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АННОТАЦИЯ

Бозор иқтисодиётининг ривожланиш тенденцияси товар белгиси егалари учун етарли даражада ҳимояни талаб қилмоқда. Чунки бу масала инвестициялар оқимига бевосита таъсир кўрсатади. Мақолада товар белгисини рўйхатдан ўтказиб ёки ўтказмасдан тадбиркорлик муносабатларига киришганда товар белгисига бўлган дастлабки ҳуқуқлар таҳлил қилинади. Ўрганиш объекти учта мамлакатда: Ўзбекистон, Хитой ва Германияда товар белгилари егаларининг ҳуқуқлари доирасини қамраб олади. Шунингдек мақолада ушбу мамлакатлар қонунчилигида товар белгиларини рўйхатдан ўтказишнинг афзалликлари ўрганиб чиқилади. Бундан ташқари, дастлабки фойдаланувчи ва кейинги рўйхатдан ўтказувчи ҳуқуқларини ҳимоя қилишнинг баъзи амалий хусусиятларига аниқлик киритилади.

Калит сўзлар: товар белгиси, дастлабки ҳуқуқ, рўйхатдан ўтказилмаган товар белгиси, ҳаммага маълум товар белгиси, товар белгисини рўйхатдан ўтказиш.

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ПРЕДВАРИТЕЛЬНЫЕ ПРАВА В ТОВАРНОЙ ЗНАКЕ В СРАВНИТЕЛЬНОМ ИССЛЕДОВАНИИ УЗБЕКИСТАНА, КИТАЯ И ГЕРМАНИИ

АННОТАЦИЯ

Растущая тенденция рыночной экономики требует надлежащей защиты владельцев товарных знаков, поскольку это напрямую влияет на поток инвестиций. В этой статье анализируются прежние права на товарный знак, приобретенный в ходе коммерческой деятельности с регистрацией знака или без нее, кроме того, этот документ будет касаться сферы прав владельцев товарных знаков в трех разных странах: Узбекистане, Китае и Германии. В этом документе также рассматриваются преимущества регистрации товарного знака в пределах юрисдикции этих стран, а также разъясняются некоторые практические особенности защиты прав предыдущего пользователя и следующего владельца регистрации.

Ключевые слова: торговая марка; предыдущее право; незарегистрированный товарный знак; известный товарный знак; регистрация торговой марки.

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PRIOR RIGHTS IN TRADEMARK IN UZBEKISTAN, CHINA AND GERMANY COMPARATIVE STUDY

ABSTRACT

The growing trend of the market economy requires the proper protection for the trademark owners as it has direct impact to the flow of investment. This article analyses the prior rights of a trademark which is acquired during the business with or without registration of a mark, besides that this paper will address the ambit of a trademark owners' rights in three different countries: Uzbekistan, China and Germany. This paper also explores the advantages of the trademark registration within the jurisdiction of those countries and also clarifies some practical features of protecting the rights of the prior user and a following registrant.

Keywords: trademark; prior right; non-registered trademark; well-known trademark; trademark registration.

INTRODUCTION

Trademark rights can be gained by registering a trademark or by using such trademark in practice as a well-known trademark. It is vitally essential to the brand owner to be familiar with the regulations of registration of a mark whether it is well-known or not, in order to control a mark completely in particular jurisdictions. In the following paragraphs I will describe the trademark system, registration and the rights of the well-known trademark user in Uzbekistan, China and Germany.

The Trademark mechanism of Uzbekistan

In the Republic of Uzbekistan, the intellectual property system including trademark is regulated by the Intellectual Property Agency (hereinafter referred as Agency) under the Ministry of Justice of the Republic of Uzbekistan (hereinafter referred as Uzbekistan).

The Trademark registration and protection mechanism in Uzbekistan is mainly regulated by the following legal acts: Civil Code of the Republic of Uzbekistan; Law of the Republic of Uzbekistan on Trademark, service mark and the geographical name of the product origin (hereinafter Trademark law); Law of the Republic of Uzbekistan on Competition. In order to create sufficient protection to the intellectual property rights, pursuant to the Resolution of the President of the Republic of Uzbekistan on 1 July 2019 N.4380 Intellectual Property Agency was transferred under the Ministry of Justice.

The protection of the well-known trademarks in Uzbekistan

The well-known trademarks in Uzbekistan can be protected by registering a trademark or without the registration the well-known trademark according to the international treaties. According to the Article 32 and 32 of the Trademark laws the legal protection to the well-known trademarks in Uzbekistan given by resolution of the Board of Appeal of the Intellectual Property Agency under the Ministry of Justice [1].

After the declaration of a trademark as a well-known, the prominent trademark will be included into the database of the Well-known trademarks in Uzbekistan. Moreover, the Agency will upload information about well-known trademarks in its official website after inclusion of the well-known trademark into database. The content of the uploaded information will be decided by Agency. Non-registered well-known trademarks in Uzbekistan will be given the same protection as registered trademarks.

