TRADEMARKS, BRANDING AND BUSINESS GROWTH

Introduction

Definition of Intellectual property rights –> industrial property rights –> trademarks

From all living species, humankind is characterized by the brain as the source of intelligence leading to creativity and inventiveness. Without this organ, imitation and simulation will prevail and no further human creations and developments will occur. Indeed today, the survival of a human or an enterprise or a nation depends largely on their capacity to create to invent and to produce.

Thus, intellectual property rights, as the products of human mind, constitute the most important right and they are ranked in the top of rights. They allow humankind as a creator to benefit from his own work. It is a legal aspect or manifestation of a parental relationship between the humankind working as a creator and the fruit of his mind investment in a creation.

Need for protection

Intellectual property (IP) refers to the legal frame organizing creations of the mind: in a general meaning, IP means legal rights which derive from intellectual activities in the industrial, scientific, literary and artistic fields. Set of assets related industrial, scientific, literary and artistic fields such as inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

IP belongs to Human rights and Article 27 of the Universal Declaration of Human Rights is reserved for these rights. According to it, the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions is recognized.

IP is divided into two major categories:

Copyright: mainly covers literary and artistic works such as written works (novels, poems) or oral (presentation, conferences) and plays works (theatre plays, audiovisual works (films, radio work) musical works (song, instrumental), artistic works (for example drawings, paintings, photographs and sculptures, and architectural designs, maps, technical or designs models, plans, software and databases. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

Berne Convention for the Protection of Literary and Artistic Works (1886) has recognized the importance of these rights and tried to give a harmonized system of protection of these rights on the international level.

Industrial property: essentially covers inventions (patents), industrial designs, trademarks and geographic indications of source; Paris Convention for the Protection of Industrial Property (1883) is the first and important legal text organizing on the international level these rights.

Tunisia / Egypt / Ethiopia

Tunisia – important - example article 6bis for well-known trademarks

Industrial property rights are also divided into two categories:
- **Innovation and creativity rights**: mainly we find patents, industrial designs, utility models, plant varieties

- **Distinctiveness rights**: mainly we find trademark, trade name, geographical indication,

Among the above IP rights, for the needs of the current presentation, my focus will concern Trademarks since it occupies a foremost position in industrial property rights leading to business growth especially in developing and less developed countries.

➢ **What is a trademark?**

Very broadly, it is sign or symbol linked to a product or a service.

- verbal (with examples)
- device (with examples)
- compound (with examples)
- traditional (with examples)
- non traditional (tested, sound, smells)

**Conditions of trademarks**

- available
- distinctive
- legal

**Three kinds of marks:**

- Manufacturing mark: the sign or the service used to distinguish products of industrials or manufacturers

- Trademark: signs or symbols used by traders on products goods which are not produced by him. He just commercializes these products. Generally they are used in distribution chains (hypermarkets Carrefour since 1976)

Nowadays, the manufacturer is in same time a trader: the same entity produces and commercializes thus the same mark is manufacturing and trade mark.

- Service mark the signs or the symbol is used not to cover a product but to cover services such us services provided by hotels, restaurants travel agencies, transport companies....

For the purpose of this presentation, I will use a functional definition of a trademark:

A trademark is a distinctive sign that identifies certain goods or services produced: It is sign used by a trader or a manufacturer or service provider in order to:

- Distinguish their goods or services from competitors’ services or products.

- To create before consumer an intellectual link between them and the product or the service

➢ **How can be differentiated with other neighboring distinguishing rights?**
- **Trademark and trade name:**

  Trade name serves to distinguish companies from each other however trademarks distinguishes products or services of these companies. Then, a company has a unique trade name but the company may have several trademarks.

  Trademark can be in the same time a trade name of the company especially if the trade name of company becomes famous (cars companies)

- **Trademarks and geographical indication:** functional difference: the first links the product or the service to the owner. However, the second links the product or the service with a geographical zone which offer specific characteristics usually:

  - A quality due to that region environment or soil notably agriculture products (Tunisian examples: Harissa du cap bon, olive oil chaal, deglet nour, France: Roquefort, gruyere, champagne Bordeaux” for wine produced in the Bordeaux region of France etc.

  - Or specific manufacturing techniques, traditions, arts or skills (Swiss watches) developed over the time in that region.

Legal deference: The owner of a trademark uses it exclusively. Geographical indication can be used by any producer who shares the quality or the skills in the place designated.

⇒ **Evolution of trademarks function**

  Its origin dates back to ancient times. First reference to trademarks finds its origin in middles ages and then trademarks progressively evolved especially in France and Italy by some craftsman and traders who get used more and more to engrave or put their names on their products.

