



## LEGAL REASONING: HOW WELL-KNOWN MARKS ARE POSITIONED THROUGH LEGAL POSITIVISM

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### ABSTRACT

Legal protection for well-known mark needs to be examined. Indonesia has tried to conform its legal system with international law, most notably the Paris Convention and the TRIPS Agreement. However, the court's decision indicates that the well-known mark remains unfavourable. This paper aimed to analyse judges' rationale when they rejected a lawsuit against a well-known trademark in Indonesia which was the trademark dispute of "Starbucks" and Pierre "Cardin". This study was conducted using legal research methods and it examined legal materials from judges' decisions and literature review. Therefore, knowing the judge's rationale for dismissing the claim is essential. In the first case, the plaintiff's documented evidence was insufficient to establish the respondent's bad faith, but the judge's justification for rejecting the lawsuit was insufficient either. Meanwhile, in the second case, the judge denied the claim based on *ne bis in idem*, which aims to reach legal certainty, so the judge can lean more toward positivism. The positivism requires clear rules so as not to cause multiple interpretations. However, trademark and geographical indication law does not give complete regulations on well-known marks. As a result, problems and conflicts frequently arise in practice when it comes to the protection of well-known marks.

**Keywords:** Pierre Cardin; Starbucks; Well-Known Mark

### 1. INTRODUCTION

In 1994, Indonesia ratified the Trade Related Intellectual Property Rights (TRIPS) Agreement. Since then, all the related regulations have been accommodated by the Government, one of which is trademark whose last and new version of law was promulgated in 2016. However, this seems insufficient to prevent the violation of the trademark owner's exclusive rights. In 2015–2021, there were 1,184 cases of intellectual property infringement and a total of 658 cases related to trademarks<sup>1</sup>. Using Hegel's dialectical perspective, which includes the thesis, antithesis, and synthesis,<sup>2</sup> intellectual property infringements can be positioned as the antithesis to the application of intellectual property (thesis). Laws concerning intellectual property were adopted from western societies. As a result, enforcing this regulation created a slew of issues including to Indonesian culture which is distinctive from Western society. Therefore, intellectual property violation, such as trademark infringement, is unavoidable.

Passing off is one of the most frequent types of trademark violation. Passing off occurs when a company without a registered trademark discovers another company using their brand without permission. The protection of unregistered marks continues to be a minor concern in Indonesia, as it is in the majority of civil law nations,

1 Wibi Pangestu Pratama, 'Ada 1.184 Kasus Pelanggaran Haki Ditindak Di RI Sejak 2015', *Ekonomi.Bisnis.Com*, 2021, <https://ekonomi.bisnis.com/read/20211006/9/1451327/ada-1184-kasus-pelanggaran-haki-ditindak-di-ri-sejak-2015> (accessed on 3 March 2023).

2 Alison Stone, 'Adorno, Hegel, and Dialectic', *British Journal for the History of Philosophy* 22, no. 6 (2014), <https://doi.org/10.1080/09608788.2014.952264>, p 1.

and registration is the sole means to gain trademark rights<sup>3</sup>. Indonesia has a “first to file” or constitutive method for trademark registration, which implies that the owner of the mark must register it with the Directorate General of Intellectual Property in order to obtain the trademark rights<sup>4</sup>. Hence, the protection of well-known mark is still questionable because some of well-known brands are not registered yet. The well-known mark is used for financial goals that are detrimental to the well-known brand owners. Popular brands are copied, exploited, or altered for economical purpose<sup>5</sup>.

Pierre Cardin case is one of the examples of passing off, ruled out by the supreme court in 2018 with a negative verdict for the plaintiff (Pierre Cardin International). In the case of Starbucks, the local registrant registered the mark, and the trademark office awarded the registration unexpectedly. Therefore, the owner of Starbucks United States who filed a lawsuit to have the mark, which was registered in bad faith, revoked. Nonetheless, the court denied the claim. This study examined these judgements to gain a concrete understanding of the law, with a particular emphasis on the legal reasonings. This justification is necessary to show the judge’s thinking process while making a decision. A legal case is an excellent tool for examining two facets of judicial reasoning: first, how judges justify their decisions, and second, how they contribute to the coherence of a legal system<sup>6</sup>. In addition, the decision shows how legal reasoning is used in a real context<sup>7</sup>. There are some reasons why legal reasoning is essential and relevant: 1) to guarantee the validity of the argumentation as it is closer to the truth and fairness. 2) to help legal enforcer to analyze, formulate, and evaluate the fact, data, and legal argumentation. 3) to understand the legal issue, empirical practice, and decision. 4) to understand the primary domain and the essence of the legal decision as legal reasoning with logic as the basis. Furthermore, understanding how trademark law operates is also essential to identify the synergies of the dialectic process. Therefore, this study is important to determine the outcome of implementation of trademark legislation in Indonesia, particularly with regard to the famous trademark issue.

Some research show interest in legal reasoning, like Frederick Schauer, who wrote the relationship between legal reason and law<sup>8</sup>. This essay analyzed the topics and debate among participants, addressing the question of the link between law and legal reasoning revealing much about law, legal reasoning, and the enterprise of legal theory. This study showed the difference from Frederick Schauer’s research by applying legal reasoning to brand cases. On the other hand, trademark analysis was also found in Zhang and Cui’s article, which discussed the empirical study of trademark infringement cases in China. Zhang attempted to evaluate whether trademark use should be a significant factor in determining trademark infringement. Zhang’s research and this current study examined trademark infringement through case studies. However, Zhang and Cui’s research addressed the factors in determining trademark infringement in China, while this study focused on how judges considered the infringement of well-known brands in Indonesia. Furthermore, Nora Ho Tu Nam and Marius Schneider also wrote about the protection of well-known trademarks in Africa and the challenges of trademark protection in several African countries. On the other hand, this study indicated the difference by focusing on well-known trademark violations in Indonesia, especially how courts decided and considered famous mark disputes.

