

The Application of the Safe Harbor Policy Doctrine to the Liability of E-Commerce Platforms in Addressing the Trade in Counterfeit Goods

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ARTICLE INFO

Keywords: Safe Harbor Policy, E-Commerce, Counterfeit Goods

Received : 14, January
Revised : 20, February
Accepted: 27, March

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ABSTRACT

The purpose of this study is to analyze in depth the legal position of e-commerce platforms in cases of counterfeit goods circulation, reviewing the principles of PMSE and safe harbor policy, and spreading the weaknesses of the act quickly clause in handling violations of the law. This study uses a normative legal research method, supported by regulatory-legislative approach methods, conceptualization, and analysis. The results of the study explain that the legal position of e-commerce platforms in the circulation of counterfeit goods is regulated by the principles of PMSE and safe harbor policy, where their responsibility can arise if they fail to act quickly to remove illegal content in accordance with Article 22 paragraph (2) of PP 80/2019. They can also be sued under Article 1365 of the Civil Code if proven negligent. Although safe harbor protects platforms that act immediately, there are still legal loopholes because this regulation is reactive without clear preventive obligations. Therefore, special regulations are needed to strengthen supervision and prevention of the circulation of counterfeit goods.

INTRODUCTION

The rapid advancement of technology and information has transformed many aspects of human life, including commercial activities that were previously conducted through conventional means but are now increasingly carried out through online platforms. Article 1 point 2 of the Law on Electronic Information and Transactions (ITE Law) defines an electronic transaction as a lawful legal act conducted using computers, computer networks, or other electronic media. In online transactions conducted through e-commerce platforms, several parties are involved, including sellers (merchants), consumers, payment intermediaries (acquirers), Certification Authorities, and issuers. However, the rapid development of e-commerce has also given rise to new challenges, particularly the increasing circulation of counterfeit goods in online marketplaces (Suprpto, Josephine, & Putra, 2023).

In Indonesia, consumers often exhibit a tendency to purchase counterfeit goods due to their significantly lower prices compared to authentic products, despite the fact that such practices clearly infringe upon intellectual property rights. This situation has contributed to the growing number of sellers offering counterfeit goods on e-commerce platforms, where imitation products that closely resemble genuine items are marketed at considerably more affordable prices. Consumer demand for counterfeit goods in e-commerce platforms is closely linked to economic factors, particularly the relatively high prices of original products, which remain beyond the purchasing power of a significant portion of the population. As a result, a distinct market for imitation products has emerged on various e-commerce platforms, including Tokopedia, Shopee, and Blibli. On these platforms, counterfeit goods are often promoted using descriptions such as “look-alike products” or “super-grade replicas” in order to attract potential buyers. Although many consumers are aware of the potential legal consequences and the comparatively lower quality of counterfeit goods, the substantially lower prices offered continue to encourage their purchase. This research focuses on the circulation of counterfeit goods within e-commerce platforms operating under the Consumer-to-Consumer (C2C) transaction model. Such platforms are frequently utilized by individual sellers to market imitation products, which tend to attract consumers with relatively limited purchasing power (Dharmawan et al., 2018).

THEORETICAL REVIEW

According to Article 8 of Law Number 8 of 1999 concerning Consumer Protection, it is stipulated that business actors are prohibited from producing and/or trading goods and/or services that do not comply with the applicable standards and legal requirements. Specifically, Article 8 paragraph (1) provides that business actors are prohibited from producing or trading goods and/or services that:

1. do not meet or comply with the required standards and the provisions of laws and regulations;
2. are inconsistent with the net weight, net content, or quantity stated on the label or packaging of the goods;

3. do not correspond to the actual measurements, scales, weights, or quantities as declared;
4. are inconsistent with the condition, guarantee, features, or efficacy as stated on the label, packaging, or description of the goods and/or services;
5. do not correspond to the quality, grade, composition, processing method, style, model, or specific use as indicated on the label or description of the goods and/or services;
6. do not conform to the promises stated in the label, packaging description, advertisement, or sales promotion of the goods and/or services;
7. do not include the expiration date or the recommended period for optimal use of certain goods;
8. do not comply with halal production requirements as declared in the halal statement indicated on the label;
9. do not provide labels or product descriptions containing information such as the product name, size, net weight or content, composition, instructions for use, date of manufacture, potential side effects, as well as the name and address of the business actor, along with other information required by law for proper use; and
10. do not provide information and/or instructions for the use of goods in the Indonesian language in accordance with the applicable laws and regulations.

Furthermore, paragraph (4) of the same provision stipulates that business actors who violate the provisions referred to in paragraphs (1) and (2) are prohibited from trading such goods and/or services and are obliged to withdraw them from circulation. The definition of a business actor is provided in Article 1 point 3 of Law Number 8 of 1999 concerning Consumer Protection, which states that a business actor refers to any individual or business entity, whether in the form of a legal entity or a non-legal entity, that is established and domiciled or conducts activities within the jurisdiction of the Republic of Indonesia, either independently or jointly through agreements in the organization of business activities across various economic sectors. In the context of this research, e-commerce platform providers cannot be equated with business actors who directly sell counterfeit goods (commonly referred to as “KW” products). This is because operators of e-commerce platforms primarily function as providers of electronic communication facilities that enable commercial transactions, rather than as direct sellers of goods offered on the platform. According to Article 1 point 11 of Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (Perdagangan Melalui Sistem Elektronik/PMSE), an Electronic Commerce System Operator (PPMSE) refers to a business actor that provides electronic communication facilities utilized for conducting trade transactions through electronic systems.