  At that time, trademarks were divided into two categories according to how they were used.

  We find a first category of trademarks of sealing (the trademark was sealed on the livestock) this presented a primitive use of trademark because in reality it is not a trademark since it does not provide trademark rules linking these assets to consumers. It was merely a seal making a reference to the owner of these cattle in order to avoid confusing them with other cattle or to dissuade thefts from stealing them.

  Second category: trademarks of production they were essentially used by craftsman and traders to show to buyers the maker of the product and consequently to guaranty its quality through linking the product to famous craftsman and trader.

  The modern trademarks

  Over the years, these marks have evolved into today and following industrial revolution and the expansion of world trade and due to changes in economic systems trademarks play a major role in the chain of production, and commercialization of various goods and services with different specificities but of the same category.

  Exhibitions and trade fairs played an important role to develop trademarks since traders and manufacturer were compelled to use different trademarks to help consumers to distinguish and select various products of the same category when they are displayed for sale in a fair.

  With the development of trade which became a system for commercializing wide range of products of different competitors.
Nowadays, trademarks evolved to become a tool which helps consumers to identify and purchase a product or service based on its specific characteristics and quality and helps them to find and meet their needs.

Through these different definitions and during these stages of evolution of trademarks, it is clear that a trademark has played and continues to play a role which became crucial over the time. This role evolved from simply differentiating products of various craftsmen to become nowadays one of the most valuable assets in the company. Indeed, in nowadays immaterial economy the value of a company goes far beyond its physical assets due to the value of its trademarks (Apple, Coca-Cola etc).

Today, trademarks are an important factor that may help in achieving business growth for a company or even for a nation economy.

Before dealing with how trademarks play a role in boosting business growth, we need to define business growth.

The narrow meaning: on individual or enterprise level, business growth can be defined as the process of improving some measures of an enterprise's success such as boosting the revenue by greater products sales or by increasing profitability by minimizing costs (www.businessdictionary.com).

More broadly, in the nation economy, it means a positive change in the level of production of goods and services by a country over certain period of time (www.investwords.com).

Through this presentation, we will see that trademarks are an important asset to contribute to the business growth either by boosting revenues or by minimizing costs:

I - Business growth on the company level

1 - A trademark can be the best advertising tool for the company: The mark becomes identity of the company and its products or services. Thus, if a trademark becomes identity of a company, it will stick with consumers and company is not required to recourse to a big budget for advertising itself when deciding to enter a new market. The notoriety of the trademark will be the window from which the company will reach new markets and new consumers without spending huge amount for advertisements.

Since the first and the essential mission of a trademark is to allow consumer to recognize a particular product or service and to distinguish it from similar products and services belonging to other competitors, a trademark plays an important role in engraving and tailoring the image of the product or service in the mind of the consumer.

Trademarks as a tool to advertise the company: People start identifying a company by its logo. Thus, creating a fantastic trademark is a crucial step toward building and growing the company business.

Trademarks as a tool to advertise the product or to the service: in communication field, it is commonly highlighted that a trademark plays an emotional role. Nowadays, consumers
are more and more enchained by trademarks. A good trademark helps to make the product attractive and appealing; hence, it adds to the commercial value of a product and increases its marketability. Increasing the product markability conducts to more appeal for the product by consumers and this will push the company to produce more to answer these needs and in general to its business growth.

Consequently, the trademark itself consolidates and even may substitute promotional campaign in orienting consumers to a product or a service. Indeed, by playing such advertising role, a trademark will answer double concerns of the company: attracting more clients and saving some advertising budgets. In both cases, a company due to its popular trademark among consumers will develop its productivity and ensure a business growth in the marketplace.

2 - **Trademarks offer additional legal measures to save company expenses and investments:**

A company invests huge amounts to make its new products answering quality high standards and consumers requirements. To make these products reach the targeted consumers, it is necessary to advertise these products. Now promotional activities are very costly for the company. All these amounts invested became vulnerable and can be easily lost if another competitor mislead and deceive consumers as the origin of the products through an unauthorized use of the products.

Most of countries adopted an arsenal of laws to fight against counterfeiting. These laws, through enforcing rights of the owner of the trademark, allow the latter to preclude and dissuade other from counterfeiting his products and services. Thus, trademark, through the laws protecting it, offer a legal protection to the product bearing the trademark and consequently ensure its continuous displays for consumers with the same quality and safety. Consequently, a trademark helps to protect company sales and increase its productivity and save jobs with the company which will be in continuous development to meet the consumers’ needs → trademark contributes to its business growth.

