not only benefits trademark owners but also bolsters consumer trust and market stability. Furthermore, public awareness about the significance of trademark registration is essential, as it contributes to a broader understanding of intellectual property rights and their role in protecting innovation and business identity. Ultimately, a robust trademark system supports a fair and competitive business environment, fostering economic growth and innovation. (Surahman et al., 2023) The transfer of trademark rights is indeed a significant aspect of the modern economic landscape. Trademarks, which serve as a unique identifier for goods and services, play a crucial role in trademarks and marketing strategies. However, the legal transfer of these rights is contingent upon the trademarks being registered and recognized by law. Without this legal protection, the rights associated with a trademark cannot be exclusively owned or transferred, as they are not yet deemed to have the distinctiveness or association with a particular source that trademark law requires. This is in line with the principles of the Civil Code, which typically stipulates that only rights that are legally recognized and delineated can be subject to agreements such as transfers or licenses. Therefore, for a trademark transfer to be valid and enforceable, it must comply with the relevant trademark laws and registration procedures that confer the exclusive rights to use and transfer the trademark in question. (Alfii et al., 2023) The protection of trademark rights is indeed a critical aspect for businesses of all sizes. It's not just large corporations that benefit from trademark protection; small and medium-sized enterprises (MSMEs) also have much to gain from understanding and utilizing intellectual property laws to safeguard their trademarks. The creative economy thrives on the unique expression of ideas, which are often encapsulated in a trademark. However, as highlighted by Uli W Nuryanto's research, there is a noticeable gap in IP law literacy among owners, which can hinder their ability to protect their business interests effectively. Raising awareness and increasing knowledge in this area can lead to significant benefits, such as better management of legal entities and a stronger position in the market. It's essential for business entities to recognize the value of trademarks rights and the power they hold in ensuring business longevity and success. (Nuryanto et al., 2023) Pancasila, as the foundational philosophy of Indonesia, emphasizes the importance of social justice and the common good. The concept of the public domain is indeed significant in this context, as it pertains to assets and cultural elements that are accessible to all citizens without the restriction of individual ownership. While Pancasila does not explicitly regulate the public domain, its principles guide the creation of laws and policies that aim to balance individual rights with the collective interests of the Indonesian people. The Pancasila Ideological Development Agency plays a crucial role in ensuring that regulations are harmonized with Pancasila's values, promoting social inclusion, and the institutionalization of these principles. Moreover, the Constitutional Court of Indonesia has the responsibility to align legal developments with the ideology of Pancasila, ensuring that the nation's laws reflect its core values of democracy, unity, and social justice (Arthur Novy, 2016).

In the context of Indonesian Positive Law, the public domain elements in trademarks are governed by Law No. 20 of 2016 concerning Trademarks and Geographical Indications, which stipulates that trademark rights are protected as intellectual property. Once the protection period ends, these rights become part of the public domain. Additionally, from the description of the theoretical framework and research that has been made, this research determines the problem formulation as: what are the public domain elements of ecoprint in trademark according to Indonesian Positive Law and the utilitarian perspective for MSMEs?

RESEARCH METHOD

The study employs a legal analysis. By utilizing a descriptive normative research method, it systematically examines legal norms and principles. The incorporation of both primary and secondary data enriches the research, allowing for a robust examination of legal documents, statutes, and case law. The use of tertiary legal summaries further supports the study by providing synthesized legal insights. Analyzing these elements through legal theory with a conceptual and comparative perspective enables the study to not only understand the legal framework in its current state but also to compare it across different jurisdictions or time periods, potentially offering a broader understanding of the legal landscape.

RESULT AND DISCUSSION

In the book Intellectual Property Rights and Climate Change interprets TRIPS agreement for Environmental Sound Technologies is interpreted as "the rights given to people by the creation of their minds." These usually grant the artist exclusive permission to use his or her creation for a set period of time." The results of human creativity are evidence of the development of human civilization, which has become known as intellectual property rights because, at the same time, it can be used commercially by the owner of intellectual property rights in the form of compensation for his innovative work. (Zhuang, 2017) Commercial or economic factors that are causing problems with intellectual property are becoming more prevalent not only in Indonesia but also around the world. The Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyrights Convention, the Trademark Law Treaty, and the establishment of the World Intellectual Property Organization (WIPO) under the United Nations that protects intellectual property, as well as the World Trade Organization (WTO) that encompasses trade related to intellectual property, and the Berne Convention. TRIPs also adapt the Rome Convention and the WIPO Treaty to the current situation, and TRIPs ensure comprehensive HKI protection, which must be certified by WTO members. Indonesia was ratified by Law No. 7 of 1994 on the Establishment of the Indonesian Trade Organization.

