

Legal Protection of Trademarks Based on the Justice Value

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The goal in this study is to assess and analyse the legal protection of a registered trademark by positive law, and legal protection of the registered mark is based on the values of justice. The method in this study is social legal research. This study uses primary and secondary data. The technique of collecting data is through observation, interview and literature study. Data was analysed using an interactive model proposed by Matthew B. Miles and A. Michael Huberman which includes three (3) activities, namely data reduction, data presentation and conclusion/verification. Research found that the implementation of the legal protection of the registered mark is based on the positive law in Indonesia and has not been based on values of justice because of legal protection under Act No. 20 of 2016 on Marks and Geographical Indications, in particular the provisions of Article 35 paragraph (2). These have not provided protection to the registered trademark after more than 20 years. Law Marks and Geographical Indications are more focused on means of dispute resolution through the instrument of the alternative registered trademark dispute resolution, temporary determination of the Court, trademark lawsuit, a lawsuit in the Commercial Court, and through the instrument of punishment. Legal protection of the registered mark is based on the values of justice the provisions of Article 35 Paragraph (2) of the Act No. 20 of 2016 on Marks and Geographical Indications.

Key words: *Legal, protection, trademark, justice.*

Introduction

A brand is very important in the world of advertising and marketing because the public often associate an image, the quality and or the reputation of goods and services with a particular brand (Tim, 2006). A brand also can meet consumer needs for identification or distinguishing features. These are very important and is a guarantee of the quality of the product or service in an atmosphere of free competition (Adrian, 2009).

The existence of legal protection for brand owners is legitimately intended to provide rights that are exclusive for brand owners so that another party cannot use a sign identical or similar to their goods if their goods or services are the same or nearly the same. "Special rights tend to be monopolistic, meaning that only the brand owner can use it" (Agung, 2008). Rights holders can use its brand with a note without breaking the rules that exist in the use of the brand, while prohibiting others to use a trademark without consent.

Piracy and imitation brand make the business world slump due to unhealthy competition which resulted in the rise of bad faith behaviour of businesses adventurers. Such situations will further disrupt Indonesian business nature. Viewed globally, these conditions do not rule out the possibility of foreign investors doing lazy business. In turn, the competitiveness of Indonesian businesses also at the global level will be weakened by the decline in the level of confidence in the brand and in Indonesian products. We can imagine the damage to the image of Indonesia, if this country spreads false brands or brands that piggyback well-known global or local brands (Iman, 2009).

Other legal protection is also given to the owner of the trademark if the brand has been used or taken by another person or other legal entity. Act No. 20 of 2016 on Marks and Geographical Indications has set visible protection of famous brands. This is different in Act No. 15 of 2001 on Marks if the previous brand did not set up a lawsuit to protect the famous brands matter. This is contained in Chapter XV Article 83 through Article 84 and regulates the lawsuits and protects the brand that has been registered.¹

Protection of registered marks and the extension period of registered marks still use the general category, in the sense that all brands are only protected for 10 (ten) years and can be extended for another 10 (ten) years. The protection of registered marks as well as the extension of the time of registered marks is made in a special category regarding special protection for brands that meet the requirements or verification that have been determined, chewing the developing Indonesian State. TRIPs that provide legislative choices. The purpose of the legislative choice is an opportunity for developing countries and least developed countries to realize legislation in the field of IPR that suits their needs.) (Rahmi, 2013).

Act No. 20 of 2016 on Marks and Geographical Indications does not confirm and or explain the position of a registered mark who's legal protection expired after 20 years which causes a registered mark to have expired legal protection. But if the brand is still circulating in the market it has no standing in law or regulation in the sense that there is no legal certainty to the brand.

¹ Further see the explanation of Article 83 of Act No. 20 of 2016 on Marks and Geographical Indications that describe Granting the right to bring a civil action based on unfair practices conducted another olehpihak intended to provide legal protection to owners of famous brands, although not listed.

Based on the background described above, then the problem studied in this research is formulated as follows: the legal protection of a registered trademark is by positive law, and the reconstruction of the legal protection of the registered mark is based on the values of justice.

