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IMPORTANCE OF TRADEMARK PROTECTION AS A FORM OF INTELLECTUAL PROPERTY

Abstract

Intellectual property means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. The World Intellectual Property Organization (WIPO) is one of the specialized agencies of the United Nations (UN). The “Convention Establishing the World Intellectual Property Organization” was signed at Stockholm in 1967 and entered into force in 1970. However, the origins of WIPO go back to 1883 and 1886, with the adoption of the Paris Convention and the Berne Convention respectively. A trademark as a form of intellectual property is any sign that individualizes the goods and services, and distinguishes them from the goods and services of competitors. Trademarks already existed in the ancient world. They started to play an important role with industrialization, and they have since become a key factor in the modern world of international trade and market-oriented economies. Industrialization and the growth of the system of the market-oriented economy allow competing manufacturers and traders to offer consumers a variety of goods in the same category.

The main purpose of this research is to identify and learn modern approach to the trademark protection as well as to focus on the role of trademark as a part of intellectual property.

Key words: *Intellectual property, protection of trademarks, history of trademarks, registration process, international acts on trademarks*

Aytac Məzahir qızı Qurbanzadə

Əqli mülkiyyətin forması kimi əmtəə nişanlarının mühafizəsinin əhəmiyyəti

Xülasə

Əqli mülkiyyət dedikdə sənaye, elmi, ədəbi və incəsənət sahələrində zehni fəaliyyətin nəticəsi olan hüquqlar başa düşülür. Ümumdünya Əqli Mülkiyyət Təşkilatı (ÜƏMT) Birləşmiş Millətlər Təşkilatının (BMT) ixtisaslaşmış agentliklərindən biridir. “Ümumdünya Əqli Mülkiyyət Təşkilatının yaradılması barədə Konvensiya” 1967-ci ildə Stokholmda imzalanmış və 1970-ci ildə qüvvəyə minmişdir. Ancaq Ümumdünya Əqli Mülkiyyət Təşkilatının (ÜƏMT) yaranması müvafiq olaraq 1883 və 1886-cı illərdə qəbul olunmuş Paris və Bern Konvensiyaları ilə əlaqədardır. Əmtəə nişanı əqli mülkiyyətin bir forması kimi əmtəə və xidmətləri fərdiləşdirən və onları rəqiblərin əmtəə və xidmətlərindən fərqləndirən hər hansı işarədir. Əmtəə nişanları qədim dövrlərdən mövcud olmuşdur. Onlar sənayeləşmə dövründə vacib rol oynamağa başlamış və həmin vaxtdan beynəlxalq ticarət və bazar yönümlü iqtisadiyyatların müasir dünyasında əsas amilə çevrilmişdir. Sənayeləşmə və bazar yönümlü iqtisadiyyatlar sisteminin inkişafı eyni kateqoriyadan olan müxtəlif əmtəələrin rəqabət apararı istehsalçı və ticarətçilər tərəfindən təklif edilməsinə şərait yaratmışdır.

Bu araşdırmanın əsas məqsədi əmtəə nişanlarının mühafizəsinə müasir yanaşmanı aydınlaşdırmaq və öyrənmək, həmçinin əqli mülkiyyətin bir forması kimi əmtəə nişanlarının roluna nəzər yetirməkdir.

Açar sözlər: *Əqli mülkiyyət, əmtəə nişanlarının mühafizəsi, əmtəə nişanlarının tarixi, qeydiyyat prosesi, əmtəə nişanlarına dair beynəlxalq aktlar*

Introduction

Intellectual property laws, along with court decisions and regulations, establish rules for the following activities:

- the registration and administration of intellectual property

- selling or licensing of intellectual property, and
- resolving disputes between companies making or selling
- similar intellectual property products and services. (Rishard, 2018: 14).