IPR in Indonesia places a greater emphasis on individual legal protection, which has a longer duration and occurs on a specific territory, even though IPR focuses on the principles of intellectual property, which are: 1) the principle of fairness, in which the principal holder has the right to a fair trial. 2) the economic principle of royalty or technical fees for themselves and their heirs; 3) the cultural principle of intellectual freedom that can lead to new ideas or new ways of thinking; 4) the social principle that the rights granted to individuals would improve the well-being of society. (Fatimatul, 2022)

A. Trademark and Public Domain

A trademark is a symbol that can be used to promote goods and services created by an individual legal or business entity. Indonesia has approved TRIPS in the areas of intellectual property, copyright, patents, geographical indications, industrial design, trade secrets design, and integrated circuit layout design. Patent rights are granted to creators in the field of technology (Undang-Undang Nomor 13 Tahun 2016 Tentang Paten, Lembaran Negara NO.176 Tahun 2016, Tambahan Lembaran Negara NO.5922, 2016), Copyright is granted to creators in the field of art (Undang-Undang Republik Indonesia Nomor 28 Tahun 2014 Tentang Hak Cipta Pasal, Lembaran Negara Nomor 266 Tahun 2014, Tambahan Lembaran Negara Republik Indonesia Nomor 5599, 2014), trademark rights are granted to goods or services that have distinctive value; Geographical indications show quality goods from certain areas which are determined by geographical location, natural and human factors (Undang-Undang Republik Indonesia Nomor 20 Tahun 2016 Tentang Merek Dan Indikasi Geografis, Lembaran Negara Nomor 252 Tahun 2016, 2016), Industrial design is given to the shape, configuration, or composition of lines, colors, or a combination of lines and colors that gives an aesthetic impression. It also forms three- or two-dimensional patterns and can be used in making products, goods, industrial commodities or handicrafts (Undang-Undang Nomor 31 Tahun 2000 Tentang Desain Industri, Lembaran Negara No. 243 Tahun 2000, Tamahan Lembaran Negara No. 4045, 2000), Integrated Circuit Layout Design is given to three-dimensional design patterns in the manufacture of integrated circuits (Undang-Undang Nomor 32 Tahun 2000 Tentang Desain Tata Letak Sirkuit Terpadu, Lembaran Negara No. 244 Tahun 2000, 2000).

There are several international conventions related to trademarks, such as the Paris Convention (Paris Convention for the Protection of Industrial Property), which has four main principles, namely: a) Open Agreement Principle: allows any country to join or leave the convention without requiring approval from other countries. b) Principle of National Treatment: requires member countries to provide equal treatment to foreign and local owners of industrial property rights (IPR). c) Principle of Priority Rights: gives priority rights to IPR applicants who first register an IPR application in their country and then, within the country, other members within a certain period of time. d) Principle of Voluntary Dispute Resolution: stipulates that disputes between member states regarding the interpretation or application of the convention can be resolved through negotiations, arbitration, or international. (Paris Convention for the Protection of Industrial Property, 2013)

The World Intellectual Property Organization (WIPO) was established following the Paris and Berne conventions. According to the WIPO, IPR is the result of human creativity, which includes the creation of new symbols, names, and graphics for use in commerce. WIPO's aim is to promote the development of an effective international human rights system that allows for new innovation and creativity through collaboration with other international organizations. Furthermore, WIPO promotes administrative collaboration among IPR agencies. WIPO is an international agency that regulates and protects IPR. WIPO has several main tasks, including a) guiding the organization in discussing and forming rules related to IPR

at the international level. b) Providing facilities and services for people around the world who want to register and protect their IPR in various countries. c) Resolving various cross-border IPR disputes. d) Help connect IPR systems through uniform standards and infrastructure. e) Maintain a general reference database on all IPR matters. f) Provide reports on the status of IPR protection or innovation globally and nationally in the country concerned. g) In general, IPR and WIPO play an important role in protecting the rights and interests of creators, as well as encouraging innovation and creativity in various fields. (Trademark Law Treaty, 1994)

Moreover, the WIPO also regulates trademark rights where there is a treaty that discusses trademarks. Which is aimed at helping consumers identify certain goods or services. According to the WIPO, a trademark is a combination of words, letters, numbers, images, symbols, three-dimensional features, sounds, fragrances, or color patterns that are used as distinguishing features in the case of trademark registration, which is intended to obtain legal certainty and the position of the right holder. Trademark protection is usually valid for 10 years and can be extended, and the Madrid Protocol allows trademark holders to obtain trademark protection throughout the world through a friendlier, easier, faster, and more economical system by registering the mark in 4 WIPO member countries to obtain protection throughout the world. The advantage of this protocol is that it can save costs on trademark registration applications, make it easier for trademarks in their country of origin to compete internationally, and gain recognition of the trademarks' ownership. (Besar, 2022)

