Disregarding Fair Competition Law: The Social and Economic Consequences

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1 Introduction

This essay may be provocative in that, beginning with a critique of the current precarious state of the legal system, it proceeds to apply fundamental ideas in one field of law, namely Intellectual Property Rights, to other fields of social interaction where the relationship between competition and the level playing field is poorly defined, and concludes with the problems encountered by the victims of neoliberal economic activities in the Third World in obtaining justice in the First. This paper has its starting point in the following two passages that appear in *La Raison du moindre État: Le neoliberalisme et la justice* by Antoine Garapon, director of the Institut des hautes études sur la justice (IHEJ). In his work, Garapon provides us with a remarkable and disturbing analysis of the impact of neoliberalism's ascendancy on justice and how the legal system is being transformed by neoliberalism into a matter of numbers, or as Garapon writes,

> L'efficité redéfinit l'acte de justice qui devient un 'produit' dans cette immense entreprise de services à laquelle est désormais assimilé l'État. Une telle valorization des chiffres risque d'avoir un effet pervers: rapatrier toute evaluation de la justice sur ce qui est measurable, c'est-à-dire sur le temps et sur l'argent ...[1]

Garapon criticizes the way in which neoliberalism presumes an inference between the legality of an action and the legitimacy of its results, and between the purity of intention and an absence of any blame for what has been the result of the action,

> La raison néolibérale est antitotalitaire car elle est antitotalisante. [...] Elle postule ainsi une présomption d'inférence entre la légalite d'une action et la légitimité de ses resultats, entre la pureté de ses intentions et l'absence de culpabilité sur ce qu'elle a produit. Il y a non seulement un lien mais une continuité entre le niveau micro d'une action humaine et le niveau macro de ses effets sur le monde.[2]

2 Trademark Law

Discussion regarding the underlying principles of trademark law, and by extension unfair competition law, is a field of jurisprudence that combines intimately the interest of the individual as a consumer and the company as a producer. It is a field that has experienced and continues to experience a noticeable expansion during the present neo-liberal ascendancy. Trademark law concerns itself to a great extent with *confusion*, and more specifically with the *likelihood of confusion* rather than actual confusion itself, as caused by various aspects of *misrepresentation* pertaining

[1] Antoine Garapon. *La Raison du moindre État: Le neoliberalisme et la justice*, Paris: Odile Jacob, 2010: 56.
[2] Antoine Garapon, 43.

to commercial transactions. As Bently and Sherman emphasize, within the domain of English law,

> [I]n deciding whether a misrepresentation has taken place the key concern is not with the state of the defendant's mind. Instead it is with the consequences of the defendant's actions and the effect that these have upon the public. [...] It does not matter that the defendant's representation is true, honest, or legitimate if it deceives the public.[3]

Furthermore, while evidence of actual confusion may well be significant,

> [T]he question whether there is a likelihood of confusion is ultimately decided by the court.[4]

Conviction is thus a result of the court's view of the likelihood of confusion occurring and thence of the offence of infringement, rather than as the result of any actual confusion having taken place. A decision regarding guilt is thus reached prior to the commission of an offence, and punishment allotted. This new task imposed upon the judiciary is a topic that is commented by Garapon in the context of the measures taken against terrorism,

> Le juge doit abandoner sa mission classique de pondérer les droits de celui qui est accusé et de la société qui l'accuse, pour prononcer un jugement de réalité sur la dangerosité. La gestion du risque n'appelle plus un raisonnement de proportionnalité, mais un calcul hypothétique, en rapportant une situation réelle à une probabilité ou à une intuition; il est à proprement parler 'dé-mesuré'. On entre alors dans le 'dogmatisme du probable'.[5]

While the laws regarding trademarks in the United Kingdom and United States differ on a number of points, as do the details of the laws regarding trademark infringement in different circuit courts in the United States, there also exist many similarities. There are a number of criteria established against which to weigh the factors that are relevant in confusion, such as the characteristics and size of the relevant public who may be confused, the point in time when confusion occurs, the importance of whether actual confusion can be proved to have occurred, the proximity of the fields of business of the claimant and the defendant, etc.[6] Nevertheless, seeing the process in the light of the above passage, we may note that similarities do exist. While terrorism and trademark infringement are far removed from one another, the necessity imposed of a hypothetical calculation regarding risk is inherent in both fields of law and is similarly complex.

By way of structuring and restricting a court's latitude in reaching a ruling concerning confusion, batteries of criteria and test have been established in trademark law. When discussing *likelihood of consumer confusion*, in their critique of a ruling, later reversed and remanded, of Sifton, J. in the United States District Court of the Eastern District of New York in *Virgin Enterprises Ltd. V. Nawab* (335 F.3d 141 (2d Cir 2003), Barton Beebe et al. comment at length on the factors applicable in United States Law.[7] What is striking however is that the unstated underpinning of the various factors and tests at the heart of trademark law may be summarized as being an overriding concern with asymmetries of knowledge on the commercial market-place. *Unfair competition* is rooted in imbalances in knowledge; the court is asked to decide whether

[3]Lionel Bently and B. Sherman. *Intellectual Property Law (Third Edition).* Oxford: Oxford University Press, 2009: 756.

