THE FUTURE OF INTELLECTUAL PROPERTY AS A WEAPON OF WAR

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ABSTRACT

Before the signing of the Decree of the Russian Federation on May 27, 2022, the use of intellectual property as a weapon of war was largely unprecedented. This article reviews the implications of the Russian-Ukrainian War on trademarks belonging to countries deemed to be “unfriendly nations” and their impact on the future of intellectual property as a weapon of war. Following the issuance of economic sanctions by the United States of America and many other countries against Russia, many global organizations took their products off the Russian market. However, in doing so, these companies did not anticipate the emergence of Russian copycat brands without any permission, licenses, or royalty payments.

KEYWORDS

intellectual property, trademark law, Russian-Ukrainian war, intellectual property as a weapon of war, Madrid Protocol, Russian copycat brands

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INTRODUCTION

Starducks, Makdonalds, Cool cola. Sound familiar? On February 24, 2022, Russia invaded Ukraine, marking the beginning of the Russian-Ukrainian War. As the biggest war in Europe since World War II, the invasion has resulted in catastrophic consequences for the entire world. As expected, there have been significant impacts on the mobility of people and goods in Europe as airspace restrictions and regulations were put into place and fuel prices increased due to limited supplies. However, in addition to “expected” consequences, the Russian-Ukrainian War also brought unanticipated implications for international trademark and intellectual property law.

Trademark law combines protection of intangible property and business interests. After the start of the Russian-Ukrainian War, many global organizations took their products off of the Russian market in response to the threat of sanctions imposed by the United States and as a way to “protect their brands from losing value” in case they ever return to doing business in Russia. However, in response to more and more companies pulling out of the Russian market to avoid United States’ sanctions or risk showing support to Russia in any way, Russia deemed the United States an “unfriendly nation,” and signed a decree to address

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4 See About IP, *What is Intellectual Property?*, WORLD INTEL. PROP. ORG., https://www.wipo.int/about-ip/en/ (defining intellectual property as “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce”) (last visited Oct. 31, 2023).
the “unfriendly actions of the United States of America and [the] foreign states and international organizations that have joined them.”

The signing of the decree transformed intellectual property rights into weapons of war by restricting payments to foreign intellectual property right holders deemed “unfriendly,” opening the door for Russian copycat products to take over the Russian market. Upon its signing, Russian businesses were given permission to use intellectual property from countries deemed “unfriendly” without having to pay the owner for using and infringing on their mark. In the several months since the signing of the decree, multiple countries, including Japan, New Zealand, and those in the European Union, among others, have been added to the list of “unfriendly countries” for imposing sanctions against Russia. Thus, when global brands like Starbucks, McDonalds, and Coca-Cola removed their products from the Russian market to avoid risking US sanctions, copycat brands quickly began making their way into the market, since the decree strictly prohibited “Russian residents from making license payments to foreign bank accounts of rights holders residing in ‘unfriendly states’.” With almost identical logos and brand names, Starducks, Makdonalds, and Cool Cola are just a few examples of the many Russian brands that are taking advantage of the product exodus in the Russian market and the new decree.

This article seeks to address the complex issue of international intellectual property law protections during a time of war. More specifically, this article will focus on both word and design trademark protections, the threat imposed by the signing of the Russian Decree, issues companies may face if they decide to re-enter the Russian market in a post-war world, and future use of intellectual property as a weapon of war. Part I of this essay briefly describes the United States’ Trademark system and provides a comparison to the Russian system. Part II addresses the Russian copycat brands in greater detail and the issue of trademark

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6 Decree of the President of the Russian Federation Vladimir Putin, О временном порядке исполнения обязательств перед некоторыми правообладателями [On the temporary procedure for fulfilling obligations to certain right holders], May 27, 2022, No. 322 (Russ.) [hereinafter Decree of the Russian Federation].


8 DiNapoli & Marrow, supra note 5.

9 Mikhail Tereshenko, Russian government approves list of unfriendly countries and territories, TASS RUSSIAN NEWS AGENCY, (Mar. 7, 2022, 6:08 AM), https://tass.com/politics/1418197.

10 The Status of Intellectual Property, supra note 7.
infringement by Russian companies. Part III concludes by suggesting how the manipulation and suspension of intellectual property may be used as a strategy in future wars.

I. INTRODUCTION OF US TRADEMARKS

The Lanham Act defines a trademark as, any word, name, symbol, or device, or any combination thereof, (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown (15 U.S.C. § 1127).  