Another convention that regulates trademark or trademark rights, namely Trade-Related to Intellectual Property Rights (TRIPs), in Article 15(1) TRIPs stipulates that “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark.” additionally “are devoid of any distinctive character or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed.” The description signs that do not have the distinctive characteristics necessary to identify the commercial origin of goods and services on the market do not qualify for protection. Non-distinctive, descriptive, and generic signs are not required to be accepted for registration and protection under the international regulations of *telle quelle protection*. Many national trademark systems incorporate this restriction into the absolute reasons for rejection. A mark is not distinctive enough to function as a trademark. The mark is unable to differentiate goods or services from one company from those of another company. The same applies to descriptive and general signals, which customers are unlikely to understand as evidence of commercial origin. From a normative standpoint, indicators expressing product attributes should be accessible to all companies engaging with the product. Similarly, generic signs that are commonly used to indicate goods or services in the present language must be readily available to other users and the general public. It is important to be descriptive and generic. Trademark law fulfills this need by leaving non-distinctive, descriptive, and generic signs unaffected as long as they are not capable of functioning as identifiers of commercial sources in trade. So the provisions of TRIPs that regulate the basic rules for trademarks are: (1) trademarks have differentiating power to prevent consumer confusion; (2) service or service marks must be protected in the same way as marks that differentiate goods; (3) there are limited exceptions to the rights granted by trademark rights by taking into account the legitimate interests of the trademark rights owner and third parties; (4) time period protection must not be less than seven years and can be extended indefinitely; (5) cancellation of an unused mark can be carried out if it has not been used for a period of three consecutive years or there is a valid reason due to obstacles to the use of the mark. TRIPs give member countries the authority to incorporate the rules of the TRIPs agreement into national laws in order to provide better protection of intellectual property rights. (Pepy, 2022)

The Trademark Law Treaty (TLT) was established in 1996 with the goal of (1) improving and standardizing the process of registering trademarks at the regional and national levels. This is accomplished by enhancing and incorporating several features of the process. It can be achieved by enhancing and incorporating some of the features of the procedure with applications for easier and more accessible in a variety of jurisdictions and harmonizing administrative procedures within a country's national legal system. (2) TLT determines the duration of the restriction of access to the internet and the implementation of national regulations for document authentication and verification, as well as signature on the basis of correspondence and access to the internet, because in some countries, signature on the internet is required in accordance with the laws of the country. With the implementation of TLT, this criterion is no longer necessary. So that trademark owners can complete and file trademark documents more quickly and affordably. (3) TLT renews member countries' trademark registration requirements, with trademark rights protection lasting ten years and renewable for an additional ten years. In essence, TLT serves to facilitate international trade. Indonesia has ratified a number of additional international intellectual property agreements. As a result, the Trademark Law

in Indonesia must be modified to comply with approved international accords, such as the Trademark Law Treaty or the Paris Convention for the Protection of Industrial Property. (Trademark Law Treaty, 1994)

Marks that do not have inherently distinctive properties may acquire the capacity to differentiate goods or services as a result of their use in commerce. Marks that are not distinctive, descriptive, or generic may become trademarks and be removed from the public domain. (Zhuang, 2017) The Indonesian Trademark Law specifies that trademarks can be registered in the form of images, logos, names, words, letters, numbers, color arrangements, sounds, and holograms that separate the product or goods sold from other goods or distinctiveness. This trademark law aims to protect both the local and national economies. There is no official definition regarding the concept of public domain in the trademark system. One approach is based on the legal status of public domain material, which requires that it be free of intellectual property rights. This approach emphasizes the possibility of trademarks being exploited to re-monopolize material for which other intellectual property rights have expired. In contrast, a definition of the public domain that emphasizes freedom of use enables the evolution of a broader idea of the public domain. The concern is whether the material can be freely utilized, rather than whether it is free of all trademark rights. With this more flexible approach, public domain work does not need to be fully free of trademark rights. The public domain also contains user liberties, which persist even after trademark protection is granted. This method allows us to analyze the many constraints imposed on trademark rights, including intrinsic limitations caused by limiting protection to use in commerce and use as a mark, as well as limitations caused by the adoption of exceptions. Legal and freedom-based definitions. (Senftleben, 2013)

According to the legal definition, creative works that are not protected by intellectual property rights due to its cannot be owned or used by anyone for commercial purposes, or intellectual rights that have expired or the protection period has expired, become public domain. In Indonesian law, a trademark is an intellectual property right dominated by individuals (individuals or corporate entities). Trademark rights can be prolonged indefinitely as long as the trademark is utilized and renewed on a regular basis, ensuring that trademark protection lasts forever as long as it fits the legal standards. Trademark protection can be prolonged as long as the trademark is utilized and refreshed on a regular basis, allowing it to remain forever. However, additional requirements and conditions must be completed before a trademark can be registered. (Undang-Undang Republik Indonesia Nomor 20 Tahun 2016 Tentang Merek Dan Indikasi Geografis, Lembaran Negara Nomor 252 Tahun 2016, 2016)

In the field of intellectual property, the public domain has several roles, including functioning as a basis for the creation of new knowledge or creations, enabling competitive imitation, enabling continued innovation, enabling low-cost access to information, gaining access to cultural heritage, promoting education, improving public health and safety, and promoting democratic processes and values. (Severine, 2010)

Refer to UNESCO, Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace: Publicly accessible information, the use of which does not infringe any legal right or any obligation of confidentiality. It thus refers, on the one hand, to the realm of all works or objects of related rights that can be exploited by everybody without any authorization, for instance because protection is not granted under national or international law or because of the expiration of the term of protection. On the other hand, it refers to public data and official information produced and voluntarily made available by governments or international organizations. It can be regarded as publicly accessible information, meaning material that anybody can access without breaching legal rights or confidentiality obligations. This consists of two major aspects: 1) Works or objects having related rights that can be used by anybody without permission. This can occur when protection is not guaranteed by national or international law or when the protection period has expired. 2) Governments or international organizations create and provide public data and official information on their own initiative. In summary, the public domain contains works that are no longer copyrighted, and information made available by public bodies for wide public use. Basically, the public domain can be understood to include, in the context of trademarks, all signs that are not protected as trademarks, and all forms of use of protected signs that are outside the scope of the exclusive rights of the trademark owner. (Paul F, Uhlir United Nations Educational, 2012)

