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THE VALUE OF A TRADEMARK

WARTOŚĆ ZNAKU HANDLOWEGO

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Summary: The paper discusses how trademarks are legally regulated, and how their value is established, considering trademarks in the context of products and services, brands, and innovation processes. The author analyses how the aforesaid factors condition consumer's way of perceiving trademarks, pointing out that what a man needs is not what a consumer buys. The author concludes that the above-mentioned factors have a decisive impact on establishing the value of a trademark. They may not have a direct influence on physical assets of a titleholder, but they impact plans made by the management in order to advertise a product or a service.

Keywords: brand, trademark, value.

Streszczenie: Artykuł omawia zagadnienia prawnej ochrony znaków handlowych oraz ich wyceny w kontekście produktów i usług, marek oraz procesów innowacyjnych. Autorka przeanalizowała, w jakim stopniu wymienione czynniki wpływają na sposób postrzegania znaków handlowych przez konsumentów, wskazując, że potrzeby człowieka a decyzje zakupowe konsumenta to odrębne kwestie. Stwierdziła, że wymienione wcześniej czynniki mają decydujące znaczenie w ustalaniu wartości znaków handlowych. Nawet jeżeli nie mają bezpośredniego przełożenia na aktywa posiadacza znaku handlowego, to kształtują decyzje zarządzających dotyczące promocji produktów i usług.

Słowa kluczowe: marka, znak handlowy, wartość.

1. Introduction

How valuable is a trademark? Is the value related to the products or services of a certain brand? Does it consider a specific innovation procedure? These are questions which have a complex answer and are also related to the consumer's way of perception of the trademark. To start answering these questions, it is necessary to define the relation of a brand, innovation and public perception and how these three factors interact.

The value of a certain brand is related to several factors. One of those is the way the trademark is known and how the consumer feels in acquiring a certain product or service. In many cases, it is believed that different brands have diverse origins, which may not be true. But the brand plays an important role for the consumer, because he feels safe and he trusts its quality. On the other hand, it is an important factor for the consumer's choice, because he trusts the guarantee and the technical assistance provided. He is also aware of the cost of its maintenance. All these factors are considered, apart from the price of the product or service, and have a direct impact on the trademark's value.

The knowledge of these facts is also considered by the title holder of a trademark, which is normally an enterprise. The way a certain product or service is commercialized, its advertisement, its consumers are determinant factors for the evaluation of a brand. It is part of the trade strategy to commercialize and select a determinate group of trademarks, whose value is a part of the business asset.

2. The trademark

It is often considered that an enormous variety of trademarks allows the consumer to have a huge quantity of options as well as indicating the variety of product origins. As a matter of fact, it indicates that the consumer has the possibility to choose between different articles, but it doesn't that they have a different origin.

The enforcement of the trademark regulation, which is not limited to the national law, has in many cases to be submitted to international or regional treaties. Therefore the kind of legislation to be applied in order to estimate the value of a certain brand should be considered. The legal system is based on regulations passed by the suitable authority [Wróblewski 1986, p. 5]. The main concept is the existence of a legal system which is capable of regulating the permissible relation between title holders in different countries. There are consequently two conditions to be implemented; the first is the way the rule is interpreted and the second, its logical derivation transfers the validity to the consequences [Wróblewski 1986, p. 10].

The trademark plays an important role in the introduction of a product or a service into the market. Because of the technological development the impact of sense of smell on the consumers cannot be undervalued [Wiszniewska 2013, p. 1].

The variety of trademarks indicates that several products or services are offered to the consumer. But there is another fact which is not so often known which is the idea of "trademark's family". According to Barbosa [2009, p. 1] a trademark's family is constituted by a group of brands which are owned by the same enterprise. Figure 1 shows how this definition works [Inside P3 2013].

In most cases the consumer does not know that a different trademark has the same origin of another one. It is a practice of the market, because for the consumer the fidelity is not based on the title holder, but on a specific trademark. It also happens in services, such as traveling, where the consumer buys an air ticket from a certain

airline, without taking into consideration the business group it is part of. This point is easily understood if the following Table 1 is showed, where the ranking of 2016 of the major worldwide airlines is shown [Aviação Comercial net 2017].

