Comments on WIPO “Draft Questionnaire on Nation Brand Protection in Member States”

Emerging Issues Committee

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Introduction

The International Trademark Association (INTA) welcomes the opportunity to provide input concerning the “WIPO Request for Draft Questionnaire on Nation Brand Protection in Member States” which was published on May 18, 2020.

The questionnaire is a good initiative to understand the global landscape. However, any positive answers about existing “nation brands” must be carefully analyzed to determine if they have any real legal effect or are, in many cases, mere tourism slogans. Indeed, if countries began to assert rights in their names without any legal basis, thousands of trademarks which incorporate geographical terms or country names themselves could be invalidated.

The major issue for the draft questionnaire is the need for an expanded definition of what is meant by a “nation brand”, since historically this has been a marketing concept, not a property right belonging to a particular government or its designee.

Country names are not protected under Paris Convention 6ter (only visual insignia are such as flags or crests), there is no “sovereign” right to the country name under international law, regulatory or indigenous or other rights, and no legal concept for protection for these signs except under generally accepted intellectual property (“IP”) law, i.e., trademarks, service marks, certification marks, collective marks, geographical indications, or indications of source. All of these IP rights are tied to goods and services, not the country itself. For example, the “nation brand” SWISSNESS promotes SWISS MADE goods such as watches and services such as banking. In fact, the word SWISS can be a trademark for airlines, a geographical indication for watches, and a generic term (in many countries) for a type of Emmental-like cheese. However, the Swiss Confederation itself is not the “brand owner”. Many countries would protect misbranding as under general unfair competition, customs, or unfair trade practices, such as “GERMAN sausage made in France”.

Specific Comments

Question 1 needs a thorough reworking and expansion. The concept of “nation brand” is not a legal one but a marketing one aimed at increasing global interest in a country and its benefits. The inventor of the word “nation brand” in 1996, Simon Anholt, an Oxford anthropology graduate and former advertising executive, created the so-called “Nation Brand Hexagon” shown below showing the six elements of the “brand”, if it can be called that legally (“brands” are usually thought of as linked to a trademark).
A quick review of the hexagon reveals this approach is not an IP analysis, but is a method for determining the reputation and attractive power of a country. Specifically, the concept of the “nation brand” is tied to the power of a country name (or related indicia) to attract attention based on its ability to convey certain concepts such as culture, reputation, and market position. Thus, the “Nation Brand Hexology” is focused on uses of a “nation brand” to attract tourism or encourage investment and does not account for traditional trademark uses by governments or private entities. Notably, the “Exports” section of the “Nation Brand Hexology” is qualified by specifying the “public’s image of products and services” of a nation rather than the sources, compositions, or qualities of those products and services specifically (emphasis added).

**Question 2:** This question assumes that a country is the only entity which can develop a nation brand, yet later questions discuss other possible owners such as individual tourism agencies, manufacturing cooperatives, etc. It may be appropriate to expand the initial question to account for use by government agencies, private entities, etc. to ensure that the four tick boxes are not overlooked.

**Question 3:** This question presumes a policy. A better question would be IF there is a policy reason, what is it?

**Question 4:** This question seems adequate, but “communication” of 6ter protection is not always required for 6ter protection. In addition, it may be appropriate to add a further question as 4(d) requesting information about any protection schemes for other indicia as detailed in our feedback above concerning question #1.

**Question 5:** This question seems adequate.
Question 6: This question seems adequate, except for the definite article “the” – this assumes that a nation can have only one brand. There could be numerous nation brands.

Questions 7-30: These questions seem adequate. The only general comment is that other signs which are not “nation brands” but do include a country’s indicia such as flags, names, etc., have been left out, such as geographical indications using the country name or insignia. In addition, it may be appropriate to include language similar to that proposed for questions #1 and #4 in the interest of capturing information regarding protections for other indicia such as informal names, abbreviations, slang, region names, etc. because such issues have been routinely raised during SCT meetings.

Conclusion

Overall, the questionnaire appears to be a good first step in understanding the extent to which any sign claiming to be a “nation brand” is protected nationally and internationally. The central problem with the current draft is that it is not clear exactly what is being asked.

Should you wish to further discuss any of the points raised or additional issues, please contact INTA’s Representative to WIPO, Tat-Tienne Louembe, at tlouembe@inta.org