



INTERROGATING ISLAMIC LAW AND POSITIVE LAW AGAINST ONLINE TRANSACTIONS OF COUNTERFEIT PRODUCTS IN THE CONSUMER SOCIETY

Iva Faizah

IAIN Metro Lampung

Ivafaizah@metrouniv.ac.id

Zulfa Ahmad Kurniawan

UIN Kiai Haji Achmad Siddiq Jember

za.kurniawan@uinkhas.ac.id

Abstract

Counterfeit products, known as KW products, goods with low quality, are buying and selling very profitable commodities. The fact that Indonesians are known as consumptive people, driven by a large number of Indonesians, the development of technology that facilitates transaction access, and the emergence of various marketplaces that provide counterfeit products make it easier for people to get the desired counterfeit products. The ease of getting the product with the same quality as the original product but with a minimal price is an advantage for the transaction. However, that transaction also brings losses, especially for the owner of patent rights on the trademarks of the products being traded, on the condition that the loss is legally violated and provides criminal penalties and fines for the perpetrators, as well as in the point of view of Islamic law. Literatur study is used as a research method to examine the views of Islamic law and the positive law on buying and selling counterfeit products. The results of the analysis state that intellectual property rights in the form of patents, trademarks, copyrights, and others are seen as one of the *huquq maliyyah* (property rights), which has legal protection (*mashun*) like *mal* (wealth) then someone who consciously uses or transacts counterfeit products on patents, trademarks, copyrights, and others illegally has committed an injustice, and this action is unlawful.

Keywords: *Counterfeit Products, Consumer Society, Islamic Law, Positive Law.*



Introduction

Indonesia ranks fourth as the country with the largest population in the world. The Directorate General of Population and Civil Registration noted that Indonesia's population as of June 2021 numbered 272,229,372 people.¹ From the composition of its population, Indonesia has a large number of young people. It is estimated that in 2020-2030 the total workforce (age 15-64) will reach 70 percent of the total population.² As a country with a large population, Indonesia has many necessities of life. According to the Nielsen Global Survey of Consumer Confidence and Spending Intentions, Indonesia ranks third as a country with a high level of consumer confidence.³ With such a large population, Indonesia is a very potential market.

¹ "Distribusi Penduduk Indonesia Per Juni 2021: Jabar Terbanyak, Kaltara Paling Sedikit," *Ditjen Kependudukan dan Pencatatan Sipil Kemendagri*, August 7, 2021, <https://dukcapil.kemendagri.go.id/berita/baca/809/distribusi-penduduk-indonesia-per-juni-2021-jabar-terbanyak-kaltara-paling-sedikit>.

² Aris Syabani, "Sehat Tanpa Narkoba, Hebat!" *KBR*, Oktober 09, 2017, https://kbr.id/10-2017/sehat_tanpa_narkoba_hebat_/92841.html.

³ "Nielsen: Optimisme Konsumen Indonesia Peringkat Lima Besar Dunia." *Katadata Media Network*, February 23, 2017, <https://databoks.katadata.co.id/datapublish/2017/02/23/nielsen-optimisme-konsumen-indonesia-peringkat-lima-besar>.

As a consumerist country, Indonesia can be proven from the following facts. *First*, from 2000 to 2015, GDP per capita increased dramatically from IDR 6.78 million to IDR 45.18 million, which means people's incomes have increased. However, the marginal propensity to save (MPS) tends to decrease, while the marginal propensity to consume (MPC) tends to increase. It means that the interest in saving is decreasing while consumption is increasing. *Second*, Indonesia's state budget is always in deficit, meaning the government's spending is more significant than its income. Based on Central Statistics Agency (BPS), from 2007 to 2016, the state budget has always been in deficit. *Third*, inflation always occurs in the month of Ramadan, when the amount of consumption should decrease because Muslims are fasting during the day, but the facts are quite different. The amount of consumption increases in the month of Ramadan, causing one of the causes of inflation. According to Continuum research, it is stated that during Ramadan 2021, April 1-25, 2021, shopping activities through online media will increase three times, with 47 percent types of clothing purchases, 18 percent for household furniture, 8 percent for communications, and 6 percent for restaurants.⁴

⁴ Safir Makki, "Riset: Belanja Online Naik 3 Kali Lipat Selama Ramadan," *CNN Indonesia*, May 3, 2021, <https://www.cnnindonesia>.

In fact, during the Covid-19 pandemic, it did not reduce consumer interest in shopping online. It is evident in the moment of the national online shopping day known as Harbolnas (national online shopping day, Shopee promotion), celebrated on December 12 every year. Harbolnas 2020, the online buying and selling platform (Shopee), recorded 3 million user visits within the first hour of the event. Sales records on the site are also recorded as the highest sales, with 1 million products sold within 1 minute.⁵ The increase in consumers shopping online is also due to the increase in internet users in Indonesia as a medium that acts as an intermediary in online shopping. Indonesia is the third Asian country with the most internet users as of March 2021, with 212.35 million people.⁶

The convenience of shopping through online media does not only have a positive impact in the form of increased

com/ekonomi/20210503160755-92-637972/riset-belanja-online-naik-3-kali-lipat-selama-ramadan.

