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## Juridical Analysis of Regulations Controlling Import or Export of Goods That are Suspected of Originating from Intellectual Property Infringement, Particularly on Registered Trademarks

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### Abstract

Protection of intellectual property laws can start from the action of preventing the entry or exit of goods from a country. The Directorate General of Customs and Excise, Ministry of Finance of the Republic of Indonesia, which is the implementing agency in the customs sector, can control the import or export of goods suspected of being or originating from the result of intellectual property infringement. This is a financial activity involving several institutions, including the Directorate General of Customs and Excise, the Ministry of Finance of the Republic of Indonesia as executor, the Directorate of Trademarks, the Ministry of Law and Human Rights as the institution that issues trademark rights, and the Commercial District Court to exercise judicial authority. Since its implementation, regulations have been made regarding the processes and conditions for controlling the export and import of goods, which accommodate the interests of the state as a regulator with the aim of regulating and harmonizing customs regulations and trademark law and the interests of rights holders or mark owners as the injured party if there is an infringement. However, there are arrangements that are ‘considered’ to be detrimental to the right holder or registered mark owner in relation to the domicile of the party applying for trademark protection in the customs area. This research was conducted using a normative research type with statute and conceptual approaches. With this research, brand owners and rights holders can determine the right steps to protect their registered marks in accordance with applicable regulations.

**Keywords:** Control of Import or Export of Goods; Intellectual Property Infringement; Protection of Registered Marks.

## Introduction

Intellectual property legal protection can be start with the preventive action of entering or removing goods from a country.<sup>1</sup> Customs<sup>2</sup> is the institution in charge of controlling the import or export of goods suspected to be or originating from intellectual property infringement. This is one implementation of the international agreement ‘Agreement On Trade-Related Aspects Of Intellectual Property Rights (TRIPS)’, which is part of the World Trade Organisation (WTO) agreement.<sup>3</sup> The following can be found in Part III Enforcement of Intellectual Property Rights; Section 4 Special Requirements Related to Border Measures:

“Members shall, in conformity with the provisions set out below, adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories”.<sup>4</sup>

Customs, which is the gate for goods in and out of a country, focuses on infringement related to intellectual property.<sup>5</sup> The underlying rules are Government Regulation no. 20 of 2017 concerning Control of Imports or Exports of Goods Suspected of Being or Coming From Violation of Intellectual Property Rights and Regulation of the Minister of Finance of the Republic of Indonesia No. 40 / PMK.4 / 2018

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<sup>1</sup> Mario Alfons, ‘Implementasi Hak Kekayaan Intelektual Dalam Perspektif Negara Hukum’ (2017) 14 Jurnal Legislasi Indonesia.[302].

<sup>2</sup> Customs is everything that is related to the supervision of the traffic of goods entering or leaving the customs area and collecting import and export duties. Article 1 number 1 *Law No 17 of 2006 concerning amendments to Law no 10 of 1995 concerning Customs*.

<sup>3</sup> Indonesia has ratified the World Trade Center agreement through *Law No 7 of 1994 concerning Ratification of the Agreement Establishing the World Trade Organization (Agreement to Establish the World Trade Organization)*. Because of this, it is automatically also subject to the terms of the Agreement On Trade-Related Aspects of Intellectual Property Rights (TRIPS).

<sup>4</sup> Part III Section 4 of the Agreement On Trade-Related Aspects Of Intellectual Property Rights.

<sup>5</sup> Sulasi Rongiyati, ‘Protection of The Intellectual Property Rights on Creative Economic Products’ (2018) 9 Jurnal Negara Hukum.[40].

concerning Recording, Prevention, Guarantee, Temporary Suspension, Monitoring, and Evaluation in the Context of Controlling Imports or Exports of Goods Suspected to be or Derived from the Result of Intellectual Property Rights Violations. Previously, customs infringement has been regulated by Law Number 17 of 2006 concerning Amendments and Law Number 10 of 1995 concerning Customs, stated in Chapter X Import or Export Prohibition and Restriction.