Unfair competition also can be of great help as a legal set of rules organizing fair competing in markets. However, in our opinion and according to our experience in practical cases occurred in Tunisia, laws relating to trademarks protection are more efficient due to the fact that in developing countries and due to the fact that companies and economy in general are of small or medium seize counterfeit is a threats more than unfair practices.

In addition, companies decide often to attack their competitors on the basis of trademarks law since proving and evidencing counterfeiting is easier than proving breaching unfair competition rules.

3 - **Trademarks help in paying back investment spent:**

When a trademark is protected, the owner is granted an exclusive right to use it and a protection against unauthorized copying or imitation of the trademark by third parties. This helps to ensure a fair return on investment made by the company to make new products, to commercialize and marketing them and in general any investment spent to promote its image and its reputation before consumers.
4 - Trademarks make the company managers vigilant and adopting updatable strategies:

Today’s economy is more and more uncertain. It is changing everyday (fashionable economy). The policy makers of the company shall adapt their strategies relating to production, marketing and investment to the changes in the market in order to keep their position. Thus, the necessity to keep their trademark looked for by consumers, leads company’s managers to adjust their policies either to recourse to a:

- A branding strategy based on avoiding running with the existing trends and moving with the common culture.
- A branding strategy based on doing things different, creating new brands and new trends daring and competing crazily

Whatever strategy that will be considered, the most important thing here is that this debate and vigilant watch of the perception of the trademark by the consumers in a changeable market will push the leaders of the company to take decisions aiming to keep a trademark in continuous success and consumers’ appeal:

5 - Trademarks offer additional source of financing

A - Auto-financing:

a- Trademark assignment contract: For some companies which own several trademarks, assigning one of these trademarks to another company against an agreed price offers to the assigner an opportunity to obtain immediate funds which can be of great help to the company to finance its planned projects and then the obtained cash money may enhance its business growth.

b- Contracts of licensing: a contract by which the owner of the trademark called licensor permits to another party called licensee to use the trademark on the products or the service produced or provided by the licensee in the territory of the licensee and for an agreed period.

If both parties reach an agreement they sign a document called license contract” which sets the conditions of the grated license (exclusivity, territory, duration, quality control, confidentiality, counterfeiting fighting, jurisdiction and conflicts of law, recordal).

Among these terms and condition, a particular focus concerns this dealing with the amount of money to be paid and its modality (it can be a fixed sum or a lump sum).

Licensor through concluding the contract of license will obtain an additional source of financing the company.

c - Contracts of franchising: It is a contract by which the owner of the trademark provides as franchisor technical information, know-how, reputation to a second party called distributor or franchisee that makes investment and special décor and re-looking the premises to be fit to the reputation of the trademark. Thus it is a combination of the reputation of a trademark with investments.

A good example where a trademark through a contract may help to business growth:

The franchisor will get further source to finance the company owner of the trademark
The franchisee: Even if he invests to prepare the premises and even if he pays money against the franchise contract, he will receive many benefits: will obtain goodwill on a ready trademark which plays immediately its main role: appeal new consumers.

B - Bank credits

A successful trademark is a mirror which reflects the success of the enterprise and this consolidates the confidence of financial institutions (banks, insurances, investments companies) and negotiating with them becomes easier and loans are granted easier. Thus, a strong trademark helps the company manager to obtain finances to the planned projects.

5 - Co-branding may profit for companies

A co-branding agreement involves two or more companies acting in cooperation to associate any of their logos. The main object for this agreement is to combine the strength of two brands. In most cases, the two companies form an alliance to work together and to create marketing synergy.

A co-branding agreement may be profitable to a company since in most cases; there will be conditions to be respected by it and which are related to quality high standards. Thus, both companies have interest to not breach these high standards otherwise the contract will be terminated.

Consequently, a co-branding agreement which imposes to each party to not damage the reputation of the trademark of the other partner will impose them to do their utmost to not breach it.

→ Trademarks’ reputation:
  - compels each partner to comply with quality high standards
  - to make the other control the process of manufacturing and the methods used to produce
  - to exchange know-how, productions techniques, commercial secrets etc

→ Business growth

II - On the level of country economy

A trademark benefits consumers and the economy at large, compelling company managers to adhere and to recourse to business growth ingredients and standards by promoting fair competition and honest trade practices, encouraging creativity and promoting more aesthetically pleasing products and services.