The circulation of imitation or counterfeit goods (commonly referred to as “KW” products) in Indonesia has become a widespread phenomenon within society. Consumers’ interest in purchasing such goods is largely driven by their

significantly lower prices, while the benefits offered are often perceived as comparable to those of genuine products. Although many consumers may not be able to afford authentic goods, they often experience a similar sense of satisfaction due to the resemblance in form and appearance between counterfeit and original products. The high level of consumer demand for counterfeit goods has consequently encouraged producers to continuously manufacture such products, even leading to the development of a distinct industry dedicated to the production and distribution of counterfeit goods. These products are widely distributed across various channels, ranging from traditional markets and shopping centers to digital marketplaces and e-commerce platforms (Khatimah, 2024).

In line with these developments, the United States Trade Representative (USTR) in 2021 released a report identifying several markets that are widely known for facilitating and benefiting from the sale of counterfeit goods. In this report, the USTR identified 42 e-commerce platforms and 35 physical markets worldwide that were allegedly involved in the distribution of counterfeit products, including items such as clothing, accessories, and books (Pranitasari & Sidqi, 2021). Indonesia was also included in this list, with three major e-commerce platforms : Bukalapak, Shopee, and Tokopedia identified as marketplaces where counterfeit goods are allegedly traded. Among the products frequently found on these platforms are counterfeit versions of well-known brands, such as Gucci, whose authentic products may reach prices of tens of millions of rupiah, yet are offered at significantly lower prices on certain e-commerce marketplaces (Khatimah, 2024).

The sale of counterfeit goods clearly constitutes a violation of Intellectual Property Rights (IPR), as it involves the unauthorized use of trademarks and the imitation of protected works without the consent of the legitimate rights holders. Producers and distributors of counterfeit goods also derive economic benefits from activities that are essentially unlawful in nature (Biela & Rosando, 2022). In this context, a significant legal question arises regarding the extent to which e-commerce platforms may be held responsible for the circulation of counterfeit goods on their platforms. Article 22 paragraph (1) of Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (*Perdagangan Melalui Sistem Elektronik/PMSE*) stipulates that if illegal electronic information content is found within electronic commerce activities, the Electronic Commerce System Operators (PPMSE), whether domestic or foreign, as well as intermediary service providers, may be held responsible for the impacts or legal consequences arising from the existence of such illegal electronic information content.

Based on this provision, e-commerce platforms may be held legally responsible for the consequences arising from the presence of such content on their platforms. However, this provision cannot be separated from the concept of the safe harbor policy as stipulated in Article 22 paragraph (2) of Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (PMSE), which provides that: "the provision referred to in paragraph (1) shall not apply if the relevant domestic and/or foreign PPMSE acts promptly to remove

electronic links and/or illegal electronic information content after obtaining knowledge or awareness of its existence.”

The safe harbor policy was first introduced in the United States in 1998. Initially, this policy was intended to prevent e-commerce platforms operating in regions such as the United States and the European Union from disclosing users' personal data to third parties without authorization. In a broader context, the policy also places responsibility on sellers to maintain the reputation and integrity of the products they offer. Consequently, any defects, inaccuracies, or issues related to the products are not attributed to the e-commerce platform itself, but rather to the owners or sellers of those products. The development of e-commerce regulations at the global level has undergone significant changes over time. These regulatory developments aim to provide legal certainty for operators of e-commerce transactions while simultaneously ensuring adequate protection for consumers (Suharsana & Wirawan, 2016).

Initially, the Global Framework for E-Commerce emphasized limiting government involvement in regulating e-commerce activities. However, there has been a growing expectation for governments to play a more active role in establishing regulatory frameworks that govern various aspects of e-commerce operations, with the aim of providing protection for both business actors and consumers. In principle, the safe harbor policy distinguishes the allocation of liability between e-commerce platforms that operate based on User-Generated Content (UGC) and the individual sellers who utilize those platforms to offer their products. Under this approach, the primary responsibility for the content and products offered through the platform rests with the sellers, while the platform functions mainly as an intermediary facilitating electronic transactions (Kementerian Komunikasi dan Informatika, n.d.).

User-Generated Content (UGC) refers to any form of content created by users or consumers related to a particular brand without financial compensation. Such content may include product reviews, responses, testimonials, case studies, and social media posts such as photos, videos, or comments. Unlike officially sponsored promotional materials, UGC is produced voluntarily by users based on their personal experiences with a product or service. The role of UGC has become increasingly significant in the digital era, particularly with the growing influence of social media platforms. Beyond strengthening consumer trust, UGC also functions as an effective marketing tool, as it is often perceived as more authentic and credible than formal advertising. Many companies strategically utilize UGC to foster deeper engagement with consumers, since content generated by fellow users tends to be more relatable and appealing to a broader audience. In this regard, UGC plays an important role in building brand trust and strengthening consumer communities surrounding particular products or services (Fitriani & Trianasari, 2023).

The concept of a marketplace refers to an online platform that provides a digital space for sellers to offer their products, while the role of the platform itself is primarily to display these products to potential buyers. On platforms such as Tokopedia and Bukalapak, it is often difficult to clearly determine who should be held responsible for goods that are prohibited or restricted from being sold.