Research Methods

The research is a qualitative research. In social science that is fundamentally dependent on the observations in humans both in the region and in their terminologies (Lexy, 2014). Suitable qualitative research methods that are for use in research in which the problem is not clear, or in a social situation that is not extensive, will need the results of further research (Sugiyono, 2015). That the law was not conceived as an autonomous normative phenomenon, but a social institute that is in real terms related to other social variables (Bambang, 1997).

This study uses a social approach to legal research as Tamahana states that socio-legal studies are associated to the Law and Society Studies (Brian, 1997), and conceptualise legal norms and laws as well as the reality (Cavendish, 1997). Socio-legal research is law research with a non-positivist paradigm, through interpretative legal research with a hermeneutic philosophy and the paradigm of critical theory. This study uses primary data and secondary data. Primary data is obtained in the field. Secondary data include (1) the primary legal materials, (2) secondary law, and (3) tertiary legal materials (Soerjono and Sri, 2009). Primary data in legal research can be seen as data that is from the behaviour of law that developed in the community (Mukti dan Yulianto, 2010). The primary data of this study are from all those who come into contact with the practice of the legal protection of the registered mark and with the legislation associated with this research.

The primary data collection techniques is by observation and in-depth interviews with key informants who have been determined based on the characteristics of the study investigators (Masri dan Sofian, 1987). For technique of data analysis of primary data, researchers used a type of data analysis technique by Strauss and J. Corbin (Stauss and Corbin Busir, 1990), by analysing the data since researchers were in the field. Furthermore, researchers conducted the preparation and categorise data in the pattern/theme. Once the data was validated, the researchers conducted a reconstruction and qualitative inductive analysis to be able to answer the problem. Data will be analysed using an interactive model proposed by Matthew B. Miles and A. Michael Huberman (Matthew and Michael, 1992) which includes three (3) activities, namely data reduction, data presentation and conclusion or verification.

Results and Discussion

Legal Protection of Trademark Based on Positive Law in Indonesia

Article 35 of Act No. 20 of 2016 on Marks and Geographical Indications clarified the process on the extended time for brand protection and term submission as set out in Article 35 as follows (Redaksi, 2017):

- 1) The registered brand gets legal protection for a period of 10 (ten) years from the filing date.
- 2) The term of protection referred to in paragraph (1) may be extended for the same period.
- 3) Request of an extension referred to in paragraph (2) shall be submitted electronically or non-electronically in Indonesia by the owner or his Proxy within a period of 6 (six) months before the expiration of the protection of the registered Trademark.
- 4) Request of an extension as referred to in paragraph (2) can still be filed within a period of 6 (six) months after the expiry of the term of protection of the registered brands with a charge and a fine of the renewal fee.

Request for extension of time period of registered mark protection shall be filed in writing by the owner or their proxies within a period of not more than twelve months and at least six months before the expiration of the time range for the protection of the registered mark. The demand is for it to be submitted to the Directorate General of IPR and for it to be charged the amount which will be determined by the decision of the Minister whose scope of duties and responsibilities include the supervision of the brand (Saidin, 2004).

Rejection of a registered brand extension is notified in written to the owner of the brand or power of attorney by mentioning the reason. An applicant or their proxies may appeal in the Commercial Court against the decision of rejection of the extension of a registered trademark. An approved application for renewal by the Directorate generals IPR is notified in writing to the applicant or the power of attorney and the extension of the range of time is recorded in the General Register of Marks.

As a country that is one of the members of the World Trade Organization (WTO) Indonesia must adapt registered trademark protection under the International Convention followed, as stated in Article 1 paragraph 3 and Article 2 of the TRIPs (Trade-Related of Intellectual Property Rights).

Brands that are protected for use in business, so the use of the brand must be in accordance with the registration, as stated in the certificate. As a brand only exists for the trade of goods and/services, if the goods or services are not produced anymore then acknowledgement of the brand has no meaning (Rahmi, 2013).



From the point of the rule of law and law enforcement, the provisions of the TRIPS Agreement has strengths and advantages compared to other international conventions that already exist. This is due to the TRIPS Agreement having the legal tools to force adherence. Forcing power tools embodied in the provisions of Article 70 of the TRIPS Agreement are set on all forms of intellectual property infringement and can be completed through the World Trade Organization if it has not been dealt with separately by the member State (Elyta, 2012).