⁵ Cindy Mutia Annur, "Mengapa Animo Belanja Online Tak Surut Meski Tertekan Pandemi?" *Katadata Media Network*, December 15, 2020, <https://katadata.co.id/muhammadridhoi/analisisdata/5fd88300336b8/mengapa-animo-belanja-online-tak-surut-meski-tertekan-pandemi>.

⁶ Viva Budy Kusnandar, "Pengguna Internet Indonesia Peringkat ke-3 Terbanyak di Asia," *Katadata Media Network*, October 14, 2021, <https://databoks.katadata.co.id/datapublish/2021/10/14/pengguna-internet-indonesia-peringkat-ke-3-terbanyak-di-asia>.

sales of products being marketed but there are also some negative impacts resulting from the convenience of online shopping, such as increased consumerism in society.⁷ Such an enormous shopping interest may be caused by the sheer desire to follow the trend, giving rise to further problems such as buying counterfeit products to follow trends that are dynamic and continue to change from time to time but with limited purchasing power. Counterfeit products are goods that violate trademarks, contain copyright infringement, or are counterfeit products in other types, such as packaging, labels, and forms. All of these things are included in counterfeiting activities and what is purchased is not goods or services that Indonesian consumers need. During the Covid-19 pandemic, counterfeit products were used by unscrupulous people to make a profit by distributing counterfeit medicines and vitamins. The increasing public demand for high-growth pharmaceutical products triggered it. The pharmaceutical sector in the fourth quarter at the end of 2020 grew by 30.75% and became one of the manufacturing industry sub-sectors, which experienced an increase. However, on the contrary,

⁷ Angelina FT. Antow, "Pengaruh Layanan Online Shop (Belanja Online) terhadap Konsumerisme Siswa SMA Negeri 9 Manado," *E-Journal Acta Diurna* 5, no. 3 (2016): 1-6, <https://ejournal.unsrat.ac.id/index.php/actadiurnakomunikasi/article/view/12770>.

the production of medium and large-scale manufacturing industries experienced negative growth.⁸

Several factors influence consumer decisions to buy counterfeit products, such as affordable prices, brand image, product quality identical to the original product,⁹ economic limitations,¹⁰ interest in certain brands, and the prestigious impression of counterfeit products identical to certain brands.¹¹ Among these several factors, the price factor is the most influencing consumer purchasing decision on counterfeit products. It is because counterfeit products have lower prices than original products, counterfeit product prices follow consumer needs, counterfeit product prices are by the quality offered,

⁸ Badan Pusat Statistik, "Indikator Konstruksi, Triwulan IV-2021," *BPS*, April 8, 2022, <https://bps.go.id/publication/2022/04/08/8134ad6132fcee cf0daea331/indikator-konstruksi-triwulan-iv-2021.html>.

⁹ Deni Dwi Mahendra, "Faktor-Faktor yang Mempengaruhi Keputusan Pembelian Sepatu KW (Imitasi) di Pasar Klithikan Yogyakarta" (*M.Acc Thesis*, UPY, 2017).

¹⁰ Arkan Gharzian, "Keputusan Pembelian Barang KW di Kalangan Mahasiswa Salatiga," *Jurnal Ecodunamika* 1 no. 1 (2018): 1-5, <https://ejournal.uksw.edu/ecodunamika/article/view/1512>.

¹¹ Gourgius Peter Sembiring & Monika Sri Yuliarti, "Pengaruh Harga, Kesadaran Merek, dan Promosi terhadap Keputusan Pembelian Produk Fashion KW di Instagram pada Kalangan Mahasiswa Universitas Sebelas Maret," *Jurnal Komunikasi Massa* 1 (2019): 1-13, <https://www.jurnalkommas.com/docs/Jurnal%20D0215049.docx>.

and counterfeit and original product prices are relatively competitive.

Counterfeit products sell well in Indonesia for several reasons. *First*, people's hedonic and consumptive lifestyles cause them to want to "look rich" by buying branded products. *Second*, the desire to look stylish with branded products is different from the desired income, so they buy counterfeit products that are much cheaper with an identical appearance. *Third*, low public awareness of the importance of product quality means that the quality of original products is better than counterfeit products. *Fourth*, the lack of strict law enforcement against sellers and users of counterfeit goods makes circulation increasingly widespread.