Nevertheless, the public frequently assumes that the marketplace platform provider bears responsibility for such products. Previously, Circular Letter of the Minister of Communication and Information Technology Number 5 of 2016 stipulated that marketplace service providers could not be held liable for prohibited products offered or sold by individual sellers through their platforms. This provision reflects the regulatory approach that distinguishes the role of the platform as an intermediary from that of sellers who directly market and distribute goods through the marketplace (Fitriani & Trianasari, 2023).

The safe harbor policy provides legal protection to e-commerce platform providers from direct liability for content uploaded by sellers on their platforms. Under this principle, e-commerce platforms cannot automatically be held responsible for the sale of counterfeit goods, provided that they act promptly to remove or disable access to illegal content after obtaining knowledge or receiving notification of its existence. According to the Elucidation of Article 22 paragraph (2) of Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (PMSE), the phrase “acting promptly” refers to actions taken immediately after becoming aware of the existence of illegal electronic information content. Such prompt action may be demonstrated through the existence of procedures implemented after receiving a notification from another party or after the platform independently becomes aware of the illegal electronic content, in accordance with the applicable laws and regulations.

A new legal question that arises is how the position of e-commerce platform providers should be understood in relation to the widespread circulation of counterfeit goods when examined through the principles governing Trade Through Electronic Systems (PMSE) and the safe harbor policy. Furthermore, it raises the issue of the extent to which the regulatory clause requiring platforms to “act promptly” is effective in addressing and preventing such legal violations.

The enforcement of trademark violations under Law Number 20 of 2016 concerning Trademarks and Geographical Indications is often considered less effective, primarily because such violations are categorized as complaint-based offenses (*delik aduan*). This means that, in the absence of a formal complaint or authorization from the rightful trademark holder, e-commerce platforms cannot automatically be held liable for violations of Intellectual Property Rights (IPR). This approach differs from the provisions under Law Number 15 of 2001, under which the Directorate General of Intellectual Property (DJKI) possessed greater authority to act more proactively in addressing trademark violations. In addition, sellers whose accounts have been removed by e-commerce platforms can often quickly register new accounts, making it difficult to effectively prevent or eliminate repeated violations.

When examined in relation to the circulation and sale of counterfeit goods through e-commerce platforms, Indonesian positive law does not yet comprehensively regulate the actions of third parties who, without authorization, market or sell imitation products, even though such activities clearly infringe upon the economic rights of trademark holders. This situation indicates the existence of a normative gap within the legal framework that has

not been adequately addressed. Such circumstances not only violate the rights of trademark owners or copyright holders but also create legal uncertainty, which contradicts the fundamental principle of legal certainty. The lack of clear legal regulation allows infringements of economic rights to persist, as some members of society may assume that if a particular conduct is not explicitly regulated, it may be carried out without legal consequences.

The conceptual framework concerning legal certainty is consistent with the development law theory proposed by Mochtar Kusumaatmadja, which emphasizes that law must be dynamic and function as an instrument for shaping and transforming social behavior (Atmadja & Budiarta, 2018). In the context of the sale of counterfeit goods through e-commerce platforms, responsive and progressive legal regulations are required in order to keep pace with the rapid development of technology and digital commerce. Such regulations should clearly define the responsibilities of both e-commerce platform providers and sellers involved in transactions involving counterfeit goods. This is essential to ensure that the law not only upholds legal certainty but also functions as an effective instrument of social change in protecting the rights of trademark and copyright holders in the digital era.

This research represents a development of the legal issue previously examined by Lutfi Aldi Bing Slamet and I Gede Yusa in their study entitled "Legal Protection for Consumers in the Sale and Purchase of Branded Shoes." The study discusses consumer legal protection in cases involving the purchase of counterfeit branded shoes, as well as the legal consequences arising in the relationship between business actors and consumers in such transactions. The findings of the study indicate that consumers are entitled to compensation when the goods received do not conform to the agreed terms. Furthermore, the legal consequences imposed on business actors are based on Articles 100–102 of the Consumer Protection Law (UUPK), which provide that business actors may be required to pay compensation and to cease all activities involving the unauthorized use of the trademark in question, as such use constitutes an infringement of the rights of the registered trademark holder. In addition, under the applicable criminal provisions, business actors involved in such violations may face criminal sanctions of up to ten years of imprisonment (Slamet & Yusa, 2019).

Subsequently, research conducted by M. Anwar Nashir entitled "Legal Protection for the Public Against the Circulation of Counterfeit Goods" examines the legal protection afforded to society in relation to the circulation of counterfeit goods, as well as the obstacles encountered in providing such legal protection (Nashir, 2023). Based on these previous studies, there are certain similarities with the present research, particularly in relation to the circulation and sale of counterfeit goods occurring through e-commerce platforms or online marketplaces. However, this research differs in its primary focus, as it examines the legal issues concerning the position and liability of e-commerce platform providers from the perspective of the Safe Harbor Policy doctrine. Based on the background of the issues discussed, this research is therefore conducted under

the title: “The Application of the Safe Harbor Policy Doctrine to the Liability of E-Commerce Platforms in Addressing the Trade in Counterfeit Goods.”