Weaknesses in Indonesia’s regulatory framework pose a threat to well-known brands in Indonesia. In Indonesia, the Trademark Law permits the state to accept registrations of identical brands, and in the event of a disagreement, it permits the judge to make a ruling that threatens the existence of goodwill. Thus, analyzing and comparing the reasoning of specific cases on Starbucks and Pierre Cardin will differentiate this study from

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- 3 Shujie Feng, ‘How Are Unregistered Trademarks Protected in China?’, *IIC International Review of Intellectual Property and Competition Law* 44, no. 7 (2013), <https://doi.org/10.1007/s40319-013-0106-6>, p 816.
  - 4 Renggi Ardy Putra, ‘Legal Possibility To Regulate Defensive Mark As Well-Known Mark Protection In Indonesia’, *Journal of Intellectual Property* 1, no. 1 (2018): 1–12.
  - 5 Larisa Ertekin, Alina Sorescu, and Mark B. Houston, ‘Hands off My Brand! The Financial Consequences of Protecting Brands through Trademark Infringement Lawsuits’, *Journal of Marketing* 82, no. 5 (2018), <https://doi.org/10.1509/jm.17.0328>, p 2.
  - 6 L. M. Soriano, ‘Environmental “Wrongs” and Environmental Rights: Challenging the Legal Reasoning of English Judges’, *Journal of Environmental Law* 13, no. 3 (1 March 2001): 297–313, <https://doi.org/10.1093/jel/13.3.297>.
  - 7 Shidarta, *Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan* (CV. Utomo, 2006), p 60.
  - 8 Frederick Schauer, ‘On The Relationship Between Law and Legal Reasoning’, *Oxford: Hart Publishing*, 2021, 1–27.

others. In addition, this study focused on the philosophical perspective to find the judge's view in examining the case. Hence, the first and second reasons demonstrated the uniqueness of this study. The entire endeavor of explicating and elaborating the standards and forms of dynamic legal reasoning<sup>9</sup> must be situated within the context of the fundamental values attributed to the legal order<sup>10</sup>. Based on this, this study case is also expected to provide benefits for legal orders.

As such, it is necessary to first define the meaning of legal reasoning and legal positivism, before analysing the case of Pierre Cardin and Starbucks to finally conclude the legal reasoning presented by both cases. Although, in general, the resolution of intellectual property disputes is the authority of commercial courts (disputes on trademarks, patents, copyrights, integrated circuit layout designs, industrial designs) and district courts (disputes on the protection of plant varieties and trade secret), it should be emphasized that this study only analyzed two trademark decisions resolved in the commercial court, namely the Pierre Cardin and Starbucks.

## 2. RESEARCH METHODS

This study was a legal research. Legal research involves the use of a variety of printed and electronic sources. The printed sources included court decisions, administrative documents, and scholarly commentaries<sup>11</sup>. The approach method used was the statutory approach and the case approach. The legal materials used were primary and secondary legal materials, collected through tracing laws and regulations, court decisions, literature reviews, books and research journals. The legal sources obtained were then analysed qualitatively to answer the problems studied as the basis for conclusions.

## 3. FINDINGS AND DISCUSSION

### 3.1. Legal Reasoning and Legal Positivism

It is intriguing to comprehend the judge's thinking as a result of their position as a law enforcer who has the authority to make the law through their decision, albeit in a weaker capacity in civil law states. Even when judges are in a stressful environment while confronting particulars, and they still judge according to the rule of the case<sup>12</sup>. Historically, the legislative branch was responsible for rulemaking, while the judiciary administered the law. In consequence, the judge frequently employs normative-dogmatic reasoning in their decision. Since judges' decision is ruled-based, civil law reasoning is doctrinal and takes the law as it is stated in the books into consideration<sup>13</sup>. However, the idea of a borderless state implies that interactions between states are inevitable causing the blending of common and civil law to be unavoidable. For instance, in civil law, the judge is required to apply a non-doctrinal interpretation of the law. In addition, it is proven that the law is incomplete and, in the worst condition, is unable to solve concrete problems. Regardless, it is undeniable that a case's conclusion may be significantly influenced by the degree of generality or abstraction used to characterize a precedent, a right, the legislative intent behind a statutory provision, or the component purpose underlying a constitutional provision<sup>14</sup>.

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9 Tanel Kerikmäe and Sandra Särav, 'Paradigms for Automatization of Logic and Legal Reasoning', August 2017, [https://www.researchgate.net/profile/Tanel-Kerikmaee/publication/319069131\\_Paradigms\\_for\\_Automatization\\_of\\_Logic\\_and\\_Legal\\_Reasoning/links/598e16ff0f7e9bf4fbb017be/Paradigms-for-Automatization-of-Logic-and-Legal-Reasoning.pdf](https://www.researchgate.net/profile/Tanel-Kerikmaee/publication/319069131_Paradigms_for_Automatization_of_Logic_and_Legal_Reasoning/links/598e16ff0f7e9bf4fbb017be/Paradigms-for-Automatization-of-Logic-and-Legal-Reasoning.pdf), (accessed on 15 December 2022).

10 Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), [https://books.google.co.id/books?hl=en&lr=&id=VG1CAgAAQBAJ&oi=fnd&pg=PR8&dq=legal+reasoning+decision+judgement&ots=Ph3xDVbC6k&sig=y-JDxqJV37P4XzMcOG29LRdGD\\_g&redir\\_esc=y#v=onepage&q=legal%20reasoning%20decision%20judgement&f=false](https://books.google.co.id/books?hl=en&lr=&id=VG1CAgAAQBAJ&oi=fnd&pg=PR8&dq=legal+reasoning+decision+judgement&ots=Ph3xDVbC6k&sig=y-JDxqJV37P4XzMcOG29LRdGD_g&redir_esc=y#v=onepage&q=legal%20reasoning%20decision%20judgement&f=false), p 2 (accessed on 10 December 2022).

11 Morris L. Cohen and Kent C. Olson, *Legal Research in a Nutshell*, 6th ed, West Nutshell Series (St. Paul, Minn: West Pub. Co, 1996), p 2.