Criminal sanctions in civil law process can be an alternative to criminal proceedings, as according to the intellectual riches of TRIPS, issues are private rights, however Indonesian law enforcement through police action mostly regards intellectual property as part of public rights (Marny, 2017).

The actions of when that can be subject to criminal sanctions, in implementing a brand protection registered under Act No. 20 of 2016 on Marks and Geographical Indications, are as follows:

1. Every person without the right to use the same brand on the whole with the other party owning the registered trademark for similar goods or services.
2. Every person without the right to use brands that have similarity in principle with the other party's registered trademark for similar goods or services being traded.
3. Every brand merchandise or services are bought and sold that cause health problems, disorders of the environment, and or death to humans.
4. Any person who is using a sign without the right to use that sign if that has a similarity in principle of geographical indications of other parties for the same goods or services similar to goods or services listed.
5. Any person with no right to use a sign that has a similarity in principle of geographical indications of other parties for goods or services of the same products as the products or goods listed.

Any person who violates the act which, as has been described above, will be subject to criminal sanctions that aim to protect the brand registered under Act No. 20 of 2016 on Marks and Geographical Indications. Crime is prohibited and criminalises anyone who violated the ban (Edi dan Dian, 2013).

The criminal law is a brand of special criminal law. Criminal law typically is part of our criminal law which is dispersed in a variety of the Act, in addition to containing material criminal law material also includes formal criminal legal materials, or in other words, the criminal law specifically contains the norms and criminal sanctions that are not regulated in the Criminal Code and also includes the rules of procedural law that deviate from the provisions of the Criminal Procedure Code (Ruslan).

Criminal law in the sense that the objective meaning of criminal law can be seen from the aspect of prohibitions, namely prohibition with criminal sanctions for those who violate the provisions of the crime, in other words that the criminal law objectives (*ius poenali*) is the same material as criminal law (Ruslan). With exposure to the above, it can be interpreted that any person who commits acts prohibited by the criminal law will be liable to criminal law. Criminal law consists of norms that contain imperatives and prohibitions which have been linked to a sanction in the form of penalties, and that is a special affliction (Lamintang, 1997).

In formulating the notion of crime, as is which has been discussed above, there are some lawyers who regard the ability of responsible (*Toerekeningsvatbaarheid*) as an element of a criminal offense. It could be argued further, regarding the ability of responsibility for this, whether it is an element of a criminal offense or not, which is evident in every formulation of a crime in the criminal Code in that the ability to be responsible has not been mentioned, this means that under the Act it is not an element. Because it is not an element that is mentioned in the formulation of the crime of the practice of law it does not need to be proven (Adami, 2014).

Can the term "crime" be equated with the Dutch term "*Strafbaar feit*"? To answer that we need to know in advance whether "*Strafbaar feit*" means the behaviour (in Dutch: *handeling*) of the criminal which is punishable, as it is against the law, and is associated with fault and those that carried it out are responsible (Edi dan Dian, 2013).

In Article 100 paragraph (3) of the Law of Marks and Geographical Indications it gives the most severe criminal penalty than other criminal acts, namely with imprisonment for 10 (ten years) and fined Rp. 5,000,000,000.00 (five billion rupiah), for an act by any brand of merchandise or services that are traded that cause health problems, disorders of the environment, and/or death to humans. Due to consumer protection being an integral part of the Federal healthy business activities (Ahmadi, 2013).

If traded brands result in health disorders and causes death even damaging to the environment as a user, it is not only consumers who are disadvantaged; likewise for the consumer buyer, it may also include or individual enterprises, but the buyers who utilise the goods or services to be traded on cannot be termed as final consumer but rather the consumer between or distributors, retailers, agents, and so on (Intan Nur dan Rukiyah, 2014).

The imposition of criminal sanctions against the makers (actors) a registered trademark infringement should be irrespective of the nature or the abolition of the criminal suppression of criminal acts and the perpetrators are to be held accountable for violations of the registered mark before the law.

Criminal liability is an assessment conducted after the fulfillment of all the elements of a criminal offense or evidence of the crime. This assessment is done objectively and subjectively. Objective assessment is related to the manufacturer and with the violation of legal norms, it is associated with moral values that are being violated, in the end, this oriented on values of morality error ought to be reproached. Subjective assessment is made against the manufacturer of the particular circumstances that have violated morality psychology reproach, to assess if they are culpable or not (Agus, 2016).

