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urban space at the example of London's
Regent Street and Paris' Champs-Élysées**

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Trademarks as Fictitious Commodities: An Erosion of the Public Interest?

An Assessment of the use of trademarks over urban space at the example of London’s Regent Street and Paris’ Champs-Élysées

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Abstract

With reference to Karl Polyani's notion of fictitious commodities we evaluate whether the protection of two worldwide known streets, namely 'Regent Street' in London and the 'Champs-Élysées' in Paris may be perceived as an erosion of the public interest and thus call for potential policy reformulation or reforms to substantive trademark law. The reasons for this choice are twofold: Firstly, the existing body of literature offers an in-depth discussion on the complex dynamics between the public interest and patents and copyrights, yet relatively little has been said so far on the correlation of the public interest and trademarks. Secondly, trademark protection over urban space is a recent phenomenon that has in and by itself not yet been properly grasped, neither from a policy, commercial or legal perspective. We conclude that the ownership structure of each of these two trademarks suggests that, contrary to intuition, it is the use of trademark protection rather than the renouncement from trademark protection that guarantees, at least in these two instances, the public interest. We contend however that the increased use of trademark protection over urban space does bear the potential for the erosion of the public interest and call upon policy makers to formulate guidelines in that respect.

Introduction

Since the TRIPS Agreement (the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights) entered into force, the intellectual property (subsequently abbreviated to IP) system reached a previously unknown claim to fame. Interwoven with an increasing critique of the further liberalisation of international economic activity on the terms of the developed world, IP rights have come to be seen, beyond the IP experts' community, as yet another illustration of how commercial interests prevail over the wider public interest.¹ Within that overarching rationale, International Political Economy (IPE) scholarship² in the post TRIPS era tends to treat the IP system as if it were a homogenous system, rather than a bundle of various forms of proprietary creative innovative expression. Patents within that context have come to be perceived as the *pars pro toto*³ for IP rights, to the extent that the two terms are used interchangeably. With respect to the preservation of the public interest patent/IP rights have come to be seen in an inconceivable dichotomy. Most interestingly, both critiques and proponents of the IP system seem to have accepted that it is inherently at odds with the public interest.⁴ While the most ardent critiques argue that patents may be blamed for 'impeding patients in need, particularly in developing countries, from obtaining urgently needed medication'⁵, proponents for the IP system equally seem to acknowledge that compulsory licensing and other forms of substantive patent law reforms may be the only way to assure the maintenance of the public interest.⁶ The TRIPS Agreement itself may be read as ample proof of this overarching rationale. 'The Doha Declaration on Public Health states: '...that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health.'⁷ It grants thus the right to the signatories of the treaty to both grant IP rights, but also withdraw these in cases where the preservation of the public interest may be at risk. The policy debate on IP and the public interest seems thus to be framed under a series of reductionist assumptions and therefore leaves way for policy formulation primarily under a 'weak' versus 'strong' IP protection dichotomy. Within this context, trademarks have so far been seen as 'uncontentious' and, if at all, their relationship towards the preservation of the public interest, been summarised under overarching parameters that may very well hold for patents but less so for trademarks, which follow a different legal and

economic rationale than patents and other forms of IP rights. While this may seem obvious to most working in the area of IP, it is far less obvious to those increasingly framing the IP debate at the international level.

By studying exclusively the use of trademarks over urban space at the example of ‘Regent Street’ in London and the ‘Champs Elysées’ in Paris, we discuss to what extent it is legitimate to argue that IP contributes to an increased erosion of the public interest and thus the further commercialisation of what is generally perceived as the public domain. In doing so, we fill a clear gap in the existing literature. Firstly, trademarks as a potential policy concern have so far passed unnoticed in the existing IPE literature, secondly, a more differentiated understanding of what constitutes the public interest in the context of trademark protection over urban space is needed and thirdly, the use of trademark protection for urban space has never been discussed in the literature at all, neither from a political, commercial or legal perspective. By presenting therefore, what is a very recent trend in the leverage of trademarks for an increased competitiveness of cities at the international level, we assess to what extent the competing interests between business and the public can and need to be addressed through cutting edge policy making.

The Economics of Trademarks

With IP rights being territorially limited rights, the TRIPS Agreement provides for the time being the only truly international framework for IP-based commercial exchange. Thus we refer for the purpose of this paper to trademarks as defined by this treaty. According to TRIPS Article 15, a trademark is defined as any sign that serves as a ‘marker’ for a given product or service:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.⁸

The definition provided by the TRIPS Agreement relies on the WIPO’s (World Intellectual Property Organisation’s) Paris Convention for the protection of industrial property. The TRIPS Agreement states that a trademark provides protection to the owner of the mark by ensuring the exclusive right to use it to identify goods or services, or to authorise a third party to use it in return for payment. The initial period of protection varies (under TRIPS it is seven years), but a trademark can be renewed indefinitely beyond the time limit on payment of additional fees. Trademark protection is enforced by the courts, which in most WTO member states have the authority to block trademark infringement.