One of the most important requirements for trademark registration is "distinctiveness" or differentiating power. Article 15(1) TRIPs. This is necessary to prevent consumer confusion between one trademark and another. Furthermore, under Article 18 TRIPs, trademarks continue to be protected if the trademarks owner re-registers them for seven years and without a time restriction. Non-distinctive, descriptive, and generic marks are not eligible for registration under Article 6A of the Paris Convention. Such marks cannot be issued if they lack a distinguishing characteristic or contain descriptive and generic elements. Meanwhile, public domain refers to something that is generally known and owned by the wider community. Therefore, the use of elements from the public domain is usually not in accordance with the requirements for trademark registration because they do not meet the distinctiveness criteria. In other words, a trademark must be unique and distinguishable from other marks to be registered and receive legal protection.

The instrument for preserving the public domain is first, limitations on inherent exclusive rights which may result in the trademark owner being unable to exercise control over use for personal, religious, cultural, educational, or political purposes; second, limited exceptions that can be applied to exclude certain forms of use from the control of the trademark owner. (Senftleben, 2013) Trademarks can take the shape of symbols, words, names, designs, sounds, or colors that can be used to define or identify a product, such as the Intel trademark, which utilizes a distinctive sound, or Apple, which uses a bitten apple design, among others. Without realizing it, the public domain is important for society. In the case of the ecoprint public domain, it turns out that it is used for ecoprint trademark rights, which will be reviewed under Indonesian positive law, which is linked to the theory of utilitarianism for MSMEs that benefit from the ecoprint coloring technique.

B. Public Domain as A Trademark

Trademarks are associated with a product's identity; trademarks seek to shield consumers from fraud caused by counterfeit items or products, which can affect the trademark owner monetarily and reputationally, as well as consumers. Currently, there are various trademarks in Indonesia that use the public domain, even though using the public domain in a trademark makes the trademark non-distinctive; therefore, they should not be granted IPR. (Litman, 1990) Trademarks are obtained if they do not have equivalent elements: all signs that are generally excluded from trademark protection (absolute exclusion); all signs that do not meet the basic protection requirements of distinctiveness (relative exclusion); all forms of use that cannot be controlled by the trademarks owner due to limitations inherent in exclusive rights (relative freedom of use); and any form of use that cannot be controlled by the trademark owner due to the application of limited exceptions (absolute freedom of use). However, currently, many trademarks are in the public domain, such as the Es Teh Indonesia trademark, (Wahyu, 2021) *aqua*, *teh botol* (bottled tea), *teh kotak* (tea in a box), *teh gelas* (glass of tea), *supermie* (super noodle) and also ecoprint (DJKI, n.d.). Meanwhile, public domain cases used by trademarks in Europe include the use of the Mona Lisa and Nightwatch paintings as trademarks for tobacco and chemicals. (Senftleben, 2022)

Es Teh Indonesia is public domain; iced tea is commonly known by the public as steeping tea leaves and then adding ice; the combination of public domain words does not make *Es Teh Indonesia* distinctive, but rather non-distinctive due to its lack of differentiating power and is generic. Several trademark rights in the public domain, including IDM000016785 class 5 *Teh Gelas* belonging to PT Jamu Puspo Internusa, have expired. *Teh Kotak* with trademark numbers 372474 and 367818 in class 30 is also a trademark that uses a name from the generic or public domain, it cannot be extended because *Teh Kotak* is non-distinctive and then after the trademarks rights expire, the trademark owner is PT Ultrajaya Milk Industry & Trading Company, Tbk registered the trademark for *teh kotak* with additional words or phrases to give it distinctiveness, then re-registered the box with the trademarks "UJ Ultra Jaya Teh Kotak" having the trademark number IDM000323476 class 30. Furthermore, there is a *Teh Botol* that received trademark number IDM000185039 class 30 for dry tea leaf products in paper packaging owned by the Sosrodjojo family. This trademark distinguishes itself from other products, such as *Teh Botol* water known as "Teh Botol Sosro" IDM000371787 class 30 and IDM000371779 class 32, by using the addition of Sosro, which comes from the identities of the five owners who are all from the same family, namely Sosrodjojo. Another example of public domain on trademark rights is the *aqua* mineral water product with the number IDM000054149 class 32 belonging to PT Aqua Golden Mississippi, which is essentially non-distinctive because *aqua* means water in Latin and is a generic word (DJKI, n.d.) with a primary meaning, and the *aqua* is still getting trademark rights from DGIPR.