[4]Bently, 759.

[5]Garapon, 104.

[6]For a list of factors, see Bently, 760.

[7]Barton Beebe, T.F. Cotter, M.A. Lemley, P. S. Menell, and R.P. Merges. *Aspen Casebook Series: Trademarks, Unfair Competition, and Business Torts.* New York: Wolters Kluwer, 2011: 174f.

this imbalance can create confusion, not whether it has. In the case that confusion is not viewed as being liable to occur, competition must necessarily be fair, and thus we arrive at the unusual concept of *'fair competition law'* that is used in the title.

Two recent cases of unfair competition, in which the decisions remain points of discussion, may serve to highlight the complexities of the *likelihood of confusion* concept. In Australia the erstwhile Swedish automobile manufacturer Saab made use of what is known as green marketing to launch a new vehicle in 2007. Among the claims was that since Greenfleet Australia, a company used by Saab in their marketing offensive, would plant seventeen native trees for every Saab sold, a green action that would offset one year's carbon dioxide emissions of the vehicle. However, elsewhere in the advertisement materials it was claimed that Saab had taken measures to offset the carbon dioxide emissions for the lifetime of the vehicle. This false representation was judged as sufficient to cause the possibility of confusion in consumers and thereby disadvantage Saab's competitors. Interestingly, a suggestion has been made that seventeen trees actually would be longer-lived than a Saab automobile, and that they in fact would indeed offset the carbon dioxide emissions for the lifetime of the vehicle.[8] Nevertheless, the court's decision stands.

In another recent and highly visible case the Europe Court of Justice (ECJ) in 2010 ruled on *Louis Vuitton v. Google* regarding Google's allowance of the trademarks of unaffiliated companies to be used in advertising links in Google's AdWords system. This case was of great importance since the major part of Google's revenue, or 22.9 billion US dollars out of a total gross revenue in 2009 of 23.6 billion US dollars, came from advertising. And it has been suggested that a major part of the advertising revenue derived from Google AdWords. The ECJ decided, as Stephan Bechtold summarises the ruling, that,

> A producer of fake LV products violates trademark law if his keyword-backed advertising link creates the impression that his products are actually produced, or at least authorized by LV.[9]

As Bechtold remarks, while the ECJ had settled the relevant points of law, it had failed to rule whether producers of fake products themselves infringed trademark law, since that would depend on consumer confusion, and such matters are not the concern of the ECJ but of the French national courts. With regard to Google's liability, the ECJ did not find that Google engaged in direct trademark infringement since it was not responsible for the trademarks selected by advertisers, but that it could be liable for secondary infringement. However, the European E-Commerce Directive of 2000 restricts the liability of information society providers. The question is whether the Google AdWords system is automatic and passive, or whether Google plays an active role in the selection of advertisements by its customers. In the end the ECJ refrained from ruling whether keyword advertising can lead to consumer confusion, among other omissions in its decision. These details were left to national courts to rule upon. What is clear is that in September 2010 Google revised its AdWords policy, and the member state courts would continue to rule as they had previously done, interpreting European trademark law in quite different ways.[10]

Fair competition law would presuppose a level playing field with equal access to information for all parties involved. According to *unfair competition law* when the general public, in the person of a number of consumers or a putative percentage of possible consumers (while never stipulated, it appears that the figure lies somewhere between 15%-20% of the *related public*), is

[8] Paul Sergius Koku and J. Ratnatunga. 'Green Marketing and Misleading Statements: The Case of Saab in Australia', *Journal of Applied Management Accounting Research (JAMAR)* 11:1, 2013: 1-7, and particularly note 4.

[9] Stefan Bechtold. 'Law and Technology: Google AdWords and European Trademark Law', *Communications of the ACM (Association for Computing Machinery)*, 54:1, 2011: 30-32.

[10] On the significant and often unresolved differences between the laws of England, Germany and the Netherland, see Rogier W. De Vrey. *Towards a European Unfair Competition Law.* Leiden: Martinus Nijhoff, 2006.

in the position of possessing less reliable knowledge than the producer or marketer of a certain product and, being unaware of its actual origin, is in the position of being more likely than not to be deceived by that producer or marketer and thus lead to believe that the product is something that it is not, *confusion* in its legal meaning may occur. In the case that the general public possesses sufficient knowledge so as to be able to make an informed choice, confusion cannot be considered to have occurred.