On the other hand, the development of information technology has also made it easier for consumers to shop. They are even offered to buy in installments or credit practices, such as PayLater, a new electronic-based payment method with an online pay later system. These new payment methods have been proven to increase the impulsive buying behavior of e-commerce users in Indonesia. This convenient method had the effect of an increase of 6.4 percent.¹²

¹² Rahmatika Sari, "Pengaruh Penggunaan Paylater terhadap Perilaku Impulse Buying Pengguna E-Commerce di Indonesia," *Jurnal Riset Bisnis dan Investasi* 7, no. 1 (2021): 44-57, DOI: 10.35313/jrbi.v7i1.2058.

The presence of counterfeit products in society certainly creates potential losses, including for consumers. Consumers have the right to obtain clear and correct information about the products they buy, such as specifications, variations, materials, sizes, compositions, and others. Therefore, when consumers feel cheated, they can report the problem to the Consumer Dispute Settlement Agency (BPSK) located in cities/regencies in Indonesia, and consumers can get compensation rights of up to IDR 200 million—as Law Number 8 of 1999 concerning Consumer protection.¹³

The Indonesian Community Against Counterfeiting (MIAP) and the Institute for Economic Analysis of Law & Policy at Pelita Harapan University examined the impact of these counterfeit products on the Indonesian economy in 2020. The results revealed that the nominal economic loss reached IDR 291 trillion with a tax loss of IDR 967 billion.¹⁴ High levels of counterfeiting were found in the software sector (84.25 percent), cosmetics (50 percent), pharmaceuticals (40 percent), fashion (38 percent), food and

beverage (20 percent), and automotive (15 percent). As a result, the Indonesian government has decided on several regulations to prevent losses due to buying and selling transactions.

Meanwhile, Ulama Nahdlatul Ulama (NU), through the Bahtsul-Masail study (a forum for studying Islamic law), also responded to sale and purchase counterfeit products. These scholars stated that even though the sale and purchase of counterfeit products have fulfilled the principles and rules of buying and selling but can harm other people (*dharar*).¹⁵ Therefore, this study examines this issue from the perspective of Islamic law (sharia) and positive law in regulation in Indonesia. So, counterfeit products can be a cheap alternative for consumers but are detrimental to the producers of the original product. Meanwhile, the Indonesian Ulema Co-uncil (MUI) also decided on a fatwa regarding the Protection of Intellectual Property Rights (IPR). According to the fatwa, the transaction is illegal because it contains elements of *gharar*, *tadlis*, and dangers that harm creators and copyright holders.¹⁶

¹³ Shidarta, "Badan Penyelesaian Sengketa Konsumen: Seberapa Greget?" November 5, 2018, <https://business-law.binus.ac.id/2018/11/05/badan-penyelesaian-sengketa-konsumen-seberapa-greget/>.

¹⁴ "Ngeri, Kerugian Ekonomi Akibat Produk Palsu Capai Rp 291 T," *Rakyat Merdeka*, December 22, 2021, <https://rm.id/baca-berita/ekonomi-bisnis/105376/ngeri-kerugian-ekonomi-akibat-produk-palsu-capai-rp-291-t>.

¹⁵ Bahtsul Masail, "Hukum Jual Beli Produk KW," *NU Online*, May 12, 2019, <https://islam.nu.or.id/bahtsul-masail/hukum-jual-beli-produk-kw-dM5fr>.

¹⁶ Fatwa of the Indonesian Ulema Council (MUI) Number 1/MUNAS VII/MUI/5/2005 concerning the Protection of Intellectual Property Rights (IPR).

There are several studies on Islamic law and Indonesian Positive Law on counterfeit products. However, they have yet to study it in the discourse of consumer society. Syamsiah examines more focus on the law of buying and selling pirated books online from the perspective of positive law and sharia economic law. According to him, buying and selling disobey Law Number 28 of 2014. Meanwhile, from the perspective of Islamic law, he refers to the Fatwa of the Indonesian Ulema Council (MUI) decision regarding the Protection of Intellectual Property Rights (IPR).¹⁷

Aniss Aisyah et al. reviewed the selling and buying of the branded cosmetic product in Islamic law. They concluded that according to Islamic law, it is detrimental to the original trademark owner because it takes away the rights of another party's trademark, which he owned first. Sellers support manufacturers in buying and selling branded counterfeit products. The practice of buying and selling violates sharia principles because the product is a brand right of another company that claimed to be its own.¹⁸

¹⁷ Siti Syamsiah, "Jual Beli Buku Bajakan secara Online Perspektif Hukum Positif dan Hukum Ekonomi Syariah," *Thesis*, IAIN Bengkulu (2021). Accessed September 12, 2022. <http://repository.iainbengkulu.ac.id/5396>.

