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ARTICLES

INTERNATIONAL TRADEMARK PROTECTION FOR COMPUTER PRODUCTS: HOW TO MAKE A MARK IN FOREIGN MARKETS

Lee Bendekgey*

I. INTRODUCTION

Companies in the computer industry, like those in other high-technology industries, generally are aware of the importance of maintaining legal protection for their technology.¹ The same companies are often much less conscientious about protecting their trademarks and service marks. This relative lack of attention to trademark protection among computer companies probably results from the relatively low priority that many companies assign to the marketing of the products they have developed. However, with the advent of the mass market for computer products, advertising and marketing have taken on increasingly greater significance since very few products are good enough to sell themselves.

Trademark and service mark laws constitute the primary vehicle for protecting a company's investment in promoting its products and services. Section 45 of the Lanham Trademark Act of 1946, the federal trademark statute, defines "trademark" as "any word, name, symbol, or device or any combination thereof, adopted and used by the manufacturer or merchant to identify and distinguish his goods, including a unique product, from those manufactured and sold by others and to indicate the source of the goods, even if that source is unknown."² The same section defines a service mark as a mark "used in the sale or advertising of services to identify and distinguish the services of one person, including a unique source,

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1. For example, most companies are quite conscious of the need to protect trade secrets by having employees sign confidentiality agreements.

2. 15 U.S.C. § 1127 (Supp. 1986).

from the services of others and to indicate the source of the services, even if that source is unknown."³ Thus, a mark serves to identify goods or services as emanating from a single source.

Because trademarks and service marks identify the source of goods or services, they constitute one of the most easily identifiable elements of a company's goodwill. As the goodwill associated with a particular product grows, the mark under which it is marketed itself becomes a valuable asset, enhancing the marketability of new products or services for which it is used. For example, the IBM mark can be a crucial factor in creating a market for a product bearing that mark. No company can afford to forego the benefits of developing protectable goodwill in a mark. Thus, obtaining and maintaining trademark and service mark rights both domestically and in foreign countries should be a key component of any domestic and international marketing strategy.

Companies planning to market their products internationally should be just as careful to protect their marks in foreign jurisdictions as they should in the United States. However, differences between foreign trademark laws and those of the United States create numerous potential pitfalls for the novice entrant into foreign markets. This article will summarize the basic steps necessary to protect trademarks and service marks in foreign countries, emphasizing commonly encountered differences between foreign and United States trademark laws.

Four basic activities are required to develop and protect rights in a mark, whether domestically or internationally. They are: 1) selection; 2) prosecution of appropriate registrations; 3) proper use of the mark; and 4) enforcement. Each is discussed in greater detail in the remainder of this article. Before discussing the legal considerations applicable to these activities, it is appropriate to review the major trademark treaties that affect the ability of a mark's owner to protect its rights internationally.

II. MAJOR TRADEMARK TREATIES

Because rights in marks are territorial in nature, a trademark owner's acquisition of rights in the United States does not automatically give it any rights outside the United States.⁴ Consequently, the acquisition of rights in a mark in any jurisdiction must be analyzed primarily under the local laws and regulations of that jurisdic-

3. *Id.*

4. See 1 GILSON, TRADEMARK PROTECTION AND PRACTICES § 9.01 at 9-1 (1984).

tion. There are, however, many bilateral and multilateral trademark treaties that affect the ability of a U.S. trademark owner to obtain protection in foreign nations.

Perhaps the most important multilateral treaty governing intellectual property rights is the International Convention for the Protection of Industrial Property of 1883, generally referred to as the Paris Convention. Approximately ninety countries, including the United States, are members of the Paris Convention.⁵ The Paris Convention was revised in Washington in 1911, the Hague in 1925, London in 1934, Lisbon in 1958, and Stockholm in 1967.⁶ Not all countries, however, are signatories to the most recent amendments. Consequently, to determine the effect of the Paris Convention on the rights of a United States trademark owner in a particular country, one must refer to the most recent version of the Paris Convention signed by both the United States and the jurisdiction in question.