In general it can be said that the objectives to be addressed by the criminal law are to protect the interests of communities and individuals from the actions of an offense by a person. The criminal law is not only focused on the protection of society, but also of individuals, so as to create balance and harmony (Mahrus).

Seen in the Supreme Court ruling No. 539 K / Pid.Sus / 2007, the registered trademark infringement in this decision is principally acted out intentionally and without the right to use the same brand in principle as the registered trademark of another party's goods or services produced and or traded.

The registered brand infringement case is in a brief description; the defendant Kurnian Gunardi has been producing goods with the kind of sheets with the brand of "Love", while the goods to the type of bedspreads were registered by Rony Ridwan under the brand "My Love". The brand produced and traded by the defendant Kurnian Gunardi had the same sheets on main goods with the brand of "My Love" which was registered by Rony Ridwan. Criminal law provisions still function in the protection of a registered trademark in Indonesia. Since the purpose of the brand infringers conviction on a criminal sanctions in order to create Deterrence effect, i.e. both to the doer of the deed of registered trademark violation as well as to society in general in order to not participate in registered trademark infringement action copying or imitating for their punishment.

Act No. 20 of 2016 on Marks and Geographical Indications focusses on conceptually protection, and Act No. 20 of 2016 on Marks and Geographical Indications focusses on means of dispute resolution regarding registered brands through the instrument of alternative dispute resolution, temporary determination of court, the lawsuit brand, lawsuit in the Commercial Court, and through the instrument of punishment. Implementation of the provisions of the instrument of punishment for the legal protection of the registered mark is very dominant weighting fines to criminal sanctions is on the average right around Rp. 2,000,000,000.00 (two billion rupiah), and contained in Article 100, 101 and 102 of the Act No. 20 of 2016 on Marks and Geographical Indications. Criminal fines levied against the defendant of a registered trademark infringement will be paid to the State. And the State alone gets the cash infusion of violation of the rights of a person. This means that the trademark owner registered with criminal

law enforcement instruments will not cause repairs to the losses suffered by the trademark owner due to the use of the mark without permission.

Specific legal protection of a registered trademark and registered trademark of special protection extension has not been described or regulated in Act No. 20 of 2016 on Marks and Geographical Indications. Article 28D (1) of the 1945 Constitution stipulates that "every person has the right to recognition, security, protection and legal certainty and equal treatment before the law". The right of individuals to obtain recognition of property rights was further referred to in Article 28H paragraph (4) of the 1945 Constitution and states that "every person is entitled to have private property rights and property rights should not be taken over arbitrarily by anyone, so that the entire legislation who was born in philosophy should refer to the values of Pancasila and the Constitution of 1945". Therefore the system of legal protection of a registered trademark and the brand protection extension period has registered a paradigm of legal certainty and fairness. A registered mark which expired the protection period of 10 (ten) years and then was extended to the sum of 20 (twenty) years is after that in the position of a registered trademark without certainty or vacuum that allows opportunities in the magnitude of arbitrary actions for the registered mark if it still appears in the market.

Legal Protection of a Trademark Based on Justice Value

Brand as intellectual property rights are Perfect Properties, namely ownership which includes mastery of the object (substance) and benefits (result) objects as a whole. Then the state should assure the protection of a registered trademark by not limiting the protection to a certain time, but to set the system of the division of the results of the use of the brand, and at least add income against the State. With reason:

1. Brands are the property of the owner of the mark, pursuant to Article 28H paragraph (4) of the 1945 Constitution states that "every person is entitled to have private property rights and property rights should not be taken over arbitrarily by anyone". If the state limit only provides brand protection for 10 (ten) years from the date of acceptance of the brand and this can be extended for another 10 (ten) years. This means that the State only protect a brand as the property of the brand owner for 20 (twenty) years. And after that the brand does not get protection. This means that any party can take a brand that is not protected. Of course this is very inconsistent with the Constitution of the Republic of Indonesia contained in Article 20 H paragraph (4) Constitution of Republic of Indonesia of 1945.
2. Registered trademark protection needs to be reconstructed for the period the brand has been circulated or have been known amongst the people. Additional provisions are made, such as brand protection for 10 (ten) years and extension for 10 (ten) years. Given this protection, the results of the use of the State's brand royalties are for the essence of protection to be

kept running in order to prevent abuse of the brand that has been known and circulating in the community.