METHODOLOGY

In this research, the author employs a normative legal research method, which is chosen due to the existence of a normative gap within the current regulatory framework. This method primarily emphasizes the statutory approach, namely the analysis of existing laws and regulations that are clear and do not give rise to multiple interpretations, making it relevant to the legal issues examined in this study. In addition to the statutory approach, the author also applies a conceptual approach to understand the various legal concepts underlying the issues discussed, as well as an analytical approach that enables a critical evaluation and interpretation of the available legal data. Furthermore, the sources of legal materials used in this research are not limited to statutory regulations but also include previous research findings and other relevant legal literature. This approach is intended to provide a comprehensive and in-depth conceptual framework regarding the topic under study. By integrating various research approaches and sources of legal materials, this research is expected to contribute to the development of legal scholarship and provide constructive recommendations for addressing issues related to trademark violations and intellectual property rights in the context of digital commerce (Marzuki, 2010).

RESULTS AND DISCUSSION

In The legal position of e-commerce platform providers in relation to the circulation of counterfeit goods, when examined from the perspective of the principles of Trade Through Electronic Systems (PMSE) and the Safe Harbor Policy, indicates that in common public understanding, the term frequently used to refer to goods that infringe trademark rights is counterfeit goods. In everyday usage, such goods are often described using terms such as “KW (quality), replica, grade ori, premium,” and other similar designations intended to indicate the quality level or the degree of resemblance of the product to the original branded goods (Giantama & Kholil, 2020). Furthermore, the forms of trademark infringement can be identified in the substantive provisions of Article 100 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications, which include:

1. The use of a trademark that is identical in its entirety to a registered trademark.
2. The use of a trademark that has substantial similarity in its essential elements to a registered trademark.
3. The use of a trademark that has partial or complete similarity, where the type of goods involved may result in health hazards, environmental harm, and/or human death.

Article 83 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications clearly provides legal protection for trademark owners as well as license holders as the rightful parties. The provision stipulates that a trademark owner may file a lawsuit against any party that uses the trademark without authorization in order to: (1) obtain compensation for the losses

incurred; and (2) request the cessation of all acts related to the unauthorized use of the trademark.

In relation to violations occurring within e-commerce platforms, Article 15 paragraph (1) of Law Number 11 of 2008 concerning Electronic Information and Transactions, as amended by Law Number 19 of 2016 (ITE Law) also establishes the responsibility of platform providers as operators of e-commerce websites. Under this provision, Electronic System Operators (Penyelenggara Sistem Elektronik/PSE) are responsible for the operation and management of the electronic systems under their control.

Nevertheless, Article 15 paragraph (3) of the ITE Law stipulates that: “The provisions referred to in paragraph (2) shall not apply in cases where it can be proven that the occurrence results from force majeure, error, and/or negligence on the part of the users of the Electronic System.” Accordingly, in the context of e-commerce platforms operating under a marketplace model, where the goods offered for sale are owned and provided by users or merchants, the platform provider may not necessarily be held liable for the products listed or sold through the platform. However, this provision also creates a potential legal loophole, as it allows platform providers to avoid liability if it can be demonstrated that the violation arises from the actions, negligence, or fault of the electronic system users. Consequently, within marketplace-based platforms—where the goods offered are directly controlled by individual merchants—this regulatory exception may indirectly enable the continued circulation of counterfeit goods, since responsibility may be shifted primarily to the sellers rather than the platform operators.

With the existence of such exceptions, platform providers are not held directly responsible for the products sold by users on their platforms, including counterfeit goods, as long as they can demonstrate that they were neither directly involved in nor negligent in managing the relevant content. This situation reinforces the application of the safe harbor policy, which is frequently invoked to exempt e-commerce platforms from legal liability for the activities carried out by their users. As a consequence, this regulatory framework may inadvertently exacerbate the problem of counterfeit goods circulating within e-commerce platforms. The lack of clarity in the regulation creates opportunities for sellers of counterfeit products to continue operating with relatively minimal legal risk. Therefore, a more comprehensive and stricter regulatory reform is necessary in order to close these legal loopholes and ensure more effective enforcement against the circulation of counterfeit goods in digital marketplaces (Yuswar, Saviera, & Sirait, 2023, p. 8).

Regulations concerning the responsibility for managing online platforms are set out in Circular Letter of the Minister of Communication and Information Technology of the Republic of Indonesia Number 5 of 2016, which establishes the limitations and responsibilities of platform providers and merchants in User-Generated Content (UGC)-based electronic commerce. In Section V.C.2 of the Circular Letter, it is explained that the responsibilities of UGC platform providers include: (Totimage, Aziz, & Taufik, 2022)

1. ensuring that the electronic system and the management of content within the platform are conducted in a reliable, secure, and accountable manner; and
2. such responsibility shall not apply if it can be proven that the violation results from the error or negligence of the merchants or users of the platform.

The philosophical foundation underlying this provision is reflected in the statement contained in Roman Numeral I (General Provisions) of the Circular Letter of the Minister of Communication and Information Technology of the Republic of Indonesia Number 5 of 2016. In this section, it is explained that although online platforms provide significant convenience for users, they are also vulnerable to misuse by account holders or content uploaders who intentionally insert data or information that violates the law, whether for personal gain or other unlawful purposes. Such misuse may produce negative consequences for platform providers, as they may be perceived as being involved in or facilitating the illegal activities carried out through their platforms. If this perception is not properly addressed, it may pose a serious risk to platform providers, potentially affecting the sustainability of their operations as well as the overall reputation of their business.

