

## Optimization of Legal Policies Against Trademark Rights Violations Based On Restitution

Grace Putri Hastino<sup>1</sup> , Elina Fauziah<sup>2</sup> , Vina Maylani<sup>3</sup> , Teddy Asmara<sup>4</sup> , Ari Nurhaqi<sup>5</sup> 

<sup>1</sup>Swadaya Gunung Jati Cirebon University, Cirebon, Indonesia

<sup>2</sup>Swadaya Gunung Jati Cirebon University, Cirebon, Indonesia

<sup>3</sup>Swadaya Gunung Jati Cirebon University, Cirebon, Indonesia

<sup>4</sup>Swadaya Gunung Jati Cirebon University, Cirebon, Indonesia

<sup>5</sup>Swadaya Gunung Jati Cirebon University, Cirebon, Indonesia

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### ABSTRACT

**Background.** Trademark counterfeiting is a significant violation of Intellectual Property Rights (IPR) and has emerged as an important issue within the legal and economic framework

**Purpose.** This research aims to analyse the basic concept of trademark infringement and how to optimize legal policy against restitution-based trademark infringement.

**Methods.** Using normative juridical research method (doctrinal) with a descriptive and analytical nature, data collection techniques are done through literature review, content analysis, and case studies with qualitative analysis.

**Result.** The results show that trademark infringement is an economic criminal offence that significantly harms the owner. Law Number 20 of 2016 still focuses on criminal punishment without guaranteeing the recovery of victims' losses.

**Conclusion.** Therefore, restitution as part of criminal sanctions is very important to realise complete justice. Implementation. By integrating restitution into the criminal process, Indonesian law can better protect intellectual property rights and provide fair and adequate protection for brand owners.

**Keywords:** Legal Optimization, Trademark Rights, Restitution

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**Citation:** Hastino, P. G., Fauziah, E., Maylani, V., Asmara, T & Nurhaqi, A. (2025). Optimization of Legal Policies Against Trademark Rights Violations Based On Restitution. *Rechtsnormen Journal of Law*, 3(3), 236–246.

<https://doi.org/10.70177/rjl.v3i3.2259>

#### Correspondence:

Grace Putri Hastino,  
[gracehastino34@gmail.com](mailto:gracehastino34@gmail.com)

**Received:** April 29, 2025

**Accepted:** May 10, 2025

**Published:** May 10, 2025

### INTRODUCTION

Trademark counterfeiting is a significant violation of Intellectual Property Rights (IPR) and has emerged as an essential issue within the legal and economic framework. (Alif & Aminah, 2024; Anshary et al., 2024; Nur Tsani & Ginting, 2021). Permatasari et al., (2024) states that trademarks, as a category of intangible assets, have significant economic value that must be protected. Trademark infringement is included in counterfeiting and theft, which has implications for financial losses for brand owners, reduces consumer trust, and undermines market competition, thus being categorized as economic crimes



(Fajar Dian Aryani, Erwin Aditya Pratama, 2022; Supriyanta, 2007).

Trademarks are included in the property rights for which the owner is obliged to obtain protection, as John Locke (1988: 287–290) states that property rights are part of human natural rights that arise from the results of one's work and efforts. If a person creates or builds something, he is entitled to its ownership and protection. A brand as part of intellectual property reflects its owner's identity, creativity, and hard work. Therefore, acts of counterfeiting or theft of a trademark can be considered a form of deprivation of rights that violate the principles of morality and justice. Protecting brands legally means respecting human efforts and maintaining the dignity of business actors in a healthy economic system (Nanda Janusafitri, 2024).

Trademark protection as recognition of the rights of business actors has been reflected in various legal instruments such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), which requires member countries of the World Trade Organization (WTO) to provide legal protection for trademarks. In addition, the *Paris Convention for the Protection of Industrial Property* (Paris Convention, 1883) also affirms the principle of national treatment and exclusive rights to trademarks for their owners. In Indonesia, the provisions regarding trademark protection are regulated in Law Number 20 of 2016 concerning Trademarks and Geographical Indications, which gives the exclusive right to registered trademark owners to use and defend their trademarks from all forms of infringement in line with the constitution's mandate.