The fundamental principle of the Paris Convention is that of "national treatment." Under this basic principle, each member country is required only to accord nationals of other member countries the same trademark and service mark rights it grants to its own nationals.⁷ Thus, although the Paris Convention imposes certain minimum obligations with regard to the subject matter of protection, it tolerates much diversity in the form and extent of protection, relying instead on the requirement that member nations refrain from favoring their nationals over those of other member nations.

The Paris Convention does, however, provide a potentially significant procedural benefit to the United States trademark owner seeking to protect its rights internationally. Pursuant to the Paris Convention, when a national of a member country applies to register a mark in its home country, applications to register the same mark for the same products filed in other member countries within six months after the original filing are deemed to have been filed on the original filing date.⁸ This special priority provision may be particularly helpful in countries where priority of rights is based on the

5. See, TRADEMARKS THROUGHOUT THE WORLD, Appendix C (Trade Activities 1986).

6. I MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, § 19:24 at 926-27 (2d Ed. 1984).

7. International Convention for the Protection of Industrial Property of 1883 Paris Convention, Multilateral, art. 2, 21 U.S.T. 1629, 1631, T.I.A.S. No. 6923.

8. Paris Convention, *supra* note 7, art. 4c, 21 U.S.T. at 1632.

date of filing the application.⁹ Thus, a company seeking to protect its marks internationally is well advised to file trademark applications in foreign countries promptly after filing in the United States.

The United States is also a member of the General InterAmerican Convention for Trade Mark and Commercial Protection of 1929. Like the Paris Convention, the InterAmerican Convention requires each member country to grant nationals of other member countries the same trademark and service mark rights it affords its own nationals.¹⁰ Under the related Protocol on the InterAmerican Registration of Trade Marks, it was once possible for a U.S. company to obtain a multinational registration applicable to all member countries by applying to the InterAmerican Trade Mark Bureau. Unfortunately, in 1945, the United States terminated its accession to the protocol, although it remains a member of the InterAmerican Convention.

Another important treaty providing for multinational trademark registration is the Arrangement of Madrid for the International Registration of Marks of Manufacture or of Commerce of 1891, typically referred to as the Madrid Convention. Under the Madrid Convention, a national of a member country that first registers a mark in its home jurisdiction may apply to the World Intellectual Property Organization (WIPO) to publish the registration and communicate it to other member countries.¹¹ A national of a member country is defined as one domiciled in or having a "real and effective industrial or commercial establishment" in one of the member countries.¹² Once the registration has been communicated by WIPO to the member countries specified by the registrant, those member countries have one year in which to declare that they cannot protect the mark in question.¹³ Absent such a declaration, the multinational registration takes effect on the first anniversary of its communication to the member and has the same effect as if a national registration had been obtained in each such country.¹⁴

Unfortunately, the United States is not a member of the Madrid Convention. It is possible for a U.S. corporation to take advan-

9. See *infra* text accompanying notes 20-21.

10. Inter-American Convention for Trade Mark and Commercial Protection of 1929, Multilateral, 46 Stat. 2907, T.S. No. 833.

11. See 1 GILSON, TRADEMARK PROTECTION AND PRACTICE § 9.01[1] at 9-1 - 9-2 (1984).

12. Madrid Convention, art 2, 27 Stat 958, T.S. No. 385; Paris Convention, *supra* note 6, art. 3, 21 U.S.T. at 1631.

13. Madrid Convention, *supra* note 12, art. 11.

14. 1 GILSON, TRADEMARK PROTECTION AND PRACTICE, § 9.01[1] at 9-2 - 9-3 (1984).

tage of the Madrid Convention by applying to register its marks in the name of a subsidiary domiciled in a Madrid Convention country. The principal disadvantage to this approach, however, is that the registration cannot later be assigned to the U.S. parent company if, for example, the registrant is dissolved.¹⁵ In addition, experience suggests that many companies are reluctant to permit their subsidiaries to be registered owners of their trademarks.

Thus, although the United States is a party to two major multilateral intellectual property treaties, it is not a member of any treaty providing for multinational trademark registration. Thus, having determined, based upon appropriate trademark searches, that a mark is available for its international use, a company interested in international protection will usually have to embark on a program of applying to register the mark on a country-by-country basis.