¹⁸ Aniss Aisyah ar-Rahmah et al., "Tinjauan Hukum Islam terhadap Jual Beli Produk Kosmetik Tiruan," *Prosiding Hukum Ekonomi Syariah* 6, No. 2 (August 2020): 648-652, DOI:

Meanwhile, Souiden et al. examine the effect of religiosity and ethics on consumption behavior. They investigate the effect of individuals' ethics, religiosity, and attitudes toward counterfeits on purchase intentions of counterfeit products. The analysis further reinforces the more powerful effect of sensed economic advantages on the purposes of buying counterfeits.¹⁹ Likewise, Riquelme et al. also examine that people do not consider buying counterfeit products unethical, even in the religious community, and do not perceive legal risks.²⁰

Marlyna and Sardjono examine the practice of counterfeiting trademarks from the perspective of positive law in Indonesia and consumer protection.

10.29313/syariah.v6i2.24285.

¹⁹ Nizar Souiden et al., "Is Buying Counterfeit Sinful? Investigation of Consumers' Attitudes and Purchase Intentions of Counterfeit Products in a Muslim Country," *International Journal of Consumer Studies*, 42 (2018): 687-703, DOI: 10.1111/ijcs.12466.

²⁰ H.E. Riquelme, E. Mahdi Sayed Abbas & R.E. Rios, "Intention to Purchase Fake Products in an Islamic Country," *Education, Business and Society: Contemporary Middle Eastern Issues* 5, no. 1 (2012): 6-22. DOI: 10.1108/17537981211225835; M. Jashim, Jugindar Singh Kartar Singh & Benjamin Chan Yin-Fah, "Influence of Religiosity and Attitude towards Intention to Purchase Counterfeit Products: An Empirical Study in Dhaka, Bangladesh," *International Journal of Psychosocial Rehabilitation* 24, no. 2 (February 2020): 1137-1148. DOI: 10.37200/IJPR/V24I2/PR200416.

They found that the Trademark Law No. 20 of 2016 provides minimal protection, and protecting customers is not the primary purpose of trademark law in Indonesia.²¹ Furthermore, Maulana also researched related issues. According to him, trademark violations also include complaint offenses, where if no party feels aggrieved and reports them, there will be no legal process.²² On the other hand, Davidson examines that buying counterfeit products is an illegal²³ and unethical act that only benefits illegal sellers or buyers, and religious values can reduce the intention to buy them.²⁴

²¹ Henny Marlyna & Agus Sardjono. "Does the Trademark Protection Regulation Protect Consumers against Counterfeit Products? Analyzing the Theories of Trademark and Indonesian Trademark Law." *Pertanika: Journal of Social Sciences and Humanities* 27, 3 (2019): 1865-1877, [http://www.pertanika.upm.edu.my/pjssh/browse/regular-issue?article=JSSH\(S\)-1082-20](http://www.pertanika.upm.edu.my/pjssh/browse/regular-issue?article=JSSH(S)-1082-20).

²² Diky Faqih Maulana, "Transaksi Barang Counterfeit di Kios Buku Yogyakarta Perspektif Sosiologi Hukum Islam," *Research Gate* (2020). <https://www.researchgate.net/publication/34591863>.

²³ Alexander Davidson, Marcelo Vinhal Nepomuceno & Michel Laroche, "Shame on You: When Materialism Leads to Purchase Intentions toward Counterfeit Products," *Journal of Business Ethics, Springer*, 155, no. 2 (March 2019): 479-494, DOI: 10.1007/s10551-017-3479-5.

²⁴ Souiden et al., "Is Buying Counterfeit Sinful?"

Counterfeit Product Quality Grades and Level of Public Consumption

Counterfeit Product Quality Grades

Counterfeit products—often referred to as *KW products* which is an acronym for *Kwalitas* (quality)—are products that imitate existing products, whose shape and quality are imitated without the permission of the official manufacturer that owns the brand.²⁵ KW products have certain levels that reflect the quality of the counterfeit product from the original product. There is no definite standard about this level, but what is often referred to in the community is KW super or KW 1, KW 2, and KW 3. The higher the number, the lower the quality of the counterfeit product.

For example, counterfeit products (KW) that are widely circulated and used are sports fashion products. Many well-known brands, such as Adidas and Nike, sell their counterfeit products freely in Indonesia, as seen in the pedestrian stalls on Jalan Seturan (south of the Mataram Ditch) in Yogyakarta. The circulation of this product is extensive. Almost every type of product has a counterfeit product. Usually, manufacturers of counterfeit products are

²⁵ Kay Ka-Yuk Lai & Judith Lynne Zaichkowsky, "Brand Imitation: Do the Chinese Have Different Views?" *Asia Pacific Journal of Management* 16 (1999): 179-192, DOI: 10.1023/A:1015482707900.

more interested in imitating well-known products with high prices but in great demand. According to Rachmat Gobel, former Minister of Trade, "At least 40 percent of the products on the Indonesian market consist of KW products."²⁶

Islamic Views on Intellectual Property Rights (IPR)

The legal status of counterfeit products is related to the intellectual property rights of the original product. Intellectual property is wealth for intelligence products such as technology, knowledge, art, literature, song compositions, written works, caricatures, and others that are useful for humans.²⁷ The exclusive rights granted by the state to individual IPR actors (inventors, creators, designers, and the like) are intended as a reward for their work (creativity). The IPR system supports an adequate documentation system for all human creativity so that plagiarism of technological works or other exact works can be avoided or prevented.