Intellectual property law consists of various separate and interrelated legal disciplines, each with their own specific characteristics and terminology. If the author (owner) of the creation is concerned about the object of the protection, he/she will need to know what form (or forms) of intellectual property applies to it: 1) Patent law establishes three types of patents: Utility patents (the most common) are awarded for new processes, machines, manufactures, or compositions of matter, or new uses of any of the above. The utility patent owner has the exclusive right to make, use, and sell the invention for a limited term: it expires 20 years after the date the application was filed. Design patents are awarded to new nonfunctional, ornamental, or aesthetic design elements of an invention or product. A design patent lasts 15 years from issuance if it was filed on. 2) Copyright law protects expressions of creative ideas such as songs, artwork, writing, films, software, architecture, and video games. Copyright law does not protect ideas and facts, only the manner in which those ideas and facts are expressed. 3) Trademark law protects marketing signifiers such as the name of a product or service or the symbols, logos, shapes, designs, sounds, or smells used to identify it (Rober, 1997: 24).

The interrelation among the different forms of intellectual property should also be concerned in order to identify and understand the meaning and essence of these forms. Copyright and trademark: For instance, it's not uncommon for an item to be protected under both trademark and copyright law. The expressive artwork in a package design may be protected by copyright, while the overall look and feel of the package may be protected as a form of trademark. Likewise, a commercial may include some material covered by copyright (for example, a jingle) and other material covered by trademark (the product or company name). The difference here is that copyright protects the literal expression, while trademark protects whatever is used to designate the source of a product or service being offered in the marketplace. Another example can be considered which occurs among patent, copyright, and trademark. Patent law can intersect with copyright and trademark law in the case of certain products. For example, the designer of a toy or of jewelry may protect the device's name or appearance (as a trademark), the design of the item (design patent), the appearance of any artwork or graphics (copyright), and the novel, non-obvious functionality of the device (utility patent) (Justine, Torremants, 2019: 122).

Trademarks as form of intellectual property consist of any word or symbol used by a merchant to identify its goods or services, and to distinguish them from those of others. To be subject to protection under the trademark laws, a mark must successfully distinguish the origins of its associated goods, and not be confusingly similar to marks used by others or merely describe the characteristics of those goods. Trademark rights arise under state law as soon as the mark is used on goods in commerce. Trademark law also protects the appearance of product packaging and, in some cases, the actual physical configuration of the goods, if these serve as brand identifiers. A trademark owner may prevent others from using any mark that creates a likelihood of confusion as to the source or sponsorship of the associated goods or services. (Roger, 2003: 315) Terms such as "mark", "brand" and "logo" are sometimes used interchangeably with "trademark". "Trademark", however, also includes any device, brand, label, name, signature, word, letter, numerical, shape of goods, packaging, color or combination of colors, smell, sound, movement or any combination thereof which is capable of distinguishing goods and services of one business from those of others. It must be capable of graphical representation and must be applied to goods or services for which it is registered. Specialized types of trademark include certification marks, collective trademarks and defensive trademarks. A trademark that is popularly used to describe a product or service (rather than to distinguish the product or services from those of third parties) is sometimes known as a genericized trademark. If such a mark becomes synonymous with that product or service to the extent that the trademark owner can no longer enforce its proprietary rights, the mark becomes generic (Barton, 2001: 64).

Trademark rights persist so long as the mark continues to be used and retains its distinctiveness. Trademarks form one arm of the common law of unfair competition, a collection of principles that

encourage the maintenance of honest practices in commercial affairs. A number of other doctrines are grouped under this heading, including passing off, reverse passing off, dilution and false advertising.