The same case with *aqua*, ecoprint refers to a primary meaning of printing technology that uses environmentally friendly natural dye raw materials invented by India Flint, whose intellectual property was registered and has since become public domain. The registration of trademarks involving the term "ecoprint" appears to be a complex issue, particularly when considering the public domain status of ecoprint technology and the potential conflict with existing trademark laws. DGIPR has the challenging task of navigating these intricacies, especially when the issuance of trademark rights for additive coloring products may contradict the established meaning of "ecoprint." Furthermore, the enforcement of Article 21 paragraph 2, which mandates the rejection of applications resembling a famous name, adds another layer of legal consideration in the protection of intellectual property and trademark rights. It is essential for such regulatory bodies to balance the protection of public domain innovations with the rights of trademark holders to ensure fair and lawful registration practices. (Lantip Narwastu, et al., 2011)

In article 22, trademarks that have become generic names can be combined with other terms to differentiate them, as in *Teh Botol Sosro* and *UJ Ultrajaya Teh Kotak*. There are various stages involved in obtaining trademark rights as a product's identity, including trademark application, formal examination, announcement period, substantive examination, and certificate granting. The announcement process is an important period during which parties who believe that rights previously granted by the state may be violated

or harmed as a result of another party's submission of a trademark application to make an opposition can file an objection. (DJKI, n.d.)

In Europe, the use of the Mona Lisa painting as a tobacco trademark and Nightwatch as a pharmaceutical trademark constitutes a disturbance to public order; the EFTA Court in Vigeland ruled a disturbance to "public order" in the two cases above. This is the basis in the context of trademark registration covering two aspects, namely 1) a broader public order basis, which involves scenarios where trademark registration could pose a real and quite serious threat to 'certain fundamental values,' 'the fundamental interests of society,' or a fundamental problem for the State and the entire society. 2) A specific case of the foundation of public order: the necessity to protect the public domain as a fundamental societal interest. Even if a legal system does not recognize the importance of protecting the public domain, values, interests, or other issues may justify the refusal of trademark registration due to a conflict with public order. One of the goals of this grounding is to avoid unfair overlap of the positive connotations that signs may acquire as a result of their evolution in the cultural realm. As a result, the public domain must be maintained as a fundamental interest of society. (Senftleben, 2013)

According to cases in Indonesia and Europe, using the public domain for trademarks rights disrupts public order, notwithstanding the fact that the trademark utilizes a generic name and lacks distinctiveness. On the other hand, the public domain has become cause *célèbre* among progressive intellectual property and cyberlaw specialists, who see it as essential for sustaining innovation. If a genius cannot justify corporate property claims (since knowledge existed before individual ownership claims), then the public domain does. (Chander & Sunder, 2004). Therefore, the government must adopt legislation for the preservation of public domains, as well as supporting regulations for validating trademark rights in Indonesia. This is a precautionary principle that the government must follow when granting trademark rights in order to protect the interests of the general public in using the public domain.

Responding to the legal vacuum in the public domain, WIPO performed a scoping study of the public domain. Intellectual property rights were criticized for failing to broaden the scope of protection in the public domain. A favorable public domain system must be established to support the ideals. This entails enforcing copyright rules and establishing material conditions that allow public domain resources to be accessed, enjoyed, and preserved. (Severine, 2010)

C. Benefits of Ecoprint for Indonesian MSMEs

The public interest must take precedence over recognizing inherent rights to intellectual property rights. In the United States, incentive-based recognition of intellectual property serves as the foundation of the intellectual property system in the Anglo-American legal tradition, and Indonesia follows suit in this regard. Intellectual property rights allow inventors to receive incentives and economic benefits. So that the protection of IPR and this incentive stimulus will drive innovation, which will have an impact on technological growth and trust in the business environment in Indonesia (Zhuang, 2017). Intellectual property rights are temporary exclusive rights provided by the state. Utilitarian theory, often known as utility theory, holds that intellectual property generates incentives for innovation and creativity that serve the general public's interests by not seeing individual inventors as separate objects with rights. According to Jeremy Bentham, from an ethical point of view, correct and acceptable activities are actions that can have substantial usefulness for the public. (Muharrir & Haryono, 2023)

Utilitarianism, a philosophical theory that emphasizes the maximization of overall happiness, has indeed been influential in discussions about social welfare and public policy. Jeremy Bentham and John Stuart Mill, two prominent figures in this school of thought, argued that policies should aim for the greatest good for the greatest number. In the context of intellectual property, Bentham recognized the disparities in costs between creators and imitators, advocating for the protection of creators' rights to encourage innovation. Similarly, Mill supported the idea of patent monopolies, suggesting that exclusive rights granted by the government could incentivize innovators by offering them rewards commensurate with the benefits their inventions bring to consumers. These perspectives highlight the utilitarian approach to balancing individual rights with broader societal benefits, a principle that continues to shape policy debates today.

The advantages and drawbacks of intellectual property becoming public domain are common; those in favor see public domain as a benefit to the larger community, while those opposed see it as a threat to the economic profits of their work. On one hand, it democratizes access to a wealth of resources, allowing Micro, Small, and Medium Enterprises (MSMEs) to innovate without the burden of licensing fees or the complexities of copyright law. This can be particularly advantageous for startups and smaller businesses that may lack the funds to invest in proprietary materials or pay for the use of copyrighted works. By leveraging public domain assets, MSMEs can significantly reduce operational costs and redirect their focus and finances towards areas such as research and development, marketing, and expansion. Furthermore, the public domain serves as a rich repository of knowledge and creativity that can spark new ideas and foster innovation. MSMEs can draw

upon a vast array of works for inspiration, adapting and building upon them to create new products or services. This not only aids in product development but also in crafting unique marketing strategies and business models that can set a company apart in a competitive market.