The clause reflects a degree of conformity with the provisions set forth in Article 15 paragraph (3) of the ITE Law, which may serve as a legal basis for determining liability in cases involving goods that infringe trademark rights. Nevertheless, the legal standing of a ministerial circular letter as a regulatory foundation for the operation of e-commerce activities is relatively weak. This is because a Circular Letter of the Minister does not formally contain binding legal norms, such as norms governing conduct (including prohibitions, obligations, permissions, or exemptions), the allocation of authority (determining whether an entity is authorized or unauthorized), or formal determinations. Consequently, such circular letters do not establish enforceable sanctions for violations of the provisions contained within them.

The absence of legal liability imposed on marketplace platform providers for trademark infringements committed by their users highlights the urgent need for stricter regulatory measures. Although platform providers cannot be held entirely responsible for the content uploaded to their platforms since such content is generated by sellers (users) their role as operators and managers of the platform remains an important consideration in the context of legal accountability. Platform providers do not merely offer a digital space for sellers to market their products; they also possess the authority to regulate, monitor, and determine the types of content permitted to appear on their platforms, including the goods that may be offered for sale. Therefore, their role in supervising and managing platform activities becomes a significant factor in assessing responsibility for the circulation of goods that potentially infringe trademark rights (Arkan & Rahaditya, 2023, p. 8).

In this context, the regulation of legal liability imposed on platform providers may refer to Article 1365 of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata/KUHPer), which stipulates that any unlawful act that

causes harm to another person obliges the party whose fault caused the harm to compensate for such losses. Accordingly, if an e-commerce platform fails to exercise adequate supervision over the sale of counterfeit goods on its platform, it may be considered negligent, thereby causing harm to the rightful trademark owners. Although, from a technical perspective, platform providers primarily function as intermediaries that facilitate online transactions, the level of control they possess over the content displayed on their platforms means that they cannot be entirely exempt from legal responsibility (Yudha, 2023, p. 10).

The absence of clear legal obligations imposed on e-commerce platforms creates a regulatory gap that may be exploited by sellers of counterfeit goods, who utilize these platforms to distribute products that infringe trademark rights. Therefore, more comprehensive regulatory measures are required to ensure that platform providers also bear a degree of responsibility, not only in facilitating transactions but also in ensuring that the goods offered through their platforms do not violate applicable laws. Accordingly, e-commerce platform providers should take proactive measures to prevent the circulation of counterfeit goods. Stricter and more comprehensive regulations are necessary to close the existing legal loopholes that have been exploited by parties engaged in violations of intellectual property rights.

The element of fault in legal liability may be based on omission or negligence, particularly where inaction results in losses to the rightful party. In this regard, platform providers cannot entirely claim exemption from responsibility for unlawful goods available on their platforms solely by relying on the provisions set out in Article 15 paragraph (3) of the ITE Law. According to Insan Budi Maulana, as the primary operators of e-commerce websites, platform providers at least play a role in facilitating the distribution of such illegal products. This is primarily due to the fact that consumers or buyers typically conduct payment transactions through the platform provider, which subsequently transfers the payment to the merchant after a certain period of time.

Consequently, the platform functions not merely as a passive intermediary but also as a transactional facilitator within the e-commerce ecosystem. In this context, the assurance of legal protection in relation to such fault is also consistent with the provisions set forth in Article 83 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications, which grant trademark owners the right to pursue legal remedies against parties that unlawfully use their registered trademarks. This provision provides a legal basis for seeking compensation and for demanding the cessation of activities related to the unauthorized use of the trademark (Giantama & Kholil, 2020).

The legal issues concerning the liability of e-commerce platform providers in addressing the circulation of counterfeit goods become increasingly complex when associated with Article 15 paragraph (3) of the ITE Law. The application of this provision, which exempts platform providers from liability when violations arise due to the negligence of electronic system users, is often viewed as granting excessive protection to e-commerce platforms. Although the substance of Article 15 paragraph (3) of the ITE Law is not entirely inappropriate, its absolute application becomes less relevant when confronted with the reality of the

continuously increasing circulation of counterfeit goods on such platforms. This provision, which was originally intended to protect platform providers from errors committed by users, is frequently invoked to avoid responsibility, even though platform providers possess the authority to monitor and control the content uploaded to their platforms (Alhakim, Dewi, & Rompis, 2024).

In this context, the principle of good faith, as stipulated in Article 3 letter (a) of Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (PMSE), becomes an essential element. This principle requires all parties involved in electronic transactions, including business actors and consumers, to conduct their activities in good faith. More specifically, the principle of good faith requires e-commerce platform providers to actively participate in supervising and taking firm action against the circulation of counterfeit goods that infringe intellectual property rights. Platform providers cannot merely act as facilitators of transactions without assuming a degree of responsibility for the content uploaded by their users.

