Hungary
Hongrie
Ungarn

Report Q188

in the name of the Hungarian Group
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Conflicts between trademark protection and freedom of expression

Questions

1) Analysis of current legislation and case law

1.1) a) What instrument of your law (eg. Constitution) guarantees the right to freedom of speech?

The law that does guarantee the right to freedom of speech is the Constitution of the Republic of Hungary (Act No. XX of 1949, as amended, hereinafter referred to as the Hungarian Constitution).

b) What does the right to freedom of speech include? Is both artistic and commercial speech protected? If so, does commercial speech have a different degree of protection?

Article 61(1) of the Hungarian Constitution provides that everyone has the right to freely express his opinion, and to access and distribute information of public interest. This very broad concept does cover both artistic and commercial speech, provided such speeches are within the basic meaning and contents of the fundamental right to freedom of speech.

c) Are also corporations or only individuals entitled to invoke freedom–of–speech arguments?

Both individuals and corporations would be entitled to invoke freedom of speech arguments.

d) Is free speech only protected from unwarranted governmental interference, or is it also implicated when a private party calls upon a court to enforce rules of law whose effect would be to restrict or penalise expression?

The concept laid down in the Hungarian Constitution would make the free speech argument applicable in both cases that is, regardless if it is an insupportable govern–mental interference or possible restriction of the right based on private initiative.

1.2) a) How are free speech interests invoked in trademark litigation?
b) Is there a provision in your trademark law which specifically concerns the admissibility of e.g.:

- *criticism of another's mark or derogatory reference to another's mark;*
- *parody, satire or irony;*
- *artist's use of another's mark;*
- *using another's mark as a badge of loyalty or allegiance;*
- *using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product*

to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use is understood as involving a non–trademark use in which case the question of freedom of speech does not arise).

There are no such provisions in the Hungarian Trademark Act.

c) *If no such provisions exist, how are free speech interests invoked in trademark litigation? Is there an "open end clause" or "fair use clause" in your trademark law which permits taking into account freedom–of–speech–arguments? If not, are there any other gateways in your trademark law to permeate free speech concerns? Or do courts apply freedom–of–speech arguments directly with reference to the constitution?*

We are not aware of any trademark litigation where respondents put up a defense based on the free speech concept. Since the Hungarian trademark law does not deal with this issue in any respect, it would be up to the courts to apply directly the Constitution, if such issues arise.

d) *How much discretion do the courts have in applying free speech concerns?*

They would most likely be exercising their discretionary rights with balancing proprietary rights and justification of the free speech arguments on a case–by–case basis.

1.3) *If there are trademark infringement cases in your country where defendant primarily sought to attack a company's ecological or employment policy, commercial practices and the like, do these cases also address the application of rules prohibiting defamation such as libel and slander or do they focus on the tarnishment of plaintiff's trademarks only? (The National Groups are not expected to elaborate on their country's laws prohibiting defamation.)*

We are not aware of any such cases.

1.4) a) *If you consider the trademark infringement cases in your country in which freedom of speech–arguments were invoked what are the criteria applied by courts for determining whether a freedom–of–speech argument is justified? How important is the reputation of the trademark in question? Does it matter whether the use of the trademark in question is non–commercial or may free speech–arguments also be invoked if the trademark use is mainly commercial in nature? Does it matter whether the use of the trademark involves an expression or social discourse of objective/considerable value or a contribution to the public debate? Is the defendant allowed to express his views in a trenchant way? Or is the defendant required to report in a balanced way or even sparingly?*

If necessary, please differentiate between:

- *criticism of another's mark or derogatory reference to another's mark;*
- *parody, satire or irony;*
- *artist's use of another's mark;*
- *using another's mark as a badge of loyalty or allegiance;*
- *using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product*

to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech (please specify in case use is understood as involving a non–trademark use in which case the question of freedom of speech does not arise).

