

Research Article

# Analysis of the Mechanism for Establishing Trademark Licenses and the Role of Notaries in Ensuring Legal Certainty in Indonesia

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**Abstract:** Trademark registration is very important to guarantee economic rights and exclusive rights for creators, this concerns the legal protection obtained. The problem then is Based on the author's analysis of various sectors of the Law, namely: First, Law Number 2 of 2014 in conjunction with Law Number 30 of 2004 concerning the Position of Notary. Second, Law Number 20 of 2016 concerning Trademarks and Geographical Indications. Third, Law Number 28 of 2014 concerning Copyright. It is clear that there is no Article at all that regulates the formation of a trademark license. The purpose of this study is to analyze: 1) Analyze and determine the mechanism for the formation of intellectual property rights for trademark licenses in the national legal system. 2) analyze and determine the urgency of Notary involvement in the formation of trademark licenses in Indonesia from the perspective of legal certainty. The approach method used in discussing this research problem is the type of normative legal research, using a legislative approach, an analytical approach and a conceptual approach. The data collection method uses literature studies and documentation studies. The results of this study conclude that: 1). The mechanism for establishing intellectual property rights over brand licenses in the national legal system uses the Ministerial Regulation under the Ministry of Law in this case the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 67 of 2016 and HAM Concerning Trademark Registration through the Directorate General of Intellectual Property. Registration is carried out using the bureaucratic mechanism procedures that have been determined by the Ministerial Regulation and technical implementation through bureaucratic instruments at the Directorate General of Intellectual Property of the Ministry of Law and HAM. 2).

**Keywords:** Contract Law; Legal Certainty; Legality Of Agreements; Notary; Trademark

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## 1. Introduction

The transfer of intellectual property rights (IPR) requires a notarial deed as valid written evidence. This is based on Article 1867 in conjunction with Article 1868 of the Civil Code, which states that written evidence can be provided through authentic deeds or handwritten documents. An authentic deed, as defined in Article 1868, is a deed created by or in the presence of an authorized public official, in accordance with the form prescribed by law. This deed is absolutely necessary for applications to register the transfer of rights in the field of IPR, thereby providing legal certainty and serving as a perfect means of proof for the parties involved. (Simanjuntaka & Mariyana, 2020).

A notarial deed has the status of authentic written evidence, which can be used at any time as strong, even perfect, evidence for the parties involved in the agreement. Before drafting the deed, the notary must ensure that all the legal requirements of the agreement have been fulfilled by the parties. This ensures that the deed is not only legally valid but also reliable for future evidence. A license agreement is a type of agreement used by the parties to regulate the legal relationship between the licensor and the licensee. Dewi Astutty Mochtar defines a license agreement as a legal relationship in which the owner of the technology transfers their technology through the granting of license rights to a specific

individual or legal entity. This is a key mechanism for the transfer of knowledge and innovation. (Shuhei & Ayu, 2023).

License agreements play a crucial role in providing legal protection for the parties involved within the framework of contract law. This ensures that the interests of all parties are accommodated in a contract. Contract law governs so many aspects of human life and is becoming increasingly important in business transactions, especially when dealing with unknown parties, both domestically and internationally, as a strong foundation for establishing relationships. (Sumini, 2017).

A trademark is one of the eight components of Intellectual Property Rights (IPR) that has significant economic value. A trademark serves as a distinctive feature that distinguishes one product from another. Historically, trademark law was originally created to prevent fraud or protect consumers. Products without trademarks are difficult to recognize and can cause confusion for consumers. For producers, trademarks not only serve to distinguish their goods or services but also to build a strong brand image in the market. Trademarks are believed to convey positive associations to consumers, especially when the products or services produced are satisfactory. Trademarks must have a distinctive character that is easily recognizable and pronounceable, typically expressed in the form of a design, word, shape, or sound. Design trademarks are often considered the most effective in Indonesia due to their ease of identification. (Sitorus, 2019).

For businesses, trademarks also guarantee that the products produced are of the highest quality and prevent unfair competition from parties seeking to piggyback on their reputation. Unfortunately, trademark infringement is common, especially for trademarks that are late or have not yet been registered. In this situation, the issuance of an authentic deed can be a crucial temporary legal alternative to protect the rights of trademark owners (Julius Rizaldi, 2024).