This brings us to the *general public* for whom the law is framed, and whose interests, along with those of producers, the law is intended to protect. As Bently notes the characteristics that ought to be attributed to the general customer are rarely discussed.[11] However, the ECJ has stated in 1999 that the average consumer is *'reasonably well informed'* and *'reasonably observant and circumspect'*. This further leads to the supposition that the general customer has enjoyed a degree of schooling and has access to such information as is generally available and is not risk-seeking in her consumption. There is thus no differentiation between consumers and, where confusion is concerned, all may be considered as equals concerning all purchases that do not require expert knowledge.

One of the most important avenues to social equality is equal opportunity to education. As Michael Lamport Commons of Harvard Medical School noted in 2008, "On the surface, it appears that a liberal market-driven economy incorporating informed consent should create a level playing field for everyone."[12] However, he identifies a range of issues that render this statement untenable, noting that, for example, "the playing field in free markets is often made unequal by variances in education and capital". Importantly Commons reminds us that,

> [C]lassical economics assumes that if all the consumers have access to information, that all consumers will be able to use the information (e.g. sufficient levels of literacy to read and understand it) [...] Similarly, the basic logic about providers of goods and services is, "If consumers choose for themselves, then providers are not liable as long as they have provided the information."

And towards the end of his essay, Commons makes the sobering statement, 'the institutionalization of informed consent actually exaggerates rather than minimizes the meritocratic effect of a market economy.'

In reality all consumers are not equally well informed. Indeed, all consumers are far from being equals. Referring to the United States government report *National Assessment of Educational Progress* (2004), Susan Neuman and Donna Celano write, 'Children in low-income families lag significantly behind their more affluent peers academically, socially, and physically.'[13] They continue to note that the gap caused by low reading skills has an insidious consequence, with 'differences in the amount, rate, and speed of gathering information from media sources lead[ing] to a growing knowledge gap.' And they refer to Gaziano who noted in 1997, based on a review of more than ninety studies, that there exists a 'persistence of *knowledge inequalities* across topics and research settings.'[14] We are very far from the theoretical view of the *level playing-field* as posited, for example, by Tim Lewens,

> Equal opportunity requires not only the elimination of legal and informal barriers of discrimination, but also efforts to eliminate the effects of bad luck in the social lottery

[11] Bently, 871.

[12] Michael Lamport Commons. 'Implications of Hierarchical Complexity for Social Stratification, Economics and Education,' *World Futures* 64, 2008: 432.

[13] Susan B. Neuman and D. Celano. 'The Knowledge Gap: Implications of leveling the playing-field for low-income and middle-income children', *Reading Research Quarterly* 41:2, 2006: 179.

[14] C. Gaziano. 'Forecast 2000: Widening knowledge gaps', *Journalism and Mass Communication Quarterly* 74, 1997: 237-264 (my italics).

on the opportunities of those with similar talents and abilities.[15]

3 The consequences of knowledge asymmetry

The final question that I would like to highlight is the difficulties experienced by those who are the victims of *knowledge asymmetry*, socially disadvantaged and risk discrimination in the courts, if it were not for the actions of perspicacious judges. La Oroya, which lies five hours from La Paz in Peru, was designated in 2007 by the environmental group the Blacksmith Institute as one of the ten most polluted places on earth.[16] The town is the site of an ore smelter that has been spewing out a toxic cocktail of heavy metals that has poisoned the inhabitants. A study carried out by St. Louis University in 2005 found that more than 90% of children from La Oroya had excessive levels of lead in their bodies. Furthermore, ambient levels of sulfur dioxide, the cause of acid rain, have been measured at 27,000 parts per cubic meter, or almost 100 times the limit established by Peruvian law.[17] The dire condition of the children's health has been documented in a recent major study.[18] The ore smelter has been run since 1997 by Doe Run Peru, a subsidiary of the Renco Group that is owned by the billionaire Ira Rennert. The smelter was previously run between 1922 and 1973 by the Peruvian company Cerro de Pasco. After being expropriated by the Peruvian government in 1973 it was run by the state-owned company Centromin until 1997.

Two nuns acting as the 'next friends' of 137 children from La Oroya brought a lawsuit in 2007 against Doe Run Peru that was later amended to a lawsuit against Missouri and New York corporations that are claimed to be the real owners, i.e. the Renco Group. The lawsuit alleges that the children have been exposed to and injured by lead released by a metallurgical complex in La Oroya. While this might appear to be a clear case of torts, lawyers for the Renco Group have argued that the case should be removed from the district court to the federal court claiming that the case, to quote the words of the very learned judge Catherine D. Perry, 'presents a federal question on its face under the federal common law of foreign relations because the lawsuit implicates the vital economic and sovereign interests of Peru.'[19] In her lucid discussion of the motion to remove the case, Judge Perry notes that 'The questions presented by the case are whether American defendants made decisions or took actions in the United States that cause the plaintiff's damages', and correctly dismissed the motion to remove the case to federal court.