III. SELECTION OF MARKS

The first step in developing rights in a mark is to select one that is as distinctive as possible and that does not infringe the rights of others. Although the legal standards applied in foreign jurisdictions vary, the distinctiveness, or strength, of a mark depends on two primary factors. The first is the inherent distinctiveness of a mark. Coined terms such as Xerox are the strongest and descriptive words and generic terms are the weakest.¹⁶ An example of a descriptive mark for a computer is "User Friendly"; examples of generic terms include "spreadsheet" and "microcomputer." In addition, a mark can be weakened, or diluted, if similar marks are used, even for unrelated products or services.

If foreign use of a mark is likely, or even possible, a number of steps should be taken in selecting a mark to ensure its protection in foreign jurisdictions. First, before a mark is adopted and foreign trademark applications filed, advice as to the registerability of the mark in target jurisdictions should be obtained. For example, from this author's experience, the trademark authorities in the United Kingdom, Japan, West Germany, and Switzerland, to name a few, are more likely than the United States Patent and Trademark Office to reject certain marks on the ground that they are descriptive. In these countries, as in the United States, a descriptive mark can only be protected if it can be shown that through large and substantial use, the public has come to associate the mark with a single

15. Madrid Convention, *supra* note 12, art. 9bis.

16. 1 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, § 11:1 at 433 (2d ed. 1984).

source.¹⁷ International trademark counsel may succeed in identifying such potential difficulties and in recommending solutions, such as use of the mark in conjunction with a logo, to enhance its registrability in foreign countries.

Where a mark is likely to be used internationally, it is advisable to retain a multilingual specialist or translation service to determine whether the proposed mark or its phonetic equivalents have negative connotations in countries in which it is likely to be used.¹⁸ For example, when Exxon Corporation commenced use of the ENCO mark in Japan, it discovered that a phonetically similar Japanese word is used to describe a disabled car along the roadside.¹⁹

Perhaps most importantly, a company considering adoption of a mark should have the mark searched. A trademark search canvasses various sources to determine whether others are likely to object to the use or registration of the proposed mark. Trademark searches vary widely in thoroughness and corresponding expense. While no trademark search provides an absolute guarantee that a mark will be available, such searches are a valuable tool for identifying potential problems before incurring the expenses of advertising and attempting to protect the mark.

The most thorough means of clearing a mark internationally is to conduct country-by-country searches. These searches are supervised by local counsel in the countries where the proposed mark is to be used. There are three primary advantages to this approach. First, country-by-country searches are the most thorough searches available. Second, local counsel can assist in identifying potential linguistic difficulties associated with use of a mark, and in framing the search request so that it takes into account phonetic variations on the proposed mark that may not occur to an English speaker. Finally, local counsel is in a position to advise as to whether marks disclosed by the search are likely to pose an obstacle to use or registration of the proposed mark under the law of the jurisdiction in question. Because the legal standards applied in each country vary widely, such advice can be enormously helpful.

Of course, country-by-country searching can be a relatively expensive undertaking. Accordingly, it may be advisable to develop a more limited search plan. For example, if a company has relatively

17. See generally, Campbell, *Trademark Searching in the United States and Abroad*, 82 PAT. & TR. R. 245 (1984).

18. 1 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 11:5 at 442 (2d Ed. 1984).

19. *Id.*

limited funds to devote to trademark searching, it is possible to limit searching to include a full search in the United States and certain key foreign jurisdictions, which would be the anticipated principal markets for the product such as Japan and selected Western European countries. At the same time, it may be advisable to conduct a less thorough, preliminary search covering additional countries. Most U.S. search firms offer preliminary international searches for marks having a close prefix similarity to the proposed mark. These searches typically canvass registrations in many European countries, Canada and Japan. Other preliminary searches canvass registered marks in European and African nations, as well as marks registered under the Madrid Convention.²⁰ While a preliminary search does not provide assurance that a mark is registrable in the jurisdictions covered, it does help to identify obvious obstacles to use of a mark abroad.