Table 1. The ranking of 2016 of the major worldwide airlines

Fleet	Company group	Airlines
1482	American Airlines	American Airlines American Eagles American Connection
1362	Delta	Delta Air Lines
1231	United	United United Express
719	Southwest Airlines	Southwest Airlines
651	Lufthansa Swiss	Lufthansa Swiss Austrian Brussels Airlines
597	British Airways	British Airways Iberia Vueling Aer Lingus
536	Air France	Air France KLM Transavia

Source: [Aviação Comercial net 2017].

In most cases, the consumer relies on a specific trademark, not considering its titleholder. We must also consider that, according to the International Regulation, the protection of a brand may be limited to those which are visually perceptible [TRIPS 1995]. It does not mean that other types of signs will not be important for a certain type of industry. It is well known that sounds may be related to a certain product, such as a motorcycle (Harley-Davidson). In 1994 [Sapherstein 1998, p. 1] Harley Davidson filled a trademark application with the following description: “The mark consists of the exhaust sound of applicant’s motorcycles, produced by V-twin, common crankpin motorcycle engines when the goods are in use.” It was not the first case and according to Sapherstein [1998 p. 2] there were 729,000 sound trademarks registered at the USPTO. Several oppositions were filed in the Harley-Davidson’s application based on the concept that many motorcycles engine would produce the same kind of sound. After six years of litigation the application, Harley-Davidson decided to withdraw it [Sweeney 2014].

Another kind of protection is based on the idea of protecting smell marks. It considers that the consumer in general acts in a certain way, depending on the effect of smell [Kumar 2016, p. 130]. The concept of olfactory trademarks was excluded

from protection in 1994 in Trademark Law Treaty, according to article 2 (1), (b): “This Treaty shall not apply to hologram marks and to marks not consisting of visible signs, in particularly sound and olfactory marks.”

There are cases related to non-traditional trademark. In one of the cases (Heideberger Bauchemie Case), which is related to an olfactory brand (it smells like strawberry fruits), it was rejected by the German Patent Office. This decision was maintained by the European Court of Justice on following grounds: (a) the chemical formula was not sufficiently intelligible, not sufficiently clear and precise; (b) the written description was not clear; (c) the physical deposit was not stable [Carapeto 2016, p. 37]. Those premises have an impact on the IP title holder, because a proper protection may grant a higher value for its asset.

3. The trademark value

The trademark plays an important role for the company as a major asset. Its value depends on many factors which are not often linked to the value of corporal assets; it is more a rate related to the consumer’s expectations. It may depreciate depending on those expectations and related to other facts, such as the expiration of protection period of a patent.



Fig. 2. Value of a brand

Source: [Donahue Fitzgerald Attorneys 2016].

There is a definite strategy of the title holders to identify quality, a social group to a certain brand. The way a certain trademark is used is a critical option of its owner. It has a direct impact on its value and can be established according to Figure 2 [Donahue Fitzgerald Attorneys 2016].

The trademark has its identity. It identifies a certain quality of service or goods, therefore the customers feel safe in acquiring brand-name goods. They experience being a part of a certain exclusive group of consumers as well. It is a consequence of the way it is advertised. The advertisement is made in such a way as to have a specific target and that is also a question of marketing strategy. Those components have an influence in the logo chosen. The reason is that this choice is made after a survey where the consumer's feeling is taken into consideration. The logo reflects the trademark; it is the way the society identifies a certain product or a service. In certain occasions, such as airways, it may inspire a certain degree of reliability, especially considering travellers who are afraid of flying. The consumer identifies the company by its logo and feels safe to travel.

Those considerations have also an important role in defining the trademark's value. For this purpose, it is not necessary to be an expensive product or service. The point to be considered is its social and economic impact, where its price is just one of those components, but not a determinant one. Take for example the trademark Coca-Cola. A can costs about US\$ 1 in the USA, but the value of the trademark is about US\$ 73.1 billion [McWilliams 2016].

The value of a certain brand is not directly related to its strength. There are other factors to be considered and one of them is the way the product or service is recognised by the consumer. Is it a popular or sophisticated product? Does it belong to a certain group of consumers? Is it related to a certain chain of enterprise? Is it a place where the consumer gets what he wants and with the necessary warranty for the acquired product? All those aspects are considered when identifying a service or a product and the trademark is used to identify all those characteristics. The trademark is not just a sign to identify a service or a product, but it is also a factor considered when the consumer chooses to get one of those. He believes that the delivered product or service will be the best and even exclusive and that he, as an individual, will be considered a VIP consumer, even if it is not true. According to Elmore [2015, p. 67]: "Customers, for example, may distinguish the business by its location or owner, or the business may simply employ names or symbols for which it possesses no trademark rights. It follows that the value of a trademark ordinarily is something less than the value of a brand."