Although trademark protection has been regulated legally, counterfeiting and trademark theft violations are still rampant. In 2023, DJKI, together with the police, revealed a counterfeit network of well-known cosmetic brands such as Estée Lauder and L'Oréal in Jakarta, with the discovery of more than 100,000 counterfeit products and losses estimated at IDR 15 billion. (Kompas, 2023). The same year, PT Pisma Abadi Jaya allegedly produced sarongs under the fake Gajah Duduk brand, showing that brand counterfeiting also reached the textile sector. (Batik Tv, 2023). Meanwhile, in December 2024, the DJKI destroyed evidence of intellectual property infringement worth more than IDR 5 billion, including counterfeit products of Lego, Louis Vuitton, and Honda. (Public Relations of the Ministry of Law and Human Rights of South Sulawesi, 2024).

The massive counterfeiting and theft of trademarks leads to the porosity of protection instruments in legal instruments such as in Law Number 20 of 2016 concerning Trademarks and Geographical Indications, the perpetrators of trademark infringement are only subject to imprisonment and fines, while the victim or the owner of the trademark can be charged with significant losses considering that from trademark registration which requires costs, financial losses due to market volume stolen by brand counterfeiters, to the cost of litigation processes that are not cheap to fight for the rights to the trademark owned. However, from the series of losses, there is no reciprocity or compensation from the perpetrator, which is affirmed by the legal instrument to repair the losses of the brand owner. This, according to the author, is like falling down a ladder.

From this problem, restitution must be applied to the legal system in Indonesia regarding trademark protection, considering that restitution is a legal action to restore the victim's condition to its original state before the violation occurred, either through the return of assets, finance, or the restoration of confiscated rights (Birks, 2003, p. 17). In the case of trademark infringement, which is essentially an infringement of a person's work and intellectual property, the perpetrator must not only be punished by the state, but also obliged to return or compensate for the losses incurred to the trademark owner. This is in line with Locke's principle that the protection of property rights must include restoration (*Restitution*), not just retaliation (*Punishment*) (Locke, 1988).

The involvement of the state in providing protection to trademark owners for trademark infringement is affirmed in the concept of restitution, Locke, as applied to China, Russia, and

Germany, in implementing restitution integratively through criminal justice mechanisms in cases of trademark infringement, not separately imposing compensation through civil courts. Thus, fulfilling the rights of the trademark owner does not go through a complicated mechanism, and the material losses of the trademark owner are repaired. (Bazenkova, 2015; BBC, 2007).

This study aims to analyze the basic concepts of trademark infringement and how to optimize legal policies against trademark infringement based on restitution. This research is expected to provide relevant recommendations to improve the legal protection of trademarks in Indonesia.

## **METHODS**

This research uses normative (doctrinal) juridical research to investigate related legal regulations, theories, and concepts. (Sokant, 1986:14). As for the legislative approach, conceptual is used in the research. (Marzuki, 2005:35) This research is descriptive and analytical, concentrating on explaining legal principles and critically examining their application. Data collection techniques are carried out through literature reviews, content analysis, and case studies. The data is then analyzed qualitatively to produce comprehensive information and draw relevant conclusions.

## **DISCUSSION**

### **Forgery or theft: the basic concept of trademark infringement as a form of crime**

This sub-chapter analyzes the basis of criminal sanction thinking against property law violations, with a primary focus on brand rights in the intellectual property landscape. Because, it is important to understand how the state has rationalized the criminalization of property law violations, and how this construct of thinking is then applied. The author acknowledges that, historically, reliance on parallel property law has been a mecca in implementing and legitimizing criminal consequences for intellectual property rights violations (Çapar, 2023). It is characterized by some types of intellectual property rights infringement categorized as 'theft or forgery' (Mohamed, Khadijah, 2022; Muehlfeld & Wang, 2022; Shuhufi & Firdayanti, 2023), where the term is conventionally associated with unauthorized extortion, attempted impersonation, plagiarism (Language Development and Development Agency in KBBI VI Online, 2024). Theft and counterfeiting essentially interfere with every property right, as individuals lose control of their property irrevocably after it is taken.