In the view of Islam, IPR includes assets or is called *al-mal* (Arabic). Most scholars from the Maliki, Shafi'i, and

²⁶ Saugy Riyandi, "Produk KW di Pasaran Indonesia Indonesia Surga Barang Palsu," *Merdeka.com*, March 30, 2015, <https://www.merdeka.com/uang/indonesia-surga-barang-palsu.html>.

²⁷ Syafrinaldi, *Hukum tentang Perlindungan Hak Milik Intelektual dalam Menghadapi Era Globalisasi* (Pekanbaru: UIR Press, 2010).

Hambali madhahb believe that copyrights on original and functional works are classified as valuable assets, as are objects that may be utilized according to the Shari'a (Islamic law).²⁸ Because the IPR is property, it is not permissible to use other people's property without their permission. As the hadith of the Prophet Muhammad, "Surely your blood (soul) and wealth are valuable (noble, protected)..." (Hadith narrated by at-Tirmidhi).

IPR is classified under two sections: Copyrights and Industrial Property Rights. The second includes Patents, Industrial Designs, Trademarks, Repression of unfair competition, Layout designs of integrated circuits, Trade Secrets, and Plant Variety Protection.²⁹

Islamic Views on Consumption

Consumption is an activity that aims to reduce or use up the usefulness of an object, either in the form of goods or services, to meet needs and immediate satisfaction.³⁰ In Islam, consumption cannot be solely done for satisfaction. In the Qur'an ([5]: 88), Allah says, "[...] and eat food that is lawful (*halal*) and good (*thayyib*) from what has been given to you and fear Allah and you believe in Him."

²⁸ Keputusan Fatwa MUI.

²⁹ WIPO, *Background Reading Material on Intellectual Property* (Geneva: WIPO, 1988), 3.

³⁰ M.A. Karim Mustofa, *Kamus Bisnis Syariah* (Yogyakarta: Asnalitera, 2012).

It means Allah commands us to consume what is *halal* and *tayyib* for our bodies. *Halal* is not only from the substance but also from the method of obtaining and processing it. In another verse in the Qur'an ([2]: 188) it is stated, "Do not consume one another's wealth unjustly, nor deliberately bribe authorities to devour a portion of others' property, knowing that it is a sin."

Trade in Indonesian Regulations

Trade (sale and purchase) are exchanging transaction tools (money) and goods needed between the seller and the buyer after both parties feel that their rights and obligations have been fulfilled. The community often practices this transaction to meet life's needs or earn income. In Indonesia, buying and selling are regulated in the Code of Civil Law (KUHPerdata) from articles 1457-1540.

Article 1457 of the Civil Code states that sale and purchase is an agreement in which one party binds himself to deliver an item and the other to pay the promised price. Then, article 1458 states that sale and purchase occur when the seller and buyer reach an agreement on the products and the price. Even though the products have not been delivered and the price has not been paid.

The seller's obligations under the Civil Code in articles 1473-1512 are stated as follows.

- 1) The seller must clearly state the sale and purchase agreement;
- 2) The seller is obliged to hand over the products and bear them;
- 3) The goods sold must be delivered in the same condition as the transaction and the same condition as stated in the agreement;
- 4) The seller must bear the defects of hidden products and has no obligation to guarantee products with defects that can be seen and known by the buyer himself.

Some of the obligations of the buyer in the Civil Code (part 3 of article 1513-1518) include:

- 1) Pay the price at the agreed time and nominal;
- 2) Deferring payment by the buyer can be done if the buyer feels there is concern about the buyer's interference in controlling or owning the goods being transacted until the concern or disturbance is removed by the seller;
- 3) If the buyer arrives at the specified deadline and does not make a payment, the seller can demand cancellation of the sale and purchase according to the code.

Islamic View on Trade

Islam regulates all forms of human activity directly and indirectly, either explicitly or implicitly, in the

guiding texts (al-Qur'an and Hadith). Regarding the practice of buying and selling, Allah says in the Qur'an ([2]: 275), "People who consume (transact with) *riba* (usury) cannot stand up, except like a person who is staggering because of demonic possession. It happened because they said trade are the same as *riba*. In fact, Allah has justified buying and selling and forbidding usury. Anyone who has received a warning from his Lord (regarding *riba*) to him, then he stops, so that what he has earned before becomes his and his business (is up to) to Allah. Those who repeat (*riba* transactions) are the inhabitants of hell. They live in it."