Those ways to identify a certain product or service, through its trademark, may not be based on rational basis. It is just a feeling, a belief. The strength of a certain trademark can be established by the following figure [IAM 2014].

In many cases a certain film character becomes a relevant trademark. Its use will be part of a commercial strategy of its owner to have the protection as a copyright also in goods and services; for both of them the trademark is one of the best way of

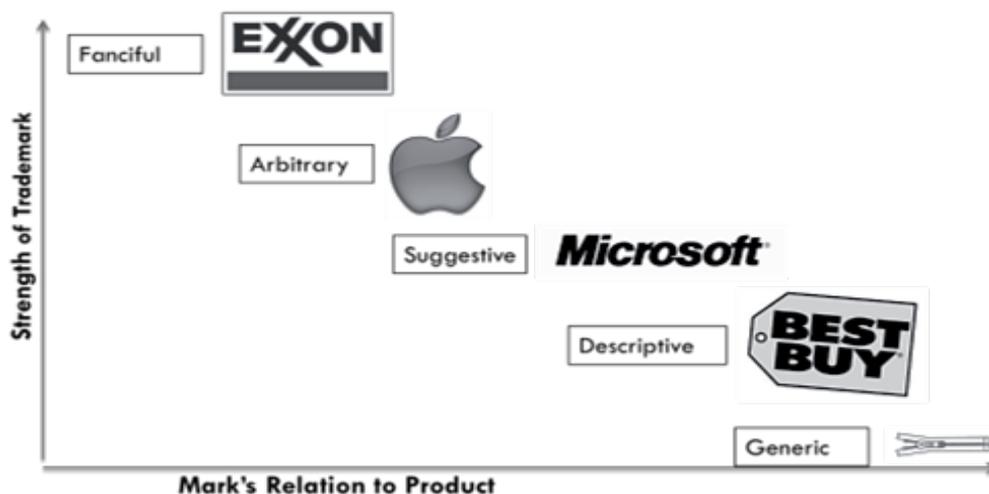


Fig. 3. Strength of a brand

Source: [IAM 2003].

protection. If the character Minions, from Universal Pictures is taken as an example, the following figure will show the number of trademark applications at the USPTO [USPTO 2016]:

Considering film characters, it is also point to state that nowadays they are not limited to the film only. Depending on the film, its popularity and what kind of public it is directed to, a variety of products may be put into the market to promote it, considering for instance a child's fantasy. As an example, we can mention: Harry Potter and all characters involved in all nine films, TV-series as *House of Cards* (USA), based on the British one, called *The House of Cards*, which is not so famous as the US one. Harry Potter has 116 records, Hermione Granger has 7 records and House of Cards has 24 records at the USPTO [2016].

The characters almost become real people and this is also extended to the places. The significance may result in trademark protection to have a wider one, not limited to the copyright. There is marketing to be done, products and services to be offered. It is possible to say: make your dreams come true. On the other hand, all those trademarks are also used in many other products, which do not have direct relation to the movie picture, such as cosmetics, tourism, textile, etc. One example: the file n. 85963267, for the trademark "Harry Potter and the Forbidden Journey". It identifies the following products: "Sleeping bags; plastic cake decorations; non-metal key chains; chair pads; deck chairs; corks for bottles; picture frames; pillows and seat cushions; booster seats; infant walkers; bassinets; high chairs; hand-held flat and folding fans; decorative mobiles; soft sculpture wall decorations." Those products are not normally associated to the movies, but the way the film was commercialized has enabled the use of this trademark; it is part of a marketing strategy.