12 Zenon Bankowski, and James Maclean, *The Universal and The Particular in Legal Reasoning* (Ashgate Publishing Limited, n.d.), p xiii.

13 Shidarta, *Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan*, (CV. Utomo, 2006), p 209.

14 Gerard Conway, 'Levels of Generality in the Legal Reasoning of the European Court of Justice', *European Law*

Meanwhile, reasoning can be defined as i) the concluding process from a deposition, ii) the application of logical thinking in problem-solving, iii) the understanding ability without in-person experience or sensory perception<sup>15</sup>. Legal reasoning applies logical thinking to understand the principle, rule, data, fact, and legal preposition<sup>16</sup>. Legal reasoning is used to know the judge's ground in deciding a case<sup>17</sup>. In relation to reason and humanity, David Hume stated that reason instructs the tendencies of actions, and humanity identifies those which are valuable and beneficial<sup>18</sup>. He also explained that reason conveys the knowledge of truth and falsehood, which will lead to discovering the concealed and unknown<sup>19</sup>. Reasoning can work only with given premises, presume certain deductions, and make conclusions from these premises.

As the example, the major premise is that: "every person unlawfully uses any Mark which is identical to the registered Mark of other parties and similarly produced and/or traded goods and/or services shall be sentenced to imprisonment of up to 5 (five) years and/or fines up to Rp2,000,000,000.00 (two billion rupiahs)". In addition to it, the minor premise is that: "Alex uses the identical mark of the other party". The conclusion drawn is that: "Alex shall be sentenced to imprisonment of up to 5 (five) years and/or fines up to Rp2,000,000,000.00 (two billion rupiahs)". The above example is deductive reasoning, with the principal premise and conclusion as normative, whereas the minor premise as the preposition of fact.

On the other hand, in inductive reasoning, the prepositions provide some degree of support for the conclusion. Inductive reason starts from some specific events to general events, with the steps as follows: (1) gathering specific facts; (2) formulating hypothesis; (3) verifying the hypothesis against the facts so that general propositions are reached; (4) formulating scientific theories and laws based on the verification that has been done<sup>20</sup>. Inductive reasoning can be demonstrated by the existence of two premises, with the first premise: "Joni stole and was sentenced to five years in prison", while the second premise: "Andi stole and was sentenced to five years in prison". Then, it is concluded that all the thieves were sentenced to five years in prison. If the decision of a particular case is known, the outcomes of cases with comparable facts should be similarly resolved, according to an established legal principle<sup>21</sup> which corresponds to the inductive legal reasoning.

Legal reasoning can be seen in axiology, ontology, and epistemology. Axiology focuses on the purpose of the law. Through these three perspectives, legal reasoning is used to achieve the goal of the law: justice, legal certainty, and utility. To answer the central question on the meaning of the law depends on the philosophy that one believed and adopted. Natural law believes that justice is the sole purpose of the law; positivism regards legal certainty as its purpose; utilitarian and legal realism's purpose of the law is utility, while the historical law takes justice and utility as its goal; and sociological jurisprudence chooses legal certainty and utility<sup>22</sup>.

On the other hand, ontology raises issues about the fundamental nature of law<sup>23</sup>. Natural law defines law as a universal principle of truth and justice; legal positivism and utilitarianism interpret it as a positive norm; historical schools regard it as an institutionalized pattern of behavior; sociological jurisprudence interprets it

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*Journal* 14, no. 6 (November 2008): 787–805, <https://doi.org/10.1111/j.1468-0386.2008.00440.x>, p 787.

15 Lorens Bagus, 'Kamus Filsafat, Jakarta: PT', *Gramedia Pustaka Utama*, 1996, p 794.

16 Urbanus Ura Weruin, 'Logika, Penalaran, Dan Argumentasi Hukum', *Jurnal Konstitusi* 14, no. 2 (2017): 374–374, <https://doi.org/10.31078/jk1427>, p 381.

17 Teguh Samudera, 'PENELUSURAN / Penalaran Hukum ( Legal Reasoning )', no. i (n.d.), <http://www.dppferari.org/wp-content/uploads/2019/04/Penelusuran-Penalaran-Hukum.pdf> (accessed on 2 December 2022).

18 David Hume, *An Enquiry Concerning the Principles of Morals: A Critical Edition*, vol. 4 (Oxford University Press, 2006), p 7.

19 David Hume, *An Enquiry Concerning the Principles of Morals: A Critical Edition*, vol. 4 (Oxford University Press, 2006), p 72.

20 Edward N Zalta and GOTTLOB FREGE, 'Stanford Encyclopedia of Philosophy-Winter 2011 Edition', *URL=< Https://Plato. Stanford. Edu/Archives/Win2019/Entri Es/Frege*, 2013 (accessed on 3 December 2022).

21 William Meadow and John D. Lantos, 'Expert Testimony, Legal Reasoning, and Justice', *Clinics in Perinatology* 23, no. 3 (September 1996): 583–95, [https://doi.org/10.1016/S0095-5108\(18\)30230-6](https://doi.org/10.1016/S0095-5108(18)30230-6).

22 Agus Setiawan, 'Penalaran Hukum Yang Mampu Mewujudkan Tujuan Hukum Secara Proporsional', *Jurnal Hukum Mimbar Justitia* 3, no. 2 (2017): 204–204, <https://doi.org/10.35194/jhmj.v3i2.257>.

23 Shidarta, *Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan*, (CV. Utomo, 2006), p 60.

as a judge's decision; and legal realism interprets it as a symbolic meaning of social actors<sup>24</sup>. The meaning of law according to Realism is closely related to how it is used. It tries to understand the relationship between how people act and what happens when laws are put into place. Its formal object is how laws work in society. Realism is based on real events caused by actions that are in line with social rules and norms<sup>25</sup>.