The two most common types of trademarks are word and design marks. Generally, wordmarks refer to actual words themselves while design marks refer to graphics and logos. Regardless of the type of mark or where it falls on the distinctiveness spectrum, all trademarks must act as source identifiers that consumers recognize in connection with a good or service. Upon seeing the golden arches on a red background, consumers automatically know that the brand in question is McDonalds. Similarly, upon hearing, “You’ve Got Mail,” consumers automatically connect the jingle with AOL mail.

Additionally, and as provided by the Lanham Act, trademarks must be used in commerce. Registration with “a bona fide intent to use” is

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14 See Jennifer E. Rothman, Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, The Right of Publicity, and Preemption, 135 Harv. L. Rev. 1271 (March 2022) (explaining how a trademark should have the capability to distinguish a company’s products and services from other trademarks).
15 See Trademark sound mark examples, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/trademarks/soundmarks/trademark-sound-mark-examples (last visited Nov. 1, 2023) (featuring the AOL jingle as one example of famous and identifiable sound marks).
possible, however, actual use is needed at a later date. Use in commerce simply means that the mark is used in commerce in connection with the goods or services. If a mark is not yet used in commerce at the time a trademark application for registration is submitted, the mark may still be able to be registered with “a good faith intent to use the mark in commerce at a future date.” However, exclusive rights to trademarks are afforded on a first to use basis, thus, stressing the importance of having and showing actual use of the mark in commerce in connection with the goods or services.

A. Distinctiveness

The strength of a trademark is based on where the mark stands on a spectrum of distinctiveness. By default, all word marks fall somewhere on this spectrum of distinctiveness, which then signifies whether the mark will be considered “strong” or “weak.” Distinctiveness refers to the ability of consumers to “quickly and clearly identify you as the source of your goods or services.” The categories of distinctiveness include generic, descriptive, suggestive, coined, and arbitrary marks.

On the one end of the spectrum are generic terms and descriptive marks. Generic terms are unprotectable, while descriptive marks are considered “weak” and “hard to protect against competitors.”

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17 Id.
18 Basis How to satisfy the requirements for clarifying, substituting, or adding a filing basis, or applying for more than one filing basis, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/trademarks/apply/basis (last updated Mar. 3, 2021) [hereinafter Basis How to satisfy the requirements].
21 See Poorvika Chandanam, Spectrum of Trademark Distinctiveness, IP MATTERS (AUG. 14, 2020), https://www.theipmatters.com/post/types-of-marks-protectability (explaining that distinctive marks are those that describe products unique qualities so as to avoid consumer confusion).
23 Id.
24 See id. (referring to the terms used throughout the article to describe various types of trademarks).
25 Id.
terms are merely the “common, everyday name” for goods or services.\textsuperscript{26} While they technically are not actual marks, generic terms are composed of words that are so common that “they do not indicate source” and thus, cannot be registered as a trademark.\textsuperscript{27} Aspirin has become generic because people have used the brand name to describe the actual medication itself.\textsuperscript{28} Similarly, Band-Aid is another example of a mark that has become generic due to the everyday use of the name for the adhesive bandage product.\textsuperscript{29} Additionally, even if a descriptive mark describes the qualities, features, or characteristics of a good or service, they may still be granted trademark protection with secondary meaning.\textsuperscript{30} For example, Kentucky Fried Chicken falls within the descriptive mark category because the mark suggests to consumers that they are eating fried chicken from the State of Kentucky. As mentioned, in order for descriptive marks to become protectable, they must acquire a “secondary meaning” through commercial use to “become associated with a single commercial source in the minds of consumers.”\textsuperscript{31} A “secondary meaning” elevates the mark “in the minds of consumers as a distinctive identifier of a specific brand,” thus, making it more than a merely descriptive word or phrase.\textsuperscript{32} ChapStick is one example of an originally descriptive mark that gained registration through acquiring a secondary meaning as consumers began to associate the brand with lip balm.\textsuperscript{33}

