

Think Different Decision and Trademark Protection Strategy

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In systems where the registration is not mandatory for trademark use, it is apparent that the trademark registration strengthens the protection provided to the trademark. However, regarding trademark protection, being limited only to national and / or international trademark registration without a multifaceted and long-term supporting strategy is doomed to fail in the long run. As a matter of fact, in the midst of intellectual property wars, which used to be covert and nowadays are very overt and at a high level, where firms have registered many elements as trademarks, from slogans to store designs, from colors to advertising music; in our opinion, seeing trademark protection as mere registration is equivalent to being behind the times. However, no matter how many precautions are taken, it cannot be disregarded that a small strategic mistake or a visionary interpretation, even there are no mistakes at all, also carries the risk of having an adverse effect.

One of the most widely used and critical trademark protection strategies is cancellation cases due to non-use of a trademark. As accepted in many systems, trademarks primarily serve commercial activities and, therefore, it is expected that the trademarks will be actively used. Indeed, trademark stocking, which is to keep a trademark actively even though it is not used by the trademark owner, where the trademark owner also prevents third parties to file a trademark application is basically undesirable. The increase in trademark stocking over the years and the fact that the trademark registrations were used only one day and cannot be actively used for various reasons, have prompted the legislator in many systems, and the concept of tolerance has occurred. Accordingly, in many systems, a tolerance period, generally, of 3 or 5 years from the date of trademark registration is granted to trademark owners, and it is expected that the trademark will be used seriously during this period. In terms of trademarks that are not used at the end of this period, third parties are granted the right to claim non-use defense or to demand the cancellation of the trademark due to non-use. Again, in many systems, the obligation to prove the use of the trademark is imposed on the trademark owner and, at this point, symbolic uses and uses not supported by objective documents of appropriate nature, not intended to create market share, meaning that are not serious, are not considered sufficient in terms of accepting the fulfillment of the obligation to use the trademark.

Today, cancellation actions due to non-use have turned into a strategic item that is also used as a rightly tool to influence the parties. Because the applicants who want to register their trademark but cannot pass the ex officio examination, either first discuss with the previous dated trademark owner, or assert -directly- the defense of non-use, or - according to the nature of the dispute between the parties- file a cancellation action against the previous trademark -due to non-use- as a much stronger action. This method saves more time and expenditure compared to an appeal process with a high chance of losing the appeal or a classic cancellation action, and relatively increases the likelihood of success. As a matter of fact, the main point of the legal review is use of the trademark, and it is much easier procedure for the claimant to carry out considering that the case / counteraction is likely to be accepted if the trademark is not used, as well as the fact that the burden of proof is on the defendant - contrary to the general order.

In this respect, a very recent decision rendered by the General Court of the European Union, Apple vs. EUIPO - Swatch ("THINK DIFFERENT") dated 8 June 2022, is a very good example of versatile trademark law practices and strategies. In our opinion, THINK DIFFERENT case file is an instructive file which includes many trademark law principles and trademark law strategies including many elements such as slogan trademark, European Union community trademark, strong trademark discussion, high level attention of the consumers, serious use criteria, and

the evaluation of the right to be heard. To briefly explain the history of the file; the expression "THINK DIFFERENT", which has been used during the advertising campaigns of Apple, one of the global technology companies, and has been aimed to provide a meaningful impetus to the company, was registered as a community trademark in the European Union in 1997. In 2015, another global company, Swatch, which operates in watch industry, filed a trademark application "TICK DIFFERENT". This trademark application has been challenged by Apple on various grounds, notably with the claim that "TICK DIFFERENT" is similar to "THINK DIFFERENT", which will create likelihood of confusion. Upon the objection, Swatch chose a much more active and powerful method, and filed a cancellation action against "THINK DIFFERENT" trademark due to non-use, as a move not only to overcome the objection, but also to directly eliminate the reason for the objection. This request was examined by the EUIPO and it was decided to cancel the relevant trademark due to non-use, as the use of the trademark in order to commemorate famous persons/events or from time to time on the website was not considered as sufficient for use of the trademark. The decision of the General Court on the file was brought to the General Court of the European Union upon Apple's appeal / appeal request was announced recently. With this decision, Apple's appeal was rejected and the EUIPO decision of cancellation of "THINK DIFFERENT" trademark was approved to be appropriate.

