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Драган Вујисић



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EUROPEAN COURT OF JUSTICE ON THE USE OF A PREVIOUS TRADEMARK REPUTATION IN TERMS OF INFRINGEMENT

Summary

The proprietor of the trademark has the right to prohibit the use of a protected (or similar) trademark, which may mislead consumers. It is debatable whether this notion is considered only through the prism of quantitative criteria or for its determination it is necessary to apply qualitative criteria. Quantitative criteria refer to the necessary degree of brand awareness in the trade, and qualitative ones refer to all the circumstances that can affect the good reputation of the so-called trademark reputation. The subject of research is the case law of the European Court of Justice, which will determine how the court acts in cases of trademark infringement by exploiting its reputation. To this end, the authors make an analysis of Directive 207/2009 which regulates the issue of relative reasons for refusal of registration.

According to the provisions of Directive 207/2009, the member states of the European Union in their legal solutions should provide procedures, measures and legal remedies in which way the realization of legal protection would be ensured.

Key words: *trademark, distinctive character, trademark infringement, legal protection.*

1. Introduction

The large number of goods and services on the market manifests the need for mutual differentiation, how, and in what way, it would be possible for consumers¹ ie

¹ „Consumer“ in the sense of the Law on Consumer Protection ("Official Gazette of the Republic of Macedonia" No. 38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015 and 152/2015, in hereinafter LCP), is any natural person who buys products or uses services for direct own consumption in the business premises of the trader, outside the business premises as

users of services to recognize where the products and services come from and on what basis they should determine their purchase or use of services. Consequently, enabling consumers to identify a product, whether it is the goods or services of a particular trader² is a major function of the trademark to distinguish it from other identical or similar products of competitors. Nowadays, ie in the modern conditions of realization of the legal transactions, there are two basic ways of acquiring the right of a trademark as a subjective right of industrial property, namely:

- *Acquiring a trademark right by using a sign (these are well-known trademarks) and,*

- *Registration of the right in the appropriate register.*

According to the first way provided in theory and practice, when using a certain sign for marking goods or services, the priority in terms of acquiring the right as subjective, has the one who first used a certain sign to mark the goods or services. More precisely, the establishment of a certain company through long-term use of a specific mark, regardless of the fact that it is not registered in an appropriate register, gives appropriate rights to the holder of this right.

Acquisition of a trademark right by use is a tradition applied in Anglo-Saxon law.³ This system has been adopted in many countries such as Switzerland, Brazil, Great Britain, USA, Italy.⁴

The absolute reasons for refusing trademark registration are in the function of protecting the public interest and apply to all signs, regardless of the type of goods or services in question. The main reasons for rejection are those based on distinctiveness, descriptiveness and generism. One of the basic conditions for achieving its function of a trademark is distinctiveness. A trademark is eligible for distinction if it gives a special distinctive character to goods or services in comparison with identical or similar goods or services, and this can be noticed *by the average consumer*. More precisely, not to mislead him or her, which may negatively affect the stability of the legal trade of goods and services, the confidence of the consumer sector in the market

well as with remote agreements for purposes that do not fall within his/her commercial, economic, craft or professional activity.

² In the economic literature, the trader is often equated with an enterprise, firm, company, etc. It is not just about terminological determination. Namely, an enterprise in the sense of the Law on Trade Companies (LTC) is a business enterprise and an object of law that can be subject to sale and purchase. In contrast, the company in the sense of the LTC is the name under which an entity with the status of a trader conducts its business activities. Finally, the term company has penetrated the Macedonian legal system under the influence of comparative terminology. However, for the proper application of substantive and meritory law, it is essential to determine the status of the entity. According to the LCT, a trader is any entity that is registered in the trade register, performs trade activity in one of the forms known to the LCT (AK, KD; KDA, JTD, DOO-DOOEL, TP - sole trader).

³ Марковић, С. М., *Право интелектуалне својине*, Белград, 2000, р. 147.

⁴ Besarović, V., *Intelektualna svojina*, Beograd, 2000, p. 148.

of goods and services, repercussions on the economy in terms of distrust or consumption of less quality goods and services.

