

QUESTION 68

Economic significance, functions and purpose of the trademark

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Economic Significance, Functions and Purpose of the Trademark

Resolution

The IAPIP

adopts the principles expressed in the Summary Report (Annuaire AIPPI 1976, p. 165) and confirms on that basis the following opinion:

I. The trademark is of economic importance not only to the manufacturer and the merchant but also to the consumer. It has an important role both in national and international trade facilitating the flow of goods or services, irrespective of the state of development, economic structure or social system of the various countries.

It is a condition for the proper function of the trademark that there must be an exclusive right of ownership of the mark, and the owner - be he a person or a group of persons - must be protected in law against any infringing use so long as the trademark retains its distinguishing function. Hence, the trademark law in every country lays down the "normative functions" of the trademark, being the function of indicating origin and the function of identification.

When used in trade, the mark additionally possesses "economic functions" which may vary according to its use and the type of trademark. Among these economic functions, the following should especially be mentioned:

- the quality function,
- the advertising function,
- the competitive function and the like.

It is in the general interest of the proprietor, the merchant and the consumer as well that no restriction be made to the possibility of maintaining in force the right to the trademark, nor should its value in the territory where the exclusive right exists be jeopardized or lessened.

II. There is no erosion of trademark rights when measures are introduced to repress abuses which can be committed in the exercise of these rights. In fact, the IAPIP strongly condemns any abuse which a trademark proprietor might make of his rights. Erosion means such measures as affect the very essence of the trademark right and prevent it from producing its full effects.

The IAPIP is of the opinion that the very essence of the trademark right would be seriously affected by the various measures which are listed as follows:

1. arbitrary prohibition of protection of a trademark (This means the restriction of the right of the trademark proprietor to acquire and exercise a trademark right where he himself thinks it advisable);
2. compulsory licensing of a trademark (It is an essential part of trademark right that the trademark must be used exclusively by its proprietor and a licensee chosen by him. Hence, compulsory licensing leads to deception of the consumers);
3. prohibition of the renewal of a trademark (It is an essential characteristic of the trademark that its proprietor is entitled to prolong the validity of the trademark at his discretion);
4. compulsory assignment from the outset of a foreign-owned trademark to a local producer of the goods in the country (This regulation is tantamount to an expropriation of a trademark right);
5. compulsory assignment of a trademark, after a number of years of licensed use, to the licensee (This acts against the principle that a licensee uses the trademark solely on behalf of the proprietor but never acquires proprietary rights to the mark by using it);
6. prohibition by law of the licensing of a foreign-owned trademark, unless used exclusively on goods for export (No state is entitled to register a mark within its territory but to enforce its use in another country);
7. compulsory use in place of a foreign mark, or in association with it, of a trademark owned by a national of the state (If it is enforced to brand a product by a foreign or by two trademarks respectively, the distinguishing function of the trademark is diluted);
8. complete ban on trademarks for particular goods (e.g. pharmaceutical, plant seeds) (Unless the proprietor is free to use a mark for whatever product he wants, irrespective of its kind, a fundament of trademark right is endangered);

9. compulsory use of a non-proprietary name, which is to be the more prominent, in a combination with a trademark (It is the aim of such measures to replace trademarks by generic names).

III. Acts of erosion, as listed above, having become apparent in various countries, and a central attack against trademark rights as such having been made from the side of UNCTAD in 1977, the IAPIP considers it essential that not only governments but also consumers should be made aware of the fact that trademark erosion is detrimental to the development of international trade and to the protection of the consumer against misleading practices. Therefore, the IAPIP expresses the wish that any measures which interfere with the very existence of the right to trademark be renounced by the governments.

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