The principle of good faith is also closely related to the principles of prudence, transparency, and accountability as stipulated in Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (PMSE). Under these principles, platform providers are expected to exercise active supervision over the products offered for sale on their platforms. Violations of these principles may result in the invalidation of agreements between the parties involved, without prejudice to the rights of parties who have acted in good faith in conducting the transaction. Accordingly, e-commerce platforms are required to adopt proactive measures in preventing and addressing the circulation of counterfeit goods, while demonstrating that their operations comply with the regulatory principles established under applicable laws and regulations. This includes ensuring that the content uploaded to their platforms does not violate legal provisions. Ultimately, the failure of e-commerce platform providers to uphold the principle of good faith may create legal loopholes that can be exploited by parties engaged in trademark infringement. Therefore, the role of platform providers should not be limited solely to the provision of services, but must also encompass the obligation to actively participate in addressing legal violations, such as the circulation of counterfeit goods, in accordance with the governing legal framework.

Accordingly, users of the platform who act as merchants bear full responsibility for the goods they offer for sale. The importance of establishing liability for platform providers is rooted in the need to uphold the principles of legal certainty, prudence, and good faith, as reflected in Article 3 of the ITE Law. The legal responsibility of platform providers should therefore be regulated in order to ensure that they exercise due diligence in operating and managing the electronic systems within marketplace platforms. Such regulation constitutes a proactive measure to ensure that the management of digital platforms remains free from legal violations. Therefore, it is essential that provisions concerning this matter be incorporated not only within the ITE Law but also within other regulatory frameworks that support and govern the operation of e-commerce in Indonesia (Harun, Dungga, & Tome, 2019).

E-commerce platforms generally implement specific procedures to address such violations, particularly through a takedown mechanism for content that infringes Intellectual Property Rights (IPR). If a platform fails to promptly take such action, it may be considered as facilitating or participating in the infringement. From a criminal law perspective, such conduct may potentially give rise to liability under Article 55 of the Indonesian Criminal Code (KUHP) concerning participation in a criminal act. Furthermore, platform providers may also face legal claims if they are deemed to have neglected or ignored reports of intellectual property violations occurring on their platforms. Nevertheless, despite the existence of regulations governing the responsibility of e-commerce platforms in relation to the circulation of counterfeit goods, law enforcement in practice has not yet been sufficiently effective in reducing the number of counterfeit products that continue to be freely traded on e-commerce platforms in Indonesia.

In this context, the principles of good faith and prudence, as stipulated in Article 3 letter (a) of Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems (PMSE), require platforms to take a more active role in preventing violations of Intellectual Property Rights (IPR). Moreover, pursuant to Article 1365 of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata/KUHPer), a platform that fails to adequately supervise the content uploaded to its system may be considered to have committed an unlawful act that causes harm to other parties, particularly trademark owners. Therefore, a stronger commitment is required from platform providers to uphold these principles. Such commitment is essential to reduce the circulation of counterfeit goods and to promote a healthier and more equitable electronic commerce ecosystem.

Accordingly, the legal position of e-commerce platform providers occupies a complex role: on the one hand, they function as facilitators of electronic transactions, while on the other hand, they also bear a responsibility to ensure that the content available on their platforms does not violate applicable laws. Failure to fulfill this responsibility may not only give rise to potential legal consequences but may also undermine the integrity and public trust in the platform within the broader ecosystem of electronic commerce.

In addressing the second issue of this research, namely the effectiveness of the “acting promptly” clause in addressing legal violations related to the circulation of counterfeit goods in e-commerce, it can be observed that widely recognized brands in the economic sector often constitute a substantial source of revenue. This phenomenon is largely driven by consumers’ desire to appear fashionable and to use branded products, even when they face financial limitations. As a result, many consumers aspire to purchase branded goods despite their relatively high prices. For individuals with limited financial capacity, counterfeit or imitation products often become a more attractive alternative. In this context, the role of business actors, both domestic and international, becomes crucial in providing electronic communication facilities that support digital commerce. These actors include telecommunications service providers that function as intermediaries connecting the transmission of

information between parties. Marketplaces such as Tokopedia, Bukalapak, and Shopee serve as examples of Electronic Commerce System Operators (PMSE) that provide platforms enabling buying and selling transactions. Within these platforms, merchants who are sellers utilizing the marketplace infrastructure can offer their products directly to consumers. In addition, intermediary service platforms such as OLX, Carmudi, and Rumah123 operate as digital intermediaries that connect sellers and buyers without directly participating in the transaction itself. Furthermore, social media platforms such as Facebook have also evolved into spaces that facilitate commercial activities, allowing users to interact and conduct transactions with relative ease. The presence of these diverse digital platforms has significantly simplified the interaction process between sellers and buyers, thereby creating a more dynamic digital commerce environment (Sheila, Syifa, Syafii, & Tarina, 2023).

The presence of marketplace platforms provides significant advantages for merchants, enabling them to reach a broader market without incurring substantial operational costs. However, these platforms are also vulnerable to misuse by parties who offer illegal goods, including products that have not obtained the necessary distribution permits, do not comply with the Indonesian National Standard (SNI), or consist of stolen goods. In addition, illegal goods may also include counterfeit products that are frequently sold through online platforms and that infringe upon intellectual property rights, including copyright (Saidin, 2010, p. 10).

Intellectual property constitutes a form of property derived from the results of human intellectual creativity that are embodied in a work possessing both originality and utility. It reflects the capacity of an individual to produce creations through intellectual effort, which subsequently acquire economic and legal value. Within the framework of legal protection, intellectual property represents an intangible asset that arises from the exercise of human intellect and is therefore entitled to recognition and protection under the law. According to H. OK Saidin, not every individual possesses the ability to effectively utilize intellectual capacity to generate intellectual property. Only those who consciously endeavor to employ their intellectual potential are capable of producing works that transform ideas and creativity into objects of property recognized as intellectual assets. This perspective underscores that intellectual property is the result of deliberate intellectual effort, which converts creative thought into works that may obtain legal protection and economic value (Saidin, 2010, p. 10).