Regarding epistemology, legal reasoning is seen from the method used in the legal reasoning process<sup>26</sup>. The six philosophies also have different methods of legal reasoning. Natural law and legal positivism use the doctrinal-deductive form; utilitarianism apply a doctrinal-deductive method followed by a non-doctrinal-inductive method by testing the legislation with reality to obtain juridical applicability and, at the same time, gain public acceptance; historical philosophy and sociological jurisprudence use inductive non-doctrinal reasoning with deductive doctrinal reasoning; and legal realism uses inductive non-doctrinal methods to achieve benefits. Using inductive, non-doctrinal methods, legal realism attempts to elaborate all the objects it explains on the basis of the actual form of legal events<sup>27</sup>. Since rule of law depends of the quality of legal reasoning<sup>28</sup>, it cannot be denied that legal reasoning will affect the legal order, regardless of its aim, meaning, or method.

In both of the decisions considered for this study, positivism serves as the foundation for the judges' ultimate rulings. Legal positivism is the source of positivist logic<sup>29</sup>. Legal positivism is a view in legal philosophy which emphasizes that the existence of law depends on the existence of rules made by the state and not on moral values or principles of justice. This view also emphasizes the importance of interpreting the law objectively and neutrally in making decisions by judges. Kelsen explained that a judge's decision must be based on applicable legal norms, not moral values or principles of justice.<sup>30</sup> According to Joseph Raz, the view of legal positivism stated that law must be understood separately from the considerations of morality and justice. In this view, the law should not be confused with what ought to be done or what is morally right or wrong, the law is seen as a set of regulations made by legitimate authorities and implemented by an independent judicial system.<sup>31</sup>

According to positivism, which is predicated on an analytical approach to the study of causal phenomena, the truth comes from an external, perceivable reality<sup>32</sup>. Legal positivism holds the view that law is a social fact whose presence can be recognized from its source without the need to examine its contents further. There is no requirement for a conceptual relationship between morality and law<sup>33</sup>. Law, as a social fact, is derived from pre-existing social practices, which must meet certain criteria before being officially recognized as law. These criteria include the presence of behavioural patterns that conform to general standards, the existence of public requests to comply with these standards, and the normative status of the standards<sup>34</sup>. Moreover, a legal norm

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- 24 Setiawan, 'Penalaran Hukum Yang Mampu Mewujudkan Tujuan Hukum Secara Proporsional', *Jurnal Hukum Mimbar Justicia*, 3, 2, 2017, p 211.
  - 25 Christina Bagenda, 'Filsafat Realisme Hukum Dalam Perspektif Ontologi, Aksiologi, Dan Epistemologi', *Jurnal Ius Constituendum* 7, no. 1 (18 April 2022): 115, <https://doi.org/10.26623/jic.v7i1.4777>, p 115.
  - 26 Setiawan, Setiawan, 'Penalaran Hukum Yang Mampu Mewujudkan Tujuan Hukum Secara Proporsional', *Jurnal Hukum Mimbar Justicia*, 3, 2, 2017, p 212.
  - 27 Bagenda, 'Filsafat Realisme Hukum Dalam Perspektif Ontologi, Aksiologi, Dan Epistemologi', *Jurnal Ius Constituendum* 7, no. 1 (18 April 2022): 115, <https://doi.org/10.26623/jic.v7i1.4777>, p 115.
  - 28 Vern R Walker, 'Discovering the Logic of Legal Reasoning', *Hofstra Law Review* 35, no. 4 (n.d.), Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol35/iss4/2>, p 1687.
  - 29 Mario Julyano and Aditya Yuli Sulistyawan, 'PEMAHAMAN TERHADAP ASAS KEPASTIAN HUKUM MELALUI KONSTRUKSI PENALARAN POSITIVISME HUKUM', *CREPIDO* 1, no. 1 (31 July 2019): 13–22, <https://doi.org/10.14710/crepido.1.1.13-22>.
  - 30 Hans Kelsen, *General Theory of Law & State*, Law & Society Series (New Brunswick, N.J: Transaction Publishers, 2006), p 144, p 374, p 441.
  - 31 Joseph Raz, 'Legal Principles and the Limits of Law', *The Yale Law Journal* 81 (1972), p 834, p 853, p 848.
  - 32 Indra Rahmatullah, 'Filsafat Positivisme Hukum (Legal Positivisme)', *ADALAH* 6, no. 1 (8 June 2022): 1–12, <https://doi.org/10.15408/adalah.v6i1.26427>, p 2.
  - 33 Pramudya A. Oktavinanda, 'Positivisme Hukum Dan Pendekatan Hukum Dan Ekonomi -- Suatu Pembelaan (Legal Positivism and Law and Economics -- A Defense', *SSRN Electronic Journal*, 2013, <https://doi.org/10.2139/ssrn.2314530>, p 3.
  - 34 H. L. A. Hart, *The Concept of Law*, Third edition, Clarendon Law Series (Oxford, United Kingdom: Oxford

must be grounded on social facts, and an unfounded standard is not. One of the many reasons why law must be distinct from morality is that it is difficult to find consensus among competing moral ideas<sup>35</sup>.

### 3.2. Judicial decision on Pierre Cardin

One of the controversial litigations concerning the well-known mark involved Pierre Cardin. The procedural perspective and the judge's legal reasoning have not been touched upon, despite the fact that it has been examined by the majority of authors. Therefore, it is still interesting to talk about the subject. It was filed in 2015 by Pierre Cardin (France) against Alexander Satryo Wibowo (Pierre Cardin Indonesia) as the first respondent and the Government of The Republic Indonesia Cq Department Of Justice and Human Rights Cq Director General of Intellectual Property Rights Cq Directorate of Marks as the second respondent.



Pierre Cardin Paris



Local Pierre Cardin

The Central Jakarta Commercial Court, in its decision number 15/Pdt.Sus-Merek/2015/PN.Niaga.Jkt.Pst, dismissed the Plaintiff's allegation that: 1) he has been a prominent designer since 1950; 2) he has registered "PIERRE CARDIN" since 1974 for many classes of commodities, including cosmetics and perfumes; 3) the mark has been constantly utilized in other nations around the world.