Through authentic deeds, the rights and obligations of the parties are clearly defined, thereby ensuring legal certainty and hopefully avoiding disputes. If disputes do arise, authentic deeds, as complete written evidence, contribute significantly to the inexpensive and rapid resolution of cases. The role of a notary is indeed intended to assist the public in obtaining authentic written evidence regarding various circumstances, events, or legal acts. A notarial deed provides certainty that the events or facts stated therein were indeed performed by the notary or explained by the parties present at the time stated in the deed, in accordance with the prescribed procedures. Formally, a notarial deed proves the truth and certainty regarding the day, date, month, year, time of appearance, identity of the parties/appearing parties, signatures and initials, witnesses, and the Notary. This deed also records the statements or declarations of the parties/appearing parties in detail. (Mia, 2020).

As public officials, notaries are granted the authority by law to draw up authentic deeds. This authority is explicitly regulated in Article 1(1) of the Notary Profession Law and further emphasized in Article 15(1) of the Notary Profession Law. The provision states that notaries are authorized to issue authentic deeds regarding all acts, agreements, and decisions required or desired by the parties involved, ensuring the certainty of the date of issuance of the deed, storing the deed, and providing copies, duplicates, and extracts of the deed, provided that this task is not assigned to another official. As public officials who perform part of the government's duties and responsibilities, notaries play a crucial role in creating legal certainty, order, and legal protection for society. Therefore, every deed drawn up by a notary has high probative value and is legally valid, making it an irrefutable piece of evidence. (Junita, Abdul & Djoni, 2022).

From an analysis of various relevant laws, such as Law No. 2 of 2014 in conjunction with Law No. 30 of 2004 on Notary Positions, Law No. 20 of 2016 on Trademarks and Geographical Indications, and Law No. 28 of 2014 on Copyright, it is clear that there is no specific provision governing the establishment of trademark licenses (Kosasih, 2021). This legal vacuum poses significant issues, particularly in business activities involving trademarks.

This legal vacuum causes problems when conducting business activities for a brand. The trademark registration mechanism, which takes 30-90 days based on Regulation of the Minister of Law and Human Rights Number 67 of 2016, is inefficient for business actors who need trademarks quickly. Therefore, new authority is needed for notaries to issue trademark license certificates. This will fill the legal vacuum temporarily while awaiting the completion of the registration process at the Ministry of Law and Human Rights, thereby providing a swift solution to the needs of businesses.

Based on the above background, the author is interested in conducting research, where the issues to be discussed in this study are 1) How is the mechanism for establishing

intellectual property rights for trademark licenses in the national legal system? 2) What is the role of notaries in establishing trademark licenses for legal certainty? The purpose of this research is to analyze and understand the mechanism of forming intellectual property rights for trademark licenses within the national legal system and to analyze and understand the role of notaries in the formation of trademark licenses in Indonesia from the perspective of legal certainty.

### 3. Proposed Method

For this study, the author will use normative legal research, which is research that places law as a system of norms. This system of norms examines principles, norms, rules, and legislation, court decisions, agreements, and doctrines. The study examines the role of notaries in the formation of trademark licenses in Indonesia from the perspective of legal certainty. (Sudjono, 2005).

This research data uses qualitative analysis methods, namely descriptive analysis, which means that this research source uses legal analysis techniques. Qualitative means that the legal materials used in the research to ensure the accuracy of the data are obtained from primary data (Civil Code, Law of the Republic of Indonesia Number 30 of 2004 concerning the Position of Notary, Law of the Republic of Indonesia Number 2 of 2014 concerning Amendments to Law -Law of the Republic of Indonesia Number 30 of 2004 on the Notary Profession, Law of the Republic of Indonesia Number 28 of 2014 on Copyright, Law Number 20 of 2016 on Trademarks and Geographical Indications; and secondary data (books, journals, and related reports). (Mukti & Yulianto, 2020).

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### 4. Results and Discussion

#### 4.1. Mechanism for Establishing Intellectual Property Rights Trademark Licensing in the National Legal System

Trademark registration in Indonesia is firmly rooted in positive law, a direct implication of the principle of the rule of law enshrined in the Constitution (UUD 1945). Trademarks, as an important sector in state affairs, are subject to this positive law, which is set out in various written regulations. This demonstrates the state's commitment to creating a clear legal framework for trademark protection.

In the Indonesian legal system, there is a hierarchy ranging from the 1945 Constitution to Local Regulations (PERDA). Beyond PERDA, there are more technical regulations, particularly in the context of trademarks, namely Ministerial Regulations. The purpose of establishing Ministerial Regulations is to carry out the administrative functions of the Presidential Government through its assistants, namely the Ministers. Such technical regulations are essential because the Law only outlines the general framework, while the details of policy implementation must be realized through Ministerial Regulations.