Control of import or export of goods begins with recording, meaning data collection in the recording system of the Directorate General of Customs and Excise, Ministry of Finance of the Republic of Indonesia, and where the owner or holder of the right to a mark submits a written application to the Customs and Excise Official. However, there are special arrangements that require the owner or right holder who is a business entity to be domiciled in Indonesia. This becomes an obstacle for owners or rights holders who are business entities but not domiciled in Indonesia, because trademark law does not limit the location of the applicant for the mark or the right holder.

### **The Control Process of the Import or Export of Goods That are Suspected of Originating from Intellectual Property Infringement**

Import or export controls are carried out on goods that are suspected to be or are suspected of originating from an infringement of IPR in the form of a mark<sup>6</sup> or copyright<sup>7</sup> that has been approved and recorded on a recording system (recordation) at the Directorate General of Customs and Excise, Ministry of Finance of the

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<sup>6</sup> Mark is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, color arrangement, in the form of two dimensions and/or three dimensions, sound, hologram, or a combination of two or more of these elements to distinguish goods and or services produced by persons or legal entities in trading activities of goods and/or services. Article 1 number 1 *Law No 20 of 2016 concerning Marks and Geographical Indications*.

<sup>7</sup> Copyright is the exclusive right of an author that arises automatically based on the declarative principle after a work is manifested in a tangible form without reducing restrictions in accordance with the provisions of laws and regulations. Article 1 number 1 *Law No 28 of 2014 concerning Copyright*.

Republic of Indonesia.<sup>8</sup>

There are two systems: the Ex-Officio Scheme, which is the territory of the Directorate of Customs and Excise, the Ministry of Finance of the Republic of Indonesia and the Judicial Scheme, which is the authority of the Commercial Court. Not all intellectual property is included in the both systems, as illustrated in the table below:<sup>9</sup>

Jenis HKI	Ex-Officio Scheme	Judicial Scheme
Merk	✓	✓
Hak Cipta	✓	✓
Paten	✗	✓
Desain Industri	✗	✓
Desain Tata Letak Sirkuit Terpadu	✗	✓
Varietas Tanaman	✗	✓
Indikasi Geografis	✗	✓

Assessment of violations refers to Law Number 20 of 2016 concerning Trademarks and Geographical Indications as well as Law Number 28 of 2014 concerning Copyright.

When marks are deemed to be infringing, Article 21 paragraph (1) of Law Number 20 of 2016 concerning Trademarks and Geographical Indications states the following:

- (1) The application is rejected if the Mark is similarly or in whole to:
  - a. A registered mark that belongs to another party or has been previously requested by another party for similar goods and or services;
  - b. Well-known trademarks owned by other parties for goods and/or similar services;
  - c. Well-known trademarks belonging to other parties for goods and/or services that are not of the same type that meet requirements; or
  - d. Registered Geographical Indication.

<sup>8</sup> Section 2 Minister of Finance Regulation No 40/PMK 4/2018 concerning Recording, Prevention Guarantee, Temporary Suspension, Monitoring, and Evaluation in the Context of Controlling Imports or Exports of Goods Suspected to be or Derived from the Result of Intellectual Property.

<sup>9</sup> IPR Socialization Material and Pre-Survey at the Directorate General of Customs and Excise

The series of import control processes includes Recording, Prevention, Submission of Warranties, Suspension, Physical Inspection, Physical Inspection Report, and Termination of Deferral.

1. Recording is the activity of entering intellectual property data into the customs database of the Directorate General of Customs and Excise. It must be submitted in writing and an examiner who understands trademarks and copyrights must be appointed. Further research is carried out to accept or reject the application for recording.
2. Prevention is a process carried out if there is an indication of trademark or copyright infringement, accompanied by sufficient evidence obtained during an intelligent examination or analysis based on information from the recording system of Intellectual Property at the Directorate General of Customs and Excise, Ministry of Finance of the Republic of Indonesia. If an infringement is found, the Directorate will notify the trademark or right holder regarding the finding.
3. Submission of Guarantee occurs when the trademark or right holder submits a Guarantee to the Directorate General of Customs and Excise in the form of a bank guarantee or insurance guarantee amounting to IDR 100,000,000 (one hundred million rupiah).
4. Suspension is a temporary postponement of the release of imported or exported goods from the Customs Area that are suspected of being or originating from a violation of IPR.<sup>10</sup>