\begin{itemize}
\item[\textsuperscript{26}] See Strong trademarks, supra note 22.
\item[\textsuperscript{27}] Id.
\item[\textsuperscript{28}] See Brand, BENTLEY UNIV. (Mar. 10, 2018), https://www.bentley.edu/news/popular-brands-had-their-trademarks-revoked-law (explaining how Aspirin lost its trademark by becoming generic that it lost any association with its original product name).
\item[\textsuperscript{29}] See SS Rane, Lost in the crowd! - The life of generic trademarks, LEXOLOGY (May 19, 2022), https://www.lexology.com/library/detail.aspx?g=457d63a8-5573-4e7f-a466-c04177ede13#:~:text=The%20term%20Band%20Aid%20is%20registered%20by%20Johnson%20%26%20Johnson.
\item[\textsuperscript{30}] See Jeanne C. Fromer, Against Secondary Meaning, 98 NOTRE DAME L. REV. 211, 222 (Nov. 16, 2022) (explaining “descriptive terms are understood to lack inherent distinctiveness because they describe the products to which they are affixed and thereby do not readily signify source. Trademark law nonetheless allows descriptive marks to be protected if they acquire secondary meaning.”).
\item[\textsuperscript{33}] See id. (explaining how the Holiday Inn trademark gained secondary meaning when consumers associated the descriptive words with lodging).
\end{itemize}
Suggestive, arbitrary, and fanciful marks are considered to be stronger marks because they are more creative and unique.\(^{34}\) Suggestive marks suggest “a quality of the goods or services” but require additional creative power to connect the mark to the product and service.\(^{35}\) For example, the word “peloton” means the “main body of riders in a bicycle race.”\(^{36}\) Therefore, the mark for Peloton suggests that the brand has something to do with bike riding, but the meaning and connection are not inherently obvious. Even less obvious is an arbitrary mark which involves a word that has a common meaning with no relation to the product or service which it is used for.\(^{37}\) For example, the word “amazon” would usually refer to the Amazon Rainforest and region of South America. However, Amazon, the service, has no connection to the rainforest. Similarly, Apple sells technological products, not the fruit. Finally, the strongest type of mark on the spectrum of distinctiveness is a fanciful mark.\(^{38}\) Fanciful marks are made up of completely invented words that have no actual meaning.\(^{39}\) Google and Verizon are two examples of fanciful marks because on their own these words have no meaning other than the product or service they are used in connection with.

B. Factors to Consider When Filing a Trademark Application

Another important concept to consider when filing for a trademark registration in the United States are the *DuPont* factors, which help brands avoid future issues with confusingly similar marks.\(^{40}\) *In re E.I. du Pont de Nemours & Co.* set out a list of 13 factors for trademark examiners in the Federal Circuit to consider when reviewing a trademark application before granting the trademark.\(^{41}\) The 13 factors are:

1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression;

\(^{34}\) *Strong trademarks*, supra note 22.
\(^{35}\) *Id.*
\(^{37}\) *Strong trademarks*, supra note 22.
\(^{38}\) *Id.*
\(^{39}\) *Id.*
\(^{41}\) *Id.*
2) The similarity or dissimilarity and nature of the goods or services described in an application or registration or in connection with which a prior mark is in use;
3) The similarity or dissimilarity of established, likely-to-continue trade channels;
4) The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing;
5) The fame of the prior mark (sales, advertising, length of use);
6) The number and nature of similar marks in use on similar goods;
7) The nature and extent of any actual confusion;
8) The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion;
9) The variety of goods on which a mark is or is not used;
10) The market interface between the applicant and the owner of a prior mark;
11) The extent to which applicant has a right to exclude others from use of its mark on its goods;
12) The extent of potential confusion; and
13) Any other established fact probative of the effect of use.\textsuperscript{42}

Notably, applying the \textit{DuPont} factors is an extremely subjective analysis which may lead to each component being given a different weight.\textsuperscript{43}

While the \textit{DuPont} factors are specifically considered by examiners in the United States, Russia has a similar system, analyzing the likelihood of confusion between trademarks.\textsuperscript{44} Typically, the Russian equivalent of the USPTO, Rospatent, reviews trademark applications, “and if the marks

\textsuperscript{42} Id.


[are] deemed confusingly similar to other registered trademarks, [they] reject the registration of such marks.\textsuperscript{45} Even with the signing of the Russian decree by President Putin, Rospatent has been vocal that if they come across an application for “an identical or similar trademark [that] has already been registered in the Russian Federation, it would be the ground for refusal in such registration.”\textsuperscript{46} Interestingly, just because a trademark is registered in the United States does not inherently afford trademark protection in other countries and similarly, “a registered U.S. trademark cannot be used to curtail infringements in another country.”\textsuperscript{47} For example, if Starbucks was registered in the United States, but not in Russia, and Stars Coffee wanted to obtain a registration in Russia, Rospatent would not be able to deem Stars Coffee confusingly similar to Starbucks, because Starbucks is not a registered trademark in Russia. Therefore, assuming no other marks would be deemed confusingly similar, Rospatent would likely grant Stars Coffee a registration, meaning that if Starbucks ever wanted to obtain a trademark in Russia, the application for registration may be rejected on the grounds of being confusingly similar to a previously registered mark.