Rahmi & Aminah (2022) revealed that the concept of IPR, which initially only referred to material (property), was transformed to merge and harmonize with criminal law because these intangible assets have economic value that must be maintained. This transformation shifts the discussion from whether IPR infringement should be a crime to specific cases of infringement that deserve criminal penalties, this is in line with the perception of criminalizing theft or counterfeiting, which reflects the role of criminal law in protecting property (Hamdiyah, 2024; Putri Mardi Utami, 2023).

In the field of intellectual property, especially trademarks, which are categories of intangible property but have economic value, so that when a violation occurs in the form of theft or counterfeiting, it harms the owner of the right, which makes this violation can be categorized into criminal law (Scott, 2024; Scott, 2020). Manta & Wagner (2015) States that, there are similarities in the infringement of IPR and counterfeiting, as both can reduce the value of something without eliminating it. Forgery, also known as 'malicious damage' or 'criminal property damage,' usually, the law establishes penalties based on how much damage occurred, determined by looking at the cost of repairing the damage or a decrease in the market value of the property. (Manta & Wagner, 2015) On the other hand, counterfeiting or brand theft is a criminal offense when a person

deliberately takes control of another person's property without permission, causing the value of the property to drop but not eliminating it. (Manta & Wagner, 2015).

To understand the criminalization of trademark infringement, the author concentrates on the indicators of unlawful acts (as *actus reus*). The most apparent disadvantage of crimes such as theft or counterfeiting in brand misuse is the financial impact on the property owner, which can deter individuals from carrying out productive activities as well as the potential risk of loss of income, so it is reasonable to conclude that most of the perpetrators in property-related cases are illegal acts that have implications for the detriment of the rights owner.

Trademark infringement can be classified into two forms of criminal acts, namely forgery and theft, based on the nature of the action against the trademark owner as described in the following table.

**Table 1.** Classification and characteristics of trademark infringement

Classification	Characteristic	Explanation
Forgery	Impersonation of a brand (name, logo, design) without permission	Actors use visual elements and brand identity to mislead consumers into believing that the product is genuine
	Intent to deceive or deceive	Counterfeit products are marketed as official goods from the brand owner.
	Infringement of the moral rights of the brand	Obscuring the origin of goods and misusing brand image
Theft	Economic profit-taking of unlicensed brands	The perpetrator sells products with counterfeit brands and makes a profit from the work of others
	Violation of the exclusive right of ownership	Using someone else's intellectual property as if it were your own
	Actions are carried out unlawfully.	There is no legal basis, such as licensing or official approval.

In conclusion to this sub-chapter, it can be emphasized that infringement of trademark rights is not just a civil matter involving the ownership of a mark or trademark. It has transformed into an act with criminal consequences when it fulfills the elements of counterfeiting and theft. Through an approach that views brands as intangible property with economic value, the state has a rational basis for criminalizing infringement of trademark rights. Counterfeiting and theft of trademarks directly undermine the legal protection order of intellectual property, as the perpetrators not only violate the owners' exclusive rights, but also cause economic losses and disrupt the market's integrity.

**Optimizing Legal Policies Against Restitution-Based Trademark Rights Infringement: A New Horizon Recommendation**

Indonesian law uses a criminal approach to infringement of intellectual property rights, especially trademarks, as outlined in Law Number 20 of 2016 concerning Trademarks and Geographical Indications, with Chapter XXI discussing Criminal Provisions related to trademarks. Two articles regulate the categories or classifications of criminal acts related to brands. Therefore, there are only two categories of criminal acts of counterfeiting, plagiarism or brand theft, including the following:

*"Article 100*

- (1) *Any person who without the right to use the same Trademark in its entirety as the registered Trademark belonging to another party for similar goods and/or services produced and/or traded, shall be sentenced to imprisonment for a maximum of 5 (five) years and/or a maximum fine of Rp2,000,000,000.00 (two billion rupiah).*
- (2) *Any person who without the right to use a Trademark that has a similarity in essence with a registered Trademark belonging to another party for similar goods and/or services produced and/or traded, shall be sentenced to imprisonment for a maximum of 4 (four) years and/or a maximum fine of Rp2,000,000,000.00 (two billion rupiah)."*

Judging from the article above, it can be classified into two forms of infringement of imitation, counterfeiting, or brand theft: imitation, counterfeiting with complete substance, and impersonation with most of the same principles. In order for an act to be classified as a criminal act, the act must meet the criteria outlined in Article 100 of Law Number 20 of 2016, and The elements are as follows:

1. Subject of the Perpetrator: The subject of the perpetrator in this article states with diction "Everyone"; therefore, the subject of the law to be declared as the perpetrator is 'person', which may give rise to criminal liability (Mangkunegara, 2018).
2. Against the Law: "With No Rights" is a term of art where the act must meet the elements of unlawful (Alif & Aminah, 2024; Saiman, 2018). In general, in criminal acts that have an element of unlawfulness in the form of having no rights, it is always related to property rights. (Nur Tsani & Ginting, 2021). Goods or property rights confiscated or utilized by the perpetrator belong to someone else, and only the owner has the right to enjoy them. The absence of the owner's consent indicates that the perpetrator has used it illegally to the detriment of the owner of the trademark rights.
3. *News Reus*: Elements *Actus Reus* refers to the action component of a criminal act (Romandona & Yasin, 2024), as defined in Article 100 of Law Number 20 of 2016 concerning Trademarks. This relates to goods or services involved in production and/or trade. (Anshary et al., 2024) Therefore, for the criminal act of trademark infringement described in Article 100 of Law Number 20 of 2016 concerning Trademarks to be punishable, the infringer must use the trademark on goods or services during production and/or trade activities.
4. Essential substance elements of the Trademark Field: Identical in all respects to the registered trademark of another individual. In this case, there must be a general similarity between the infringer's trademark and the other party's registered trademark.

In both articles, the distinction is related to the definition of substance or subject matter of the overall similarity including imitation, replication or complete reproduction of another individual trademark, while simultaneously achieving proper similarity in aspects including Type of goods or services, Class of goods, Similarity of goods, Similarity of design, Similarity of use and maintenance. (Butticè et al., 2020; Utama et al., 2021).

Two indicators to determine how a brand constitutes a counterfeit are: similarity to logo, image, text, or sound, type and class of goods, usage, and marketing channels. The second indicator is that the trademark used by the infringer shows an overall resemblance to other registered trademarks in the General Register of Trademarks (DUM) (Indriani, 2024). Only registered trademarks are protected under the criminal act of trademark infringement, and

unregistered trademarks do not receive protection. The state grants exclusive rights only to registered trademarks and their owners.

In understanding Article 100 Paragraph (1), it can refer to Several concrete cases in Indonesia that have shown this article's real implementation. One of them is the case of counterfeiting of Estée Lauder and L'Oréal-branded cosmetics, in which authorities raided warehouses that produced and circulated counterfeit products of the famous brands (Kompas, 2023). Thing-thing. It is visually identical to the original product. However, it is produced without a permit and of low quality, thus harming consumers while harming the brand owner economically and reputationally. In this context, the *Unfair use of identical trademarks as a whole* and for *similar items* is fulfilled so that the perpetrator can be convicted based on Article 100 paragraph (1).

Another example is the case involving PT Pisma Abadi Jaya, where the company allegedly imported and traded counterfeit Lego toy products. The product completely imitates the brand and Lego trademark logo that has been registered in Indonesia, and is sold to consumers as original products (Batik Tv, 2023). Law enforcement in this case shows how the state applies criminal provisions to protect global brands that have gained local legal protection.