There are two types of temporary hold orders:

1. Temporary Suspension Order Due to Position is an order for temporary suspension at the request of the owner or holder of IPR originating from Prevention.<sup>11</sup>
2. Judicial Suspension Order is an order for temporary suspension at the request of the owner or IPR holder who does not originate from the Prevention.<sup>12</sup>

In this case, the type of temporary suspension order is Temporary Suspension Due to Position. It is the authority of the Commercial Court, based on the request of the owner or right holder. Furthermore, if the court accepts a request for suspension of goods suspected of trademark or copyright infringement, a decision will be issued, which consists of the following steps:

1. Accepted application;
2. Temporary suspension of release of goods from Customs Area;
3. Instructing Customs and Excise Officials to carry out warrant;
4. Instructing the Petitioner to immediately apply for an examination;
5. Declaring fixed guarantee at the Registrar's Office of the Court;

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<sup>10</sup> Regulation of the Supreme Court of the Republic of Indonesia Number 6 of 2019 concerning Temporary Suspension Orders. Article 1 number 7.

<sup>11</sup> *ibid.* Article 1 number 15.

<sup>12</sup> *ibid.* Article 1 number 16.

6. Deferring court fees until final determination.<sup>13</sup>

Based on the warrant, the Customs and Excise Officials notify the suspension order to the Importer, Trademark or Right Holder, Directorate General of Intellectual Property. Maximum suspension period during the deferment is 10 working days.<sup>14</sup> There are exceptions for suspension for luggage carried by passengers, border crossers, crews of transportation means and goods by post or courier services.<sup>15</sup>

5. Physical examination is an in-person inspection of goods suspected of infringing on intellectual property. What must be considered is that the goods are examined in accordance with the Commercial Court's decision, carried out by a physical examiner official, and then the owner or right holder presents an examiner to examine the item. *Examiner* is a person who understands and is competent regarding the authenticity of goods, trade names, product appearance, packaging, distribution and marketing routes and the number of products marketed in an area in the form of trademarks and geographical indications, copyrights, patents and geographical indications of plant varieties and circuit layout designs. This is an integrated designation appointed by the Owner or IPR Holder.<sup>16</sup>
6. Physical Examination Report is conducted by the trademark or right holder jointly with Customs and Excise Officials, Representatives from the Court, Representatives from the Directorate General of Intellectual Property and importers/exporters/owners of goods or their proxies.<sup>17</sup>
7. Termination of Deferral is conducted when the postponement period has expired or there is a legal or other action.

### **Recording Arrangements of the Directorate General of Customs and Excise.**

The recording mechanism in this enforcement process is not intended to replace the registration mechanism for Intellectual Property Rights, the Directorate General of Intellectual Property, Ministry of Law and Human Rights. This recording mechanism is only intended to assist the Directorate General of Customs and Excise in having sufficient data regarding existing Intellectual Property Rights so

<sup>13</sup> *ibid.* Article 8.

<sup>14</sup> Article 57 paragraph (1) of *Law Number 17 of 2006 concerning Amendments. To Law Number 10 of 1995 concerning Customs* jo. Article 13 *Government Regulation Number 20 Year 2017 concerning* jo. Article 13 *Regulation of the Supreme Court of the Republic of Indonesia Number 6 of 2019 concerning Temporary Suspension Orders* (n 13).

<sup>15</sup> Slide 16, Material on IPR Enforcement by DJBC, Regulations, Directorate General of Customs and Excise, Ministry of Finance of the Republic of Indonesia.

<sup>16</sup> *Regulation of the Supreme Court of the Republic of Indonesia Number 6 of 2019 concerning Temporary Suspension Orders* (n 13). Article 1 number 20.

<sup>17</sup> Article 15 of *Government Regulation Number 20 of 2017 concerning Control of Imports or Exports of Goods Suspected of Being or Coming From the Result of Violation of Intellectual Property Rights*.

that profiling and targeting can be carried out more effectively.<sup>18</sup>

Recording is also an implementation of the ASEAN Single Window member countries.<sup>19</sup> Data and information integration in the ASEAN Single Window is covered by the National Single Window system. Based on *Agreement to Establish and Implement the ASEAN Single Window*, Article 1 paragraph 2 explains that National Single Windows is a system which enables the following:

- a. Single submission of data and information,
- b. A single and synchronous processing of data and information, and
- c. A single point of decision making for customs release and clearance. A single point of decision making shall be uniformly interpreted as a decision for the release of cargoes by customs on the basis of decision, if required taken by line ministries and agencies and communicated in a timely manner to customs.