However, the shift of intellectual property into the public domain can also be seen as a disincentive for creators, who may feel that their potential earnings are undercut once their works are no longer protected by copyright (Buccafusco & Heald, 2017). The absence of financial incentives might lead some to question the value of investing time and effort into creating new works if they will eventually lose exclusive rights to their creations.

Moreover, there is a risk that the quality and originality of content may decline if creators perceive a lack of adequate compensation for their efforts. This could lead to a cultural landscape where innovation is stifled, as the rewards for creating new and original works are diminished. In balancing these perspectives, it's clear that the public domain can be a powerful tool for MSMEs, enabling them to save on costs and stimulate creativity. Yet, it's also important to consider the long-term implications for content creators and the overall health of the creative industries. A nuanced approach that respects the rights and contributions of creators while also promoting access and innovation is essential for fostering an environment where both creators and users of intellectual property can thrive.

In Indonesia, the protection of intellectual property rights (IPR) plays a crucial role in enhancing the competitiveness of Micro, Small, and Medium Enterprises (MSMEs). Trademarks like *Mak Ichi* cassava chips and *Nerowara* Nutmeg Balsam exemplify how IPR can bolster the market position of MSMEs. These trademarks serve as a shield against unauthorized use, ensuring that the original producers retain economic benefits and recognition. (Tanjung & Imaniyati, 2022) However, the legal protection for products in the public domain, such as *jumputan* fabric—a technique similar to the Japanese *Shibori*—and ecoprint fabric, remains ambiguous. While these traditional crafts are integral to cultural heritage and have significant economic potential, the lack of clear legal protection could lead to exploitation and loss of communal knowledge. Establishing a robust legal framework for such traditional knowledge is essential to safeguard the interests of MSMEs and maintain the cultural integrity of Indonesia's rich artisanal legacy. The efficiency of the foundation of public order as a means of conserving cultural marks outside the trademark system, a scenario in which the legal system recognises the protection and development of the public domain as a fundamental interest of society (Senfleben, 2022) The debate over intellectual property rights, especially in the context of ecoprint fabrics, highlights a critical balance that must be struck to foster innovation while protecting the interests of small and medium-sized enterprises (MSMEs). When trademark rights are recognized for certain products or techniques, it can indeed restrict MSMEs from utilizing those names, leading to potential legal challenges and financial burdens. This can stifle creativity and limit the ability of these smaller entities to compete in the marketplace. On the other hand, intellectual property rights serve to protect original ideas and incentivize inventiveness, which can benefit the industry as a whole. Therefore, it is essential for policymakers to carefully consider the implications of intellectual property law and seek solutions that support both the growth of MSMEs and the safeguarding of legitimate trademark rights. This could involve creating clear guidelines for the use of public domain resources or establishing support systems for MSMEs to navigate the complexities of intellectual property regulations. Ultimately, a balanced approach is necessary to ensure that the development of innovative products like ecoprint fabrics can continue to thrive without disproportionately disadvantaging smaller businesses.

CONCLUSION

Ecoprint had become public domain since it wasn't registered as IPR by the patent's creator in 2021. However, ecoprint is registered as trademark of products in DGIPR. As a matter of fact, The Trademark and Geographical Indications Law serves to protect unique identifiers of products and services. Trademarks that are not distinctive, or are merely descriptive or generic, fail to serve this purpose and thus, are typically not eligible for registration. The public domain does not explicitly manage Indonesia's intellectual property rights. The intersection of public domain works, and trademark rights can indeed present complex legal challenges. When a work falls into the public domain, it is generally available for use by anyone, but if a particular aspect of that work has been trademarked, it could restrict usage in certain contexts, including MSMEs. The use of public domain is more widespread among the populace than trademarks, which only benefit one person or business entity. Due to this, the views of Bentham and Stuart Mill about the social implications of incentive intellectual property rights mostly focus on individuals (business partners and employees) who have the right to protect certain types of intellectual property rights and do not extend to the public domain. Thus, the public domain names are protected under this law if registered with the DGIPR as a trademark. From a utilitarian perspective, the protection of trademark rights serves the greater good by fostering fair competition and innovation among MSMEs, which are pivotal to Indonesia's economy. MSMEs contribute significantly to employment and economic growth, and the digitalization of MSMEs is seen as a

pathway towards an inclusive digital economy. The utilitarian approach would advocate for policies that maximize the overall welfare by supporting MSMEs in securing their intellectual property rights, thus enabling them to compete more effectively in the marketplace. This aligns with the government's efforts to bolster MSMEs presence, which is essential for their survival and growth in the modern economy.