Opinions of the authors on the importance of reconstruction on the legal protection of the registered mark is not merely for brand owners unilaterally, but Indonesia's readiness to face the ASEAN Economic Community². Because Act No. 20 of 2016 hinted about a competitive economy, it looks for the expansion of protected brands contained in Act No. 20 of 2016. The establishment of the ASEAN Economic Community blueprint contained in Asian Economic Community (MEA) 2015 signed in 2007 was created based on four pillars:

1. Single market and production base of the single market;
2. Competitive economic region;
3. Equitable economic;
4. Integration with the global economy (Directorate General of International Trade Cooperation, 2015).

Asian Economic Community (MEA) implementation will improve the economic globalisation and trade, with the principles mentioned above, if the State provides effective protection for the State brand that will compete with brands or products from other ASEAN countries. Indonesia as a country that is developing, has some variants/kinds brands that are known throughout the Provinces in Indonesia and several countries in Asia and Europe. If the brand has gone beyond time limit for 20 (twenty) years and the State does not provide further protection against the mark, while the brand has been known not only inside but outside of Foreign Affairs, the impairment, according to the authors, not only effects the brand owners but also the country where the brand originated. Because an outstanding brand in the international market can also be a means of promotion of the country of origin of the brand.

In the opinion of the author, in accordance with the mandate on TRIPS which provides legislative choice, the purpose of the legislative choice is an opportunity for developing countries and the less developed countries (least developed countries) to bring legislation in the field of IPR in accordance with their needs (Rahmi, 2013). TRIPs opportunity is given in accordance with the schedule of the 1995 commitment by developed countries in developing countries including Indonesia, this came into force on January 1, 2000.

In terms of needs, these are to be distinguished between brand arrangements for developed countries, developing countries and less developed countries. Due to in some developed

²Formation of MEA is one of the purposes of ASEAN in which the ASEAN charter destination dirumuskan in Article 1 (5) of the ASEAN Charter: To create a single market and production base of the which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in the which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and free flow of capital.

countries (South Korea and Japan) intellectual property has become one of the contributors of income for the State's economy, with brands such as electronic goods that have been well-known throughout the hemisphere.

The Republic of Indonesia provides protection and recognition of property rights to their people in the state constitution. Article 28D (1) of the 1945 Constitution stipulates that "every person has the right to recognition, security, protection and legal certainty and equal treatment before the law". The right of individuals to obtain recognition of property rights was further referred to in Article 28H paragraph (4) of the 1945 Constitution states that "every person is entitled to have private property rights and property rights should not be taken over arbitrarily by anyone". And the authors found that intellectual property rights are Perfect Properties namely ownership which includes mastery of the object (substance) and benefits (result) objects as a whole. Then the state should assure the protection of the registered trademark to prevent abuse of the registered trademark after the protection period of 20 (twenty) years. Therefore, according to the authors, reflecting legal certainty for owners of trademark rights, let alone for a particular country like Indonesia, certainly can not be equated with developed countries such as America, Germany, France and Australia in the field of brands. Because in terms of quality, the standards for universal human resources must be different (non-partial).

A registered trademark has and provides direct stimulus to the economic development of a country. The expression in accordance with the Theory of Economic Growth Stimulus Theory states: The basis of this theory is that intellectual property is an instrument of economic development. Intellectual property rights protection systems will effectively give stimulus or stimuli in the economic growth of a nation (Khorul, 2013).

Not only in terms of improvement and stimulation of the economy of the State, but also in terms of time, there is costs in development or research how a brand can be registered and entered in the General Register of Trademarks (DUM). Especially brands that use electronic media such as the brand of 3 (three) dimensions, sound, hologram or a combination of two or more elements, would have to set aside more time and cost in the birth of a brand. The expression in accordance with the Recovery Theory, states: Recovery theory explains that the inventor or creator has issued energy, time and costs and need to be given the opportunity to regain what has been produced. A creator requires replacement for the work he has done in the form that is give benefit inventions to the public (Khorul, 2013).