These distinct legal features through which a trademark can be characterised produce a specific economic rationale for the exploitation of signs and institutionalise their usage at the international level. Mainstream IPE literature⁹ tends to describe the economic rationale of IP primarily through the prism of optimal resource production and allocation of knowledge goods and services. As trademarks do not protect knowledge/technology or R&D (Research and Development) but signs,

we argue that this approach may not be the best one to describe the entire spectrum of economic opportunities provided through trademark law. Trademarks have in common with other forms of IP protection that they can be seen as monopolies. The attribution of exclusive rights over a distinctive sign can stifle competition, especially from smaller companies and prevent new entrants from market penetration. Trademarks can however also be described as economic devices, which contribute to promoting market efficiency, achieved by enabling better information about products for the benefit of producers to maximise profits and allowing consumers to make informed decisions. Through a distinctive sign, producers can attract customers and maintain customer loyalty, while consumers are able to distinguish between products.¹⁰ Trademarks extend the ‘liability of producers’ and function thus as an ex-post regulation system since they offer an incentive for producers to avoid ‘opportunistic behaviour and deliver a higher level of quality.’¹¹ Trademarks have been most commonly used in commodity markets, where large corporations wanted to distinguish themselves in the market.¹² Yet, the application of trademark law to ever new areas suggests that both, users and usage of trademarks is expanding. In the case of trademark protection over urban space, trademark owners are not only businesses, but city municipalities and non profit organisations and their leverage forms an essential element of a city’s marketing strategy. Yet, what remains so far hardly explored in practice is that the economic rationale for a trademark goes beyond the scope of excluding others from using it. In the case of trademark protection over urban space, the trademark can take an enabling function by fostering the creation of clusters. The trademark can take the function of the identity creator that unifies the various businesses operating on a given street. Rather than compete against each other, the trademark over a given district, area or street can help the various firms realise synergies, which in turn decreases dependence on large firms, provides access to new markets and help improve the overall position of the cluster in the market. St. Moritz in Switzerland is a good example of a trademark over a place that has been used for exactly that purpose. Crucial in that context is however to mention that the trademark is owned through the local tourist association by the inhabitants of St. Moritz themselves.¹³

Trademarks as Fictitious Commodities

Polyani’s work explores the patterns of commodification and in particular those of ‘fictitious commodification’, which we see as being very much relevant to the interplay of the public interest and the privatisation of signs through trademark law. Polyani’s notion of fictitious commodities¹⁴ equally holds for the new economic order of the knowledge society.¹⁵ Even though Polyani did not address IP, his work has been used by IP scholars to depict the competing tensions between private and public interests caused by artificially constructed scarcity over products of the human mind.¹⁶ Yet, the scholarly work we examined in this respect led by Bob Jessop and Michael Perelman refers to the privatisation of knowledge through patents and copyright with no specific reference made to the privatisation of signs through trademark law.¹⁷

According to Polanyi, land labour and capital are fictitious commodities and so are now signs. A commodity is a ‘good or service that is actively produced for sale in a labor process...’, while a fictitious commodity is ‘not actually produced in order to be sold. It already exists before it acquires the form of an exchange, for example nature or urban space that evolved over centuries as a result of a society’s social and cultural history, or it is produced for use before being appropriated and offered for sale, such as human artifacts, cultural heritage.’¹⁸ By reading Polanyi we find that the traditional commodities of labour and land cannot be separated from society as they are ‘no other than the human beings themselves of which every society consists and the

natural surroundings in which they exist.’¹⁹ Including them in the market mechanism means ultimately to ‘subordinate the substance of society itself to the laws of the market.’²⁰ Polanyi does contend that labour, land and money are ‘essential elements of industry’, which require organisation through markets, but his argument is that they are ‘obviously not commodities; the postulate that anything that is bought and sold must have been produced for sale is emphatically untrue in regard to them.’²¹

Polanyi’s notion of fictitious commodities holds for trademarks, and particularly for trademark protection over urban space. A trademark ‘commodifies’ a sign by introducing the concept of private ownership. As a trademark helps a sign to reach commodity status, it is a thorough indication that the logic of the market is expanding not only to the tangible aspects of society, but increasingly so, to its intangible, immaterial and symbolic aspects.²² The trademark converts the intangibility of a place created through the brand into something with substance – a fictitious commodity. It is fictitious because a sign itself cannot be a pure commodity. Trademarks of place cannot exist separately from the place itself. The use of trademarks over urban space on the internet expands that fiction to the reality of the virtual world. Therefore a trademark is not only a fictitious commodity but also a means towards commodification. This is why Jessop²³ and Ishikawa²⁴ call IP ‘fictitious capital’ as it is a financial rather than material asset, which also holds for trademarks.