Indonesia implemented the National Single Window system by issuing Presidential Regulation Number 44 of 2018 concerning the Indonesia National Single Window, which became effective on March 31, 2018. It was explained that the Indonesia National Single Window, hereinafter abbreviated as INSW, is a National System Integration that allows for the submission of single data and information, data processing and information singly, and synchronously, and submitting a single decision to grant customs clearance and release goods in accordance with statutory provisions.<sup>20</sup> In the recording process, the trademark or right holder must attach the

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<sup>18</sup> Marni Emmy Mustafa, *Control of Imports of Exports of Goods Suspected of the Result of Intellectual Property Rights Violations in Indonesian Customs Areas and Its Relation to Temporary Suspension*.

<sup>19</sup> ASEAN Single Windows is an integration of data and information through an electronic system among member countries, including Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Previously there was an agreement between ASEAN countries that was contained in the Agreement To Establish And Implement The ASEAN Single Window. The definition of ASEAN Single Window is contained in article 1 paragraph 1, which states that the ASEAN Single Window is the environment where the National Single Windows of Member Countries operates and is integrated.

<sup>20</sup> Article 1 number 2 *Perpres No 44 of 2018 concerning Indonesia National Single Window*. The INSW system used, abbreviated as SINSW, is an electronic system that integrates systems and/or information systems related to the process of handling customs documents, quarantine documents, licensing documents, port/airport documents, and other documents related to export and/or import, which ensures data and information security and integrates information flow and processes and automatically integrates them between internal systems.

following:

1. Proof of ownership of rights;
2. Data on the characteristics of authenticity of products, such as brands, goods, trade names, product displays, packaging, and distribution and marketing routes, as well as the number of products marketed in an area in the case of IPR in the form of marks;
3. Statement of responsibility from the owner or rights holder for all consequences arising from recording.

Data collection in the recording system of the Directorate General of Customs and Excise is submitted by the owner or right holder who is a business entity domiciled in Indonesia.<sup>21</sup>

In the regulation, there are restrictions on who can apply for recording; this is contradictory to the understanding that the recording applicant is the owner or holder of IPR. It is stated that the owner or right holder is the owner or holder of IPR protected in Indonesia based on laws and regulations in the field of intellectual property.<sup>22</sup> However, in the following rules, the owner or right holder is reduced to the following:

1. Business entity;
2. Business entities domiciled in Indonesia.

The authority of the Directorate General of Customs and Excise in protection of intellectual property law in principle is for realizing efficiency and effectiveness in supervision and service. As it is impossible for each authorized agency to carry out every regulation relating to export and import by itself, the main objective of this implementation is to avoid the complicated bureaucracy that every exporter and importer must pass through on the move. Thus, the main duties and functions of the Directorate General of Trademarks, Directorate General of

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<sup>21</sup> *Government Regulation Number 20 of 2017 concerning Control of Imports or Exports of Goods Suspected of Being or Coming From the Result of Violation of Intellectual Property Rights* (n 20). Article 5 paragraph 3.

<sup>22</sup> *ibid.* Article 1 number 8.

Intellectual Property, Ministry of Law and Human Rights, is the implementation of supervisory duties related to IPRs, which are part of the additional duties of the Directorate General of Customs and Excise because it needs clearer customs regulations.<sup>23</sup>

Therefore, the regulations and definitions of trademark and rights holders who are applicants for recording should refer to the provisions of law number 20 of 2016 concerning Trademarks and Geographical Indications.

### **Arrangements of Parties That Can Apply Control of Import or Export of Goods That Are Suggested or Originating from Intellectual Property Infringement.**

A mark is a sign that can be displayed graphically in the form of an image, logo, name, word, letter, number, or colour arrangement, in the form of two dimensions or three dimensions, holographic sound, or a combination of two or more of these elements to distinguish goods and/or services produced by people or legal entities in goods and/or services activities.<sup>24</sup> There are two types of marks: trademarks, which are marks used on goods, and service marks, which are used on services. Both are traded by a person or several persons or legal entities.