Based on the description of the theories above it is appropriate, according to the author, that the rules regarding the period of protection of the registered mark are given with certainty for the creator and owner of the registered mark, and because there is an element of stimulus to the economy of the State as well as the time and cost of creating and registering the trademark.

According to Peter Mahmud Marzuki who gives his view of legal certainty in his writing as follows:

"The existence of such rules and the implementation of these rules lead to legal certainty. Thus, the legal certainty which contains two meanings: first the general regulation makes people know what conduct should or should not do, and second, in the form of legal security for the individual from the tyranny of the government for their general regulation that individuals can know anything that may be imposed or carried out by the state to the individual. Legal certainty not only in the form of provisions in the legislation, but also consistency in the verdict of the judge's decision with the judge's decision one other similar case has been decided"(Peter, 2008).

The author argues from the description above that legal certainty strongly want arbitrariness, whether between the government and the people, or between with folk people. In the legal protection of the registered mark, the State only provides protection for 10 (ten) years which may be extended for 10 (ten) years more. This means that the State provides protection only within a period of 20 (twenty) years, and after that the brand that is still on the market and has been known by the public is not given more protection. This means that in 21 years the brand can be taken by any party and therefore the authors argue that after a period of 20 (twenty) years hardship happens to the registered mark, because there is no more legal protection from the State.

Legal certainty is certainly a very close relation to the validity of the norm in the rule itself, in this case the split validity of the enforceability norm into three parts. First; *factual validity*, Second; the validity of the normative, Third; evaluative validity. If you get an understanding about the validity it can be interpreted that validity is acknowledgement of a specific norm. A norm is valid as a statement that assumes the existence of these norms and assumes that there is norms that have binding force against those whose behaviour is governed. Rule is the law, and the law is validated in the norm. So the law is the norm to provide for sanctions (Jimli dan Ali, 2006).

Therefore, the State should be responsible for arbitrariness after the 20 (twenty) years registered mark protection in order to provide assurances as to the owner of the registered mark. The responsibility is a fundamental willingness to do what it their duty (Frans, 1987).

Article 35 paragraph (2) of Act No. 20 of 2016 on Marks and Geographical Indications is yet to ensure legal certainty and justice for the holder of a registered trademark. The term of protection of a registered mark law which is based on legal certainty and justice is an obligation of the State to ensure the protection of a registered trademark, so it needs to be reconstructed in order to reflect the certainty and fairness, because:

1. The state only provides legal protection of a registered mark for 10 (ten) years and can be extended for a following protection period of 10 (ten) years.
2. State has not set up a situation which reflects the position of the registered mark as registered trademark with legal certainty after ten (10) years of legal protection and an extended protection for 10 (ten) years.
3. State has not regulated the special brand protection given to brands that qualify as a famous brand that comes from within the State.
4. The registered brand as evidenced by a certificate that has expired trademark protection after a period of 20 (twenty) years should not be placed in a vacuum without status and can arbitrarily be acted against because of brand regulatory void.

Conclusion

Implementation of the legal protection of the mark registered by the positive law in Indonesia has not been based on values of justice caused by the concept of the protection of the Act No. 20 of 2016 on Marks and Geographical Indications. It's focus is on means of dispute resolution for a registered brand through the instrument of alternative dispute resolution temporary determination of court, brand lawsuit cancellation, the lawsuit in the Commercial Court, and through the instrument of punishment. Criminal fines levied against the defendant of a registered trademark infringement will be paid to the State. Reconstruction of the legal protection of the registered mark, is based on the values of affirming justice and clarification of the legal protection of the registered mark and the extension of the term of a registered mark. It is exclusively the State's duty to protect the rights of the individual or the exclusive right to avoid the occurrence of legal uncertainty and injustice law which occurs due to the opening of doors on abuses against the registered trademark after the 20 year protection period. Reconstruction is also based on the Constitution of the Republic of Indonesia contained in Article 28D (1) Constitution NRI of 1945, as it stipulates that "every person has the right to recognition, security, protection and legal certainty and equal treatment before the law". The right of individuals to obtain recognition of property rights was further referred to in Article 28H Paragraph (4) NRI Constitution of 1945, which states that "every person is entitled to have private property rights and property rights should not be taken over arbitrarily by anyone. So that Article 35 Paragraph (2) of Act No. 20 of 2016 on Marks and Geographical Indications reconstruction needs to be done.

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