REFERENCES

- [1] Agus, W. (2019). Kisah Pengusaha Ecoprint Pulihkan Trauma Masa Lalu. *Kompasiana*. <https://www.kompasiana.com/aguswahyudiweha/5da44d89097f360630349564/kisah-pengusaha-ecoprint-pulihkan-trauma-masa-lalu>,
- [2] Alfii, M. et al. (2023). Analisis Yuridis Terhadap Peralihan Hak Atas Merek Yang Belum Memperoleh Pelindungan Merek. *Jurnal Locus Penelitian Dan Pengabdian*, 2(9), 862–871. <https://doi.org/10.58344/locus.v2i9.1649>
- [3] Arthur Novy, T. (2016). Perlindungan Hak Masyarakat Terhadap Tanda Publik Domain Yang Digunakan Sebagai Merek. *Perlindungan Hak Masyarakat Terhadap Tanda PUBLIK Domain Yang Digunakan Sebagai Merek*, 30(28), 5053156.
- [4] Besar. (2022). *Mengenal Madrid Protocol Dalam Sistem Kekayaan Intelektual Di Indonesia*. Binus. <https://business-law.binus.ac.id/2018/04/30/mengenal-madrid-protocol-dalam-sistem-kekayaan-intelektual-di-indonesia>
- [5] Paris Convention for the Protection of Industrial Property, Core Statutes on Intellectual Property 516 (2013). https://doi.org/10.1007/978-1-137-35471-6_5
- [6] Buccafusco, C. J., & Heald, P. J. (2017). Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.2130008>
- [7] Chander, A., & Sunder, M. (2004). The romance of the public domain. *California Law Review*, 92(5), 1331–1373. <https://doi.org/10.2307/3481419>
- [8] Dewi, N. W. P. B. K. (2023). 5 Tips Memulai Bisnis Ecoprint ala Siti Khulifah, Owner Mutiara Collection, 5 Tips Memulai Bisnis Ecoprint ala Siti Khulifah, Owner Mutiara Collection. *Kompas.Com*. <https://umkm.kompas.com/read/2023/11/22/120300783/5-tips-memulai-bisnis-ecoprint-ala-siti-khulifah-owner-mutiara-collection>
- [9] DJKI. (n.d.). *Pangkalan Data Kekayaan Intelektual*. Pangkalan Data Kekayaan Intelektual (dgip.go.id)
- [10] Farah Widyanti, W. (2022). Tinjauan Peranan Hak Kekayaan Intelektua Sebagai Intangible Asset Dalam Rangka Foreign Direct Investment. *Syntax Literate: Jurnal Ilmiah Indonesia p-ISSN: 2541-0849 e-ISSN: 2548-1398*, 7(oct 2022), 2003–2005. <https://doi.org/10.36418/syntax-literate.v7i10.13124>
- [11] Fatimatul, U. (2022). *Prinsip Hak Kekayaan Intelektual*. Yuklegal.Com. <https://yuklegal.com/prinsip-prinsip-hak-kekayaan-intelektual/>
- [12] India, F. (2001). *Ecoprint*. about india flint — the school of nomad arts
- [13] Undang-undang Nomor 31 Tahun 2000 tentang Desain Industri, Lembaran Negara No. 243 Tahun 2000, Tamahan Lembaran Negara No. 4045, (2000).
- [14] Undang-undang Nomor 32 Tahun 2000 tentang Desain Tata Letak Sirkuit Terpadu, Lembaran Negara No. 244 Tahun 2000, (2000).
- [15] Undang-Undang Republik Indonesia Nomor 28 tahun 2014 tentang Hak Cipta Pasal, Lembaran Negara Nomor 266 Tahun 2014, Tambahan Lembaran Negara Republik Indonesia Nomor 5599, (2014).
- [16] Undang-undang Nomor 13 Tahun 2016 tentang Paten, Lembaran Negara NO.176 Tahun 2016, Tambahan Lembaran Negara NO.5922, Pub. L. No. 13 (2016). <https://www.bing.com/ck/a?!&&p=eff034b8712f7a20JmltdHM9MTcwNDA2NzIwMCZpZ3VpZD0xOTBiMjI3MCIhYWZiLTU0YTYtMzYwZS0zMTdjYWJhZDY1YjYmaW5zaWQ9NTE5MA&ptn=3&ver=2&hsh=3&fclid=190b2270-aafb-64a6-360e-317cabad65b6&psq=undang-undang+paten&u=a1aHR0cHM6Ly9wZXJhdHVyYW4u>
- [17] Undang-Undang Republik Indonesia Nomor 20 tahun 2016 tentang Merek dan indikasi geografis, Lembaran Negara Nomor 252 Tahun 2016, (2016).
- [18] Kiki, S. E. D. (2020). Cerita Pengusaha Batik Ecoprint Bertahan di Tengah Pandemi Covid-19. *Kompas.Com*. <https://money.kompas.com/read/2020/11/09/073500426/cerita-pengusaha-batik-ecoprint-bertahan-di-tengah-pandemi-covid-19>
- [19] Konservasi Indonesia. (2022). Livelihood Papua 2021-2022. In *Konservasi Indonesia*.
- [20] Labetubun, M. A. H. (2019). Public domain in dispute settlement of cancellation of industrial design rights. *International Journal of Innovation, Creativity and Change*, 10(5), 30–42.