Each legal system that recognizes legal protection of a trademark, provides specific regulations that regulate the criteria for assessing the similarity of the mark, its distinctiveness and recognizability on the basis of continuous use. The latter primarily due to the protection of the average consumer and the danger of abuse and bringing consumers into an unenviable position.

2. Decision of the national courts

On 27 April 2009, Ms Zainab Ansel and Mr Roger Ansel applied for registration of an EU trademark with the European Union Intellectual Property Office (EUIPO) in accordance with Regulation (EC) No. 207/2009 of the Council.

The request referred to the registration of a figurative sign that contained the green and yellow colors, as follows:



The disputed Zara Tanzania Adventure designation was submitted in April 2009 by Ms Zainab Ansel and Mr Roger Ansel as a figurative designation for classes 39 (travel and tourism services), 41 (wildlife education and training services, ecology, safaris) and 43 (travel, agency and hotel services). In August 2009, the applicant Industria de Diseño Textil, SA (Inditex) lodged an objection under Article 41 of Regulation no. 207/2009 (now Article 46 of Regulation 2017/1001) against the registration of the mark required for all the above services, relying on *its own previous and well-known* EU mark ZARA.

Zara has revolutionized the fashion world and the textile industry, giving birth to the very concept of "instant fashion". As a well-known trademark it enjoys a high degree of legal protection.

The notion of distorting the reputation of the trademark is applied in various variants to a certain factual situation, in order to give the mark wider protection. The effect of trademark infringement is based on the fact that a good reputation enjoyed by a particular product can often be used for the purposes of unfair competition. Namely, it is important in trade, for consumers to associate a good reputation with products whose quality they are convinced of. In this case, the intention of the applicant for registration of the trademark ZARA TANZANIA ADVENTURES is clear.

Protection against the exploitation of reputation implies the existence of objective and subjective criteria. Within the objective criteria, it is a trademark that does not have to be famous, but still stands out from the mass of the usual trademarks. In a subjective sense, the person who uses someone else's mark is

required *to do so with the intention of using the good reputation for their own products, which in this case is the case*. The intention to exploit usually arises from the objective circumstances related to the action, and the clue, for example, may be the degree of familiarity of the signs in the trade.

The concept of a well-known trademark in the provisions of the Law on Industrial Property is within the meaning of Article 6-bis of the Paris Convention, ie Article 16 (2) of the TRIPS Agreement. This institute deviates from the principle of speciality and under extended conditions strengthens the monopoly character of the trademark, taking into account that its effect is extended to all goods and services. The World Intellectual Property Organization (WIPO) prescribes several criteria on the basis of which a trademark is known or not.⁵

The notion of well-known trademarks is not precisely defined either in national legislation or in international conventions, and is therefore subject to analysis in theory and in case law. Namely, the question is disputable whether this notion is considered only through the prism of quantitative criteria or for its determination it is necessary to apply the qualitative criteria as well. Quantitative criteria refer to the necessary degree of brand awareness in the trade, and qualitative ones refer to all the circumstances that can affect a good reputation, the so-called reputation of the trademark. Due to the fact that neither the law nor the legal regulations regulate the criteria on the basis of which the reputation of a trademark will be assessed as well as the manner of their proper application, it leaves room for the competent authorities *to apply the principle of free evaluation*, determining criteria for evaluation of the same.

However, neither in the literal sense, nor in the sense of Art. 5, p. 2, Directive 89/104 / EEC may not require the mark to be known to a percentage of the relevant public. The required degree of recognition is considered to be achieved if the trademark is known to a significant part of the participants in the trade in which the products or protected services are sold. In examining this requirement, all relevant circumstances must be taken into account, in particular the commercial value of the trademark, the intensity and duration of use, the geographical distribution of use, and the volume of investment made by the trademark holder.