Please see 1.3.

b) *Specifically, please describe how joke articles are assessed.*

There is no specific assessment in the Hungarian law as to joke articles within applic–ability of the freedom of speech concept.

c) *May using another's mark as a badge of loyalty or allegiance be considered as an exercise of the constitutional right of freedom of speech? Does it matter whether the scarves and other goods are sold to consumers? Does it matter whether the manufacturer indicates that the goods are not original?*

It may, as long as there is no commercial interest in such expression of ones loyalty.

d) *To the extent that such use may be considered as an exercise of the constitutional right of freedom of speech please specify the cases in which the defendant is entitled to use another's mark for the purposes of comparison, point of reference, description, identification or to convey information about the characteristics of defendant's own product.*

The Hungarian Trademark Act of 1997 sets out certain limitations of trademark protection, including but not limited to using another's mark for the purpose of identifying the goods or services, provided such use of the mark comply with the honest business practices requirements (Article 15).

In addition of trademark law related limitations to trademark protection, the Act on Business Advertising Activity (Act No. LVIII of 1997) provides that in case of legitimate comparative advertising the holder of a trademark shall not be entitled to contest the use of his trademark in the comparative advertisement on the basis of exclusivity, if such use is appropriate, if it is essential for the purpose of comparison and if not used excessively (Article 7/A (4) of the Act No. LVIII of 1997).

2) Proposals for adoption of uniform rules

2.1) a) *Should free speech interests be invoked in trademark litigation?*

As outlined under 1.1), the Hungarian Constitution formulates the freedom of expression rights very broadly, thus invoking free speech interests in trademark litigation could in principle be allowed. However, taking into account the fundamental difference between the legally protected interests in case of the constitutional right to freely express one's opinion and the right to trademark protection, it does not appear either well founded or practical to establish a direct link between these two different legal institutions. Trade–mark infringement cases should be assessed and decided upon the rules and regulations governing trademark law. The main question would be whether use of a trademark occurred in the course of trade, i.e. whether the mark was used "as a mark", and if so, and provided other criteria of trademark infringement are established, there should be no room for considering free speech interests in trademark litigation.

b) *If so, should there be provisions in trademark law which specifically concern the admissibility of e.g.:*

- *criticism of another's mark or derogatory reference to another's mark;*
- *parody, satire or irony;*
- *artist's use of another's mark;*
- *using another's mark as a badge of loyalty or allegiance;*
- *using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product*

to the extent that such use should be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use should be understood as involving a non–trademark use in which case the question of freedom of speech does not arise).

No, we do not believe that trademark law should address and deal with any of these issues, merely because of the above reasons (please see 2.1.a).

c) *Or should there be an "open end clause" or "fair use clause" or any other gateway in trademark law which permits taking into account freedom–of–speech–arguments? Or should the courts apply freedom–of–speech arguments directly with reference to the Constitution? How much discretion should the courts have in applying free speech concerns?*

Courts should apply freedom of speech arguments directly with reference to the Constitution, but not in trademark litigation (please see 2.1.a. and 2.1.b.).

2.2) *In cases where defendant primarily seeks to attack a company's ecological or employment policy, commercial practices and the like, should these cases be addressed in the context of a potential tarnishment of the plaintiff's trademarks or should rules prohibiting defamation such as libel and slander be applied?*

This is an interesting question, and the answer would again depend on circumstances of each and every case. Generally, criticizing a trademark owner's policy towards ecology or employment, or its commercial practices, provided there is no confusion between the signs used and no commercial message is conveyed would usually be allowed within the freedom of speech rights. On the other hand, exercise of these rights could not be boundless, and it should preferably be avoided that circumstances of particular cases amount to a crime or tort of a libel, which could then invoke applying rules prohibiting defamation.

2.3) a) *Should there be limits to free speech in a trademark infringement context?*

As outlined above (in particular answers under 2.1.a) and 2.1.b) our view is that whenever there is trademark infringement, there should be no applicability of free speech in trademark litigation.

b) *If so, what should be the criteria be for determining whether a freedom–of–speech argument is justified? How important should the reputation of the trademark in question be? Should it matter whether the use of the trademark in question is non–commercial or should defendant also be entitled to invoke free speech–arguments if the trademark use is mainly commercial in nature? Should it matter whether the use of the trademark involves an expression or social discourse of objective/considerable value or a contribution to the public debate? Should the defendant be allowed to express his views in a trenchant way? Or should the defendant be required to report in a balanced way or even sparingly?*

Please see 2.3.a).