It is not certain when marks were first put on goods, though the practice surely goes back to ancient times. In many cases, these marks were probably just ways to identify ownership in the event of loss or theft, analogous to writing your name inside a book's cover. Perhaps one of the oldest examples of this form of "marking" is the branding of cattle, which has been dated as far back as ancient Egypt. It is no coincidence that the word "branding" today has the dual meaning of a rancher marking cattle and an MBA developing a catchy trademark and memorable advertising campaign for a new consumer product. Other ancient marks may have been simply appended to goods as an act of pride by the artists or craftsmen who fabricated them, just as it is customary for modern day painters and sculptors to sign their work. Archaeologists have identified marks of this sort on a variety of artifacts, most notably pottery, coming from a wide range of cultures around the globe. It is unlikely that ancient peoples used these markings as we use trademarks today. Commerce was primitive, most goods were made within the family unit, and the number of producers of any particular category of goods was probably quite small. In such a world, it would not be likely that one would rely on pottery markings when shopping for a new crock. On the other hand, some historians have speculated that even in ancient days, markings on products enabled users to relocate the maker of the item if it proved unsatisfactory, so that a complaint could be registered or a replacement obtained - a function that trademarks still serve down to the present day. (Ruston, 1955: 125) Medieval Trademarks: In the middle ages, merchants producing various categories of goods often were located in close proximity to each other. In larger towns and cities various neighborhoods might contain concentrations of leather tanners, cloth dyers, sword makers, goldsmiths, or butchers. This made it very easy for consumers to shop for low prices, which in turn often led to intense price competition making it difficult for many merchants to survive. As a response, medieval producers organized themselves into "guilds." These were essentially primitive cartels in which the members agreed to refrain from price competition with each other. In addition, however, the guilds usually imposed quality requirements on their members. To make it easier to identify any guild member violating those quality requirements, the guilds also often required merchants to mark their goods with identifying symbols. Thus, as one source explains: In 1202 A.D., England adopted laws to regulate the price of bread and limit bakers' profits. Many bakers were prosecuted for selling loaves that did not conform to the weights required by local laws. As a result of the "bread trials" in England in 1266, bakers were ordered to mark each loaf of bread so if a non-conforming loaf turned up, the baker could be found. The bakers' marks were among the first trademarks. As the leading work on trademark history has summarized, these medieval guild marks were used primarily "to facilitate the tracing of false or defective wares and the punishment of the offending craftsman." By the late middle ages, these mandatory markings were beginning to take on some of the features and functions of contemporary trademarks. Perhaps the earliest case of what we might consider modern trademark infringement is the decision in *J.G. v. Samford*. The plaintiff in this 1584 litigation was a maker of woolen cloth. When the defendant, a competitor who made lower grade cloth, marked his goods with the plaintiff's trademark, the plaintiff sued for deceit and the court held that these facts stated a cause of action (Robert, 2000: 314). Early Common Law Developments: From the colonial era through the civil war, most economic activity in the United States was conducted on a local level. It was expensive to transport goods over long distances, and consumers rarely traveled far from home. Consequently, unlike the situation in copyright and patent law, where there was a perceived need for national uniformity from the earliest days of the republic, trademark law remained strictly a matter of local concern until after the Civil War. It was also apparently not a source of much controversy. The first reported trademark decision after American independence was not handed down until 1837. In the following three decades only a few dozen additional cases were decided, barely averaging two cases per year. Substantively, trademark law in this era remained essentially an offshoot of the law of fraud. To recover plaintiffs effectively had to demonstrate that the defendant was using a virtually exact replica of a trade symbol, and doing so with an intent to defraud the consuming public (Frank, 2012: 59)

The rationale for protecting trademarks differs somewhat from those which animate the other two major branches of intellectual property. A major justification for the protection of both technological innovation through patents, and artistic creativity through copyright, is the need to create an incentive for people to engage in such activities in the first place. The notion is that we would have too few inventors and artists if free riders could simply duplicate their work without fear of legal sanction, because there would be no way to make a living as an artist or an inventor.

The incentive rationale, however, is not really at the root of trademark law. Our legal system does not protect trademarks to encourage firms to come up with wittier brand names or more attractive logos. The goal is not to induce another make-over of Betty Crocker or an even better name for athletic shoes than NIKE. To be more precise, trademark law does seek to provide incentives, but those incentives are designed to encourage firms to produce high quality, or at least consistent quality, goods and services, rather than to produce high quality trademarks. The theory is that when the legal system grants exclusive rights to trademarks, consumers are able to use those marks to easily relocate those firm whose products have pleased them in the past, and to reward those firms with continued patronage. As the Supreme Court has put it, “trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation” (Robert, 1997: 174).