The European Court of Justice has taken the view that Art. 5, p. 2, Directive 89/104 / EEC implies a certain degree of trademark awareness of the relevant

⁵ The degree of knowledge or recognition by a relevant part of the public; the duration, scope and geographical area of use of the trademark; the duration, scope and geographical area in which the trademark was promoted, including the advertising and presentation of loans or an exhibition of products / services to which the mark relates; the duration and geographical distribution of the registration and / or application of a sign to the extent that indicates the use or recognition of the sign; successful procedure in which the protection of the mark is achieved, and especially in those in which the mark is recognized as recognized by the competent authority and the value attached to the mark.

public, because only in that case *can consumers establish a link between the two trademarks* on the grounds that the old trademark infringement occurs.

In the impugned decision, the EUIPO Appeals Chamber found that Inditex had limited itself to general allegations and had failed to provide evidence that there was a risk of infringement, and that it had failed to take into account the *huge differences between the goods and services concerned*. Inditex claims to have provided evidence which show that the current trend in fashion brands is that they are evolving outside the fashion market into neighboring markets, such as food, restaurant services, hotels and temporary accommodation. Further, noted that fashion magazines tend to combine articles on fashion and travel, and on social media bloggers and influencers travel around the world to comment on the clothing and accessories they wear during their travels and the journey itself, including destinations, hotels and restaurants. Although the disputed services in classes 39 and 43 may not be considered strictly similar to the goods and services, they are still related to the relevant commercial sector.

In the present case, if an analysis of the signs is made, it can be concluded that from a phonetic point of view, the second-instance council rightly established that the disputed signs were partially phonetically identical, because "they share [also] the same pronunciation of ... two syllables", namely "za" and "ra". Second, he pointed out that these signs differ in the pronunciation of the additional elements "tanzania" and "adventures", which are present only in the disputed sign. Therefore, conceptually, part of the relevant public would perceive the signs as similar to the extent that they have in common the element "zara", while another part of the public would consider them different.

The General Court agreed and held that, according to the case-law, the second instance council erred in finding that the applicant had limited himself to making general allegations concerning the risk of unfair use of the distinctive character and reputation of the earlier trademarks. Since there is currently a trend for brands present in the fashion market to evolve into other markets, *the risk of unfair advantage cannot be ruled out despite the differences between those goods and services*.

It is necessary to take into account all the factors relevant to the circumstances of the case in order to determine whether there is a risk of the type of infringement referred to in Article 8 (5) of Regulation no. 207/2009. Namely, there is a connection between the reputation and the distinctive character of the previous marks and the existence of a risk of infringement; the stronger that specific character and reputation, the easier it is to accept that those risks exist, which also means that it will be easier for the applicant to fulfill his or her obligation to prove that there is a risk of infringement.

In this case, the second instance council did not consider the impact of the *previous trademark reputation strength on the existence of a risk of unfair use and of the distinctive character or reputation of the previous marks and did not conduct an overall assessment of the risk of infringement related to the unfair use of the*

reputation. As such, the impugned decision was partially annulled because the second instance council partially upheld the appeal lodged by Ms Ansel and Mr Ansel (case R 2369/2011-2) which allowed the mark requested to continue with registration in respect of services of classes 39 and 43.

The purpose of Article 8 (5) of Regulation no. (EC) 207/2009 is to enable the holder of a ***previous EU national or trademark to have a reputation for opposing the registration of marks which are likely to be detrimental to the reputation or special character of the former mark or to misuse that mark or distinctive character***. It is not required to prove the actual harm, but ***prima facie*** evidence of future risk, which is not hypothetical, of an unfair advantage or harm. The stronger the character and reputation of the previous mark, the easier it will be to accept that it has been damaged.

The second instance council should have taken into account the ***great reputation and special distinctive character*** of the previous marks in its assessment of whether there is a risk of unfair use or damage to the distinctiveness or reputation of the previous marks. The greater the risk of substitution, the greater the distinctive power of the marks, which means that trademarks with greater distinctive power enjoy wider protection from trademarks whose distinctive power is lower.

3. The distinctive character of the trademark

Distinctive character is the ability of a particular label to individualize a particular product or service.⁶ In this context, labels may be more or less appropriate to identify products marked as originating in a particular enterprise, as well as to distinguish them from the products of other enterprises.⁷ This is a dynamic category that must be visualised in the time and space context of a particular market.⁸ One of the important factors in determining the danger of substitution is the distinctive power of trademark recognition. Namely, the danger of replacement is even greater if the distinctive power of the mark is greater, which means that trademarks that have greater distinctive power enjoy wider protection from trademarks whose distinctive power is lower.⁹ Labels protected with trademarks are divided into: weak, average, well-known and famous. Well-known

⁶ Karl-Heinz Fezer, listed comment, p. 207–209.