According to the ruling, the mark has been registered and continually used in a number of nations around the world, including African Union (AIPA), Albania, Algeria, Armenia, Aruba, Austria, Azerbaijan, Andorra, Aruba, Australia, Bahrain, Barbados, Belarus, Benelux, Bosnia-Herzegovina, British Virgin Islands, Belize, Brazil, Bulgaria, Bolivia, Brunei Darussalam, Cambodia, Colombia, Congo, Curacao, Czech Republic Costa Rica, Cyprus, Canada, China, Denmark, Dominican Republic, Indonesia, Israel, Iran, Turkey and many more. Also, it was a bad faith act because the respondent copied the Plaintiff's mark. He further requested that the registration of the respondent's PIERRE CARDIN (local) mark be stated as registered in bad faith. Therefore, the respondents' mark must be declared invalid.

During the trial, the respondents raised an exception for the expiration date based on Article 69, paragraph 1, of Law No. 15 of 2001 on Trademarks<sup>36</sup>. The law stated that a lawsuit might be filed within five years of registration. The "Pierre Cardin" (local) trademark was originally registered on 29 July 1977, and has subsequently been renewed three times (1985, 2005, and 2005). The first respondent reasoned that the claim should be dismissed since the limitation had passed.

Furthermore, the second respondent asserted that the plaintiff must prove that the mark was well-known, as indicated in the plaintiff's lawsuit. The petition was based on Civil Procedure Law Article 163, which states that whoever asserts a right/event must show its truth. Given that the plaintiff asserted that he was the owner of the famous mark, it was necessary for him to provide evidence that "Pierre Cardin" was a famous mark. Since the trademark had already been registered, the bad faith was irrelevant. The respondents cited the territorial concept to support their assertion. Therefore, as long as the mark is registered, it will enjoy legal protection. Additionally, there were no similarities between the respondent's mark and any other marks for the same commodities at the time.

The plaintiff's allegations were all rejected by the judges for the lack of proof of bad faith. In accordance with the principle of *actori incumbit probatio*, the plaintiff had the burden of proof when alleging that the

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University Press, 2012), p 44.

35 Oktavinanda, 'Positivisme Hukum Dan Pendekatan Hukum Dan Ekonomi -- Suatu Pembelaan (Legal Positivism and Law and Economics -- A Defense)', *SSRN Electronic Journal*, 2013, <https://doi.org/10.2139/ssrn.2314530>, p 7.

36 The case was first registered on 2015, hence it was using the previous law, ie the law no 15 year 2001

respondent's trademark registration was obtained in bad faith (163 Civil Procedural Law). Therefore, he must offer sufficient proof of bad faith.

The negative *non sunt probanda* principle, on the other hand, appeared to be inserted as a countermeasure to the former premise. The latter was based on something negative that was difficult to verify. The registration was not based on bad faith, the respondent stated, and this was included in the negative word. It was difficult to demonstrate that he did not act in bad faith when registering the mark. On the contrary, he must verify that the registration was based on good faith. A judge's discretion was required to determine the burden of proof regardless of either premise. This allowed them to ascertain the proofing's side weight. Aside from the assumption that the burden of proof was on the assessor, it would be wiser if the burden of proof was charged to the party who was easier to prove the good faith<sup>37</sup>.

Pierre Cardin filed a cassation as a legal action in the same year due to dissatisfaction over the Central Jakarta Commercial Court's ruling. Cassation is the legal remedy for the judgment of the commercial court, according to the terms of Article 30 section 4 of the Trademark Law. Hence, in 2015, Pierre Cardin (Paris) took the same respondents to the Supreme Court and appealed the case. Article 30 of Law No 14 of 1985 on the Supreme Court (legislatively updated twice in 2004 and 2009) established three possible grounds for submitting a petition of cassation:

1. Incompetence or exceeding competency limits.
2. Wrongly applying or violating prevailing Law.
3. Failure to fulfil the conditions required by the legislation threatened by revocation of judgment.

The judge's failure to consider the factor of the plaintiff's name's reputation was cited as the reason for cassation in the cassation brief. They did not thoroughly investigate the entire matter, but rather focused on the element that led to the breach of the law. In addition, the court did not adequately apply legal logic, particularly in reference to the "PIERRE CARDIN" reputation.

Taking into account article 6 paragraph (1) of Law No 15 of 2001 on Trademarks, which offers signs of a well-known mark (registered in some countries, widespread knowledge, and reputation resulted from extensive promotion), the judge denied the plaintiff's claim and did not consider the fame of their brand, stating that the fame of the brand should be based on the time it was registered by the first respondent. Nonetheless, the plaintiff said that it was physically impossible to track down evidence from 1977 (when the respondent registered its mark). As "PIERRE CARDIN" was not commonly used in Indonesia and there was no prior cooperation between the parties, he further asserted that the judge recognized the existence of bad faith. As a result, the respondents' actions were claimed to be illegal.

An interesting factor made by the judges was the 1977 judgement by the commercial court that "PIERRE CARDIN" was not a famous name and that no trademark had been registered using the name. Also, both marks had unique characteristics that set them apart from one another. The respondent in this case permanently affixed the phrases "product by PT Gudang Rejeki" and "Indonesia product" on their respective goods (Indonesia 2015). Therefore, the respondent's activity did not constitute passing off, since the same claim had been filed with the court on 22 December 1981, giving it lasting legal effect.

One of the Judges voiced a dissenting opinion, arguing that "PIERRE CARDIN" was a well-known mark used in many countries and was a brand used to differentiate the geographical origin of the product. The parties' respective brands, on the other hand, were very similar. In addition, it did not originate from Indonesia but rather from a foreign language spoken in the language of the plaintiff. As a result, the registration was deemed to be invalid as a consequence of the passing off, and the collaboration agreement did not even exist in the first place. According to the judge's decision, the claim was validated after extensive investigation<sup>38</sup>. On the other hand, the majority of the panel concluded that this claim should be dismissed. Therefore, the cassation was also dismissed (in accordance with article 186 paragraph (6) of the penal procedure code, which states that a judgment is made by a majority vote if the judges cannot reach an unanimous verdict).