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2	86311353		DESPICABLE ME MINION MADE	TSDR	LIVE
3	86311350		DESPICABLE ME MINION MADE	TSDR	LIVE
4	86306066		MINIONS	TSDR	LIVE
5	86306059		MINIONS	TSDR	LIVE
6	86124852		MINION MISHAP	TSDR	LIVE
7	86311355		DESPICABLE ME MINION MADE	TSDR	LIVE
8	86204068		MINIONS	TSDR	LIVE
9	86145303	4571832	MINION RUSH	TSDR	LIVE
10	86311348		DESPICABLE ME MINION MADE	TSDR	LIVE
11	86311346		DESPICABLE ME MINION MADE	TSDR	LIVE
12	86306068		MINIONS	TSDR	LIVE
13	86306064		MINIONS	TSDR	LIVE
14	86306061		MINIONS	TSDR	LIVE
15	86126172		MINION TOSS BASKETBALL FOR ALL	TSDR	LIVE
16	85542135		DESPICABLE ME MINION MAYHEM	TSDR	LIVE
17	85542148		DESPICABLE ME MINION MAYHEM	TSDR	LIVE
18	85981618	4545086	DESPICABLE ME MINION MAYHEM	TSDR	LIVE
19	85542128	4397007	DESPICABLE ME MINION MAYHEM	TSDR	LIVE
20	85542113	4393192	DESPICABLE ME MINION MAYHEM	TSDR	LIVE
21	85542103		DESPICABLE ME MINION MAYHEM	TSDR	LIVE
22	85515402	4318338	DESPICABLE ME MINION MAYHEM	TSDR	LIVE

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Fig. 4. The number of trademark applications at the USPTO

Source: [USPTO 2016].

The value of a trademark takes many factors into account. According to Torres [2007] the following factor must be considered: “The value of trademarks purchased in the course of business transactions is a function of many factors. Typically, the revenue associated with such intellectual property, as well as the relevant discount rate, useful life assumptions, applicable royalty rate, profit margins, risks, and market conditions determine trademark values. Rather than looking to explain stock prices or marginal profitability as a function of intangibles, we seek to determine, or explain, the value of a firm’s acquired trademarks as a function of the sales levels they support, the context in which it was acquired (liquidation or going concern), the industry, and other exogenous factors”.

All those factors determine the value of the trademark for the enterprise. It is not just a question of how to determine the value, but also how to maintain it. There are several examples of trademarks which were famous in the past and due to many different reasons have lost their value or even disappeared, such as Pan Am and TWA (bankruptcy) or Liptor (the patent went into public domain). It is necessary to establish certain ways to value a trademark, which can take its cost approach, or its market or income approach into account [Elmore 2015, p. 69].

According to the law, a trademark grants exclusive rights. There are legal systems where a previous registration is obligatory and others where the simple use of the brand establishes the same rights. The point to be considered is obviously related to the interpretation of the legal rule. The understanding of the law is controversial and two major forms exist: the formalist and the antiformalist. The first group bases its opinion that the law is interpreted by understanding its logic in the form of a logical thinking of law and the second one denies it by considering the evolution and its argumentative technique [Wróblewski 1969, p. 3]. The granted rights also establish economic advantages. The point to be considered, when the cost approach is taken into account, relates to trademarks which are not being used. It reflects a minimum value and also the involved rate to reintroduce it [Elmore 2015, p. 69]. Its value can also be estimated by the value of potential licenses. There are brands which are often licensed and even considered only through franchising agreements. They are a part of these contracts. It is also possible to consider the income approach of a brand, where its potential income has an influence by establishing its value [Elmore 2015, p. 70]. The interpretation of the contract, according to legal dispositions, is based on formulas used by hermeneutics to understand the meaning of the legal determination. These rules, may be considered as statements which are used to formulate the philosophy of the rule to qualify a certain behaviour in terms of establishing a normative system [Wróblewski 1970, p. 21].

It is possible to conclude that the trademark plays an important role in the enterprise asset. It has nowadays a different challenge, which is related with the new ways of making business. The internet has changed a lot in the way business is made. What was local in the past, today is made worldwide. There is a new way of trading, where the electronic commerce plays an important role. The use of search engines,

like Google or electronic commerce, like Amazon, has changed the concept that the trademark is mostly used at a local level. At the USPTO, Google is a part of 178 records and in Europe there are 49 trademarks [EUIPO 2016]. It is obviously a vast protection and is based on the concept that it is an active trademark. The value is therefore a consequence of the way a brand is used. If it is not used, there will be probably a devaluation of the trademark, which can also imply in losing all of its value.

As a consequence, the use of trademark is directly related to its value. The way it is managed, is an important task of the board of the company. It cannot rely on the fact that it is a known trademark and that its value is granted. If there is a change in the way the consumer realizes the strategy of the company, it may cause a relevant harm to the value of the trademark, especially if it is also linked with the notion of security. Internet has an enormous potential, as shown in the following figure [Mail Online 2013].

