Human rights
in the practice of OHIM

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Overview

• Procedural rights
• Equal treatment
• Property rights, public interests and other rights
• Consumer rights
Legal basis

1rst Thesis:
The first source of fundamental rights is the Community trade mark Regulation (CTMR) itself.
Sources of human rights

- CTMR
- the EU Treaties,
- the Charter of Fundamental Rights (ChFR),
- the Convention of Human Rights
- general principles of the Member States.
Procedural rights

• Second thesis:
• Procedural fundamental rights are of primary, very day importance in our daily work.
Procedural rights

- **Article 41 ChFR – good administration**
- Right to be heard (Article 75, 37 CTMR)
- Reasoned decisions (Article 75 CTMR)
- Impartial examiners (Article 132 CTMR),
- Fair proceedings,
- Timely decisions (enforcability? ISO)
- Language of the Treaties when writing to Institutions (Article 120 CTMR?, CJEU Kik).
Fair trial

• Third thesis:
• Every party to proceedings before the Office has the right to effective remedy before a Tribunal, ...
Fair trial

• Every party to proceedings before the Office has the right to effective remedy before a Tribunal, ...
• except the Office itself!

• The Boards of Appeal are independent, but no Tribunal (‘quasi-judicial’),
• BoA decisions may not be appealed by OHIM,
• OHIM is not obliged to defend the position of the Boards.
Equal treatment

• 4th thesis:

Equal treatment does not apply in the examination of absolute and relative grounds for refusal.
Are these signs descriptive indications?

- GOLF USA,
- Volks.handy,
- Deutscher Ring Sachversicherungs AG
Equal treatment

• Article 20, 21 ChHR

• Absolute and relative grounds for refusal
  – bound decisions
  – no binding effect of wrong decisions

• Procedural discretion? Then self binding effect of administration (not the BoA?!)
• 5th thesis:
• Trade marks are very strange objects of property, compared to other assets.
Property rights

• Art 17 ChHR: Trade marks (and their applications) are objects of property.

• Peculiar nature:
  – No creative effort,
  – Life cycle:
    • Application,
    • publication,
    • Registered or unregistered,
    • 5 years after registration,
    • 10 years after filing,
    • immortal.
Balancing property – public interests

• 6th thesis:
• Property rights v public interests (Art. 17 ChFR)
• Public interests are well defined in the list of absolute grounds for refusal (Art 7(1) CTMR).
Property rights and public interests

• principle: application is a property right,
• Exception: public interests

• Absolute grounds for refusal (Art 7 CTMR)
  – E.g. Public order and accepted principles of morality
  – E.g. Descriptive indications must be refused because of competitors’ interests in free access to descriptive indications
  – E.g. Freedom of expression
Property rights and public interests

- 7th thesis
- Public interests are not well protected in the context of relative grounds for refusal.
Likelihood of confusion?

Earlier Community trade mark
Property rights and public interests

– No competence of OHIM Opposition Division to examine absolute grounds for refusal.
– But Opposition Division must define the scope of protection!
– Problem: Public interests in certain languages?
Solidarity with whom?

- 8th thesis:
- Actual confusion is just an indication of ‘likelihood of confusion’!

- Should Trade mark law be about consumer protection?
- Art. 38 ChFR: Union policies shall ensure a high level of consumer protection!
Consumer rights

• Art. 38 ChFR: Union policies shall ensure a high level of consumer protection!
• Political fundamental right (‘solidarity’)
• Pure consumer protection instruments:
  – Unfair business directive,
  – Pharmaceutical products,
  – Health claims regulation,
  – Publicity restrictions,
• But: what about trade mark law?
Trade mark law in principle is not about consumer protection.

- Consumer orientated examination,
- but:
  - The reference consumer is reasonably well-informed and reasonably observant and circumspect,
  - relative grounds examined not examined ex officio,
  - Guarantee function? The market decides!
Guarantee function hardly protected.

– Free transfer of trade mark without enterprise,
– No obligation for licensor to supervise quality of licensee’s products.
– The main function of a trade mark is the function of origin.
Summary

• Procedural rights are well protected.
• Equal treatment is not always guaranteed.
• Public interests limit right of property – but not always sufficiently.
• Trade mark law is not about consumer protection.
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Thank you for your attention!