C. Filing Basis for US Trademarks and the Madrid Protocol

In order to register a mark with the United States Patent and Trademark Office (USPTO), the application must include a filing basis.\textsuperscript{48} A filing basis is the basis upon which a trademark application has been filed.\textsuperscript{49} One filing basis is Lanham Act Section 1(a) Use in Commerce, showing, as the name suggests, that the mark is already used in the market in connection with a good or service.\textsuperscript{50} Additionally, a Section1(b) Intent-to-use filing basis may be used for marks that are not yet used in commerce, but soon will be.\textsuperscript{51} An Intent-to-use basis can be helpful in assigning filers a trademark filing date, which is critical in obtaining

\textsuperscript{45} Id.
\textsuperscript{47} Grieco, \textit{supra} note 44.
\textsuperscript{48} Basis \textit{How to satisfy the requirements}, \textit{supra} note 18.
\textsuperscript{49} Id.
\textsuperscript{50} Id. (referring to the Trademark Mark Act by its official name, the Lanham Act).
\textsuperscript{51} Id.
nationwide priority for the mark in order to preclude others from using or filing for the mark in commerce.\textsuperscript{52}

The Madrid Protocol provides an avenue for international protection of trademarks, in participating countries, by filling out one singular application.\textsuperscript{53} While the Madrid Protocol offers international protection in theory, it does not offer global protection of a mark.\textsuperscript{54} Instead, the Madrid Protocol merely allows trademark filers to select which participating countries they wish to also file their applications in, without having to go through the process of sending in individual applications to each country.\textsuperscript{55} Notably, Russia is a member of the Madrid Protocol,\textsuperscript{56} meaning that if one files an application in the United States, it can also choose to file for protection in Russia through the international registration system, alleviating a need to complete an application directly with Rospatent.

Many global companies file their trademarks applications through the Madrid Protocol as it is more cost-efficient and grants them protection in one-single step.\textsuperscript{57} After filing for international registration, each country decides whether to register the mark under their own trademark laws, and thus, it ultimately “remains the right of each country or contracting party designated for protection to determine whether or not protection for a mark may be granted,” even though the application was filed through one central filing point.\textsuperscript{58} Therefore, the Madrid Protocol sets forth a convenient way to register for trademark protection in multiple countries, without having to individually file for protection in each territory.

\textsuperscript{53} See Madrid Protocol, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/trademarks/laws/madrid-protocol (last updated Sept. 15, 2023) [hereinafter Madrid Protocol] (explaining that the Madrid protocol is a filing treaty which provides a cost-effective way for trademark holders to protect their marks in multiple jurisdictions by filing a single filing application).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{57} Madrid Protocol, supra note 53.
\textsuperscript{58} Id.
D. Priority

In the United States, trademark priority is granted to the first party that uses a mark in commerce.59 This system of priority in the United States is known as the first-to-use system and emphasizes the importance of the Use in Commerce and Intent-to-use filing bases described above.60 As opposed to multiple “first-to-file” foreign nations that grant priority to those who file their applications for trademark registration first, the first-to-use system allows “marks that are actually used in commerce first” to be assigned trademark rights and “given priority in their territory of use” without regards to who filed for trademark registration first.51 This system may benefit brands who have descriptive marks and need to acquire secondary meaning before they can register their trademark. For example, if another brand began using the “ChapStick” mark and filed their application before the original ChapStick did, the first-to-use system would rule in favor of the original brand and preclude the newer one from successfully registering the trademark.

On the contrary, countries that use a first-to-file system, like China and the European Union countries, give “priority over others, regardless of actual use of the marks,” when assigning their rights.62 Contrary to the countries that follow a first-to-use system, a major difference in the first-to-file system is that it does not grant priority protection to prior users of the mark who have not yet registered the mark, despite already using the mark in commerce.63 Naturally, both systems have their pros and cons, but the first-to-file system specifically presented significant issues for China, which has consequently been subject to widespread trademark squatting.64

In a first-to-file system, trademark squatting occurs where someone registers or uses a “generally well-known foreign trademark that is not