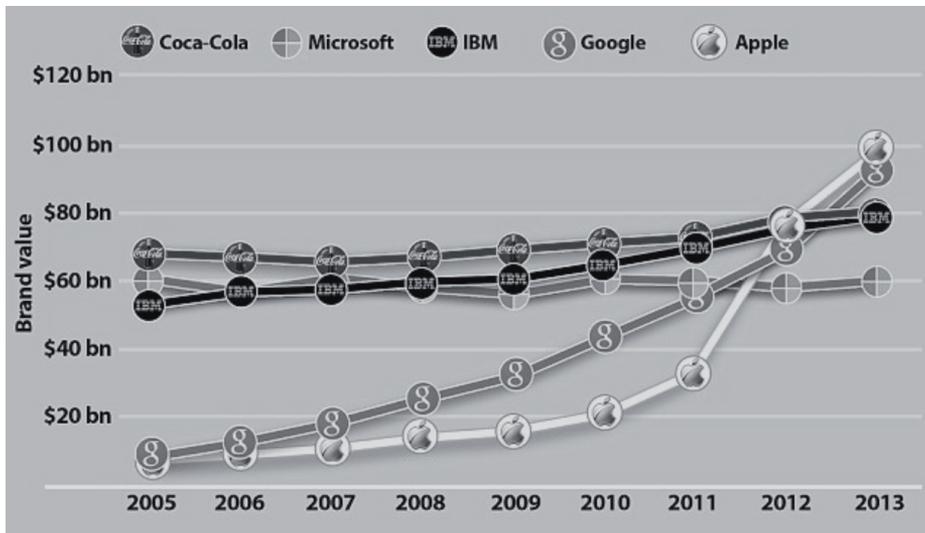


Fig. 5. Internet and trademarks

Source: [Mail Online 2013].

It is possible to observe from the table how the development of trademarks have changed in the last 12 years. The quick development of internet facilities changed the position which was almost consolidated. The value of brands like Google and Apple are not directly a consequence of a variation of the physical asset of their title holders, but the increase is a consequence of their acquired position in the market. A new expression was introduced in language: “to google”. The fact is that those trademarks almost became synonymous of their services, which is in the USA a

tremendous problem because of the possibility to lose their registered trademark, as a consequence of devaluation. A brand, which loses its originality, may have its registration cancelled, which means a problem for the management of the titleholder. It has become an urgent necessity for the managers to plan the future in order to protect their brands as a part of its strategy. The example of Apple, in the case of IPOD is to be mentioned, because it was a result of acts, which enabled its titleholder to protect the brand, its design against competitors [Krashnikov 2009, p. 164]. The adequate strategy and a certain vision of the future allows the innovators to take part of a certain percentage of the consumer's market, as a consequence of a new product, or even just because a new service was developed. The consumer feels he has achieved a new social position, just because he has a certain product or uses a specific service.

4. Conclusions

It is not possible to comprehend the real value of a trademark, without understanding it as a part of the innovation system. The first question to be made is: what does man really need. It may be easy to answer this question, which will not be the same if it is quoted in a different form: what does the consumer need. A consumer is a part of a group. He may get products and services as a consequence of a nice advertisement, or because his colleagues have it. He may also intend to buy it without really knowing why and even which necessity will be fulfilled. It is just a consequence of a social behaviour.

All the above factors have a decisive impact on establishing the value of trademark. It may not have a direct impact on the physical asset of the titleholder, but on the plan made by its management in order to advertise the product or the service. There are two external factors that must be taken into account. The first one is that the value may be negatively affected by legal or political restrictions of a certain economic activity, which may undermine the exploitation of a certain brand. An economic embargo, a financial crisis and a consequent recession may have their influence on the use of certain products or services, with consequence on the value of a certain trademark, although the physical asset of its titleholder is still the same. The second one is a consequence of losing its creativity. The trademark becomes a synonym of the product or the service, which may have as consequence the loss of its registration, with direct impact on its value.

Therefore, the task of the managements must involve the Legal Department of the company, in a way to analyse the consequence of a certain strategy. The contracts, the plan of action chosen will always have a juridical consequence and this analysis is important to preserve the asset.

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