The certificate of the well-known trademark will be given by Agency within 10 days after

including the well-known trademark into Agency's database. The form and the information included into certificate will be decided by Agency. The protection of the well-known trademarks in Uzbekistan is unlimited.

Indications of well-known trademark

Before the adoption of the Resolution N.4380 of the President of the Republic of Uzbekistan on 1 July 2019, there was no particular criteria deciding the well-known status of a trademark. However, currently the following standards should meet in order to define a well-known trademark:

- 1) should be recognized by relevant public, including actual or potential consumer;
- 2) should be known by distributors of goods/services;
- 3) should be prominent among relevant business circle which deals with this sort of goods/services.

Besides, the trademark should be recognized by relevant public by its quality, high distinctiveness through it is extensive use and so on.

To sum up, in Uzbekistan the legislation requires burden of proof and enormous documents of evidence to recognize a trademark as well-known by the Board of Appeal. The better option is to register a trademark as soon as possible when Uzbekistan becomes the place of interest for business.

The Trademark mechanism of China

In China's legal system the concept of the well-known trademark first appeared after China became the signatory state to the Paris Convention in 1985 [2], and in 1987 Chinese Trademark Office applied Article 6bis of the Paris Convention to the "Pizza Hut" trademark case [12]. Besides, Anti-Unfair Competition law [3] defined the regulation Article 5(2) to officially forbid the use of the name and trademarks of other prominent products, by introducing remedies in cases of infringement of others legal rights.

The People's Republic of China (hereinafter referred as PRC) strictly follows the regulation to register a mark to those who filed first. Which means if at the same time two or more companies apply for the identical or similar trademark, the one who applied first for a trademark registration, can acquire registration of a trademark and prohibit others to use that mark, whether it is Chinese or foreign company.

In PRC if one applies first to register a mark, the process of registration will be cheap, effective and he can also prohibit other from using his registered trademark, however the law of PRC provides the legal grounds on cancelling a registered trademark. The process of opposing or cancelling the filed application is expensive and lengthy.

The trademark registration applications should be filed to the China Trademark Office [4] (hereinafter referred as CTO) through a recognized agent. The Chinese trademark laws provide exclusive rights to the registered trademarks, but the main issue is being first who applies for a trademark registration. There have been filed myriad of biggest Chinese v. foreign IP disputes, like the "iPad" [5] and "Tesla" [6] trademark disputes in China.

The advantages of the trademark registration in PRC

The best solution in order to protect the trademark in PRC is to apply for registration as soon as possible. The trademark registration is the cheapest and quickest way of protecting trademark within the territory of PRC taking approximately 9 months and the cost is 100 USD.

When more than one applicant on the same day applies for registration identical or similar trademarks, the CTO will cogitate the evidence of first use in deciding on registration approval.

The protection of the unregistered trademarks in PRC

When someone pre-emptively filed or registered famous company's trademark, even in worst scenario that well-known company does not have prior rights (for example, copyright, design or so on), which might "invalidate" the first applicant's registration, this company have right to claim invalidation of the pre-emptively filed registration under the Articles 7,13,15, 32 and 59 of the Trademark law of the PRC [7]. After registering a trademark, the Trademark law of the PRC defines a three- month time limit for opposition and a five-year time frame to invalidate the published registration.

Article 7 of the Trademark law of the PRC indicates that applicant for registration should

follow the “act in good-faith” principle or bad-faith registrations will be cancelled later. Article 13.2 provides that the applications made by imitating, reproducing or translating another company’s prominent trademark on identical or similar goods will be refused by the CTO. The exclusive right holder of the trademark can prohibit others from use of his trademark and can attack them when the trademark used by another person can presumably distort the legal owner’s interests; or reduce the trademark individuality or decrease its distinctiveness.

Article 32 of the Trademark law of the PRC does not require the connection with the prior trademark owner, bad-faith registration of a particular existing reputable trademark along enough, to prohibited such use of the famous trademark by another person. Article 59 defines provisions of a defense for unregistered well-known trademark that can be continued use without infringement liability where other party has already registered the trademark. In this circumstance the prior right holder can limit use of the mark to the “original scope of use” and require the unregistered well-known trademark user to add some distinguishing mark to the registered trademark. However, “original scope of use” is not cogently expressed in the Trademark law of the PRC.

