The Role of Law, the Role of Reason and Intellectual Property: The Passing of Time and the Sense of the Rules

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Our times are marked by a continuous loss of credibility of the law in the world and in Europe. Law is one of the major inventions of mankind, and, thanks to the long, clever and wise activity of the Roman culture, it has evolved for more than two millennia as a key pillar of civil coexistence. Even after losing, quite early, the sanctity it had in its initial phase, law has been a real treasure for the European peoples for centuries. And (it is easy to understand why) the need for law increases along with the growth of the world population.

Nevertheless, the last decades have seen a comprehensive and troublesome deterioration of the confidence of European people in the Law. A remarkable reduction of the spontaneous compliance with the Law is noticeable everywhere. The causes are numerous, and not all of them are easy to detect. I will mention at least two of them: the rules are too many; and the rules are not always rational and reasonable, so that people cannot easily sympathize with them.

I do not know whether, in such a crowded and complicated world, it could be possible to seriously reduce the number of rules. Perhaps not. But it is possible to increase the rationality and the reasonableness of the rules. This is up to us. And this is, in my view, very important. Literature tells us (suffice it to remember the name of Franz Kafka) that compliance with senseless rules is absurd; it is something *per se* not demandable. Senseless rules call for evasion. Governments, parliaments, academics, cultural élites (if any) should be aware of this. If we lose the law, the coexistence of women and men will be much more difficult. The fallout of bad rules and of bad interpretations of law could be terrible.

The world, and Europe, need a project of “restoration” of the confidence in the law, a project aiming at reversing the present tendency – a tendency nobody today really cares much about. In all sectors of law, the process of lawmaking, that is the

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process of creation of new rules, and the process of interpretation and application of the law should increase dramatically in their level of rationality and reasonableness.

Law people, who are (or should be?) perfectly aware of this, should eventually react, and realize that bad rules and bad interpretations not only damage the limited objects they directly govern, but also contribute to discrediting the law, thus adding to a much more dangerous effect. My words may seem, and perhaps are, naive. Call it as you want, but without a new Enlightenment, the lives of our children will not be better than ours. On the contrary, they will be worse.

The problem, as I have said, touches all the sectors of law, including intellectual property law. In intellectual property law we witness various processes of creation of new bad rules, and there are some (or many?) good examples of existing bad rules.

As regards the creation of new bad rules, I will only mention the European patent with unitary effect. Professor Hanns Ullrich has recently shown that it would be easy to do better.¹ As to the existing law, I will provide just two examples.

Article 6 of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration says: “An appellation which has been granted protection in one of the countries of the Special Union pursuant to the procedure under Article 5 cannot, in that country, be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin.” In the same sense, Art. 13(3) of Regulation No. 2081/92/CE and Art. 13(2) of Regulation No. 510/06/UE say, simply, that “the denominations protected cannot become generic”.

Likewise, trade mark law considers the possibility of a registered trade mark becoming “generic”. Article 12(2)(a) of Directive No. 2008/95/EC states that “a trade mark shall be liable to revocation if [...] a) in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for the product or service in respect of which it is registered”. Article 51(1)(b) of Regulation No. 207/2009/EC on the Community trade mark is identical. Needless to say, also the national trade mark laws of the Member States provide for identical texts.

In these texts, the extinction of the trade mark right is not the result of the mere fact that the trade mark has become generic. Indeed, the extinction of the trade mark right requires that the trade mark becomes generic “in consequence of acts or inactivity” of the trade mark holder. This text is not particularly clear, but the interpreters tend to agree on the idea that if the holder shows his “activity” (i.e. if he continues to sue for infringement his competitors who use his trade mark, assuming that this use is legitimate in that the trade mark has become generic), he never loses the exclusive right. In other words, the trade mark holder can “buy” the survival of his trade mark, a trade mark that has already become generic, by simply performing absolutely useless judicial activities – useless, because his infringement suits cannot restore the distinctive character of the trade mark.

Women and men have always lived in an ever-changing world, and at least for 2,500 years, mankind has known that *πάντα ῥεῖ*, everything flows.

¹ See Ullrich, “The European Patent and Its Courts: an Uncertain Prospect and an Unfinished Agenda”, 46 *IIC* 1–9 (2015).

This applies to language as well. Languages evolve, and we know it well. Languages die and languages come to life, and none of them is fixed and immutable. We have special disciplines to study language, its history and its evolution. We are perfectly conscious that it is not our will that drives language, but a vast series of factors, many of which are not well known yet.

The above-sketched rules are a good example of the “ignorance” (or of the “arrogance”?) of lawmakers. Lawmakers act as if the world were always the same, as if the things we find in the world, including language, were always the same. Or they think that law can govern language, can interfere with, can change even, and possibly stop, the “natural” evolution of language. Lawmakers think it is possible simply to ignore the facts the law is called to rule, or that it is possible to change them, as if by magic.

The trade mark owner keeps an exclusive right on a word he could not turn into the object of a new registration. The whole series of reasons justifying the rule prohibiting the registration as trade mark of a generic word (reasons nobody has ever called into question) clearly run counter to the rule that saves the validity of the trade mark that has become generic, although the trade mark holder “resists”. This is nothing but an unjustified and unjustifiable, in my view, *cadeau* to the trade mark holder, and, consequently, an unjustified and unjustifiable obstacle to the activity of his competitors. Moreover, the rule stimulates the performance of useless activities by the trade mark holder (the trade mark will not recover its distinctive character), and motivates the creation of senseless lawsuits.

In the same way, the rule that simply ignores that geographic indications can become generic, and in fact become generic, is an unjustified and unjustifiable *cadeau* to all the producers of that “*milieu*”, which is no longer a “*milieu géographique*” in the sense of the law. Consequently, this rule poses an obstacle to the legitimate activity of all the producers of similar goods all over the world that cannot find a credible justification in the perspective of the general interest.

Both rules increase the monopolistic effect of the trade mark and of the geographic indication, without protecting something that could be considered of general interest. In the benefit-cost ratio we find only costs, and no benefits at all, for the general interest. The only parties benefitting from these rules are the trade mark holder and the producers in the territory indicated by the geographic name. It is not clear why these interests should prevail over reason and over the general interest.

Whether one agrees or disagrees with these ideas, one could certainly find many other examples of bad rules. It is important that we all denounce, without reservations, the existing bad rules and the prospective bad rules, and that we all try, without reservations, to cancel or to change them.