Certainly, Polanyi recognises that property rights are the element sine qua non for functioning markets. Like Smith, Schumpeter, Hayek and other IPE scholars,²⁵ he recognises that the privatisation of assets is an essential building block of functioning markets. Property rights need to be granted, adequately enforced by the state and market participants need to know for certain that what they own today, they will also own tomorrow, otherwise markets can not emerge. Yet, and here lies the inherent dilemma, what is beneficial for the creation of markets, is not necessarily beneficial for the maintenance of the public interest. The commodification of signs through trademarks causes tensions through the creation of fictitious commodities. This can be seen in how trademarks do not merely serve an economic purpose, but have social implications. Ramello and Silva call this a ‘divorce’ of trademarks from the goods they are supposed to represent through ‘gradually detaching itself from the product to take on a physiognomy and character in its own right, about to be exploited in various ways.’²⁶ The tensions and vulnerabilities inherent in a market based economy, call for policy consideration so to strike a balance between commercial interests and the wider public interest. Trademark law is constitutive of economic activity, which by consequence results in a re-contextualisation of the social and cultural realm of human interaction²⁷; expressed in a tension between the private and the public interest. Polanyi explains of fictitious commodities, ‘the fiction of their being produced became the organising principle of society.’²⁸ Within that context, Polanyi’s work has helped to ‘counter mainstream economic theory’s naturalisation of the market society,’ with the market being treated as ‘the optimal or default form of social organisation and the penetration of a market logic ever deeper into institutions and social life.’²⁹ We contend that in the Post TRIPS era this logic frames increasingly the state of international affairs.

Trademarks and the Public Interest

There exists an interplay between trademarks and the public interest for which a balance must be struck through reflected policy making. The notion ‘public interest’ in and by itself is a slippery concept.³⁰ Within the context of trademark protection over urban space, the public interest relates

primarily to the social and cultural aspects of economic exchange. The definition that most appropriately fits the purpose of this paper is rooted within welfare economics, which defines the public interest as the 'interest of individuals, promoted by free markets in which there is a voluntary exchange of goods and services with no market distortions, rather than the interests of privileged groups.'³¹ This definition helps make explicit the inherent tensions of economic prosperity, the potential social costs of trademark protection and the need for deliberate policy consideration in that respect. Singer et al reinforce this argument: 'contradictions inherent in democratic capitalism that tend to pit corporate or shareholder interests against consumers/citizens/employees have become starkly apparent and they are literally striking closer to home.'³²

Trademarks form an inherent element of commercial law, so by their very nature they give way to a stronger emphasis of business interests rather than other aspects of urban co-existence. Granting trademark protection over urban space reflects therefore a certain desire to provide a business environment that encourages economic prosperity: 'States still retain responsibility for legislating to support further economic development where necessary... yet... while intellectual property formally allows a balance between public and private rewards, generally it emphasises private benefits.'³³ Through the privatisation of what was originally in the public domain, the object of trademark protection experiences a shift in perspective. Keith Aoki explains that this is happening because 'private property rights are delegations of public power,' therefore, the process of enforcement also entails the enforcement of the owner's right to exclude others.³⁴ The de facto exercise of legal rights over signs associated with urban space illustrates that trademarks are taken as a norm, even when extended to new areas; such commodification is thus accepted even when fictitious. Trademark protection over urban space bears the potential towards a claim of private ownership over a sign of a place which gives rise to questions associated with legitimacy and democracy.

An inherent tension exists between economic prosperity and the public interest that is hard to resolve. We do however not argue that a potential solution to this challenge is the abolition of trademark law altogether or even the reform of substantive trademark law. The introduction of property rights over public space is not intrinsically eroding the public interest. With Max Weber we argue that property rights empower the owner.³⁵ The effects of public space becoming privatised are therefore hard to pin down but can be seen as part of a move in control. If rights are granted over creative expression and inventions that were originally in the public domain, the rightholder gets to choose what is to happen with these rights. Thus, if an institution opts for IP protection, it is equipped with an entire range of managerial opportunities it did not have before. To the contrary, signs left unmanaged in the public domain deprive the institution, be it public or private of this choice. The notion 'public interest intellectual property management' encompasses a range of strategic choices that the IP owner has at its disposal to relate property rights to the preservation of the public interest. Within the context of trademark protection for urban space these can for example be associated with the maintenance of public security or the effort to assure that shops on well known streets, such as Regent Street or the Champs-Élysées offer good value for money. Economic aspects of trademark protection, such as quality assurance, liability of firms operating on these streets and other ex-post regulatory systems do in and by itself contribute to a certain preservation of the public interest.

