

Advertising Saves the Day in Turkish Service Mark Non-use Case

20 May 2016

In a 2016 Turkish case, the Assembly of Civil Chambers clarified the approach to interpreting evidence submitted to prove use of service marks in non-use actions. The decision clarifies how to prove use of service marks in Turkey for trademark owners.

The plaintiff filed a trademark application but this was rejected due to an earlier trademark, prompting the plaintiff to initiate a non-use action against the earlier mark. The earlier trademark covers various goods and services, including those in classes 37 and 43. The plaintiff claimed the trademark is used only for retail store services and that the unused services should be struck down.

The defendant sought dismissal of the non-use action. It claimed its trademark is used for retail store services as well as construction services (class 37) and services for providing food and beverages (class 43).

The First Instance Court cancelled the part of the trademark covering "construction services" and the "rental of construction equipment and machinery" in class 37 on the following grounds:

- The trademark's five-year grace period for non-use had ended;
- The expert panel found sufficient evidence of use regarding services for providing food and beverages; and
- The expert panel and court found insufficient evidence of use regarding services in class 37. The defendant's commercial books and records include records regarding rental of construction equipment and machinery. However, these records were found to be insufficient to prove the trademark is used for the services in class 37.

Case on appeal

In response, the defendant appealed against the First Instance Court's decision. The Appeal Court reversed and remanded the case based on the following grounds:

- The submitted evidence proves the defendant had indeed used its trademark for construction services in class 37;
- Although the defendant offers retail store services and operates a supermarket chain, the defendant advertised its construction services in its supermarket chain's newsletter by publicising the building complex and mall which it had begun building;
- Invitations prepared for the introduction of the building complex and mall clearly indicate that construction services are handled by the defendant; and
- The defendant launched a website to promote the building complex and mall which it had begun building.

The Appeal Court concluded that to prove use of a service mark, using the trademark on the building complex and mall is not necessarily required. Therefore, using the trademark on brochures and advertising materials was sufficient to accept the service mark's use in class 37.

However, the First Instance Court insisted on its initial decision, meaning the case was taken to the Assembly of Civil Chambers. This higher court affirmed the Appeal Court's decision and it became final.

The Appeal Court's decision clarifies questions about how to prove use of service marks in Turkey. Evidence proving use is varied due to the nature of service marks. However, Turkish courts are rather strict on evaluating evidence submitted by trademark owners.

In most cases, advertising materials and brochures are considered weak evidence because trademark owners can prepare such evidence at any time with respect to a non-use action. The courts require evidence submitted by trademark owners to match their books and accounts. Courts prefer evidence to be supported by commercial books and records, as well as invoices bearing the trademark in question.

The Appeal Court's decision means it might now be possible to overcome a non-use action in Turkey by submitting advertising materials and brochures, as long as they show proper use.

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