IV. FOREIGN TRADEMARK REGISTRATION

Rights in marks are territorial in nature, and protection of marks outside the United States is based on the laws of the various countries in which protection is sought and certain treaties discussed above. Thus, a company's acquisition of trademark rights in the United States does not give it any rights outside the United States.²¹

The importance of foreign trademark registration to the acquisition of rights abroad cannot be overemphasized. Under United States law, rights in a mark are developed primarily through use of the mark in connection with a trade or business; consequently, the first to *use* a mark has the right to prevent others from subsequently adopting and using marks that are likely to cause confusion.²² In contrast, in many countries, priority of rights in a mark is accorded to the first to apply to register the mark, and *not* the first to use it.²³ In addition, in most countries, use of a mark is *not* a prerequisite to filing an application to register the mark. Indeed, according to the United States Trademark and Appeal Board, only the United States and the Philippines, whose trademark law is modeled after the Lanham Act, require that a mark be used as a condition to filing an

20. See *supra* text accompanying notes 10-14.

21. See 1 GILSON, TRADEMARK PROTECTION AND PRACTICE § 9.01 at 9-1 (1984).

22. See, e.g., *Hanover Star Milling v. Metcalf*, 240 U.S. 403 (1915).

23. See, e.g., Japanese Trademark Act, Article 8.

application to register the mark.²⁴

The absence of a use requirement as a condition of registration, coupled with a rule of priority based on filing, creates grave risks for a company seeking to market its products internationally without having filed appropriate trademark applications. Under these circumstances, the company may discover that others may have succeeded in registering its marks, thereby subjecting it to liability for trademark infringement for the use of its own marks. Such third parties sometimes are unrelated, but more typically they are actual or prospective distributors of the U.S. company's products. In one particularly notorious instance, Dr. Robert Aries, an American expatriate living in Paris, succeeded in registering EXXON, CHEMEXXON, PETROLEXXON, EXXTRA, TRUSTBUS-TEXXON, NADEREXXON, and EXXON PROVENCE in a variety of trademark classes in several foreign countries.²⁵

Consequently, it is crucial that U.S. exporters develop a program for filing applications to register their trademarks for appropriate classes of goods and services in appropriate countries before beginning to market their products internationally. In the first instance, it is advisable to file applications in all countries that are expected to contain major markets for the product. The importance of filing promptly cannot be overemphasized, both to take advantage of the Paris Convention priority rules described above, and to reduce the possibility that others will attempt to acquire rights to the mark by attempting to register it first. In this regard, it is especially important that appropriate applications be filed before contacting potential distributors for foreign territories. Indeed, if a product has begun to enjoy significant success in the United States, it is prudent to file trademark applications immediately in anticipation of subsequent entry into foreign markets, even if no immediate plans for foreign sales have been developed.

In all foreign nations, as in the United States, marks are registered by class according to the goods or services for which they are used. The United States is a signatory to the Arrangement of Nice Concerning International Classification of Goods and Services to Which Trademarks Apply.²⁶ As its name suggests, the Nice Arrangement establishes an international classification system for the purpose of trademark and service mark registration. Those classes

24. *Crocker National Bank v. Canadian Imperial Bank of Commerce*, 223 U.S.P.Q. 909, 917 n.31 (T.T.A.B. 1984).

25. *See*, 1 GILSON, *TRADEMARK PROTECTION AND PRACTICE* § 9.01[5] at 9-7 (1984).

26. *TRADEMARKS THROUGHOUT THE WORLD*, Appendix C (Trade Activities 1986).

that are most relevant to the goods and services offered by computer companies include: Class 9, Electrical and Scientific Apparatus, which includes computer hardware and software; Class 16, Prints and Publications, which include user and other technical documentation; Class 37, Construction and Repair, which include hardware maintenance and software support services; and Class 41, Education and Entertainment, for user training. For countries that are not parties to the Nice Arrangement, local laws and regulations must be consulted to determine the appropriate classification for registration purposes. Typically, countries that are not members of the Nice Arrangement have much more complicated classification systems with numerous categories of products and services which entail filing applications that cover multiple classes of goods. For example, the Republic of China has 103 classes for goods alone, as compared with the 42 classes of goods and services provided under the Nice Arrangement.²⁷