The Prophet also said about trade, "The Prophet was once asked: What occupation (profession) is the best? The Messenger of Allah replied: Work (enterprise) that is done with his own hands and every right trade" (Hadith narrated by al-Bazzar. *Sahih* according to al-Hakim).

Sale and purchase (Arabic: *al-bai'*) means transferring the ownership of an object with a contract of mutual exchange. According to Imam Hanafi, buying and selling are exchanging one property for another in a certain way. Then according to Imam Shafi'i, buying and selling is the exchange of one property for another, both of which may be *tasharruf* (controlled), an *ijab* (offer) and *qabul* (acceptance) according to the

method permitted by the Shari'a. So it can be concluded that buying and selling is a mechanism for exchanging assets for assets in a way that does not violate the Shari'a.

Pillars of sale and purchase transactions:

- 1) Sellers, must own the goods being sold or obtain permission to sell them, and common sense (*aqil*);
- 2) Buyers, provided that they are allowed to act with common sense and are not children who do not have a permit to buy;
- 3) Items (products) for sale. It must be something that is allowed to be sold, clean, functional, handed over to the buyer/ and known by the buyer, even if only by its characteristics;
- 4) *Aqad* (agreement) is *ijab* (approval) and *qabul* (acceptance) with words or with deeds;
- 5) The willingness of seller and buyer.³¹

Transactions on Counterfeit Products

In discussing counterfeit products (KW), the author divides into several situations and conditions using several assumptions that might occur in

³¹ A. A. M. Azzam, *Fiqh Muamalat: Sistem Transaksi dalam Fiqh Islam* (Jakarta: Amzah, 2017).

society. It is necessary because economic life, primarily buying and selling, is a dynamic condition that can affect different legal statuses.

1. The Seller does not Declare that the Product is a Counterfeit

In this case, the seller sells counterfeit products with the same brand as the original but does not inform the buyer about the product's status, whether it is genuine or counterfeit, and sellers often say that the product they are selling is genuine. With these situations and conditions, the legal justification for sellers and buyers is different.

a. For Sellers

There are several considerations in determining the seller's legal status in the context of the case above.

1) Trademarks Imitation in the View of Islamic Law

Imitating or pirating here means an attempt to reproduce a product similar to a particular product design; moreover, the same brand as the product being imitated. Thus, this is a form of violation of Intellectual Property Rights. As explained above, IPR includes product and brand design. For all parties who wish to produce and trade in order to obtain economic benefits, the permission of the IPR holder must be obtained. As stated in the Law. No. 28

of 2014 concerning Copyright, "Piracy is the illegal copying of works and/or related rights products and the widespread distribution of goods resulting from the reproduction to obtain economic benefits."

Therefore, imitating certain products means violating government regulations. In Islamic teachings, a Muslim must comply with authority (through laws and regulations of the Indonesian government), as Allah commands in the Qur'an ([4]: 59) as follows:

You who have believed obey Allāh and the Messenger and those in authority among you. And if you disagree over anything, refer it to Allāh and the Messenger, if you should believe in Allāh and the Last Day. That is the best [way] and best in result.

IPR also includes assets for the owner, as is the opinion of scholars from the Maliki, Shafi'i, and Hanbali schools who argue that copyrights on works that are original and useful are classified as valuable assets. Therefore, to use it must be the permission of the owner. In the case of product counterfeiting, the counterfeit product manufacturer does not have the license to manufacture the product, and it can be concluded that he is violating IPR regulations. Thus, its status is *haram* (forbidden) because it uses other people's property without

the owner's permission. Allah says in the Qur'an ([2]: 188), "Do not consume one another's wealth unjustly, nor deliberately bribe authorities in order to devour a portion of others' property, knowing that it is a sin," and the Hadith, "Verily blood (soul) and your wealth is unlawful (noble, protected)." (Narrated by at-Tirmidhi).

2) Trademark Imitation in a Positive Legal View

The practice of imitating trademarks without permission is a criminal act that has consequences for criminal sanctions regulated in Law No. 20 of 2016 concerning Marks and Geographical Indications, which in article 35 states that:

Paragraph 1: A registered mark shall receive legal protection for 10 (ten) years from the date of receipt.

Paragraph 2: The protection period referred to in paragraph (1) can be extended for the same period.

Paragraph 3: The application for extension, as referred to in paragraph (2), shall be submitted electronically or non-electronically in the Indonesian language by the mark owner or their proxies within 6 (six) months prior to the expiration of the protection period for said registered Mark and subject to a fee.

Paragraph 4: the application for extension, as referred to in paragraph (2), can still be submitted within a maximum period of 6 (six) months after the expiration of the registered mark protection period by being subject to a fee and a fine equal to the extension fee.