Trademark protection is provided through national legislations of states and international agreements which regulate the filing, registration and these kinds of procedures. In order to receive maximum international protection, a trademark owner must register his mark in each country where he seeks protection. More than 200 registries exist worldwide. Utilizing international registration eliminates the requirement to register in every one of the 200 registries. International registration occurs through a myriad of multinational, bilateral, and regional treaties. The United States is a signatory to many of them. Membership in these treaties affords U.S. nationals fair treatment and access to protection of their trademarks in other member countries. Four major international treaties exist for the international protection of trademarks. The Paris Convention for the Protection of Industrial Property (1883), Madrid Agreement Concerning the International Registration of Marks (1891), and Trademark Law Treaty (1994) require national treatment of foreigners for protection of trademarks. These three treaties are administered by the World Intellectual Property Organization (WIPO). The World Trade Organization (WTO) administers the fourth major treaty, the General Agreement on Trade Related Aspects on Intellectual Property (TRIPs) (1994). TRIPs, one of three treaties negotiated during the General Agreement on Tariffs and Trade (GATT), extends protection to famous marks and imposes trade sanctions against violating member countries (4, 1998: 54)

According to the Paris Convention, some provisions related to the trademark protection is stipulated in accordance with the regulation of relations in field of trademark law. The Paris Convention does not regulate the conditions for the filing and registration of marks which are determined in each Contracting State by domestic law. Consequently, no application for the registration of a mark filed by a national of a Contracting State may be refused, nor may a registration be invalidated, on the ground that filing, registration or renewal has not been effected in the country of origin. The registration of a mark obtained in one Contracting State is independent of its possible registration in any other country, including the country of origin; consequently, the lapse or annulment of the registration of a mark in one Contracting State will not affect the validity of the registration in other Contracting States. Where a mark has been duly registered in the country of origin, it must, on request, be accepted for filing and protected in its original form in the other Contracting States. Nevertheless, registration may be refused in well-defined cases, such as where the mark would infringe the acquired rights of third parties; where it is devoid of distinctive character; where it is contrary to morality or public order; or where it is of such a nature as to be liable to deceive the public. If in any Contracting State, the use of a registered mark is compulsory, the registration cannot be canceled for non-use until after a reasonable period, and then only if the owner cannot justify this inaction.

Each Contracting State must refuse registration and prohibit the use of marks that constitute a reproduction, imitation or translation, liable to create confusion, of a mark used for identical and similar goods and considered by the competent authority of that State to be well known in that State and to

already belong to a person entitled to the benefits of the Convention. Each Contracting State must likewise refuse registration and prohibit the use of marks that consist of or contain, without authorization, armorial bearings, State emblems and official signs and hallmarks of Contracting States, provided they have been communicated through the International Bureau of WIPO. The same provisions apply to armorial bearings, flags, other emblems, abbreviations and names of certain intergovernmental organizations (5)

As one of the significant sources of trademark law, the aim of the Trademark Law Treaty (TLT) is to standardize and streamline national and regional trademark registration procedures. This is achieved through the simplification and harmonization of certain features of those procedures, thus making trademark applications and the administration of trademark registrations in multiple jurisdictions less complex and more predictable. The great majority of the provisions of the TLT concern the procedure before a trademark office which can be divided into three main phases: application for registration; changes after registration; and renewal. The rules concerning each phase are constructed so as to clearly define the requirements for an application or a specific request (6)

In order to fulfil their distinguishing function for consumers who wish to make their choice between different goods of the same kind on the market, trademarks must be legally protected. Otherwise competitors could use identical signs for the same or similar goods or signs so similar that the consumer would be confused as to the origin of the goods. A deceived consumer may often not realize that the article that he has purchased is not of the origin indicated by the trademark, and may tend to hold the owner of the genuine trademark responsible if the goods do not meet the standards to which he is accustomed. However, even if the consumer eventually realizes that he has been led to buy the wrong product by a trademark confusingly similar to the one used for the product that he intended to buy, it would be difficult for him to take action against the infringer of the genuine trademark. It is therefore recognized practically everywhere that the owner of a protected trademark must have the right to prevent competitors from using identical or confusingly similar trademarks for goods identical or similar to those for which he uses his own trademark. This is the so-called exclusive right of the proprietor of the trademark. Trademark protection is not an end in itself. Even though trademark laws generally do not require use as a condition for the application for trademark registration, or even the actual registration, the ultimate reason for trademark protection is the function of distinguishing the goods on which the trademark is used from others. It makes no economic sense, therefore, to protect trademarks by registration without imposing the obligation to use them (Mary, 2005: 87).