In developing a program for foreign protection of a mark, it is important to note that many countries do not permit registration of service marks. For example, the Japanese Trademark Act has no provision for service mark registration. In the United Kingdom, service marks became registrable on October 1, 1986.²⁸ In countries where service marks are unregistrable, registration must be limited to the goods on which a particular mark is used. Even if a company is primarily a provider of services, it is often possible to identify goods on which it uses its marks. For example, a computer service bureau frequently provides customers with written documentation, thereby raising the possibility of registering its marks for prints and publications.

The unavailability of service mark registration in a particular jurisdiction does not necessarily mean that service marks are completely unprotected in that country. Under the Paris Convention, of which most industrialized nations are members, member countries are required to provide some form of protection for service marks, but need not provide for service mark registration.²⁹ In these jurisdictions, the remedies available to service mark owners are likely to be based on related theories, such as fraud or the common law action for "passing off." In general, it will be much more difficult for the service mark owner to prevail under these theories.

27. Compare Tsai, *Trademarks in Taiwan*, R.O.C., 115-19 (Saint Island 1983) with TRADEMARKS THROUGHOUT THE WORLD, Appendix A (Trade Activities 1986).

28. United Kingdom Trade Marks (Amendment) Act 1984.

29. Paris Convention, *supra* note 7, art. 6 series.

As is probably apparent from the foregoing, a program for worldwide registration of a mark is relatively expensive, and indeed prohibitive for many companies. Where entry into foreign markets will be more gradual, however, it usually is possible to design a foreign filing program that provides adequate protection at a cost that is affordable to the smaller company. The first step is to file appropriate trademark applications in the United States. Within six months after those filings, corresponding applications should be filed in countries representing the principal anticipated markets for the products. Ordinarily, the targeted markets will be Paris Convention countries. It is also advisable to file promptly in countries where counterfeiting is likely to be a problem, such as Taiwan, Singapore, Thailand, Hong Kong, Mexico and Brazil. As the foreign market for the product expands, applications to register the mark may be filed in additional countries, taking care to ensure that the applications are filed in a country well in advance of the expected market entry in that country, and in any event, prior to contacting potential distributors in that country.

V. PROPER USE OF MARKS INTERNATIONALLY

Although trademark rights in most foreign jurisdictions are based primarily on registration, proper use of marks is essential to the maintenance and enhancement of those rights. The following is a review of the most important rules that United States companies should keep in mind with respect to use of their marks in foreign countries.

While use is generally not a prerequisite to registering a mark, in most foreign countries the unexcused failure to use a mark for a specified period may endanger registration of the mark. The specified periods of time generally range from one year to five years, with three years as perhaps the most common.³⁰ If the mark is not used, the registration is subject to cancellation for nonuse. Accordingly, companies should carefully maintain records of their use of a mark in each jurisdiction, such as copies of pertinent invoices, in case the need to demonstrate such use later arises.

Many countries, particularly those whose legal systems are based upon the British model, require that an authorized trademark licensee be registered as a registered user with the appropriate trademark authorities.³¹ Compliance with this requirement in-

30. TRADEMARKS THROUGHOUT THE WORLD, Appendix B, Table 9.

31. *Id.* at Appendix B, Table 10.

volves the filing of a registered user agreement signed by the trademark licensee.

Registration of trademark licensees as registered users is typically intended to serve a number of policies. First, such agreements help to document and verify that the licensor exercises appropriate control over the quality of goods or services offered under the mark. If a licensor does not exercise quality control, the public may be deceived by resulting differences in the quality of products marketed by different parties under the same mark. Consequently, in most countries, including the United States, a trademark licensor's failure to monitor and control the quality of products sold by its licensee can cause it to lose *all* rights in the mark.³² Second, in countries where nonuse of a mark is grounds for cancellation of a registration, failure to comply with registered user requirements may prevent the owner of a mark from relying on use of the mark by its licensee to avoid cancellation of the registration. Finally, registered user requirements serve to confirm the ownership of the mark, both as between the licensor and licensee, and as among licensor, licensee, and the rest of the world. By providing that the licensee's use of the mark inures to the licensor's benefit, registered user agreements clarify the rights of licensor and licensee as between themselves. Additionally, they provide a means by which members of the public may verify the ownership status of a mark and the relation between the owner of a mark and its user.