The granting of the trademark over urban space does in and by itself not constitute in our view a breach of a public interest bargain between the private and the public sector. What does constitute

that breach is the ill reflected management of the trademark. At the corporate level there is a need to ask how issues such as corporate social responsibility can be linked to IP management and at the public policy level it means developing a series of guidelines and recommendations on how trademarks over urban space need to be approached to assure that IP protection breaks the equation of continuing to economic growth, while at the same time avoiding an erosion of the cultural and social space associated with the domain of signs.³⁶ Yet, this bargain between private interests and social costs has so far not yet emerged as an imminent question within the context of trademark protection over urban space; which in and by itself is a very recent phenomenon.

Trademark protection over Urban Space

Trademark protection over urban space translates into the extension of property rights over the intangible aspect, the symbolism, the 'idea' of a place. The commodification of a sign characterising a given area in a city means that sign can be turned into some sort of tradable item or a currency in the commercial sense. Signs, inherently interwoven with the cultural heritage and history of a city, take through the introduction of trademark protection a commercial twist, which transforms the sign into a 'brand.' This brand is not only protected from competitors, but is given a formal packaging and the law is used to redefine the relationship of citizens towards urban space. In this sense trademark protection over urban space pays tribute to Hann who argues that 'property is a cover term for how human beings regulate their relations to the things which they value.'³⁷ Schiller equally asserts that no good or service is inherently valuable, but that it is the social organisation that turns these goods or services into something valuable,³⁸ redefining ultimately the social organisational process itself.

Potentially, this may be seen as yet another expression of a new international order. Why do places require value? At the local level it can be argued that branding is less necessary, closer interaction means that residents have a better knowledge of goods and services in their vicinity. The increased internationalisation of economic exchange translates into a growing competition between places for resources, business relocation, foreign investment, visitors and even residents.³⁹ As a result, branding, traditionally associated with corporate strategy, increasingly finds its use for what was previously perceived a public policy concern decoupled from commercial interest. With the separation between public and private, the scope of the study of international relations and business administration becomes more and more obsolete, best expressed in an IPE literature that is increasingly concerned with issues such as 'nation branding' or 'place branding.'⁴⁰ Yet, as Kavartzis and Ashworth put it there should be awareness that: 'places are not products, governments are not producers and the concept of citizenship goes further than that of a consumer.'⁴¹ Branding will target a 'particular set of uses and users'⁴² Places have more varied 'users', 'owners' and 'governors' than do commercial corporations,⁴³ thus the inherent controversy about trademark protection over urban space, which gives rise to the question to what extent business actors are overstepping their traditional realms by potentially claiming ownership over the signs associated with urban space. Kurt Iveson provides a definition of public space and describes why it is important:

Public space is most commonly defined in a topographical sense, to refer to particular places in the city that are (or should be) open to members of 'the public'...For many urban activists and scholars, access to such places is said to be vital for opportunities both to address a/the public and to be addressed as part of a/the public.⁴⁴

In spite of that, we caution to associate the notion of the ‘loss’ of public space through privatisation in an entirely negative way. Hayden argues that this is because, ‘the public domain is the invocation of public-ness as a space of non-commodified purity – of open access, of the absence of private property; of free flows.’⁴⁵ However, the issue must not be clouded by normative ideals, as Iveson acknowledges the ‘struggle for democratic urban space’ is an ideal and it is one that is ‘constructed rather than something lost that needs revival.’⁴⁶ Furthermore, as Mitchell argues, the ‘work of citizenship’ requires multiple spaces.⁴⁷ Thus, public space should not be singled out as an exclusive site for citizens to exercise democratic rights. In fact, it is difficult to even identify distinct public and private spheres in the first instance.⁴⁸ This should be kept in mind when looking at the two case studies Regent Street and Champs-Élysées.