The selection of Ministerial Regulations as technical regulations for exercising the President's authority as head of government is highly relevant to the concentration of tasks and authority assigned to ministries. This shows that government institutions that focus on specific areas are essential. In the regulation of trademarks in Indonesia, given the vastness of the territory comprising various provinces and regencies, the commercial market is extremely extensive and requires centralized regulation. Considering that it is not feasible to centralize regulation entirely under the President's authority, Ministerial Regulations become a vital instrument for achieving effective trademark protection. (Bayu, 2018).

The existence of Ministerial Regulations in regulating trademark issues is in line with Nawiasky's legal concept in *Theorie von Stufenbau der Rechtsordnung* (Theory of Legal Norm Hierarchy). Nawiasky believes that abstract norms require implementing regulations. This structure includes: (a) fundamental state norms (*Staatsfundamentalnorm*), (b) basic state

rules (staatsgrundgesetz), (c) formal laws (formell gesetz), and (d) implementing regulations and autonomous regulations (verordnungen autonome satzung). Ministerial regulations fall into the latter category, providing a theoretical basis for their existence. The existence of Ministerial Regulations in the formation of legislation has confirmed that trademarks in the legalization process have formal law. This means that in the use and exploitation of trademarks, there are legal rules that must be implemented. This formal legal mechanism is related to procedural justice that must be followed by every business actor in claiming a trademark. These formal procedures aim to organize the applications submitted, ensuring the eligibility and appropriateness of the objects being applied for. (Ni'matul, 2021).

The existence of technical regulations at the level of Ministerial Regulations will assist in the implementation of the Law, ensuring that the message conveyed is properly and correctly received in its implementation. Therefore, Ministerial Regulations are a formal source of law for trademark registration, providing a clear and binding procedural framework for the registration process. The regulation of trademark registration through Ministerial Regulations is important because trademarks are often manipulated and plagiarized for business purposes. Therefore, regulation through positive law, in this case Ministerial Regulations, aims to ensure that legal regulation can be carried out effectively. This also demonstrates the state's responsibility toward trademarks, emphasizing that legal regulation of trademark registration is a crucial step. (Bivitri, 2017).

Ministerial regulations on trademark regulation are a form of the President's responsibility to provide legal protection to business actors. The authority to formulate Ministerial Regulations is delegated by the President to the Minister, so Ministerial Regulations are often referred to as "executive acts" or regulations established by the implementing agency of the Law. Trademarks regulated through Ministerial Regulations are important because they are part of the implementation of the Law, which has binding legal force.

There are several reasons why Ministerial Regulations, which qualify as part of legislation, are binding and must be obeyed. First, Ministerial Regulations contain orders to be formed based on higher legislation, or on the basis of delegation of legislation formation. Second, Ministerial Regulations are formed on the basis of authority, or on the basis of attribution of legislation formation. Ministerial Regulations serve as the legal basis for the implementation of work agendas, to exercise authority at the ministerial level. In relation to written law (legislation), it must be understood that the essence of law is also the essence of legislation. This means that every regulation is not only a rule, but also the foundation for action.

The essence of legislation implies that legal provisions are not only formulated for administrative purposes, but also have moral value. The reason is that the function of public service aims to achieve the common good. Thus, the regulation of trademark registration in the Ministerial Regulation is not only viewed as an administrative regulation but also to achieve legal benefits, such as protecting the rights of creators and ensuring that there are no violations of trademark rights. The moral value in the formulation of the Ministerial Regulation concerning trademark registration must be understood as an effort to implement a control mechanism over a business sector or industry. This aims to create order and security in economic activities. Given that trademarks are essential in the business world and often determine the value of a business, Ministerial Regulations must contain moral values that not only regulate but also provide noble values. This shows that the state is the party most responsible for creating trademark protection. (Yashinta, Siti, Rizki, & Dwi, 2023).

Historically, from Staatsblad Number 600 of 1912 to the independence period with Law Number 21 of 1961 concerning Company Trademarks and Trade Marks, trademarks have always received consistent attention through legal protection by the government. This proves that the government realizes that trademarks are a serious issue; if they are not given legal protection, the potential for social conflict in the business world will increase.