Law Number 28 of 2014 concerning Copyright, regulates provisions concerning the prohibition of selling counterfeit goods that infringe copyright. Article 10 of the Law Number 28 of 2014 concerning Copyright states that “managers of places of trade are prohibited from allowing the sale or reproduction of goods that infringe copyright or related rights in places under their management.” Furthermore, Article 114 of the Law Number 28 of 2014 concerning Copyright provides that “any manager who intentionally allows the sale or reproduction of goods that infringe copyright within the place under their

management may be subject to a fine of up to IDR 100,000,000 (one hundred million rupiah).”

Government Regulation Number 80 of 2019 concerning Trade Through Electronic Systems provides that Article 22 paragraph (1) stipulates that if illegal electronic information content exists within electronic commerce (PMSE), the Domestic Electronic Commerce System Operator (PPMSE), Foreign Electronic Commerce System Operator (PPMSE), and Intermediary Service Providers shall be responsible for the impact or legal consequences arising from the existence of such illegal electronic information content. However, the liability of the Electronic Commerce System Operator may be waived if immediate action is taken to remove the illegal content after becoming aware of its existence. This is regulated in Article 22 paragraph (2) of Government Regulation Number 80 of 2019, which states: “The provision as referred to in paragraph (1) shall not apply if the relevant Domestic PPMSE and/or Foreign PPMSE acts expeditiously to remove the electronic link and/or illegal electronic information content after obtaining knowledge or awareness thereof.”

Article 22 paragraph (1) of the Government Regulation Number 80 of 2019 concerning Electronic Commerce (Trade Through Electronic Systems) stipulates that “in the event of the dissemination of illegal electronic information content within Electronic Commerce (Perdagangan Melalui Sistem Elektronik/PMSE), the Electronic Commerce System Operator (Penyelenggara Perdagangan Melalui Sistem Elektronik/PPMSE), whether domestic or foreign, as well as intermediary service providers, shall be responsible for any impacts or legal consequences arising from the existence of such content.” However, such liability may be waived if the PPMSE promptly takes action to remove the illegal content after becoming aware of its existence. This is reaffirmed in Article 22 paragraph (2) of the same regulation, which provides that: “The provision as referred to in paragraph (1) shall not apply if the relevant domestic PPMSE and/or foreign PPMSE acts expeditiously to remove the electronic link and/or illegal electronic information content after obtaining knowledge or awareness thereof.” This regulation indicates that the legal responsibility of PPMSE is dynamic in nature, depending on the promptness with which they respond to illegal content after obtaining information or awareness regarding the existence of such content.

Based on the elucidation of Article 22 paragraph (2) of the Government Regulation Number 80 of 2019 concerning Electronic Commerce (Trade Through Electronic Systems), the term “acting expeditiously” refers to actions taken immediately after becoming aware of the existence of illegal electronic information content. Such actions may be reflected in the procedures undertaken by the Electronic Commerce System Operator (PPMSE) after receiving notification from other parties or after independently discovering the existence of the illegal content, in accordance with the applicable laws and regulations. However, the phrase “acting expeditiously” does not specifically provide an effective resolution to the circulation of counterfeit goods, which constitutes an illegal act.

Although e-commerce platforms are required to remove illegal content after becoming aware of its existence, there is no clear or detailed mechanism

specifying the proactive measures that platform providers must undertake to prevent the initial appearance of counterfeit goods. This provision primarily emphasizes reactive action after a violation has occurred, without adequately addressing how platform providers should exercise stricter control or implement effective filtering mechanisms over the goods offered for sale. Consequently, despite the existence of the phrase “acting expeditiously” in Article 22 of the Government Regulation Number 80 of 2019 concerning Electronic Commerce (Trade Through Electronic Systems), legal loopholes remain that may be exploited by sellers of counterfeit goods. As a result, there is no assurance that the implementation of this provision will effectively reduce the circulation of illegal goods within e-commerce platforms.

Counterfeiting products that use registered trademarks constitutes a form of trademark infringement regulated under Law Number 20 of 2016 concerning Trademarks and Geographical Indications. Such counterfeiting may also be regarded as a violation of the moral rights of the creator or owner of the product. This principle is reflected in Article 27 of the Universal Declaration of Human Rights, which provides that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author.” Accordingly, every individual is entitled to moral and material protection over the works they produce as their creators. Within the framework of the Trademark and Geographical Indications Law, acts of counterfeiting products that use registered trademarks violate the criminal provisions stipulated in Articles 100, 101, and 102 of Law Number 20 of 2016 concerning Trademarks and Geographical Indications (Budi, 2020). Article 103 further provides that the criminal offenses described in Articles 100 through 102 fall within the category of complaint-based offenses (*delik aduan*), meaning that prosecution may only proceed upon a report or complaint filed by the injured party. The complaint-based offenses referred to in Articles 100, 101, and 102 are categorized as relative complaint offenses, thereby granting the trademark owner the discretion to determine whether or not to pursue legal proceedings.