Case studies

Regent Street



Fig 1: Regent Street⁴⁹

Trademark protection over a street is unprecedented. The trademark for Regent Street, the famous shopping street in the West End of London was filed in 2001 and subsequently granted in 2002.⁵⁰ To grasp to what extent it is legitimate to argue that this trademark does indeed protect the intangible aspects of Regent Street, it is helpful to take a closer look at the technical details of this trademark. The trademark is registered only in the U.K. and no international or even European wide protection has been applied for. In fact, a Spanish Tobacco Company holds trademark protection over ‘Regent Street’ in the Benelux Countries, France, Italy and Spain for tobacco related goods.⁵¹ Equally, the name ‘Regent Street’ is used for streets all over the world. There is a Regent Street in Wellington (Telford), Fredericton, (New Brunswick), North Sydney (Nova Scotia), Richmond Hill, (Ontario), Sudbury, (Ontario), Port Chester, (New York), Schenectady, (New York), Madison, (Wisconsin) and Philadelphia, (Pennsylvania). Even in Cambridge (U.K.) a Regent Street can be found. A trademark search with WIPO (World Intellectual Property Organisation) and OHIM (The Office of Harmonisation for the Internal Market, which registers the Community Trade Mark in the European Union) and the respective national IP offices in these countries suggests however that none of these streets have so far been protected as a trademark, in spite of the fact that several of these streets can equally be considered shopping destinations and may be, even though less famous, comparable in character and nature to the London based ‘Regent Street.’ Thus, it seems unlikely that Regent Street will be turned into a truly international mark and its interplay with the international political economy is reduced to setting precedence for other high-end retail destinations, which may equally need to explore how to strike a balance between commercial interests and social and cultural exchange. The potential for doing so is last but not least assured by the increased harmonisation of trademark protection. The Nice Agreement for the Classification of international trademarks (‘Nice Agreement’) to which the U.K., like France is signatory to, assures that the classification of goods and services that can be protected by a trademark at the national level is exactly the same at the international

level. This technical element, of the existing international political economy of innovation, grounds the argument of the feasibility of further expansion of the approach applied in this case study.

A closer look at the type of goods and services that are protected by the trademark 'Regent Street' manifests the argument that it is in fact the symbolic, cultural and social aspect of the street that has been turned into a property right. If for example, 'Regent Street' had been protected under class 1 'chemical uses in industry, science and photography', this would by no means constitute a protection of the immaterial aspects of one of the U.K.'s most renowned shopping, tourist and leisure destinations. 'Regent Street' is however protected under a whole range of classes that are very closely related to the type of cultural, social and commercial activities associated with the street. The trademark is protected in classes 14, 16, 21, 25, 35, 36, 41, 43, 44. Among these classes, protection in classes 44, 43, 41, 36 and 35 seem most striking. These entail 'public conveniences', 'cafeteria and restaurant services', 'entertainment services, sports and cultural activities, consultancy and information services' 'leasing, rental and letting services' and all 'services related to in-store retailing.'⁵²

The protection of Regent Street raises two questions. Firstly, how are the owners of Regent Street managing their trademark? Secondly, can we find any indications of an intention to preserve the public interest?

Regent Street was fairly quickly registered as a trademark, suggesting thus that the UKIPO did not deem the registration of Regent Street to be in any way conflictuous. The law firm that obtained trademark protection for Regent Street recognised however that there is a certain ambivalence with respect to the effectiveness of registering a trademark for a street: '...there is some legal doubt as to the effectiveness of registering a place name. We have taken the view that Regent Street is genuinely a distinctive location and commercial brand. We have not had any notice of opposition to this view.'⁵³ Regent Street is certainly not a newly created sign, but an essential element of London's cultural heritage and urban space. It is named after the Prince Regent (George IV). Created in 1825 it is commonly associated with the urban planner and architect John Nash, who designed Regent Street for primarily commercial purposes. The street can thus look back at nearly two hundred years of existence as a commercial high end destination. Equally, some of the cafes and shops like the Café Royal or Dickins & Jones can equally claim early 19th century establishment.

Concerning the management of the trademark and its interplay with the public interest, a closer look at the rightholder, its mission as well as its de facto leverage in the eight years of its existence is informative in several ways. 'Regent Street' is owned by Crown Estate and part of its £6 billion property portfolio within the U.K. The existence of an institution such as the Crown Estate is an apt illustration of the U.K.'s constitutional monarchy. Created in its present form in 1760, the Crown Estate manages the crown lands on behalf of the sovereign, but the revenues it generates are not given to the monarch, but to the Treasury. While the reigning monarch receives a fixed annual payment, 'the Civil List', the surplus revenues of the Crown Estate benefits the U.K. taxpayer. Like the crown jewels, the estate managed by Crown Estate is held by Her Majesty the Queen as sovereign, but not available for her private use.⁵⁴ Paradoxically, it is exactly this type of ownership structure that assures in this specific instance the preservation of the public interest. As the owner of the trademark for Regent Street is a public institution, the public authorities reserve the right to decide what is to happen with the name and in which

context this name is to be used. The representatives of the rightholder contend: 'the planned objectives of gaining trademarks status were to protect the positive perception and integrity of the Regent Street brand and related matters from persons seeking to unfairly associate themselves with the iconic street.'⁵⁵