Following the reform, the Government has remained consistent in protecting trademark rights, as evidenced by the enactment of Law No. 15 of 2001 on Trademarks, which replaced Law No. 14 of 1997. Recognizing the importance of adapting to the times, the government has continued to update trademark laws through the enactment of Law No. 20 of 2016 on Trademarks and Geographical Indications, which remains in effect today. Since the era of President Susilo Bambang Yudhoyono, the Ministry of Law and Human Rights (Kemenkumham) has been granted full authority to implement the trademark registration mechanism. Currently, Kemenkumham uses Ministerial Regulation of the Ministry of Law and Human Rights of the Republic of Indonesia No. 67 of 2016 on Trademark Registration

as the primary instrument. However, in its implementation, Kemenkumham is deemed to have not yet been able to play its role maximally. As a public service agency responsible under the constitution, Kemenkumham should be able to process trademark registrations properly and in accordance with existing regulations, including Government Regulation of the Republic of Indonesia No. 36 of 2018 on the Registration of Intellectual Property License Agreements. The government must ensure that the issue of resolving trademark-related problems lies solely with the implementing agency, not with the existing regulations.

#### **4.2. The Role of Notaries in the Establishment of Trademark Licenses in Indonesia from a Legal Certainty Perspective.**

Notaries can provide essential legal certainty regarding the legality of an agreement, serving as an important reference for parties in business activities. This legal certainty is crucial for accelerating investment, making notaries the most appropriate institution for certifying important documents. Legal certainty is not intended to favor any party but to resolve any disputes that may arise from a legal action, avoiding endless dynamics and issues. In the context of trademark licensing, this legal certainty is even more important given the lengthy trademark registration process, while businesses face competitive pressures demanding speed. A mechanism for establishing trademark licenses without the involvement of notaries and relying solely on bureaucracy, although possible, risks creating systemic complexities and the potential for corrupt practices that harm applicants, with the lure of expediting the process through bribes. Therefore, through notaries, the process timeline can be more efficient, which in turn will encourage the acceleration of trademark registration. (Intan, 2018).

Trademark registration involving a notarial deed as a temporary license can serve as the basis for obtaining legal certainty and legal protection of trademark rights. In the event of a trademark ownership dispute, the notarial trademark license deed can serve as formal evidence of ownership rights. The lengthy waiting process in the trademark registration bureaucracy can be detrimental to businesses, so this notary deed offers a solution for expediting the acquisition of legal certainty. The desire of business operators to immediately use or claim a trademark must be accompanied by legal certainty for the security and comfort of the business. This situation often creates two opposing viewpoints: first, businesses that want to use the trademark immediately but must "circumvent" legal rules due to business pressures; second, businesses that wait for the registration process at the Ministry of Law and Human Rights but are forced to engage in bribery to expedite the trademark license issuance. Both viewpoints reflect the dilemma arising from the slow system. (Iata, 2014).

Both of the above views of business actors describe actions that are not legally justifiable, often occurring due to practices by state administrators in the field of public services, such as trademark registration. The paradigm often used is that legal certainty can justify the violation of benefits and justice. However, conceptually, legal certainty serves to ensure that benefits and justice can be realized, not to justify deviant practices.

The concept of legal certainty should not be understood in an authoritarian manner; a rational understanding is required. This means that the application of legal norms must take into account the impact of their enforcement and must be applied within reasonable limits that are acceptable to the public. In line with John Austin's view, legal certainty must be able to explain its application logically and uphold morality. In trademark registration, procedures must not only create legal certainty, but also be carried out with moral responsibility. The application of legal certainty accompanied by moral responsibility means that noble values must be upheld, even when legal certainty is applied. The collaboration between noble values and legal certainty reflects harmony between the people and the authorities within a legal system. This means that legal certainty in trademark registration must also consider that trademarks approved at a reasonable cost will give rise to legal certainty that is applied responsibly.

Legal certainty can only be effectively realized through a notary in trademark registration. A notary is not a bureaucratic institution, but rather an independent legal institution and profession that cannot be interfered with by any authority and does not have a hierarchical power structure. This is very important considering that trademarks are at the heart of the business world and require speed in legal processes without compromising compliance with the law itself. Through notaries, parties will be protected by the legal status of their trademark ownership. The deed issued by the notary regarding the approval of trademark license ownership aims to avoid legal issues during the period of registration application at the

Ministry of Law and Human Rights. With registration and the issuance of a temporary ownership deed by the notary, business process acceleration can be achieved. (Dinata, 2020).

The trademark license deed from the notary serves as a temporary basis for business operators, allowing them to use the trademark without waiting for the registration process at the Ministry of Law and Human Rights to be completed. To ensure validity, the notary will carry out the following steps: (a) The applicant submits the trademark registration form to the notary; (b) The applicant shows proof of uploading the trademark registration process on the Ministry of Law and Human Rights portal; (c) The notary reviews the documents within 2x24 hours to determine eligibility; (d) If eligible, there will be an agreement between the notary and the applicant stating the applicant's full responsibility if found to have copied another trademark; (e) If rejected, the application cannot be resubmitted.