Judge Perry has considerable experience in adjudicating motions to remove cases from the Missouri district court to other courts, for example the motion brought by Jiangsu Sopo Corporation to move *BP Chemicals v. Jiangsu Sopo* to a Chinese court,[20] and the motion by two Chinese plaintiffs to move their lawsuit *Wei Wu and Xiaoyuan Gu v. Ryder Truck Rental* to a federal court,[21] both of which she dismissed. Doe Run Resources, the Renco Group and Ira Rennert appealed against Judge Perry's ruling, claiming that the case should be removed to federal court since it fell under the Stock Transfer Agreement (STA) and was 'referable to arbitration'. The children contended that the lawsuit does not 'relate to' arbitration. The argumentation in this

[15] Tim Lewens. 'What are 'Natural Inequalities'?', *The Philosophical Quarterly*, 60 (No. 239), 2010:268.

[16] Greg Ryan. 'Nuns Sue Lead Co. Over kids' exposure in Peru', accessed at *www.law360.com/articles/362536/...* (20.07.2012).

[17] Simeon Tegel. 'In Peru, one of the world's worst polluters is set to reopen', accessed at *http://www.globalpost.com/dispatch/news/regions/americas/120227/peru-pollution-environment-doe-run-renco-la-oroya-smelter* (28.02.2012).

[18] Matthew K. Reuer et al. 'Lead, Arsenic, and Cadmium Contamination and Its Impact on Children's Health in La Oroya, Peru', *International Scholarly Research Network (ISRN) Public Health*, Article ID 231458, 2012: 1-12.

[19] United States District Court, Eastern District of Missouri, Eastern Division, Case No. 4:07CV1874 CDP (2008).

[20] United States District Court, Eastern District of Missouri, Eastern Division, Case No. 4:99CV323 CDP (2006).

[21] United States District Court, Eastern District of Missouri, Eastern Division, Case No. 4:08CV672 CDP (2008).

extremely complex case was discussed in detail by Circuit Judge Benton, who noted *inter alia* that 'the children do not invoke the STA anywhere in their complaint', and came to the correct decision that, 'The issues in this case are not referable to arbitration. The district court properly denied a mandatory stay', and affirmed the order of the district court.[22]

The first point to note is that without the judicial perspicacity of Judge Perry and Judge Benton, the case would have been transferred to federal court and significantly reduced the possibility of the children to obtain any redress again the pollutes of La Oroya. The knowledge required to reach such decisions was far-reaching. Secondly, Doe Run Resources is involved in further lawsuits concerning the effects of pollution on the health of people living in the vicinity of one of its complexes, in this case the lead smelter – the only one in the United States – at Herculaneum in Missouri. In this case seventeen children are suing the company in much the same way as the La Oroya suit. In this case too, referring back to asymmetry of knowledge, it is claimed that Doe Run was aware of the toxic nature of the lead poisoning but failed to act, or make the information available.[23] Thirdly, referring to Garapon's points concerning the legality of an action and the legitimacy of its results, and between the purity of intention and an absence of any blame for what has been the result of the action, Doe Run's spokesman in Peru is reported as having said, "The company has complied with all the relevant laws". However, according to Jose de Echave, a former deputy minister for the environment who now heads the non-profit CooperAccion, "The problem is the company is not transparent."[24] In other words, the company has not only failed to provide the necessary information to the related public in La Oroya and Herculaneum so that they could make an informed choice regarding residing in the vicinity of ore smelting complexes, but it has attempted to avoid responsibility for its commercial actions by transferring the La Oroya lawsuit out of the district courts and thereby reducing the torts component of the case.

4 Conclusion

As with trademark law, asymmetry of knowledge is at the heart of the La Oroya case. The risk of the denial of a level playing-field to those most seriously affected by neoliberalism's ascendancy and the threat of the compromising of courts stand out clearly as two of society's greatest concerns today. Failure to deal with the inference, identified by Garapon, that the legality of an action implies an absence of responsibility for the consequences of an action, particularly in the case that an identifiable knowledge asymmetry is present, risks resulting in entrenched inequality within the legal system for the foreseeable future.

[22] United States Court of Appeals, for the Eighth Circuit, Appellate Case 12-1067 (2012).

[23] Leah Thorsen. 'Lawsuits over Doe Run lead smelter could continue for years', accessed at *http://www.stltoday.com/news/local/metro/lawsuits-over-doe-run-lead-smelter-could-continue-for-years/article_415c0f78-03ee-5ed1-b533-75c1921ea038.html* (04.06.2012).

[24] Simeon Tegel. 'In Peru, one of the world's worst polluters is set to reopen', accessed at *http://www.globalpost.com/dispatch/news/regions/americas/120227/peru-pollution-environment-doe-run-renco-la-oroya-smelter* (28.02.2012).