The right to a trademark is granted by the state exclusively to the owner of the registered mark for a certain period of time by using himself or giving permission to other parties to use.

The mark applicant is an individual or legal entity filing a mark application.<sup>25</sup> There is no mention of the domicile and location of the applicant being required to be in Indonesia, especially with an international trademark registration system through

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<sup>23</sup> Djafar Albram, *Implementation Of Customs And Excise Authority Governance In Intellectual Property Rights (IPR) in Indonesia (Implementation Of Customs And Excise Authority Governance Of Intellectual Property In Indonesia)*.

<sup>24</sup> *Law No. 20 of 2016 concerning Marks and Geographical Indications* (n 9). Article 1 number 1.

<sup>25</sup> *Regulation of the Minister of Law and Human Rights of the Republic of Indonesia No 67 of 2016 concerning Trademark Registration*. Article 1 point 5.

the Madrid Protocol,<sup>26</sup> which is a procedural mechanism for international trademark applications, in the form of applications originating from Indonesia addressed to international bureaus or international applications directed to Indonesia as the destination country. Specifically for international applications where Indonesia is the destination country, the criteria for applicants are listed in Article 52 paragraph (2) of Law Number 20 of 2016 concerning Trademarks and Geographical Indications. It is stated that the applicants for application for international marks (1) are Indonesian citizens, (2) are domiciled in the territory of Indonesia, and (3) have actual industrial or commercial business activities in Indonesia. In fact, trademark law does not impose limits on the location of the domicile of the applicant or the trademark right holder.

The focus of mark assessment to be registered and to obtain a certificate is a mark that submits two applications. According to the criteria for a rejected mark as stated in chapter V of Law Number 20 of 2016 concerning Trademarks and Geographical Indications, article 20, a trademark cannot be registered if it

- a. is contrary to the state ideology, statutory regulations, morality, religion, morals, or public order;
- b. is unrelated to, or only mentions, the goods and/or services being applied for registration;
- c. contains elements that may mislead the public regarding the origin, quality, type, size, purpose of use of the goods and/or services being applied for registration or constituting the names of protected plant varieties for similar goods and/or services;
- d. contains information that is not in accordance with the quality, benefits or efficacy of the goods and/or services produced;
- e. has no distinguishing power; and/or
- f. is a common name and/or symbol of public property.

Furthermore, Article 21 states the following:

- (1) The application is rejected if the Mark is similar in substance or in whole to

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<sup>26</sup> The system used for the international trademark registration process, which is preceded by acceding to an international agreement, namely the Protocol Relating to Madrid Agreement Concerning The International Registration of Marks (Madrid Protocol). The Madrid Protocol was adopted on 27 June 1989 and entered into force on 1 December 1995 and became effective on 1 April 1996. The Madrid Protocol has undergone two amendments in 2006 and 2007. Agung Iriyanto [et al.], *Legal Aspects of Trademark Registration* (Rajawali Pers 2017).[205].

- a. a registered mark that belongs to another party or has been previously requested by another party for similar goods and or services;
  - b. well-known trademarks owned by other parties for goods or similar services;
  - c. well-known trademarks owned by other parties for goods and or services that are not of the same type that fulfil certain requirements; or
  - d. registered geographical indications.
- (2) The application is rejected if the Mark
- a. constitutes or resembles the name or abbreviation of the name of a famous person, photograph, or the name of a legal entity owned by another person, except with the written consent of the authorized person;
  - b. is an imitation or resembles the name or name abbreviation, flag, emblem or symbol of a country, or a national or international institution, except with the written consent of the competent authority; or
  - c. is an imitation or resembles an official mark or seal or stamp used by a state or government agency, except with a written approval from the competent authority.
- (3) An application is rejected if it is submitted by an applicant with bad faith.

The rights to the mark are obtained after the mark is registered.<sup>27</sup> Registered marks are legally protected for a period of 10 years from the date of receipt and can be extended. Therefore, as long as the mark is used and extended, it must be legally protected and not limited to the domicile of the registered mark owner.