- <https://doi.org/10.53333/ijicc2013/10503>
- [21] Lantip Narwastu, et al. (2011). Publik domain sebagai dasar penolakan atau pembatalan pendaftaran desain industri Indonesia. *Lontar.Uai.Ac.Id*. uri: <https://lontar.ui.ac.id/detail?id=20325925>
- [22] Litman, J. D. (1990). The public domain. *Emory Law Journal*, 39(150), 48–49. <https://doi.org/10.4324/9780080927640-18>
- [23] Moore, A. D. (2019). Intellectual property. *California Law Review*, 93(5), 27.
- [24] Muharir, M., & Haryono, S. (2023). Konsep Utilitarianisme Jhon Stuart Mill Relevansinya Terhadap Behavioral Economics. *Ekonomika Sharia: Jurnal Pemikiran Dan Pengembangan Ekonomi Syariah*, 9(1), 109–122. <https://doi.org/10.36908/esha.v9i1.765>
- [25] Mutiara, P. (2022). Kisah Edita Rianti Sukses Bisnis UMKM Ecoprint, Berawal dari Iseng Saat Pandemi. *Haibunda.Com*. <https://www.haibunda.com/moms-life/20221215170256-76-292169/kisah-edita-rianti-sukses-bisnis-umkm-ecoprint-berawal-dari-iseng-saat-pandem>
- [26] Nuryanto, U. W. et al. (2023). Penguatan umkm melalui peningkatan literasi hukum terhadap erlindungan hak merek di desa pamanuk kabupaten serang. *Batara Wisnu Journal:Indonesia Journal Community Services*, 3(2), 503–511.
- [27] Paul F, Uhlir United Nations Educational, S. and C. O. (2012). Policy guidelines for the development and promotion of open access. In *Technology*. http://unesdoc.unesco.org/images/0021/002158/215863e.pdf%5Cnhttp://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/publications/_412_12_ci_e_int_epub_3-1.epub
- [28] Paul, R. (2021). Intellectual Property Rights: A Utilitarian Perspective. *SSRN Electronic Journal*, 2011, 1–20. <https://doi.org/10.2139/ssrn.3842429>
- [29] Pepy, N. (2022). *Ketua Mahkamah Agung Luncurkan Casebook Jilid 2*. Mahkamah Agung RI. <https://www.mahkamahagung.go.id/id/berita/5139/ketua-mahkamah-agung-luncurkan-casebook-jilid-2>
- [30] Prabowo, W. et al. (2023). Perlindungan Hukum Pendaftar Pertama Hak Atas Merek (Hak Eksklusif). *Nomos: Jurnal Penelitian Ilmu Hukum*, 3(1), 6–12.
- [31] Putra, M. A. D. (2020). Perlindungan Hak Cipta Penerbit terhadap Buku Ciptaan yang Telah menjadi Public Domain. *Journal of Intellectual Property*, 3(2), 16–34.
- [32] Razi, F. (2017). Jenis dan pengaturan hak kekayaan intelektual yang diakui dan dilindungi di indonesia. *Jurnal Lex Specialis*, 11, 11–19.
- [33] Senftleben, M. (2013). *Trademark Law and the Public Domain*. 55, 145–154. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280058
- [34] Senftleben, M. (2022). No Trademark Protection for Artworks in the Public Domain-A Practical Guide to the Application of Public Order and Morality as Grounds for Refusal. *GRUR International*, 71(1), 3–17. <https://doi.org/10.1093/grurint/ikab107>
- [35] Severine, D. (2010). Scoping Study on Copyright and Related Rights and the Public Domain. *CDIP/4/3/REV./STUDY/INF/1*.
- [36] Surahman, M. et al. (2023). *Permasalahan hukum atas hak merek yang tidak terdaftar oleh notaris di indonesia*. 20(1), 169–177.
- [37] Tanjung, R. J., & Imaniyati, N. S. (2022). Konsep HKI dan Royalti dalam Pajak Usaha Waralaba. *Jurnal Impresi Indonesia*, 1(6), 659–677. <https://doi.org/10.58344/jii.v1i6.89>
- [38] Wahyu, K. N. (2021). Cerita Founder Es Teh Indonesia, Ciptakan Merek Dagang dari Ide Receh. *Kumparan.Com*. <https://kumparan.com/kumparannews/cerita-founder-es-teh-indonesia-ciptakan-merek-dagang-dari-ide-receh-1wnTAC7Q1Cm/full>
- [39] Trademark Law Treaty, (1994). <https://www.wipo.int/treaties/en/ip/tlt/>
- [40] Zainal, A. (2023). Ciptakan Trademarks Fashion Lokal Ramah Lingkungan dengan Ecoprint. *Viva.Co.Id*. <https://jabar.viva.co.id/news/16271-alfira-oktaviani-ciptakan-trademarks-fashion-lokal-ramah-lingkungan-dengan-ecoprint>
- [41] Zhuang, W. (2017). *Intellectual Property Rights and Climate Change, interpreting the TRIPS agreement for Environment Sound Technologies*. https://books.google.co.id/books?hl=en&lr=&id=5s8oDwAAQBAJ&oi=fnd&pg=PR13&ots=zTDwqPxsx7&sig=NR5nW4Niq8Dbo9bkPEJLArZleyI&redir_esc=y#v=onepage&q&f=false