The enforcement of legal certainty should not override legal procedures. Danrivanto Budhijanto argues that legal certainty cannot stand alone, but requires consideration as a basis for its application. Trademark registration should provide legal certainty, but legal procedures that maintain the quality of law in society must still be observed and upheld, avoiding a "tunnel vision" approach that ignores aspects of justice and benefit (Christianto, 2017).

Using a notarial deed as a means of achieving legal certainty in trademark registration is the right step. A notarial deed is an official document that has absolute probative force and is binding (Civil Code Article 1870 and HIR Article 165). This deed is perfect evidence and does not need to be proven again as long as its truth cannot be refuted. Its existence is crucial as a court evidence tool. Trademark registration through a notary serves as a balancing mechanism within the complex bureaucratic system. Through an authentic deed, rights and obligations are clearly defined, ensuring legal certainty, and are expected to prevent disputes. If a dispute arises, the authentic deed, as a complete written evidence, makes a significant contribution to resolving the case in a cost-effective and timely manner. The presence of a notary aims to assist the public in obtaining authentic written evidence. (Denny, Yenny & Asmin, 2022).

The impact of the written legal system in Indonesia is that all legal evidence must be in writing. At every level of the judiciary, written evidence takes precedence as valid evidence and has full legal force, especially if it is in the form of an authentic deed drawn up by an authorized official. The involvement of notaries in trademark registration provides two benefits: a streamlined system that saves time for businesses in obtaining legal certainty regarding trademarks, and legal certainty that maintains the quality of the streamlined system, creating a mutually reinforcing legal bond between legal certainty and legal utility (Fakhriah, 2023).

A notarial deed is a written piece of evidence that is considered complete because it has three types of evidentiary power. First, there is external evidentiary power (*uitwendige bewijskracht*), which certifies the deed as an authentic document. Second, there is formal evidentiary power (*formeel bewijskracht*), which ensures that the events and facts in the deed are truly known and heard by the notary in accordance with the procedure for creating the deed. Third, material probative force (*materieel bewijskracht*), which guarantees certainty regarding the material content of a deed (Arben, & Utama, 2024).

## 5. Conclusions

Based on the above explanation and analysis, and in line with the issues that have been formulated, the following conclusions are presented. The mechanism for establishing intellectual property rights over trademark licenses in the national legal system utilizes Ministerial Regulations under the Ministry of Law, specifically Ministerial Regulation of the Ministry of Law and Human Rights of the Republic of Indonesia No. 67 of 2016 on Trademark Registration through the Directorate General of Intellectual Property. Registration is carried out using the bureaucratic procedures established by the Ministerial Regulation and implemented technically through bureaucratic instruments at the Directorate General of Intellectual Property of the Ministry of Law and Human Rights.

In principle, notaries cannot enforce commercial license agreements as long as the law has not been revised, so this second issue is merely normative and conceptual in nature. Therefore, in this context, the role of a notary in the formation of a trademark license in Indonesia from a legal certainty perspective involves: First, achieving legal certainty through the issuance of a notarial deed as an authentic document, meaning that only by involving a notary can legal certainty be obtained for the use of the trademark license. Thus, the notary's authentic deed serves as an alternative for using the trademark while awaiting the completion

of the bureaucratic process. Second, the issue with trademark registration without involving a notary is that the complex bureaucracy can result in the trademark creator receiving the trademark license deed used in business activities over an extended period of 180 (one hundred eighty) days. In addition, illegal fees are also charged during trademark registration. Third, the efficiency and effectiveness of trademark registration procedures can be improved by involving notaries. The reason for this is that notaries do not require bureaucratic mechanisms, so they can work more quickly and without the complications of bureaucracy. Fourth, in order to support the advancement of the investment climate, complicated licensing mechanisms will only make investors think twice about investing in Indonesia, especially now that Indonesia is building Nusantara as the new capital of the Republic of Indonesia.

For the House of Representatives and the President to revise the following laws through the omnibus law method: First, Law Number 2 of 2014 in conjunction with Law Number 30 of 2004 concerning the Position of Notary. Second, Law Number 20 of 2016 concerning Trademarks and Geographical Indications. Third, Law No. 28 of 2014 on Copyright.

The Minister of Law and Human Rights should improve the trademark registration bureaucracy in Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 67 of 2016 concerning Trademark Registration, and the principles of accountability in the registration method should be adopted.

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