The Crown Estate is adamant that the trademark protection of Regent Street only has positive effects on the public interest. Over the last decade Crown Estate has contributed £1.8 billion to the Treasury: 'By protecting our brands we enhance our income and thus we protect the interests of the U.K. taxpayer.'⁵⁶ In contributing to economic growth, the Crown Estate meets the objectives laid down for it by Parliament. This being said, the interests of Crown Estate are primarily commercial in scope and a study of its annual report, website, press releases and online presentations does not reveal any further concern for the wider social and cultural implications of its activities. One of the front pages of the Crown Estates Annual Report 2009 states: 'The Crown Estate is above all a commercial organisation' (Crown Estate Company Report). The language the organisation uses in its documents is strongly business oriented: 'We see the people and businesses that occupy and use our land and property as our customers.' Regent Street is primarily perceived as a 'shopping experience' and a 'premier retail destination that offers opportunity for dining and entertainment.'⁵⁷ The Crown Estate's management strategy for Regent Street shows that the street is continuously referred to as a 'product,' which as the website states, can be followed on Twitter.⁵⁸ Enhanced by branding and formalised through trademark protection, Crown Estate has used the legal protection necessary to turn a street name into a property.

'Retail location branding is an essential tool of the modern property industry. We made the decision to brand Regent Street as a distinctive location. Once the branding exercise had been done the relevant trademarks needed to be protected by registration... As a highly valuable asset, The Crown Estate wanted to protect... Regent Street.'⁵⁹

The economic function of the trademark 'Regent Street' at the current time is not fully realised. Regent Street has only one licensor, the Cafe Royal. The mark is therefore not associated with any direct revenue streams, rather the mark is held for mere defensive purposes: 'Regent Street is now protected by registration to guard against passing off... We have a trademark-watch agency employed that informs us of any attempts to register brands that could be confused with ours.'⁶⁰ The trademark is seen to offer protection should someone else try to present their products (streets in this case) as that of someone else's. This is a notion, which certainly challenges the existing concept of urban space and the international exchange between cities.

Crown Estate does not seem to be eager to engage in lawsuits over its trademark: 'It is not in our interest to be oppressive in our protection of our trademarks as the cost of doing so is out of proportion to the benefit.'⁶¹ The Crown Estate would only undertake legal action for the trademark if: 'there is any detriment to us or realistic prospect of a member of the public being confused and take proportionate action. We would be generally happy to enter into appropriate settlements to achieve this position.'⁶² Yet, the 'Crown Estate would potentially raise concerns, if its interests were severely violated.'

Other economic functions of trademark protection, such as the reinforcement of clusters, the improvement of quality, efforts associated with enhanced security of the street or even trying to assure that the street is not turned into a tourist trap have not been associated with the trademark.

The trademark has been primarily seen as a monopoly that gives the owner the right to exclude others from using it, an option that has so far not been exercised. Given that the economic scope of trademarks goes beyond that, it can be argued that the trademark is not particularly well managed in the revenue-generating sense. Neither have the full economic nor the social and cultural aspects of trademark protection been exploited. Since the trademark protection for Regent Street, the Crown Estate has also obtained trademark protection for the royal parks 'Regent's Park', 'Savill Garden', 'Windsor Great Park', 'St. James's London' and the name 'Crown Estate' itself⁶³, suggesting that a more differentiated reflection of its approach towards trademark protection would have a wide impact on various public places in the U.K.

Avenue des Champs-Élysées



Fig. 2: Avenue des Champs-Élysées⁶⁴

The trademark 'Avenue des Champs-Élysées' displays many of the features of the trademark over 'Regent Street.' Trademark protection for the Champs Élysées in Paris, was registered in December 2009 in France. Unlike 'Regent Street', the scope of protection extends however beyond French territory with an international trademark registration pending for the European Union and China. Again, it is a fairly technical international treaty, the Madrid System for the international registration of trademarks, which strongly facilitates the promotion of proprietary signs at the international level.

A trademark search of the mark 'Champs-Élysées' produces 109 results of national and international marks containing the name. Some of the most renowned international trademarks are the 'Lido Champs-Élysées', 'Le66 Soixante-Six-Champs-Élysées,' the 'Milady Champs-Élysées Paris' or simply 'Champs-Élysées,' which has been registered by Swiss chocolate manufacturer 'Lindt & Spruengli' in 1991 for class 30, chocolate and pastries. The latter is registered in France, the Benelux countries, Spain, Italy and Portugal.⁶⁵ Our search results show that already back in 1991 a trademark entitled 'L'Avenue des Champs-Élysées' was registered. Owned by a French media company, the trademark is registered for classes 16 and 41, which comprise printing materials, education and cultural activities. Various activities and monuments on the Champs-Élysées are equally protected as trademarks. The French Ministry for Culture and Communication for example registered the 'Grand Palais des Champs-Élysées' as a trademark, the lighting on the Champs-Élysées are protected by the mark 'Lights on Champs-Élysées Guérlain', and so is the Christmas market on the Champs-Élysées. The Christmas market is even protected by two different marks, which are owned by two different rightsholder. The mark 'Marché de Noël des Champs-Élysées' (Christmas Market Champs-Élysées) was protected in 2009 by a private person. The mark 'Marché de Noël Champs-Élysées' is owned by the Comité

des Champs-Élysées (Champs-Élysées Committee). Both marks were granted and no potential legal concerns were raised.⁶⁶