⁷ Opinion of Advocate General Jacobs, C - 342/97 Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV, of 29. 10. 1998. item. 22, available at : curia.europa.eu/juris/liste.jsf?num=C-342/97.

⁸ Слободан, М., *Начело специјалности жига и забрана разводњавања чувеног жига - правноекономско тумачење*, Анали Правног факултета у Београду, бр. 1/2011, р. 44; Миладиновић, З., *Индустријска својина*, Ниш 2007, р. 158–160.

⁹ Fezer, К.-Н., *Gemeinschaftsrechtliche Verwechslungsgefahr als Produktkontrolle und Produktverantwortung des Markeninhabers - Zur Canon - Entscheidung des EuGH, Wettbewerb in Recht und Praxis*, no 11/1998, р. 1123; Влашковић, Б., *Дескриптивни знаци у праву о жиговима*, Крагујевац 1996, р. 83.

trademarks have a pronounced distinctive power, which can be acquired not only on the basis of registration but also on the basis of use.

4. Decision of the European Court of Justice in case T655/17

According to Directive 207/2009, within three months from the publication of the EU trademark application, a notification of opposition to trademark registration on the grounds of Article 8 due to which the trademark can not be registered may be filed by: (a) in relation to Article 8 (1) and (5), holders of the prior designations referred to in Article 8 (2), as well as licensees approved by the holder of those designations.

In the mentioned case, the dissatisfied party with the claim, requests a verdict that will annul the decision in the part with which the appeal is partially accepted and which approves the registration of the trademark reported for the services listed in item 3 of the decision in terms of of the Nice Agreement on the International Classification of Goods and Services for the Registration of Trademarks.

The European Court of Justice noted that the second instance council did not take into account the high level of recognition of previous Inditex brands or their degree of specificity to assess whether there was a risk that the later trademark would tarnish the reputation of the previous trademark or cause damage to distinctive character or reputation of previous marks under Article 8 (5) of Regulation no. 207/2009, *despite the differences between the goods and services covered by the respective designations of the parties.*

The essential function of a trademark is considered to be the origin of the product - enabling the consumer to distinguish between different goods or services. This function indicates *the legal source that produces the specific product*, ie indicates that the product always comes from the same company. Assessments should have one explanation; not origin, but preservation of uniqueness. This would mean that the trademark holder is entitled to protection even when the mark is used, even on different types of products or services. Some, of course, will oppose the claim that this will monopolize the market excessively and limit creativity. In this regard, Article 8 (5) seeks to strike a balance.

The European Court of Justice ruled that Safari's trademark was too similar to be registered. It acted correctly when it overturned the decision of the EUPO Second Instance Council and banned registration. Namely, the Zara trademark is well known internationally and therefore enjoys a high level of legal protection. Through the request for registration of a trademark which is similar and identical to the previous trademark ZARA, the intention of the applicant is evident. Exercising the distinctive power of a trademark, and achieving benefit.

Hence, it is correctly established that two companies with very similar trademarks - ie. any word, name, symbol or design, or any combination thereof, is used in the trade to identify and distinguish the goods of one company from

another. With this in mind, the SPEU's decision to reject Ansell's application - which largely depended on Zara's parent company Inditex's argument that fashion and travel are not so different - is striking. The Court found that, in line with the current trend of fashion brands developing in other markets, the risk of unfair advantage could not be ruled out despite differences between goods and services, and stressed the importance of taking into account all factors relevant to the circumstances of the case in order to determine the risk “.

The notion of danger of dilution is created in the case law and for its shaping and development, the insufficient precision is characteristic, as well as the unclear distinction from other forms of protection, and primarily from the use of the reputation of the trademark. For example, in the judgment "Odol" it is stated that the defendant has an open intention to benefit from its products in circulation and especially through the good reputation of the trademark Odol.¹⁰ On the other hand, if an unauthorized person uses a mark that is the same as the mark of a protected reputable trademark for any kind of goods or services, he may be sued for an act of unfair competition which in the legal literature is also called trademark dilution.