### License

A mark can only be used in the trade of goods and/or services by a trademark right holder, and this right is granted by the state and obtained when the mark is registered. The rights to the mark can be used by other parties, but only after obtaining permission from the trademark rights holder. Rights holders are given the authority to grant licenses to other parties to use their exclusive rights.<sup>28</sup> A license is granted by the owner of a registered mark to another party based on a written

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<sup>27</sup> *Law No. 20 of 2016 concerning Marks and Geographical Indications* (n 9). Article 3.

<sup>28</sup> *Government Regulation Number 36 of 2018 concerning Registration of Intellectual Property License Agreements*. Article 3.

agreement in accordance with the laws and regulations to use a registered mark.<sup>29</sup> It is a means for legal protection of trademarks, in addition to through law.<sup>30</sup> Licensing serves to break through the exclusivity of brand rights, so that other people can use a brand safely and legally. On the other hand, a license is a manifestation of the will of the trademark owner to exploit their exclusive rights.<sup>31</sup>

A license agreement is a form of freedom of contract, subject to article 1320 BW, which must be in the form of a written agreement. Registration is requested at the Directorate of Trademarks, Directorate General of Intellectual Property, Ministry of Law and Human Rights of the Republic of Indonesia. The license agreement is announced in the mark gazette; if it is not recorded, the license agreement will not have legal consequences for third parties. There are registered marks that cannot be registered with the license, that is (1) the mark has expired its protection period (not extended) or (2) the brand has been abolished.<sup>32</sup> The use of a registered mark in Indonesia by a licensee is deemed the same as the use of a mark by the right holder or licensor.<sup>33</sup> However, the right to the mark does not transfer to the licensee;<sup>34</sup> the authority is only to use a mark not own the mark. The licensee has the authority to file a lawsuit, and it is confirmed that the registered mark owner and/or registered mark licensee can file a lawsuit against other parties who unlawfully use a mark that is the same substantially or in its entirety for similar goods and/or services in the form of (a) compensation; and/or (b) termination of all acts related to the use of the mark.<sup>35</sup> The termination shall also include controlling the import and export of goods suspected to be originating from intellectual property infringement. The

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<sup>29</sup> *Law No. 20 of 2016 concerning Marks and Geographical Indications* (n 9). Article 1 number 18.

<sup>30</sup> Anne Fitzgerald and Brian Fitzgerald, *Intellectual Property in Principle* (Law Book Co 2004). [6].

<sup>31</sup> *ibid.*

<sup>32</sup> *Government Regulation Number 36 of 2018 concerning Registration of Intellectual Property License Agreements* (n 31). Article 4.

<sup>33</sup> *Law No. 20 of 2016 concerning Marks and Geographical Indications* (n 9).

<sup>34</sup> Agus Mardianto, 'Akibat Hukum Pembatalan Pendaftaran Merek Terhadap Hak Penerima Lisensi Merek Menurut UU No. 15 Tahun 2001' (2011) 11 *Jurnal Dinamika Hukum Fakultas Hukum Universitas Jenderal Soedirman Purwokerto Jawa Tengah*. [461].

<sup>35</sup> Article 85 of Law Number 20 of 2016 concerning Marks and Geographical Indications.

license agreement is a means for holders of trademark rights from abroad to exercise their exclusive rights in Indonesia indirectly but does not break legal provisions.

### **Conclusion**

Based on the explanation and discussion in the previous chapter, the author's suggests that the Directorate General of Customs and Excise should be able to make amendments to the regulations regarding the recording applicant Government Regulation Number 20 of 2017 concerning control of imports or exports of goods that are suspected of being or originating from a violation of Intellectual Property Rights, which is harmonized in Law Number 20 of 2016 concerning Marks and Geographical Indications and Government Regulations Number 36 of 2018 concerning Registration of Intellectual Property License Agreement as a guideline for trademark law and licensing arrangements, for the realization of comprehensive trademark protection for trademark rights holders.

Owners or rights holders who are domiciled outside Indonesia can enter into a license agreement with parties domiciled in Indonesia to provide a strong foundation for the mark in Indonesia, so that deserves protection in Indonesia as well.

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