The explanation above is one of the property rights (trademarks) that can be protected or wholly owned by a person or institution that owns and registers the trademark officially. It means that every trademark officially registered in the name of a person or institution has high legal force if parties misuse the mark.

Consequently, a law violation is committed by another party, an individual, and a company that uses trademark rights that someone officially owns. They can file a lawsuit against the other party following the regulations contained in Law Number 20 of 2016 concerning Marks and Indications Geographical Article 100 in the following paragraphs:

Paragraph 1: Any person who unlawfully uses the same brand in its entirety as the registered mark of another party for similar goods/services produced and/or traded shall be punished with imprisonment for a maximum of 5 (five) years and/or a maximum fine of a lot of IDR 2,000,000,000.

Paragraph 2: Any person who unlawfully uses a mark that is similar in principle to a registered mark belonging to another party for goods and/or services of the same kind produced and/or traded shall be punished with imprisonment for a maximum of 4 (four) years and/or a maximum fine of IDR 2,000,000,000.

In the explanation above, it was evident that all types of violations of the use of trademarks, whether used in whole or in part, that are similar to goods or services have definite legal consequences, namely imprisonment or amercement.

3) Concealment of Product Defects in the View of Islamic Law

Counterfeit products, aka KW, were created consciously by unofficial parties (without permission). Because it is an unofficial producer, the production process does not have standard standards. These unofficial manufacturers consciously try to match the product designs being imitated but with certain materials so that production costs are much cheaper than the original product. That way, the selling price of the product becomes cheaper but looks similar to the original, and of course, the resulting quality can be lower because it uses different materials.

Regarding quality, Allah forbids a Muslim from selling defective products to others without first explaining the product defects to prospective buyers. As the Prophet Muhammad said, "A Muslim is another Muslim's brother, and it is not lawful for a Muslim to sell goods to his brother that have defects unless he explains the defects to his brother" (narrated by Ibn Majah, no. 2246).

Defects mean "imperfect so that it loses value." Counterfeit products are considered defective because the resulting product is not as perfect as the original product. After all, the materials and production processes are different from the original product. Thus, a seller who sells a counterfeit product without notifying the original or counterfeit product status to the buyer is *haram* (prohibited).

Products with hidden defects have also been regulated in the Civil Code in the seller's obligations section in articles 1504-1512, which include the following points.

- i. The seller has the responsibility to bear the responsibility for goods that have hidden defects which result in the goods not being able to be used entirely and perfectly or reducing their use as they should so that if the buyer knows the condition of the item, the buyer will not buy it or buy it at a much lower price;

- ii. The seller still has to bear the hidden notes even though the seller himself does not know about it unless there has been an agreement previously if there is no obligation to bear anything;
- iii. The buyer can return the item and demand the price paid;
- iv. If the seller already knows there is a defect in the item, the seller must return the money and replace the costs for the transaction process that has been carried out.

Consumers have full rights to obtain goods that are appropriate or under their needs, not defective goods that reduce the function or usability of the goods themselves, and the state fully protects these rights through the Consumer Protection Act No. 8 of 1999 concerning Consumer Protection in several following articles:

- i. Article 8, paragraph (2) states that: business actors are strictly prohibited from trading damaged, defective or used, and tainted goods without providing complete and correct information on the goods in question; paragraph (3) states business actors are prohibited from trading damaged pharmaceutical and food supplies, defective or used and contaminated with or without providing complete and correct information.

- ii. Article 9 paragraph (1) point f states that: business actors are prohibited from offering, promoting, or advertising goods and/or services incorrectly and/or as if; the item does not contain hidden defects,
- iii. Article 11 point b states that business actors, in the case of sales made through a sale or auction, are prohibited from deceiving/misleading consumers by; declaring the goods and/or services as if they do not contain hidden defects.
- iv. Article 62, paragraph (2) states that business actors who violate articles 8, 9, and so on shall be imprisoned for a maximum of 5 (five) years or a maximum fine of Rp. 2,000,000,000.- (two billion rupiah)
- v. Article 62 paragraph (3) Business actors who violate the provisions referred to in Article 11 and so on shall be subject to imprisonment for 2 (two) years or a maximum fine of Rp. 500,000,000.- (five hundred million rupiahs).

b. For Buyers

If a buyer buys a product from a seller who sells counterfeit products without his knowledge, then the law is Halal. Because the consumer does not know in detail the product's status and thinks that the product is genuine, he is a victim of fraud by the seller. As the

hadith of the Messenger of Allah said, "Verily Allah has forgiven my people who made mistakes unintentionally, or because they forgot, or because they were forced" (Narrated by Ibn Majah, 1675, al-Baihaqi, 7/356, Ibn Hazm in *al-Muhalla*, 4/4, authenticated al-Albani in *Sahih Ibn Majah*).