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37 Ulrike Hahn and Mike Oaksford, 'The Burden of Proof and Its Role in Argumentation', *Argumentation* 21, no. 1 (2007): 39–61, <https://doi.org/10.1007/s10503-007-9022-6>.

38 Mahkamah Agung Indonesia, 'Putusan Kasasi Pierre Cardin No 557 K/Pdt.Sus-HKI/2015', 2015.

On judicial review, Supreme Court likewise rejected “PIERRE CARDIN’s” appeal, citing *ne bis in idem*<sup>39</sup>. If the question has already been decided upon by the court, it should not, according to this principle, be brought up again. The matter had previously been decided in favor of the plaintiff in decisions number 363/1981.G dated 22 December 1981 and 2468 K/sip/1982 dated 21 May 1983. Overturning the judicial review is, thus, a valid procedure under the law. The judge on the highest court agreed with the lower court’s ruling that the matter couldn’t be heard again because it had already been decided.

In conclusion, “PIERRE CARDIN” suffered losses during the entire legal process. The complaint was dismissed at the preliminary stage on the grounds that the plaintiff failed to provide sufficient evidence of the underlying facts and legal rights upon which his claims were based. As the Supreme Court agreed with the commercial court’s interpretation of the law, they declined to hear the case at the cassation level. At the review stage, the judge ruled against the plaintiff on the basis of *ne bis in idem*. All judicial proceedings have, however, met the requirements of the applicable procedural legislation.

It was also important to recognize the dissenting opinion for its recognition of cultural significance by pointing out that the name “PIERRE CARDIN” did not originate in the Indonesian language. As a direct consequence of this analysis, he conceded that the plaintiff was the rightful owner of the brand. If the plaintiff had been able to show that he was already well-known at the time the respondent registered the mark, he would likely win the case.

When it came to the judge’s justification, the supreme court ruling ontologically construed the law as legal principles were disclosed by the consideration that applied the *ne bis in idem* as their principal focus. A case may only be decided once in accordance with this principle. The identical facts shall not be the subject of another proceeding<sup>40</sup>. According to Romanian law, the *ne bis in idem* principle cannot be separated from the maxim of *res judicata pro veritate habetur* (the judgment is held for the truth), which attempts to produce legal certainty. There may be inconsistency between the two verdicts if the two trials reached opposite conclusions. Then, was the initial examination incorrect? Therefore, it will be contrary to the legal principle of *res judicata pro veritate habetur*.

*Ne bis in idem* is also recognized in Indonesia, as can be seen in article 1917 of the Indonesian Civil Code, which states as follows: The power of the legal judgment entered shall not extend beyond the topic of the assessment, to the degree that the case which has been heard shall be the same; that the claim is based upon the same grounds and is brought by and against the same parties having the same relationship. This idea is established in the penal law under article 76, paragraph 1, which stipulates that “no person shall be executed again because of an act from which the judgement of an Indonesian judge respecting it to be final.” Last but not least, in terms of axiology, the goal of law is to establish unquestionable legal certainty. However, in terms of epistemology, the way of reasoning judges utilize is called the deduction method. This approach involves linking the primary premise in the form of the *ne bis in idem* principle, which declares that “a lawsuit with the same object and subject cannot be filed a second time,” into the minor premise, i.e., the plaintiff’s action that files a lawsuit for the second time to the commercial court. This method joined the primary premise and the minor premise, from which it can be deduced that the second lawsuit filed by the plaintiff violated the concept of *ne bis in idem*. Therefore, this was an inadmissible case.

### 3.3. Judicial Decision on the Starbucks Case

Starbucks Corporation sued PT Sumatra Tobacco Trading Company and the Directorate of Trademark and Geographical indication through the Jakarta Commercial Court in 2021. In 1992, the respondent registered the same mark owned by the plaintiff, “Starbucks,” in class 34 for cigarettes and related items. Therefore, the action taken by the respondent comprised registration with bad faith for the purpose of duplicating the famous mark. Upon filing the suit on 29 July 2021, Plaintiff identified himself as the interested party in having the trademark cancelled. Plaintiff used trademark and geographical indication Law articles 20, 21, 76, and 77

39 Indonesia Mahkamah Agung, ‘Putusan Peninjauan Kembali Pierre Cardin No: 49 PK/Pdt.Sus-HKI/2018’, 2018.

40 Juliette Lelieur, “‘ Transnationalising ’ Ne Bis In Idem : How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty’, *Utrecht Law Review* 9, no. 4 (2013): 198–210.

paragraph 2 as his legal basis. The legislation allows the related party to file a trademark revocation case based on bad faith at any time. Thus, Plaintiff was justified in submitting the claim, notwithstanding the fact that it had been registered for more than five years. Nonetheless, article 76 specifies that the revocation action must be filed after the Plaintiff registered the trademark. Consequently, in order to meet the prerequisite, the Plaintiff had registered his trademark under class 34 with the register number DID202 000860<sup>41</sup>.

In his suit, the plaintiff emphasized two key factors: the famous mark deposition and the respondent's bad faith. With regard to the earlier matter, "STARBUCKS" was first launched on 13 March 1971 in the United States, and the mark was registered in 1976. In the subsequent years, the trademark was registered in 75 countries under classes 30 and 43. In 1992, the company hit a significant milestone when it went public on NASDAQ and opened 162 outlets. Having said that, the plaintiff asserted that it was a well-known mark in the industry. The latter issue was said to have been demonstrated by the respondent's activity when he registered the trademark in 1992 and when the plaintiff's trademark "STARBUCKS" was shown on NASDAQ. This was claimed to be proof that the respondent had prior knowledge of the trademark. In addition, the respondent was notorious for his practice of copying the marks of others, which was demonstrated by the fact that the commercial court had ruled on three separate cases involving this practice.