If necessary, please differentiate between:

- *criticism of another's mark or derogatory reference to another's mark;*
- *parody, satire or irony;*
- *artist's use of another's mark;*
- *using another's mark as a badge of loyalty or allegiance;*
- *using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product*

to the extent that such use should be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use should be understood as involving a non–trademark use in which case the question of freedom of speech does not arise).

We do not see any particular reasons to differentiate between these options, apart from the comparison issue. As outlined in 1.4) d), use of another's mark for comparison, point of reference etc. would basically bet not considered as exercise of the right of freedom of speech, but as legitimate use within the limitations of trademark protection, depending on circumstances of each case.

c) *How should joke articles be assessed?*

Please see the answer under 2.3.a).

d) *Should using another's mark as a badge of loyalty or allegiance be considered as an exercise of the constitutional right of freedom of speech? Should it matter whether the scarves and other goods are sold to consumers? Should it matter whether the manufacturer indicates that the goods are not original?*

It could, provided such use is not for profit. In context of this question it would be irrelevant, of no importance whatsoever whether the goods are original or fake.

e) *To the extent that such use should be considered as an exercise of the constitutional right of freedom of speech please specify the cases in which the defendant should be entitled to use another's mark for the purposes of comparison, point of reference, description, identification or to convey information about the characteristics of defendant's own product.*

Please see the explanation under 1.4.d).

The Opinion of the Group

In its Resolution to Question Q168, AIPPI had observed that "there is a wide variety of activities which may constitute trademark infringement, not all of which require use of the infringing mark *as a mark"*, and resolved, that among others, use of trademarks by fan clubs and supporters as well as use of trademarks in parody should be subject to the same analysis as other trademark use. The Hungarian Group is in full acceptance of these principles.

At the same time, we are of the opinion that whenever exercise of right of freedom of speech in relation to and against trademark rights is confusion free and non–commercial there would be no trademark infringement. However, this would not mean that freedom of speech arguments could not be applied directly with reference to the Constitution in civil and/or criminal law actions.

Summary

The Hungarian Group believes that the conflict of freedom of speech and trademark rights should be dealt with on a case–by–case basis. In each case where there is a commercial use of a trademark, where the trademark has been used as a mark, defendant should not be allowed to invoke freedom of speech arguments. However, should there be no commercial use, litigation should not be considered as a trademark infringement case, and trademark owner should avail himself of civil or criminal law remedies available where defendant could invoke freedom of speech arguments in direct reference to the Constitution.

Résumé

Selon l'avis du groupe hongrois le conflit entre la liberté de parole et le droit conféré par la marque déposée doit être traité cas par cas. Dans tous les cas où une marque déposée est utilisée commercialement, où la marque déposée est utilisée comme une marque, il ne devrait pas être permis au défendeur d'invoquer des arguments de la liberté de parole. Cependant s'il n'y a pas d'utilisation commerciale, le litige ne doit pas être considéré comme un cas de contrefaçon et le propriétaire de la marque déposée peut avoir recours aux moyens du droit civil ou criminel disponibles quand le défendeur invoque des arguments de la liberté de parole en se référant directement à la constitution.

Zusammenfassung

Die Ungarische Gruppe ist der Ansicht, dass der Konflikt zwischen Redefreiheit und Markenrechte immer in jedem Fall einzeln behandelt werden sollte. In jedem Fall wo es um kommerzielle Benutzung der Marke geht, wo das Warenzeichen als Marke benutzt wurde, sollte es dem Beklagten nicht erlaubt werden mit der Redefreiheit zu argumentieren. Falls keine kommerzielle Benutzung der Marke stattgefunden hat, sollte das Streitverfahren nicht als Markenverletzungsfall betrachtet werden und der Markeninhaber sollte sich auf zivilrechtliche und strafrechtliche Mitteln beziehen und der Beklagte könnte die Redefreiheit unter direkter Bezugnahme auf die Konstitution zur Hilfe rufen.