The “Odol” verdict provides legal protection for well-known trademarks. This verdict became world famous after the reasoning of the Elberfeld Court of Appeal, so the plaintiff states that he has a special interest in his mark not being diluted. The explanation states: Odol was a well-known brand, 28 years on the market used with great sales power. In this case, the plaintiff filed a lawsuit for dilution of his trademark because consumers were confused when this trademark was used for another type of product and they were confused, based on the labeling fact that it is a trademark with the same quality as "Odol." The explanation states that, because of this, the sign loses its advertising power when someone uses it to mark their own, although completely different products. Therefore, the judgment clearly states that the defendant took action with the sole intention of gaining benefit for his products in circulation due to the good reputation or the trademark of the plaintiff. Because the defendant takes actions contrary to good customs, ie appropriates fruits for himself, he realizes a certain benefit in someone else's name and account, in fact thus violating Article 826 of the Civil Code of Germany. The Court also considers that it is advantageous to apply Art. 1 of the Law on Prevention of Unfair Competition, stating: The parties are not in a competitive relationship, but in this case it is not significant. Conversely, it is sufficient for a person who acts contrary to good customs to include two persons in the competition.

Thus, infringed trademark rights can be found between companies operating in different industries, even if, as we have seen, neither they nor their goods and/or services show any similarities. This suggests that for well-known fashion brands, trademark protection may extend beyond the range of goods and services for which the trademark is actually known. However, convincing evidence will need to be

¹⁰ Schechter's , F., *The Rational Basis of Trademark Protection*, 40. Harv. L. Rev, 1927, p. 813.

presented to show the presence of a "connection" in the minds of consumers and the risk of infringement.

Second, if an unauthorized person uses a mark which is the same as the mark of a protected trademark for any kind of goods or services, he may be sued for so-called dilution of the trademark.

5. Conclusion

Article 8 (5) of Directive 207/2019 should be interpreted as meaning that a previous EU trademark with a reputation may be challenged against the registration of marks which are likely to be detrimental to the reputation or distinctive character of the former. The provision itself gives the right to the holder to exercise legal protection of his violated or endangered right. In this case, the intention of the applicant is clear, to use the reputation of the trademark for its advertising on the one hand and to mislead the consumers on the other hand. The effect of trademark infringement is based on the fact that a good reputation enjoyed by a particular product can often be used for the purposes of unfair competition. The intention to use usually arises from the objective circumstances related to the action, and the clue, for example, may be the level of familiarity of the signs in the turnover.

In other words, the measures for exercising legal protection must be effective and proportionate and must have the effect of preventing a third party from committing an infringement. At the same time, they must address the prevention of future infringements of intellectual property rights, as is the case here.

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ЕВРОПСКИ СУД ПРАВДЕ О ПОВРЕДИ РЕПУТАЦИЈЕ ЖИГА

Резиме

Власник жига има право да трећим лицима забрани употребу заштићеног (или сличног) жига, за обележавање истих или сличних производа, чиме се елиминира могућност заблуде потрошача у погледу порекла производа. Дискутабилно је да ли се наведена ситуација посматра само кроз призму квантитативних критеријума или је за конкретно одређивање неопходно применити квалитативне критеријуме. Квантитативни критеријуми се

односе на потребан степен свести о бренду у трговини, а квалитативни на све околности које могу утицати на добру репутацију жига. Предмет истраживања је судска пракса Европског суда правде у којој се утврђује поступање у случајевима повреде жига искоришћавањем његовог угледа. У том циљу, аутори анализирају Директиву 207/2009 која регулише питање релативних разлога за одбијање регистрације.

Према одредбама Директиве 207/2009, државе чланице Европске уније у својим законским решењима треба да предвиде поступке, мере и правне лекове којим би се обезбедило остваривање неопходне правне заштите.

Кључне речи: жиг, дистинктивни карактер, повреда жига, правна заштита.

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