The first was case number 013/K/N/HaKI/2003 jo. no. 53/Merek/2002/PN.NIAGA.JKT.PST, in which the respondent used the mark "DAVIDOVV". The second case involved an imitation of the "Benetton" trademark by the respondent (case number 02/K/N/HaKI/2004 jo. no. 68/Merek/2003/PN.NIAGA.JKT.PST), and the third case included the use of the "Harley Davidson" and "Custom Harley Davidson" marks by the respondent (case number 43/Pdt.Sus- Merek/2017/PN.Niaga Jkt.Pst). In accordance with the explanation of article 21 paragraph 3 of the trademark and geographic indication, the judges in these three judgments concluded that the respondent was an applicant with bad faith. The law defines an applicant with bad faith as one who allegedly registered their mark to fake, replicate, or duplicate the mark of another party for the benefit of their business, hence creating unfair commercial competition, deceiving, or misleading consumers.

In contrast, the respondent asserted that the case had expired because it was filed more than five years after the respondent registered the trademark. In addition, the claim based on bad faith must meet the standards outlined in article 21 paragraph 3 of the Trademark and Geographical Indication Law: the respondent must have intended to imitate and it must have resulted in unfair competition. Regarding the first stipulation, the respondent asserted that "STARBUCKS" was not initially named by the plaintiff. It was taken from the 1956 motion picture adaptation of the book "Moby Dick," which has since become public domain. Furthermore, for the second condition, the respondent indicated in his deposition that he had no intention of competing with the plaintiff. It was shown by the mark registration on class 34, which was mostly for cigarettes. There was no connection to the plaintiff's line of work. In addition, it had distinctive market and customer targets.

Moreover, the respondent asserted that the mark did not meet the statutory requirements for a well-known mark as outlined in Ministry of Law and Human Rights Regulation No. 67 of 2016. The judgment must also consider that when the respondent first registered the mark in 1992, it was not a widely recognized brand. The claim must be deemed inadmissible and rejected in light of his assertions.

The co-respondent agreed with the respondent that a trademark's notoriety is not just dependent on its foreign registration but must also meet the criteria established by the Regulation of the Ministry of Law and Human Rights' No. 67 of 2016. However, the co-respondent further asserted that the trademark investigation revealed no similarities with other marks. The absence of any similarities between the two marks should be sufficient evidence of good faith for the trademark office.

The judge's considerations recorded in the decision number 51/Pdt.Sus/Merek/2021/PN Niaga Jkt.Pst. did not accept the exception that was presented by the respondent. This was due to the fact that the judge agreed that the plaintiff's claim was presented based on bad faith. Therefore, it is permissible to file a lawsuit more than five years after the date of registration. Despite this, the judge came to the conclusion that the plaintiff was unable to demonstrate that the respondent acted in bad faith due to a lack of evidence ("...Considering,

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41 Mahkamah Agung Indonesia, 'Putusan Sengketa Merek Starbucks No 51/Pdt.Sus/Merek/2021/PN Niaga Jkt.Pst.', 2021.

that the argument of the Plaintiff’s lawsuit cannot be proven and the main claims has been declared rejected”). To prove that the respondent frequently imitated trademarks, the plaintiff simply produced a copy of the respondent’s official trademark registration for the “Starbucks” and the judge’s decisions in the “Davidoff,” “Benetton,” and “Harley Davidson” cases at trial. The judge deemed these pieces of documentary evidence insufficient to establish the respondent’s bad faith (“.....there is not a single piece of documentary evidence that can prove the respondent had bad faith in applying for the registration of the mark”).

On the basis of the evidence presented, the judge ruled that the mark did not meet the requirements for a well-known mark as outlined in Regulation of the Ministry of Law and Human Rights Number 67 of 2016. In order to establish that the mark was famous, the plaintiff must comply with article 6 bis of the Paris Convention (“...Considering, that the global criteria as an international instrument for determining the “Well-Known Mark” along with the form of legal protection is the provision of Article 6 bis Paris Convention”). Aside from that, it also needs to consider the Regulation of the Ministry of Law and Human Rights Number 67 of 2016 (“...Considering, that to define a well-known mark, the basis for guiding criteria is the provisions of Article 18 of Regulation of the Minister of Law and Human Rights Number 67 of 2016 concerning Mark Registration). The claim was also denied because the plaintiff did not establish the respondent’s bad faith. Above all else, the judge commended the co-respondent for acting in good faith.

At least two very important factors entered the judge’s consideration in this Starbucks case. The first was whether the respondent registered the mark in good faith, and the second was whether the plaintiff’s mark was a well-known one. For the former, the judge noted that the likeness principle governed the determination of the respondent’s good faith. Based on the evidence presented at trial, there was no similarity between the respondent’s mark and the registered mark at the time of its registration. Moreover, the plaintiff was unable to demonstrate the respondent’s bad faith. As a result, the judge concluded that the respondent acted in good faith.

However, the consideration provided no interpretation technique or legal definition. The same thing went for the well-known mark interpretation. Even though the judge cited article 18 of ministerial order no. 67 of 2016 and article 6 bis of the Paris Convention, no legal justification was provided. In spite of this, the judge was of the opinion that “in deciding a well-known mark, the state needs to weigh the public’s awareness of the mark as well as the result of trademark marketing.”

The lack of consideration shown by the court makes it more difficult to comprehend the approach of interpretation. By mentioning the two clauses pertaining to well-known marks (the ministerial regulation on trademark registration and the Paris Convention), it is concluded that the judge wished to demonstrate that legal norms (statutory regulations) serve as the legal basis for judges’ decisions. Consequently, legal certainty is the objective of this judgement. However, it should be highlighted that the judges did not present legal arguments, hence their method of reasoning was unclear.