The need to keep the memorable and reputable trademark before its clients and to keep the trademark in a leading position, compel the policies makers of the company to respect rules and standards which are fundamental for business growth as follow:

1 – Trademarks as an ingredient for fair competition and investment enhancing:

Trademarks help to promote economic development by encouraging companies to more invest and to more create and design products in order to keep their leading position in
the market place and to defend their powerful and memorable image that is connected and stuck before consumers due to the success of their trademarks before consumers. This enhances competition between different companies → bringing value to the marketplace → competing others and engaging to provide useful products and services worthy of the reputation of the trademark → leads to stimulate the economy of the country.

2 - Trademarks as an ingredient for fair competition through compelling to act ethically and trustworthy

A - Behave ethically: Maintaining good image for a trademark before its consumers imposes on the company to behave ethically and to show that it respects those consumers.

In case of accidents, to save the image of the trademark, the company shall takes ethical measures such as:

- acting quickly to remove dangerous and/or offensive products from the market
- limiting the impact of these accidents by acknowledging that a mistake has been made
- committing to remedying the issue
- communicating updated press releases to keep consumers informed of the development of the case.

Behaving ethically helps to send the message that consumers’ health and interests are more important for the company than profits.

→ Recent case: mineral water in Tunisia (isolated analysis shown the existence of a microbe. Not dangerous, isolated in a sole sales point, isolated concerning a unique batch but the company has decided to withdraw all the bottles produced that day and made necessary press release. In reality, this company has double concerns:

  - its own consumers
  - its partners since it has products under license

B – To be a trustworthy business partner

Co-branding leads to mutual respect of the concerned trademarks through imposing high standard to save them before consumers and not to impact negatively their reputation.

In addition, acknowledging of every company contribution, further guarantee for transparency and working honestly to ensure that the reputation of partnership business stays positive.

→ Some cases of successful co-branding experiences in Tunisia

3 - Trademarks as a good stimulus of consumption:

A faithfulness relationship between the consumer and products of services depends on the image of that product or service before consumers. It is proven by theories of modern economy, that an emotional relationship with a product or a service raise before consumer every time that product or service provide him with a high quality and meet consumer’s specific needs and expectation.

Then, since a consumer who likes a certain product or service will buy it again, it becomes necessary for the manufacturer or for the service provider to distinguish the service or the products from similar products or services in order to make it easier for the
consumer to recognize and find its popular product among the other displayed for sale in the same shelf of market.

4- Trademarks lead to commit to innovation: this engagement concerns either start-up companies or longstanding companies:

For start-up companies: a trademark is a source of inspiration and innovation: To get a place in a market where several operators are competing, the company needs to offer new products. Company shall invest in innovation to make different product and service. Or without being commercialized the company will fail to make profit from the new product. Trademarks may offer a key for the requirement of being distinct and different and consequently, helps the new product to reach consumers.

For old companies with popular brands, sometimes the market shifts to another product that suddenly renders previously valued products obsolete. This is important especially in trademarks linked to new technologies fields (telecommunications, internets etc) where losing a leading place may happen from a day to another → in order to save that popular trademark, the owner of the trademark has to innovate continuously its products and shows its skills in the latest technologies.

5- Trademarks help to enhance job recruitment

In order to keep a position in the marketplace, an owner of trademark shall be in continuous competition. This imposes on the owner of the successful trademark:

- To hire more employees to answer the increasing productivity especially those skilled and having competences and capacities to make the genuine products known before consumers as providing the requested quality.

- To create special team or allocate a special department (especially when the trademark is sustainable or legendary) and to invest in:

  - Consumers communication (collecting consumers needs, web content, press release, continuous and omnipresent advertising).

  - Market researches (competitors’ strategies, consumers’ trends).

  - Performance evaluation (statistics, analysis, review, recommendations).

- To promote its employees through meeting their professional needs:

  ✓ Implement bonuses, employee awards, or other programs that help workers to feel valued and appreciated.

  ✓ Offer advancement and professional development opportunities. Create professional development plans that include continuous training.

→ Continuous upgrading → leads to stimulate the economy of the country.

6 - Trademarks as Breaking-down globalization negative impacts:

Due to Globalization phenomenon, the world became a small village which is mainly characterized by the following features:

- wild competition where no boundaries between marketplaces
- the existing of the company is bound to producing more and to exports their products to other markets

- in increasing role is given to immaterial economy

Intangible assets, at their head we find trademarks; play foremost role is played by face to wild competition and the need to enhancing productivities and in the age of immaterial economy.

Trademarks reduces the negative impacts of globalization and its challenges through offering the link consumer-product even if the company is in country and the consumer is in another country.

Provide legal tools to clean overseas markets from counterfeited goods and this ensure productivity of the company, its life, and its expansion and business growth

→ Trademarks contribute to the expansion of commercial activity and the export of national products.