The counterfeiting case of well-known fashion brands such as Louis Vuitton also shows an apparent violation of Article 100 paragraph (1). Counterfeit products such as bags, shoes, and accessories that use logos and designs identical to the Louis Vuitton brand are massively produced and sold, without rights and an official license from the brand owner (Public Relations of the Ministry of Law and Human Rights of South Sulawesi, 2024). This is a form of *Brand identity forgery* and the unauthorized takeover of economic value, under the characteristics of counterfeiting as regulated in this article.

Furthermore, exploring the elements in article 100 paragraph (2), there is a narrowing of the value of counterfeiting by not involving the substance completely, meaning showing similarities including: visual characteristics, implied meaning, overall perception, and resulting in a lack of distinguishing attributes among brands. The perception in trade is almost the same, the similarity between the offender's mark and the registered trademark belonging to someone else misleads consumers, making it difficult to distinguish between genuine and fake trademarks.

For example, the dispute between the Gudang Garam brand and Gudang Baru in Figure 1.



**Figure 1.** Similarities in the brands of Gudang Garam and Gudang Baru (Bhaktidesta, 2016).

In this case, the new warehouse was declared to imitate the design and appearance so that it seemed like a Garam Warehouse, so this caused a dispute which in the end the Surabaya District

Court Decision Number 04/HKI-BRAND/2013/PN-NIAGA SBY stated that the Gudang Baru brand imitated the Garam Warehouse with similarities in essence.

From the legal analysis above, the author comments that there is a gap in the sanctions that have been imposed, because the material losses suffered by trademark rights owners are huge, including trademark registration, which requires a series of administrative costs. Then, in the material loss of the brand owner, it should be considered that the sales volume can determine the extent to which the goods or brand are misused, which has implications for the loss of the brand owner. On the other hand, when there is a trademark infringement, the process for litigation requires costs in law enforcement, so that the rights owner in this case is charged a loss fee that may be doubled, this is like the saying that says that "it has fallen down the stairs". The form of loss of the brand owner can be described in the following table:

**Table 2.** Types of Material Losses of Trademark Owners for Trademark Rights Infringement

No.	Types of Material Losses	Description
1	Decline in Sales of Original Products	Consumers buy fake products because they are cheaper or cannot distinguish the authenticity.
2	Reduction of Market Share	Fake brands fill the market space that should have belonged to the original product.
3	Disadvantages of Litigation and Investigation Costs	Brand owners have to spend huge money to sue the perpetrators, hire investigators, etc.
4	Image Restoration and Rebranding Costs	The impact of reputation causes companies to need to re-promote or <i>rebrand</i> to affirm authenticity.
5	Loss of Potential Revenue	Counterfeit products cover the potential profits that should be made from the legal market.
6	Loss from Defective or Defective Products Thought to be Genuine	Low-quality counterfeit products undermine consumer trust in genuine brands.

Therefore, the author proposes that sanctions for misuse, counterfeiting, or theft of a trademark must be adjusted to the material loss level, so the author proposes the application of restitution-based sanctions in optimizing legal policies against trademark infringement. Because basically one cannot take wealth or profit from the suffering of others as well as *Old Maxim Sextus Pomponius* (Schall, 2024):

*"Jure naturae aequum est neminem alterius detrimentum et injuria fieri locupletiores"*

This expression is in line with Birks, (2003) Which says that:

*"Restitution is a legal remedy designed to restore the status quo by requiring the wrongdoer to disgorge unjust gains and compensate the victim."*

**According to Peter, restitution is a legal action to restore the victim's condition to its original state before the violation occurred**, either by returning assets or finances or restoring confiscated rights. In the context of criminal law, restitution is a form of compensation paid by the perpetrator of a criminal act to the victim as part of a justice process that not only focuses on punishment but also on **the restoration of the victim's rights**.

Peter's view departs from the argumentation. Locke, (1988) Which asserts that:

*"He who hath received any damage, has a right to seek reparation from him that did it."*

Restitution is a tangible form of *restorative justice*. Locke emphasized that when a person's rights are violated, it is not enough to enforce justice through punishment alone, but also **through restitution or compensation**, to restore rights that have been unlawfully taken. Thus, in the case of trademark infringement, which is essentially an infringement of a person's work and intellectual property, the perpetrator must not only be punished by the state, but also obliged to return or compensate for the losses incurred to the trademark owner. This aligns with Locke's principle that protecting property rights must include *restitution*, not just *punishment*.