**Table 1. The comparison between Pierre Cardin and Starbucks legal reasoning:**

	<b>PIERRE CARDIN</b>	<b>STARBUCKS</b>
Verdict	rejected	rejected
Consideration	Ne bis in idem	The respondent’s bad faith was not found, and the plaintiff’s evidence was insufficient
Legal Reasoning	Ontology: principle Axiology: legal certainty Epistemology: deduction	Ontology: positive norm Axiology: legal certainty Epistemology: -

Source: analysed from The Pierre Cardin and Starbucks Judgements

The table makes it clear that both panels came to the same conclusion, which was to dismiss the claims brought forward by the plaintiffs. However, the judges provided different reasons for their judgements. Only in

the case of Pierre Cardin did the judge provide legal reasons. Starbucks's judgment was based on ambiguous reasoning because the panel only quoted Article 18 of the Regulation of the Minister of Law and Human Rights Number 67 of 2016 concerning Mark Registration and Article 6 bis Paris Convention for the Protection of Industrial Property Rights without providing legal reasoning. Hence, the judges were basically trying to uphold legal certainty.

Taking into account that the Pierre Cardin and Starbucks cases aimed for legal certainty, the judge in these cases leaned more toward positivism. According to legal positivism, only social facts acknowledged by society can be recognized as law. *Ne bis in idem* can be considered an accepted social fact since the judge acknowledges that a claim is deemed inadmissible when a judgement on the same subject and object has been rendered by a court of the same level. Insofar as the objective of this law is legal certainty and justice is regarded as an irrational concept, it falls within the realm of what should be<sup>42</sup>. Justice is an "irrational ideal" and "a value assessment based on emotional elements and consequently subjective in nature"<sup>43</sup>. Furthermore, under Hans Kelsen's pure theory of law, the law is separated from the moral<sup>44</sup>. Legal positivism, according to Hans Kelsen, explains the law as a system of norms founded on imperatives (*das sollen*), morals, and values that are deemed to have been articulated in the legislation that has been enacted. Hans Kelsen's Pure Law Theory posits that people follow the law simply because it has been officially sanctioned by those in power, regardless of whether or not it is fair or just. Although positivists acknowledge that there is a connection in the formation of law with religion, moral sciences, sociology, and politics, law is still seen as distinct from morals. Morals become part of the law when they are authorized and recognized by a competent authority. The existence of interference from sociological, political, economic, historical, and other factors is rejected by positivism. When it comes to regulating human behavior as rational creatures, positive law (*ius constitutum*) is the only type of legislation that is considered required in pure legal theory. This is because the law regulates human behaviour without contemplating "what it should be." According to Hans Kelsen, instincts and desires are distinct from the law. There is a distinct line that separates the concepts of justice and law. If fairness is codified in a written law, problems with it that are highly metaphysical will end, and there will only be justice based on the law.

Under positivism, the law should be made clear to prevent multiple interpretations and legal vacuums that can lead to uncertainty. However, the trademark law does not provide precise regulation regarding this well-known mark, but only a few articles do. Article 21 of law Number 20 of 2016 on Trademarks and Geographical Indications states that an application is rejected if it is similar or identical to a well-known mark of other parties for similar or different goods or services. This article also explains that rejection of applications for trademarks that have similarities with well-known marks must pay attention to public knowledge, brand reputation obtained from massive promotions, investment in several countries, and trademark registration in several countries.

According to the Trademark and Geographical Indication Law, the commercial court may request a survey to determine the mark's notoriety. It further provides that the owner of a famous mark may file petition to the commercial court for the annulment of the mark, compensation, and the termination of activities relating to the use of the mark (Article 76 paragraph 2, Article 83 paragraph 2, and the explanation). These articles offer no protection or definition for the well-known mark. It does not govern the registration of the well-known trademark. In addition, the formulation will inevitably be repressive. It can only be used when an issue or conflict exists. Consequently, the court becomes the primary forum for resolving the issue. Moreover, it provides only generic and abstract indicators of the well-known mark, which confuses the application of the law. As in the Pierre Cardin and Starbucks cases, the existing law's vagueness may result in a variety of trademark registration interpretations and a subsequent dispute.

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42 F X Adji Samekto, 'Menggugat Relasi Filsafat Positivisme Dengan Ajaran Hukum Doktrinal', *Jurnal Dinamika Hukum* 12 (2012): 74–84.

43 Hans Kelsen, 'Pure Theory of Law and Analytical Jurisprudence, The', *Harv. L. Rev.* 55 (1941): 44–44.

44 Muhammad Harun, 'Philosophical Study of Hans Kelsen's Thoughts on Law and Satjipto Rahardjo's Ideas on Progressive Law', *Walisongo Law Review (Walrev)* 1, no. 2 (2019), <https://doi.org/10.21580/walrev.2019.2.2.4815>, p 195.

In order to take preventative measures, the rule needs to develop a procedure for the collection of information about famous marks, either through active data collection by the government or through the mark owner's personal submission. The publication of the list of well-known marks will prevent the conflict and provide trademark examiners with a reference point when evaluating a new application.

#### **4. CONCLUSION**

Both decisions produced identical outcomes. The plaintiff's claims were denied. Hence the protection of the well-known mark is still unfavourable. On the other hand, the judge's complete reasoning existed only in Pierre Cardin's verdict. In light of this, asserting that the legal protection of the well-known mark in Indonesia still faces significant difficulties is not an exaggeration. The formulation of the article on the protection of the well-known mark as stated in article 18 of Regulation of the Minister of Law and Human Rights Number 67 of 2016 concerning Mark Registration is unclear, resulting in ambiguity. It is still questionable how the government would protect well-known marks, as the law indicates that they are protected (article 21 of Trademark and Geographical Indication Law). It was entirely foreseeable from the beginning that implementing this rule would meet challenges in the future practical experience, as evident from the Starbucks situation. The case presented ambiguous legal reasoning, which led to confusion on ontology, axiology, and epistemology. The position of the judge's philosophical theory also did not appear from deciding this case. This is also related to the abstract formulation of well-known mark regulation. Therefore, there are two suggestions that the authors give: First, in the future, for each judge's decision, there should be a philosophical theory used so that the judge's position is more apparent in providing arguments for each decision. Second, it is necessary to revise the law on marks, significantly the articles governing well-known marks, so that they are formulated more clearly to ensure legal certainty in the future.

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