Following the Nice Classification, the trademark 'Avenue des Champs-Élysées' is registered in class 11, 16, 25, 35, 39 and 41.⁶⁷ As in the case of Regent Street these classes comprise of many of the urban activities typical to occur in a well known street, such as 'transport including river transport', 'sightseeing tours', 'entertainment and leisure services', 'organisation of exhibitions or trade shows' or 'street lamps.' For that reason it can thus be argued that the trademark 'Avenue des Champs-Élysées' fully protects the intangible aspects of the street and a close look at the technical details of the mark does give way to the argument that trademark protection over the Champs-Élysées turns the street name into a fictitious commodity.

Unlike Regent Street, the 'Champs-Élysées' can only be found in Paris and no other street worldwide seems to be known by that name. Similar to Regent Street, however, the 'Champs-Élysées' can look back on several centuries of cultural history. Initially called 'Grande Allée du Roule' in 1670, then 'Avenue des Thuilleries' in 1680 it was finally named 'Avenue des Champs-Élysées' in 1789, the year of the French Revolution. Costs for trademark protection were only marginally higher than those associated with the protection of Regent Street since the Champs-Élysées are an international mark and not a national mark. So far, the 'Avenue des Champs-Élysées' shows no licensing history, but the street has formed alliances with Newsky Prospect in St. Petersburg and Chuo Dori Avenue in Nagoya, Japan. Potentially, these collaborations could lead to licensing arrangements.⁶⁸

The mark 'Avenue des Champs-Élysées' is owned by the Champs-Élysées Committee, a non-profit organisation, comprising of the companies doing business on Champs-Élysées. Founded in 1860 to help develop the Champs-Élysées, it changed to an association in 1914 under the leadership of Louis Vuitton so to 'defend and promote the avenue'. The Committee's mission is not only commercial in character. The Committee seeks primarily to maintain the reputation of the Avenue and ensure security on the street. Major activities comprise the organisation of Gala dinners, receptions, the invitation of celebrities to the street, the organisation of film festivals and collaboration with French and foreign media.⁶⁹

The rationale for trademark protection of the Champs-Élysées is similar to that of Regent Street. Protection is essentially seen as a means to exclude others from using the mark, reflecting the eagerness of the Committee to protect the reputation and prestige of the street. As the application is still pending it is too early to tell which direction the owners of the mark will take. Contrary to the Crown Estate, the discourse of the Champs-Élysées Committee shows a stronger interest in cultural aspects of the street: 'On oublie souvent la valeur symbolique...des Champs-Élysées. Notre mission consiste à perpétuer cette ambition en termes de beauté, de grandeur et de majesté, tout en lui conservant son aspect populaire.'⁷⁰ Yet, a strong commercial orientation surfaces underneath the cultural discourse: 'Les Champs-Élysées sont un lieu de cristallisation commercial unique.'⁷¹ Equally, the 'dossier: Le triomphe des Champs-Élysées' (File: The triumphs of the Champs-Élysées) reports that the Champs-Élysées attract on weekends some 600 000 clients and between 300-400.000 consumers on weekdays. The street is furthermore referred to as an 'eldorado commercial ou les places sont très chères,' a place where events are continuously created to incite the shopping experience (des événements pour créer du trafic) through activities such as special Christmas shopping opportunities. As the trademark protection for the Champs-Élysées is so recent, a full evaluation of the potential implications cannot yet be undertaken.

Certainly, the ownership structure of the rightholder guarantees to certain extent the maintenance of the public interest. As a not for profit organisation the Committee of the Champs-Élysées is by its statute bound to take issues relating to the maintenance of the public interest under consideration. Yet, it is an association that comprises primarily business. If it is to assure the public interest it will certainly have to consider how to strike a balance between profits and the public interest. That may seem a realistic pathway, given that the Committee works closely with the city municipalities and the police. In fact, the current strategy for the street can be traced back to a personal exchange between Jacques Chirac, then major of Paris, and Roland Pozzo di Borgo, the late President of the Committee.⁷²

Conclusion

In the case of Regent Street, as well as that of the Champs-Élysées the trademark protection was granted to either a government institution or a not-for-profit organisation working closely with the government. Both institutions have thus by their very statute an obligation to preserve the public interest. Yet, assuming that the profile of the rightholder will be sufficient to ensure the maintenance of the public interest is presumptive. The various existing trademarks containing the name 'Champs-Élysées' clearly illustrate that the mark can be filed by any entity, be it a firm or a private person. Does this constitute a norm deficit?