Numbers of Well-Known Marks Recognized in China (2004 – 2012) [13] (Information Collated from Website of State Administration for Industry and Commerce)

	Total recognition		AIC recognition in administration		TMO recognition in opposition		TRAB recognition	
	Chinese marks	Foreign marks	Chinese Marks	Foreign marks	Chinese marks	Foreign marks	Chinese marks	Foreign marks
2004	121 (85%)	21 (15%)	112	4	1	14	8	3
2005	166 (94%)	11 (6%)	135	1	8	7	23	3
2006	171 (95%)	9 (5%)	140*	9	/*	/*	31	0
2007	185 (93%)	13 (7%)	131	1	8	8	47	4
2008	210 (92%)	18 (8%)	132	4	22	11	56	3
2009	371 (95%)	19 (5%)	275	2	14	8	82	9
2010	669 (98%)	13 (2%)	509	1	25	7	135	5
2011	848 (97%)	26 (3%)	635	4	47	5	166	17
2012	1285 (99%)	13 (1%)	902	0	61	5	322	8

The correct data for the year 2007 should be listed as follows[13]:

	Total recognition		AIC Recognition in administration		TMO Recognition in opposition		TRAB Recognition	
	Chinese marks	Foreign marks	Chinese Marks	Foreign marks	Chinese marks	Foreign marks	Chinese marks	Foreign marks
2007	184 (93%)	13 (7%)	129 (rather than 131)	1	8	8	47	4

Unfair Competition in the PRC

Moreover, in the PRC the Anti-Unfair Competition Law also defines protection for non-registered trademarks that are well-known for the particular forms of the products [8]. In contrast, providing evidences for well-known trademarks is very complicated and requires evidence-intensive civil law suits.

The one who wants to apply for trademark registration in PRC should apply for registration as early as possible and it is also recommended first to search that the trademark that someone wants to register has not been registered yet. Moreover, if the trademark is well-known in foreign country, one should have enough evidences to prove that while restricting further infringement of a such trademark.

The Trademark mechanism of Germany

In Germany, one can protect its trademark in two different ways, first, by registering marks at the German Patent and Trademark Office and the second method is obtaining recognition of the particular trademark among the public in the sense of Article 6bis of the Paris Convention.

In the first case the recognition of a trademark is obtained on a product-related basis, taking into consideration specific situations of the individual case. However, there is no particular measurements guaranteeing the recognition of a trademark.

Empirically, in Germany courts considered that about 20-25% recognition a trademark sufficient to decide the well-known status of a distinctive mark which does not need to keep freely available [9]. However, for the marks which need to be freely available 51.2% of recognition was not enough to determine the well-known mark [10]. Moreover, in one case the German Supreme Court found that 58% of the total population recognizing the distinctive color mark “magenta” was sufficient enough to prove well-known recognition of the telecommunications service [11].

Trademarks obtained by market recognition also constitute the part the company’s assets and can be freely exploited. The well-known trademarks in the respect of the Article 6bis of the Paris Convention will enjoy greater protection in Germany even they are not registered at the German Patent and Trademark Office.

The virtue of registration of the trademark

The registration of a trademark the most advisable and preferable method of protecting the trademark. There are several reasons why the registration of a trademark is the most preferable, the first is that the burden of proof. The prior right holder of unregistered trademark should prove the existence, use, duration, type, form of the trademark from the day of commencement of the use of such a trademark. The comprehensive information, documentations and a market recognition survey regarding the non-registered well-known trademark should be presented to the court. Moreover, the five-years grace period will not apply to the unregistered trademarks, as their recognition obtained in a product-related basis. Once non-registered trademark losses its market recognition, it will automatically lose its protection.

Protection of the rights of the prior user

The prior user of an unregistered trademark can make opposition or claim for invalidation of the registration against other person who filed to registration. After a trademark registered at the German Patent and Trademark Office and the registration has been published, one can claim for opposition within the three months after registration and publication of a trademark.

According to the German Trademark Act unregistered trademark with older seniority can also be the ground for opposition, therefore proprietor can restrict the use of the registered trademark of respective mark or designation within the territory of the Federal Republic of Germany. In the respect of the Article 6bis of the Paris Convention the registration can be cancelled if the applied trademark is well-known in Germany, besides that in Section 9 (1) German Trademark law “protection of well-known marks”, “identity” or “risk of confusion” also should be met to cancel further registration.

Unfair Competition in Germany

The concept ruled by trademark law that trademark protection in Germany falls within the ambit of the case law mainly by interpretation. When the infringement of the marks beyond the scope of the trademark law and relates to unfair competition, in this regards the Unfair Competition

laws will apply.

To sum up, it is highly recommended to register a trademark, even it is well-known. Otherwise prior right holder should keep all documentation of proof which is time-consuming, the better option is to register trademarks at the German Patent and Trademark Office.

Conclusion

In different jurisdictions the prior rights protection of the unregistered trademarks is different. Some jurisdictions give full protection to the prior user while others give only limited protection. The prior rights holder can oppose the registration or can challenge the registration of the trademark. However, opposing or invalidating the registration requires tremendous evidence and effort to prove the unfair competition, bad faith registration and so on. All in all, the best option to protect a trademark is to file for registration as early as possible when a particular country becomes the region of interest.

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