It is important to note that the concept of restitution, according to John Locke, requires the state's involvement as a ruler in ensuring the protection of trademark owners' rights. Therefore, restitution-based law enforcement against trademark infringement must be strictly applied in the trademark protection legal system. In addition, integrating restitution sanctions in criminal proceedings is crucial, considering that Indonesian law on trademark rights protection currently separates the compensation mechanism through the civil court process, which can increase the cost burden for trademark owners.

The integration of restitution sanctions in criminal proceedings related to trademark infringement can be seen in several countries. In China, if a criminal court finds the perpetrator guilty of trademark infringement, such as counterfeiting, the judge can order restitution to the trademark owner as part of a criminal verdict, without the need for a separate civil proceeding, as in the case of counterfeiting of the Nike trademark leading to financial restitution to Nike. In Russia, under the Intellectual Property Rights Act, criminal courts can also order restitution for the infringed trademark owners, without a separate civil proceeding, as in the Moscow Court of Arbitration case, which ordered four companies to pay Apple for the sale of counterfeit products. In Germany, in the case of counterfeiting the Prada brand, the criminal court sentenced him to prison and a fine, and ordered restitution to Prada, without involving a separate civil lawsuit. (Bazenkova, 2015; BBC, 2007).

From the proposed concept and the author's recommendations for optimizing legal policies against restitution-based trademark infringement, it can be described in the following table.

**Table 3.** Legal protection practices of trademark owners in Indonesia and other countries, as well as policy recommendations

Aspects	Indonesian Law (Law No. 20 of 2016)	Practice in Other Countries (China, Russia, Germany)	Current Shortcomings of Indonesian Law	Optimization Recommendations
Legal approach	Criminal and Civil (separated)	Integrated criminal with restitution	There is no direct recovery mechanism in criminal proceedings	Integration of restitution into criminal proceedings

Forms of losses considered	Not explicitly taken into account	Economic and reputational losses are taken into account for restitution	Trademark owners' losses are often irreplaceable, separate civil proceedings are expensive	Restitution must take into account material and immaterial losses
Law enforcement	Enforcement is retributive (imprisonment/fine)	Combinative (punishment + restoration of victims' rights)	Only punishing the perpetrator without recovering the victim	Transformation of a retributive to restorative approach
Victims of violations	Must file a separate civil lawsuit	Brand owners receive compensation directly from criminal proceedings	Burdening victims due to the cost, time, and burden of double proof	The state is obliged to facilitate restitution as part of the punishment
Basic principles of law	Arrest of perpetrators	Victim recovery and prevention of the dark economy	Not oriented to restorative justice	Adoption of <i>the principle of "Restitution as Justice"</i> in the style of Locke and Briks

**CONCLUSION**

From the above discussion, it can be concluded that infringement of trademark rights in the form of counterfeiting and theft is a real form of economic crime that harms the trademark's owner materially and immaterially. Through Law Number 20 of 2016, Indonesian law has regulated criminal sanctions for trademark infringement. However, the emphasis is still limited to a retributive approach that does not fully guarantee the recovery of victims' losses. Sanctions in the form of imprisonment and fines do not reflect fair recovery efforts for trademark rights owners who have been significantly harmed in terms of finance, reputation, and market potential.

Based on philosophical, juridical analysis, and comparison with practices in other countries such as China, Russia, and Germany, it can be seen that integrating restitution into the criminal process can provide a more complete form of justice. Restitution is an important instrument to restore the victim's position as it was, under the principle of restorative justice affirmed by John Locke and Peter Briks. Therefore, the Indonesian legal system needs to implement policy reforms by accommodating restitution as part of criminal verdicts in trademark infringement cases.

By adopting restitution as an integral part of the criminalization of trademark infringement, the state not only demonstrates the protection of intellectual property rights but also strengthens social and economic justice for business actors. This will create a legal system that not only punishes, but also remedies.

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