A norm deficit presents a significant gap in what is understood to be typical behaviour and would require substantial trademark law reform. For us, this translates less into a norm deficit, than rather for a need for reflected norm management and policy formulation. We are not propelling the abolishment of IP rights altogether which we deem both unrealistic and unfeasible, given that too many powerful actors have a very strong stake in the preservation of the status quo. What we do however call upon is a more differentiated policy formulation on the interplay of the public interest and trademark protection over urban space. Our case studies illustrate that the rightholder to Regent Street and the Champs-Élysées have not yet fully realised the entire spectrum of economic, social and cultural implications associated with trademark protection over urban space. Protection has been obtained, yet the trademarks are held for mere defensive purposes. It may be questioned to which extent potential trademark infringement of two famous shopping streets really constitutes the primary economic rationale for these shopping streets. A more deliberate approach towards trademark ownership could entail asking how the community enabling functions of trademark protection over urban space could be further enhanced and how by the same token the trademark can serve as an instance of quality. With Hann we argue that 'some... exaggerate the nightmare of property logic and overlook countertendencies.'⁷³

Rather than propel the abolition of an intangible assets' based economy, there is a clear need for policy guidelines that help strike a deliberate balance between private property and the public interest. With respect to tangible forms of property rights these questions have formed over centuries a core element of the international political economy. Yet, we observe a close to total policy vacuum with respect to immaterial forms of property rights. As IP rights have distinctively different features from tangible forms of property, it is misleading to believe that the same type of policy guidelines hold for both forms of property. Through the TRIPS Agreement, trademarks have become entrenched with an increased emphasis on commercial interests, which calls for a 'high degree of private ownership, first as a guarantee of political liberty and later as the sine qua non of economic efficiency'.⁷⁴ Worldwide, the knowledge-based economy is under the full effect of such an emphasis. With an increased internationalisation of intellectual property through an institutional framework that has in and by itself been strongly criticised for promoting trade

strongly, but unevenly, a counterbalance is needed that looks at IP rights through a prism other than that of market efficiency. As Paul David notes, the IP discourse is still dominated by ‘questions of efficiency’ rather than notions of justice and equity.’⁷⁵

Thus, with reference to Karly Polanyi it needs to be asked: what are the implications of fictitious commodities? Polanyi himself does not reach clear conclusions as to what the implications of fictitious commodities are. As Andrew Sawyer notes, Polanyi ‘surprising does not elaborate what kind of cultural damage it causes, other than some kind of ‘disintegration’...’⁷⁶ Polanyi is clearer in his prediction of a societal reaction to the extension of the market through the ‘double movement’. The Polanyian ‘double movement’ is the political mobilisation against economic liberalism. The prospect of this counter reaction to commodification and privatisation should be taken into account when looking at fictitious commodities. It should be remembered that for Polanyi countertendencies were central to his theories of the market based economy. We are witnessing the ‘unprecedented commodification of life and livelihood on a global scale.’⁷⁷ According to Polanyi however, there is the possibility of a reaction in states responding with public policy measures. Jessop asks if ‘a ‘double movement’ might occur in relation to the growing commodification of knowledge in all of its various guises.’⁷⁸ Therefore we ask will there be a re-imposing of social control over trademarks?

The indications for a double movement are for the most part absent. For patents there has been at least public awareness and concern about the unequal private benefits derived in the area of pharmaceuticals. Still, despite the campaigning of NGOs and some developed countries, which have resulted in an international public interest reaction, there still remains general government complicity in the extended use of trademarks. Trademarks have remained almost invisible to public concerns. Trademarks will continue to be invisible as a public interest concern so long as the trademark discourse remains within the realms of a technical and thus political non-issue. Trademarks over urban space illustrate that the use of property rights over signs is not limited any more to company signs, but extended to all areas of human existence. Today streets protected through trademarks are part of our globalised society and only look set to spread in breadth and prominence, as an extension of the market mechanism. What does it mean when we as a society accept the sign of a place as a trademark, despite it being a fictitious? It is an acceptance of increasing commercialisation. We have accepted that this type of formalisation in the process of privatisation is necessary and useful. As it becomes more commonplace to obtain trademark protection of cities, regions and even nations, no doubt there will continue to be public interest consequences.

Notes

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