Trademark rights obtain exclusive legal protection, meaning that such rights may only be exercised by the trademark owner. This exclusive nature grants the trademark owner a form of monopoly right, whereby other parties are prohibited from using or exploiting the trademark without prior authorization from its owner. This special right ensures that only the trademark owner possesses full authority to manage and utilize the trademark. Consequently, trademark protection carries an exclusive character in which only the trademark owner has the full legal entitlement to use or benefit from the mark, and other parties may not exploit or use it without the consent of the rightful owner (Budi, 2020). In the context of the online sale of counterfeit branded products, relevant provisions are regulated under Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions. Articles 46, 47, and 49 of this regulation provide the legal framework governing electronic transactions. Article 46 emphasizes that electronic transactions conducted by the parties produce legal consequences and must be carried out based on the principles of good faith, transparency, prudence, accountability, and fairness.

Meanwhile, Article 49 paragraph (1) of the Government Regulation Number 82 of 2012 concerning the Implementation of Electronic Systems and Transactions requires business actors who offer products electronically to provide complete and accurate information regarding the contractual terms, the producer, and the products being offered. Paragraph (2) further emphasizes that business actors must provide clear information concerning the contractual offer or advertisement. If consumers receive goods that do not correspond with the agreement, Article 49 paragraph (3) requires business actors to provide consumers with the opportunity to return the goods. In addition, consumers also possess the right to file a civil claim in the event of breach of contract, for instance when the goods received do not correspond with what was promised in the product description or displayed in the product images (Arief, 2023).

Within the Indonesian trademark legal system, legitimate trademark owners obtain legal protection through civil litigation. In the event of infringement, the trademark owner may file a claim based on Article 1365 of the Kitab Undang-Undang Hukum Perdata, which provides that any unlawful act causing damage to another party obliges the perpetrator to compensate for such damage. In pursuing such a claim, the trademark owner must demonstrate that the infringement has resulted in financial loss or reputational harm. The purpose of this legal action is to obtain compensation and to cease the unauthorized use of the trademark, including any use that imitates or resembles the original mark, thereby safeguarding the exclusive rights of the trademark owner and preventing the recurrence of similar violations (Nashir, 2023).

In addition to filing claims under Law Number 20 of 2016 concerning Trademarks and Geographical Indications, parties who suffer losses as a result of the circulation of counterfeit goods have three alternative mechanisms for dispute resolution. The first alternative is to file a civil lawsuit before the Pengadilan Niaga. Through such litigation, the injured party may claim compensation for damages and request the cessation of related activities, including the production, distribution, or sale of goods and/or services that constitute infringement. This approach enables the aggrieved party to obtain financial compensation for the losses incurred while simultaneously seeking to terminate the unlawful practices (Muaja, 2018).

The second alternative is mediation, which is often preferred by business actors because the process is generally faster and more cost-efficient than litigation. Mediation provides an opportunity for both parties to reach a mutually agreed settlement without undergoing a lengthy court process. In addition, this approach may help preserve business relationships that might otherwise deteriorate as a result of the dispute. If mediation efforts fail to produce a resolution, the third alternative is to pursue criminal legal action by filing a complaint-based offense (*delik aduan*). This process begins with an investigation initiated upon a report or complaint submitted to investigators of the Indonesian National Police or to Civil Servant Investigators of the Directorate General of Intellectual Property. Taking these legal measures is important for the aggrieved party, as each alternative possesses its own advantages and limitations. Therefore, selecting the appropriate method may increase the likelihood of

achieving the desired outcome. Furthermore, understanding the available legal avenues underscores the importance of legal awareness among business actors to take proactive steps in protecting their rights, while also encouraging more effective law enforcement against counterfeiting practices (Muaja, 2018).

CONCLUSIONS AND RECOMMENDATIONS

The legal position of e-commerce platform providers in relation to the circulation of counterfeit goods is governed by the principles of Electronic Commerce (PMSE) and the safe harbour policy. As intermediaries in digital transactions, platforms are generally not directly liable for user-generated content. However, liability may arise if they fail to act expeditiously to remove illegal content, including counterfeit goods, as stipulated in Article 22 paragraph (2) of the Government Regulation Number 80 of 2019 concerning Electronic Commerce (Trade Through Electronic Systems). Furthermore, under Article 1365 of the Kitab Undang-Undang Hukum Perdata, platforms may also face civil liability if they are deemed negligent or intentionally allow trademark infringement to occur within their systems. Although the safe harbour policy provides protection for platforms that promptly remove illegal content, legal loopholes remain. The “acting expeditiously” clause in Article 22 paragraph (2) of Government Regulation Number 80 of 2019 primarily imposes a reactive obligation, requiring platforms to remove illegal content after becoming aware of it, without establishing clear preventive obligations. The absence of specific regulatory mechanisms regarding prevention, monitoring, and verification creates a normative gap. Therefore, a clearer regulatory framework is necessary to strengthen supervisory, preventive, and verification mechanisms, enabling e-commerce platforms to take a more proactive role in addressing the circulation of counterfeit goods and in protecting both trademark rights and consumers.

FURTHER STUDY

Future research is recommended to explore the comparative effectiveness of safe harbor policies across different jurisdictions in addressing the liability of e-commerce platforms for counterfeit goods.

ACKNOWLEDGMENT

The author gratefully acknowledges the support and contributions of all parties who assisted in the completion of this study.

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