Unused trademarks are an artificial barrier to the registration of new marks. In this connection it is interesting to take a glance at WIPO statistics. According to the statistics from 83 countries that reported to WIPO in 1990, there were about 1.2 million trademarks filed for registration, while the total of registered trademarks in 63 countries (out of about 170 offices where trademarks can be registered with protection in nearly 200 countries) amounts to more than 6.5 million. There is therefore an absolute need to provide for a use obligation in trademark law. At the same time trademark owners need a grace period after registration before the use obligation comes into effect. This is especially true of the many companies that are active in international trade. They cannot normally introduce a new product in the market in numerous countries at the same time. In order to avoid loopholes in the protection of their new trademarks of which competitors could take advantage, they must from the very beginning apply for the registration of their new trademarks in all countries of potential future use. Without a reasonable grace period for the use obligation written into the law, internationally active companies would obviously have enormous difficulties. Indeed even in their own countries companies often need several years before they can properly launch a newly-developed product on the market. This is especially true of pharmaceutical companies, which have to make clinical tests and have to apply for approval of their product by the health authorities.

The grace period granted in trademark laws that provide for a use obligation is sometimes three years, but more often five years. This is consistent with an international trend which is followed by the Model Law and by the Community Trade

Mark system. The new Swiss trademark law also provides for five years instead of the former three years. The same is true of the new common trademark law of the countries of the Andean Pact (Decision 313 of December 1991)(13, 412).

As a general rule, a mark is owned by the business that is first to use it in a commercial context - that is, the first to associate the mark with a product or service. After the first use, the owner may be able to prevent others from using it, or a similar trademark, for their goods and services as long as the owner continues to use the mark in connection with its goods and services. The rights of the trademark owner, particularly for a trademark that is not registered with the federal government, may be limited by the geographic extent of the use. First use can also be established by filing an intent-to-use (ITU) trademark registration application with the U.S. Patent and Trademark Office. The filing date of this application will be considered the date of first use if the applicant puts the mark into actual use within required time limits (between six months and three years, depending on the reasons for the delay and whether the applicant seeks and pays for extensions) and follows up to obtain an actual registration (Graeme, 2018: 149)

The owner of a trademark has the burden of enforcing trademark rights. Whether or not a trademark is federally registered, the owner may sue to prevent someone else from using it or a confusingly similar mark. Courts will examine such factors as:

- whether the trademark is being used on competing goods or services (goods or services compete if the sale of one is likely to preclude the sale of the other)
- whether consumers would likely be confused by the concurrent use of the two companies' trademarks, and
- whether the products or services are offered in the same part of the country or are distributed through the same channels.

If the mark is infringing and the mark's owner can prove a financial loss or show that the competitor gained economically as a result of the improper use, the competitor may have to pay the owner damages based on the profit or loss. If the court finds the competitor intentionally copied the owner's trademark, the infringer may have to pay other damages, such as punitive damages, fines, or attorney fees. On the other hand, if the trademark's owner has not been damaged, a court has discretion to allow the competitor to also use the mark under very limited circumstances designed to avoid the possibility of consumer confusion (Barton, 2001: 99)

Conclusion

A trade mark identifies the goods or services with which it is associated. Thus, it is inherent that a mark must be distinctive, that is, able to be easily distinguished from the identifying features of the products and services of others. Identifying products in this way is of small value to modern consumers except in the indication that it also brings of a reputation for quality and reliability. The identification of products enables traders to build and maintain reputations. It encourages them to maintain and enhance the standard for which they have become known, and supplies the information necessary for informed consumer choices, proving mutually beneficial to producer and customer. The two prime functions of a trade mark are, first, to provide an indication of source and, secondly, to guarantee quality. Both these functions can be isolated in a mark's "capacity to distinguish". According to the mentioned features, trademark protection plays an important role as an integral part of intellectual property. Although the registration process and the means of protection can be differed from country to country, the main purpose of each of them is similar.

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