

University of Belgrade

Faculty of law

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**Criteria for determining degree of fame in
trademark law**

Doctoral dissertation

Belgrade, 2020.

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CRITERIA FOR DETERMINING DEGREE OF FAME IN TRADEMARK LAW

Abstract

The subject of this research are the famous marks and their broaden protection, with particular focus on criteria for their identification. The first aim of dissertation is to define a degree of distinctiveness which brings the status of famous mark. The second aim of this research is to define concrete factors for establishing the fame of a mark, and to get closer to the precise, accepted method for identification of famous marks in market. The doctoral dissertation contains two parts, beside the Introduction and the Conclusion. In the first part, the subject of analyses was legal regime of broaden protection of famous marks. This part is divided into three sections. The Section I explores the term of a famous mark, with reference to the legislation in Republic of Serbia and European Union, but also to the legislation regulating this matter in past. After that, the three central terms defining the famous marks were analysed – the reputation, distinctiveness and connection between a mark and a good which is a subject of designation. After that, the functions of famous marks were examined and also the influence that the broaden protection has to the holders and other market players. This led to establishing the term of famous marks in its normative and functional meaning. In Section II, the term of reputation was analysed, with special focus on different interpretations of its meaning: the consequences of too broad and too narrow interpretation of this term. Afterwards, the different models of famous trademark infringement were examined; having in mind the specific consequences which are requirements for broaden protection. The associative link in the minds of relevant public participants when seeing the mark was examined in details, in order to establish whether the quality of the same could be the central method for famous marks identification. At the end of this part, the decisions from court practice were analysed, in order to establish if the institute is being interpreted in the unique manner by the relevant authorities. The Part III deals with the reasons of broaden protection of famous marks, with the aim to determine the casual link between the reasons and the degree of fame which should enable the

broaden protection. A special focus was made to the economical justification of broaden protection, and also the other theories which differently explain the ratio of this institute were explored.

The subject of the Second Part of dissertation is identification of a famous mark in the market, starting from the term of a famous mark, content and reasons of broaden protection as defined in the previous Part. This Part is also divided into three Sections, and it deals with the concrete criteria which should be considered as well as their interdependence. In the Section IV, the subject of our analyses were criteria prescribed by the Recommendations of the World Intellectual Property Organization, with the special critical analyses of each of the proposed criteria. We questioned whether the criteria for determining the well-known marks could be equalized with the ones for determining of fame of trademarks with reputation, or a difference should be made. Furthermore, the subject of research in this part were also the evidence which should prove the fulfillment of the set criteria, as well as the proper defining of relevant public that should be taken into account when assessing a fame. In the Section V the relation between quantitative and qualitative criteria was examined, taking into account the definition of famous mark and its constitutive elements as determined in the First Part of Dissertation. Special focus of analyses in this part was on reputation of the mark, or the importance of this factor for determining the fame which brings the broaden protection. The subject of Section VI was the new method for determining the fame of a mark. The research in this part covered the question of jurisdiction for considering the degree of fame, where the solution of exclusive jurisdiction of an administrative authority was explored. On the base of the conclusions from the previous sections of dissertation, in the last section the obligatory and facultative criteria for a proper identification of status of fame were determined, with the focus on the methods for their proper assessment. In Conclusion the starting hypotheses were assessed and it was concluded that the research contributed to the determination of a reliable method for assessment of trademark's fame. The most important deficient of the presented method would be a lack of precisely defined degrees of fulfillment of the two obligatory criteria which should be taken into consideration. Even though the research confirmed the thesis on

necessity of high level of fullfillness of criteria, this field of the research opened the space for further analyses. The Dissertation confirmed that the broaden protection of famous marks is mostly closely related to the primary function of differentiation of the goods in the market. Having in mind the special requirements of protection, the famous mark is not subject of a protection as such but rather the subject are its fame and distinctiveness, or those exact characteristics which enable its primary function. The functionality approach does not justify protection from taking unfair advantage of reputation, ant therefore in this part the dissertation confirms the stances on change of the nature of a trademark right towards the right which is close to the property right. On the other side, the dissertation confirmed the importance of recognizing the change of a mark being an immaterial good in the contemporary world of informational technologies, where the broaden protection provides response from a trademark law to the changed conditions of human interaction.

Finally, the dissertation contributed to setting the concrete method for assessment of fame of a mark, which recognizes two criteria as obligatory: the recognition of a mark among the relevant public and the strength of the mark's identity. The two mentioned characteristics fit into the dual, qualitative and quantitative nature of a mark. Beside the mentioned, the criteria which could be also taken into account were determined, as well as the ones which should not be taken into account. The mentioned division of relevant criteria and their assessment is based on the presented stances on functions of a famous trademark and their special protection.

Key words: trademark, reputation, distinctiveness, fame of a mark, broaden legal protection, exemption from the principle of speciality, associative link, criteria for determining of degree of fame, consumers surveys

Scientific field: Law

Scientific subfield: Intellectual property law

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5(3) : it is identical with, or similar to, an earlier trade mark irrespective of whether the goods or services for which it is applied or registered are identical with, similar to or not similar to those for which the earlier trade mark is registered, where the earlier trade mark has a reputation in the Member State in respect of which registration is applied for or in which the trade mark is registered or, in the case of an EU trade mark, has a reputation in the Union and the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mar .

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Iron Smith kft v. Unilever NV, C-125/14.

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: If the earlier Community trade mark has already acquired a reputation in a substantial part of the territory of the European Union, but not with the relevant public in the Member State in which registration of the later national mark concerned by the opposition has been applied for, the proprietor of the Community trade mark may benefit from the protection introduced by Article 4(3) of Directive 2008/95 where it is shown that a **commercially significant part of that public** is familiar with that mark, makes a connection between it and the later national mark, and that there is, taking account of all the relevant factors in the case, either actual and present injury to its mark, for the purposes of that provision or, failing that, a serious risk that such injury may occur in the future.

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