1) The Seller Informs that the Product is a Counterfeit

In this case, the seller sells a counterfeit product with the same brand as the original, but he informs the buyer that the product he is selling is a knockoff alias KW. Because sellers and buyers know and are aware that the product is a counterfeit, the legal status for both is the same.

The discussion above states that counterfeit products are haram because it is a form of piracy of other people's products and is included in the act of using other people's assets without permission. So the trading status is also unlawful because it is said that the goods being traded must be halal in the pillars of buying and selling. In addition, the rules of fiqh also say that "everything that is born (arises) from something haraam is illegitimate."

Based on the MUI Fatwa Number 111 of 2017 concerning the Sale and Purchase of the Murabahah Agreement, Article 5 (Provisions related to *Mutsman/Mabi'*) states:

- i. *Mutsman/Mabi'* may be in the form of goods and/or in the form of rights that are wholly owned by the seller (*milk al-tam*);
- ii. *Mutsman/Mabi'* must be in the form of goods and/or rights that may be utilized according to sharia (*mutaqawwam*) and may be traded according to sharia and applicable laws and regulations;
- iii. *Mutsman/Mabi'* must be tangible, clear/certain/specific and can be handed over (*qudrat al-taslim*) at the time the *murabaha* sale and purchase contract is made;
- iv. *Mutsman/Mabi'* in the form of rights, provisions, and limitations apply as specified in the MUI Fatwa number 1/Munas/VII/5/2005 concerning the Protection of Intellectual Property Rights and applicable laws and regulations.

Based on the DSN Fatwa above, it is evident that the terms or information on the goods being sold must be clear from their condition or price. When there is confidential information from the product, then this is contrary to these provisions.

According to MUI Fatwa No. 1 of 2005 concerning the Protection of Intellectual Property Rights, in general provisions, IPR includes plant variety protection rights, trade secret rights, industrial design rights, integrated layout design

rights, patent rights, trademark rights, and copyrights.

- i. In Islamic law, IPR is seen as one of the *huquq maliyyah* (property rights), which has legal protection (*mashun*) as *mal* (wealth);
- ii. IPR that is protected by Islamic law, as referred to in the point above, is IPR that is not contrary to Islamic law;
- iii. IPR can be used as an object of the contract (*al-ma'qud 'alaih*), both *mu'awadhah* contracts (exchange, commercial) and *tabarru'at* contracts (non-commercial), and can be donated and inherited;
- iv. Every violation of IPR, including but not limited to using, making, using, selling, importing, exporting, distributing, submitting, providing, announcing, reproducing, plagiarizing, falsifying, and pirating IPR belonging to another person without rights is tyranny, and the law is unclean.

The MUI fatwa above clearly stated that the law on using (as a buyer) or selling counterfeit products that imitate or use other parties' IPR illegally is a form of injustice (*dhalim*) and is unlawful (*haram*)—referring to the Qur'an [2]: 168, "O humanity! Eat from what is lawful and good on the earth, and do not follow Satan's footsteps. He is truly your sworn enemy."

All forms of despotism through the use of counterfeit products are unlawful because they harm one party, and anything that harms the other party will result in bad things, according to the Qur'an, [7]: 157, "He commands them to do good and forbids them from evil, permits for them what is lawful and forbids to them what is impure, and relieves them from their burdens and the shackles that bound them."

Hence, in positive law, it is clear that the use of counterfeit products in buying and selling transactions is a violation. So, a person or institution deliberately transacting counterfeit products will get criminal penalties and monetary fines—as the Civil Code relates to Law No. 20 of 2016 concerning Marks and Geographical Indications article 100, paragraphs 1 and 2.

Conclusion

In the consumer society, violating the law on selling and purchasing counterfeit products is hazardous. This practice is often carried out through online media. These transactions today are commonly carried out under the control of the free market. In fact, in the view of Islamic law, this is a despotic (*dhalim*) and unjust (*haram*) consequence. The seller who consciously knows that the goods he is selling are counterfeits and continue to sell them is guilty. For buyers who need to learn the status of

the goods as counterfeit goods, there is no law for the buyer in that condition; likewise, if the seller informs that the product is counterfeit, both the seller and the buyer know that it is a counterfeit product.

Counterfeit products originate from processes that are not lawful, namely, violating other people's copyrights and violating state regulations. Those are declared unlawful, so both sellers and buyers who commit violations can be subject to punishment. The fiqh rule says that "everything that comes from something that is *haram* is *haram*." This view of Islamic law does not conflict with positive Indonesian law, that the legal status of buying and selling counterfeit products is prohibited.

In Indonesia's positive legal status, the sale and purchase of counterfeit products violate copyright and trademark regulations. According to these provisions, sellers and buyers who violate this will receive criminal consequences of imprisonment and penalties.

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