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THE DEFINITION OF TRADEMARK AND ITS FUNCTION

Summary

In all jurisdictions, there is a general agreement, supported by Articles 15 and 16 of the TRIPS Agreement, that trademarks must be marks that distinguish the goods or services of one enterprise from the goods or services of others in order to be able to protect the rights of the first enterprise. Thus, the protection of business reputation is associated with the main function of the trademark.

Key words: *Intellectual property, trademark, signs, legal functions, economic functions, property*

While patents and copyrights can be defined as government subsidies that give their inventors the right to use, manufacture, or sell a product exclusively for a specified period of time, until recently, trademarks were perceived only as an indication of the commercial origin of goods. Consequently, trademarks have never belonged to monopolies.

A trademark is defined as 'any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings'. (5/160) As can be seen from the definition, trademarks are not limited to symbols in the strict sense of the word, as the law theoretically allows registration of non-traditional marks. Regardless of whether the trademarks are strictly symbols or not, it is reasonable to state that the force of the trademarks and the legal privileges afforded to them are exclusive. Trademarks endow their owners with an inherent value that can last indefinitely with the intelligence and due diligence.

The nature of trademarks

In general, what falls under a brand is outside of the product itself. The functional qualities and characteristics of the article therefore go beyond the protection of trademarks and deserve attention elsewhere (for example in patent law or advertising law). This does not mean that trademarks do not provide information about the quality and characteristics of products. However, information about the physical characteristics of products is derived from consumer experiences with products attached to a trademark, and not from the trademark itself.

Words are the most common types of characters. Word marks include: made-up word marks (fancy marks) such as Kodak, arbitrary word marks unrelated to the products they are attached to, such as Apple, or words indicating a product's function (suggestive marks) such as Kleenex. However, companies that use word marks and especially obscure marks run the risk that these words will become generic and thus eventually become public. In this case, the trademark loses legal protection. This clause confirms the argument that after re-privatization a brand loses its private property characteristics and becomes free for use in the public sphere. (6/96)

Trademark owners have also benefited from legal recognition of new types of protected materials (implicit in the current TMD), such as aromatic and colored marks, provided that these symbols have a source identification function. In fact, the expansion of protected issues in trademark law, which occurred concurrently with the expansion of trademark protection in Europe, has sparked debate about the need to rethink the current legal relationship to trademarks.

At this early stage, it is important to distinguish between trademarks and other markings. For example, a trade name is not a trademark and therefore the former should not be used to denote a trademark unless both are identical. Likewise, unlike a trademark that associates a product with a source, a certification mark (for example, a cotton trademark registered by the National Cotton Service) attempts to identify products with specific characteristics or indicate that products meet

certain standards. Finally, a label or ticket may contain a trademark, but the former is more inclusive as it may contain other information in addition to the trademark.

Trademarks as marketing shortcuts

A brand is a merchandising label and a rich open treasure trove of data. The brand acts as an external signal to help shoppers extract valuable information about specific products that might not otherwise be actively processed. Jacoby compares a brand to an icon on a computer screen. Clicking on this icon displays a large amount of information. In the context of trademarks, the information received takes the form of connected inflections containing positive or negative signals. This information convinces consumers to prefer one product over another. In general, a trademark acts as an "information umbrella" that helps to eliminate information asymmetries and market disruptions, ensuring the quality of market information and simplifying purchasing decisions (4/59).

However, the information obtained through the trademark can be either factual (for example, toothpaste reduces tooth decay) or, alternatively, in the form of emotional responses generated by advertising campaigns. While the first type of information can indeed correct information asymmetries (through lower search costs and quality assurance), there is less consensus about the economic value of the second type of information. This is at the heart of today's trademark debate. A comprehensive understanding of these conflicting functions of trademarks forms the basis on which chapters three and four will be developed.

Trademarks as a symbol for goodwill

In addition to the traditional role of trademarks as transmitters of information, trademarks have evolved since the second half of the 19th century in a new but controversial context, namely in the context of the misappropriation model in trademark law. Under this model, trademark law aims not only to prevent confusion, but also to prevent unauthorized misappropriation by protecting the company's business reputation. The logic behind this misappropriation argument is simple. A defendant using the plaintiff's trademark to attract customers will be considered misuse of the business reputation of the existing business, even if the plaintiff's reputation has not been damaged in any way. From a legal and moral point of view, misappropriation implies a stowaway regime, which should perhaps be prohibited.

From a legal point of view, goodwill is a concept that is difficult to understand as a thing of form or content. In essence, goodwill is defined as a course of action, not as a thing that makes future business more than an accident. Goodwill is most commonly defined as goodwill and the particular value attached to a trademark when a seller's investment in advertising and quality builds customer loyalty.

The relationship between trademarks and goodwill is also reflected in the concept of trademarks as property. When commentators and the judiciary referred to property in the mark, Bone said, they did not intend to protect the symbol as valuable or to encourage the design of the original marks. Instead, they mainly aimed to protect the merchant's ability to use his hard-earned reputation for profit. On this basis, the reputation of the company was protected.

The legal function

The CJEU, in the first case with Hag II, noted that the main function of trademarks is to guarantee consumers the identity of labeled products. This is due to the fact that consumers can distinguish a product or service from other goods or services of a different origin without confusion.

The preceding statement may imply that the function of a trademark is simply to indicate the origin of the goods to which the trademark is applied. In theory, when a symbol is registered as a trademark for a particular product or class of goods, any product marked with that trademark is considered to have been produced in the same establishment. In order for a trademark to perform the function of identification of origin, the owners of the registered mark must be granted the right to exclude the use of the same trademark in goods and services that they do not produce. By granting this exclusive right, trademark owners benefit in the short term from the consistent, continuous communication that is established between them and their products. In the long term, trademark owners can benefit from the marketing incentive associated with using the same trademark as a means of identification.

The specific subject matter of a trademark is to grant the owner the right to use the mark for the first marketing of a product which protects him from competitors who would like to abuse the position and reputation of the mark by selling goods to which the mark have been improperly affixed. (2/48)

The economic functions

To achieve economic equilibrium in a freely competitive market, decisions must be made on the basis of accurate information; consumers must have accessible and reliable product information. This facilitates optimal decision making. However, in all markets, manufacturers are better informed about their products than consumers. Even more worrisome, these manufacturers do not have sufficient incentives to disclose all available information about their products, especially negative aspects of quality. (3/99) The end result is information asymmetry that can lead to market disruptions. Information asymmetry increases the risk of error and makes it difficult for consumers to check product quality.

In addition to lowering search costs, a more complex function of trademarks in the economic spectrum is to denote quality, which was briefly mentioned earlier. This is what is called the trust function of a trademark.

There is no global definition of the term “quality”. While traditionally quality has been measured in terms of superiority (objective quality), quality has increasingly been measured in terms of value versus price (perceived quality) or value versus consumer preference (diversity features). Regarding the last point, the characteristics of quality and variety have traditionally been distinguished on the basis that the former include characteristics appreciated by all consumers, while the value of the latter depends on the tastes of the consumers. For example, while all consumers agree that coffee should preferably be freshly ground (quality characteristics), opinions are divided as to whether the taste should be bitter, sweet, pungent, etc.

Typically, trademarks provide the public with assurance that products bearing the same marks are "similar in nature, quality and characteristics." Because trademarks guarantee the public that all products bearing those trademarks originate under the control of a single anonymous source, trademarks become a coherent set of promises that meet a specific set of consumer expectations. Thus, the role of a trademark as a quality assurance tool largely depends on the function of origin.

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