To further evaluate the decision given by the General Court of the European Union;

- The responsibility of proving that the trademark has been seriously used within a 5-year period rests with the trademark owner. The court ruled that Apple failed to comply with this obligation.
- The responsibility of proving that the high level of attention of the consumers will lead to the conclusion that consumers will examine the product packaging in full detail and identify all the details on the packaging is also on the trademark owner. The court held that Apple failed to comply with this obligation.
- It is important to prove the use of the trademark in the region where it is registered. The reports on product sales contain information about the worldwide net sales of the computers involved, but do not provide any details regarding the sales figures in the European Union. Therefore, the documents in question have not been evaluated as sufficient in terms of the use of the trademark in the European Union.
- The use of the trademark must be proven with objective and up-to-date documents. Although numerous elements have been presented in relation to the launch of the "THINK DIFFERENT" brand in 1997 and the success of the respective advertising campaign, they have been found to date back more than 10 years.
- The documents and justifications for the serious use of the trademark submitted by Apple have been evaluated according to the relevant legal standard.
- Although it has been claimed by Apple that an assessment has been made that the relevant trademark lacks distinctive character and that this assessment was not appropriate, it was stated that this approach by Apple was originally caused by a misreading of the EUIPO decision. As a matter of fact, it has been concluded that the EUIPO's assessment that this trademark is weak does not contradict the body of evidence for the serious use of these trademarks.
- It was decided that Apple's right to be heard was not infringed in this case.

As can be seen, the General Court made a multifaceted evaluation for "THINK DIFFERENT" trademark, from its distinctiveness to its serious use, and found it appropriate to cancel the trademark on the grounds that it was not used appropriately.

If the decision is finalized, since "THINK DIFFERENT" trademark will not be under the protection of community trademark, the use of this trademark and similar ones by third parties in the relevant region will become relatively risk-free. As a matter of fact, with this decision, it can be evaluated that one of the possible obstacles of Swatch's trademark application has been removed.

One of the thought-provoking strategic points in this file is that Apple, which has reciprocal/disputed files with Swatch in different countries and jurisdictions, has acted with a relatively narrower strategy. Because while the risk of action being taken against Apple by Swatch due to different disputes between them is highly foreseeable, it is strategically thought-provoking that Apple has objected against "TICK DIFFERENT" trademark application based on the "THINK DIFFERENT" trademark, which has become open to cancellation due to non-use and which also the distinctive nature has become debatable. As a matter of fact, as the Court has mentioned, the distinguishing power of the expression "THINK DIFFERENT" being contentious, the existence of this dispute can be considered usual in the face

of the fact that slogan trademarks are not accepted to be very strong trademarks in general terms - with exceptions of course - and the meaning of the expression "THINK DIFFERENT". Moreover, in the concrete case, this discussion did not give rise to any result in its fundamental sense, and due to the fact that Swatch directly filed a trademark cancellation case, and the cancellation of the trademark which constitutes an obstacle to the trademark application, was ensured without engaging in these discussions. At this point, it should be noted that the filing cancellation action would perhaps be in question in any case, since the conditions required for filing a cancellation action due to non-use already exist in the concrete case.

All of this, once again, reveals the importance of trademark strategy. Because the slogan trademark is used as an element on the packaging of many products around the world -without making any regional distinctions - and even though the trademark was used intensely and strongly in the past, similar with the current case, according to the General Court, it is not sufficient to prevent the cancellation of that trademark. Therefore, while implementing each trademark strategy, evaluating the current situation separately and making a long-term situation analysis will remain as a valuable strategic element for trademark owners.

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