A potential pitfall for U.S. trademark owners with respect to use of marks in foreign countries involves the use of trademark notices and legends. In almost every country it is unlawful to falsely suggest that a mark is registered. Consequently, a U.S. company should be very careful in using the same promotional materials or packaging in foreign countries that were originally developed for use in the United States. Where the U.S. company's mark is registered in this country, such materials commonly will include the "registered" symbol to indicate that the mark is registered. Use of this form of notice in foreign jurisdictions, if the mark is not registered, can result in the loss of *all* rights in the mark, and may subject the user to criminal sanctions. In some jurisdictions, even the use of the "TM" form of notice commonly used in the U.S. to indicate an unregistered mark may create a risk of running afoul of this prohibition against false indication that a mark is registered. Consequently, it is advisable to consult with local counsel regarding the

32. 1 MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 18:15 at 833-35 (2d ed. 1984).

proper form of notice in each country. If compliance with notice limitations on a country-by-country basis is impractical, it may be preferable to omit trademark notices, since in most countries, their use is optional.

VI. ENFORCEMENT OF TRADEMARK RIGHTS IN FOREIGN JURISDICTIONS

Enforcement of rights in a mark is a key element in protecting the goodwill associated with it. Indeed, one of the key benefits associated with developing goodwill in a mark is the ability to prevent others from taking a free ride on that goodwill. In some countries, failure to take action against infringers can lead to a finding that the trademark owner has abandoned the mark, resulting in a loss of all rights in the mark.³³

The most valuable sources of information regarding infringement overseas are local distributors and licensees who are actually marketing products in a particular jurisdiction. Such local trading partners should be encouraged to monitor the marketplace for infringements and to report any such infringements that come to their attention. They usually are quite cooperative in this regard, as the prevention of infringement is in their interest, as well as that of their suppliers or licensors.

There are companies (such as "The CTS Group" with an office in San Francisco as well as several in Asia) which provide services designed to assist in protecting intellectual property rights in foreign countries, particularly in Asia. These companies offer a wide variety of services, including monitoring authorized producers for quality control purposes and for the purpose of ensuring that they do not engage in unauthorized or unreported sales of trademarked products. Many of these companies also offer investigative services with respect to actual or potential infringement matters, including monitoring the marketplace for infringing merchandise.

It is also wise to monitor pending trademark registrations in key foreign jurisdictions, with a view to opposing the registration of confusingly similar marks. In the United States, many law firms will monitor trademarks published for opposition in the *Official Gazette of Trademarks* published by the Patent and Trademark Office. Firms in many foreign countries offer similar services.

A discussion of the numerous difficulties typically encountered by United States trademark owners in protecting their rights abroad

33. *Id.*, § 17:5 at 777.

is beyond the scope of this article. Suffice it to say that the peripatetic nature of infringers, variations in local substantive laws, the relative lack of sympathy sometimes encountered by United States trademark owners in foreign courts, and differing concepts of timeliness and efficiency among foreign counsel and judicial systems can combine to make the foreign enforcement of trademark rights a trying experience. Nevertheless, conscientious and well-publicized enforcement efforts are necessary to protect the goodwill that becomes associated with a mark as a result of substantial investment developing a market for products marketed under the mark.

VII. CONCLUSION

Successful marketing of products in foreign jurisdictions requires a significant commitment of resources. To help protect the investment associated with entry into foreign markets and establishment of goodwill in those markets, U.S. companies should develop a plan for the international protection of their trademarks and service marks. Although differences in local laws and customs pose numerous pitfalls for the American exporter, careful planning in conjunction with international trademark counsel can help to avoid many of the more commonly-encountered difficulties.