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59 See Hana Fin., Inc. v. Hana Bank, 574 U.S. 418, 419 (2015) (holding that trademark rights are determined by the date of the mark’s first use in commerce. The party to first use the mark in commerce is deemed to have priority).
60 See Tulip Mahaseth, First-to-use versus first-to-file trademark regimes, RED POINTS, https://www.redpoints.com/blog/first-to-use-vs-first-to-file-trademark/ (last visited Nov. 4, 2023) (clarifying that applicants must actually use the trademark in commerce for some time to obtain trademark registration in the U.S.).
61 Id.
62 Id.
63 Id.
registered in the country or is invalid as a result of non-use.” Apple is a real-world example of a company impacted by the first-to-file system in China by trademark squatting, as their initial iPhone trademark application with the Chinese Trademark Office (CTMO) was filed in 2002, but only listed the subclass for “computers and computer software.” Not long after, “a Chinese company called Hanwang Technology registered the iPhone mark under the proper subclass that included ‘phones and mobile phones.’” In a first-to-use system, Apple would still be able to protect their iPhone trademark because they had been using the mark in commerce in connection with the product for a longer period of time. However, China’s first-to-file system ultimately awarded the mark to Hanwang Technology because they filed the mark in the correct category and thus, Apple “reluctantly paid […] $3.65 million to Hanwang Technology for rights to the trademark.” Thus, first-to-use priority systems better protects the first brand to use their goods or services in commerce, while simultaneously helping to combat trademark squatting.

Similarly to China, Russia is another country that follows a first-to-file system. As previously explained, in a first-to-file system, legal protection begins at the time an application is filed. To address initial concerns over trademark registrations after the decree was signed, Rospatent released a statement to assure brand owners that “[t]he presence of a previously registered identical or similar trademark known in Russia is an obstacle to the registration of the claimed designation.” In theory, a statement of that nature should prevent copycat brands from registering their marks, however, many brands have been persistent in trying to obtain registrations.

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66 Chang, supra note 64, at 338.
67 Id.
68 Id.
70 Id.
72 See Britney Nguyen, Months after Starbucks pulled out of Russia, the coffee shops are being reopened as Stars Coffee, BUS. INSIDER (Aug. 18, 2022, 1:48 PM),
Stars Coffee is one copycat brand that has been particularly adamant about filing for a trademark through Rospatent. Though unsuccessful in their efforts until now, Russia is still in the midst of a war, meaning that Rospatent can change their mind at any time and allow copycat brands to register their marks. In the event Russia did change their stance, and Stars Coffee successfully registered their trademark, Starbucks would have to weigh the pros and cons of potentially paying to get their brand back. On the one hand, it could be worth it for Starbucks, as it was for Apple in China, to pay to get their trademark rights back in Russia. On the other hand, the 130 ex-Starbucks locations in Russia accounted for less than 1% of Starbucks’ annual revenue. Thus, the minimal revenue contributions may not be worth the hassle of re-entering the market, should Russia decide to allow copycat brands to register their marks.

II. “UNFRIENDLY NATIONS” FROM RUSSIA’S STANDPOINT

On April 6, 2022, The White House announced that the United States would begin imposing “the most severe financial sanctions on Russia’s largest bank and several of its most critical state-owned enterprises and on Russian government officials and their family members.” The sanctions included the 1) “full blocking sanctions on Russia’s largest financial institution, Sberbank, and Russia’s largest private bank, Alfa Bank,” 2) “prohibiting new investment in the Russian Federation,” 3) “full blocking sanctions on critical major Russian state-owned enterprises,” 4) “full blocking sanctions on Russian elites and their family members,” 5) “[t]he U.S. Treasury prohibit[ing] Russia from making debt payments with funds subject to U.S. jurisdiction,” and 6) “commitment to supporting sectors essential to humanitarian activities.” As a result of the implemented sanctions, the United States and their allies have “immobilized about $300 billion in assets.”

73 Id.

74 See Martins, supra note 46 (warning companies to be cautious about suspending operations in Russia due to the country’s history of denying intellectual property rights over political conflict).


77 Id.
billion worth of Russian Central Bank assets, limiting the central bank’s ability to aid the war effort and mitigate sanctions impacts." Furthermore, the sanctions and export controls have “severed Russia’s access to key technologies and industrial inputs that erode its military capability,” which is essential in global efforts to bring the war to an end.

In response to being subjected to sanctions from multiple countries, Russia ultimately decided to penalize those “unfriendly nations” who imposed sanctions against them. To “protect the interests of the Russian Federation,” Russian President Vladimir Putin signed a decree “on the application of retaliatory special economic measures in connection with the unfriendly actions of certain foreign states and international organizations.” The decree specifically prohibited “economic contacts with sanctioned individuals from ‘unfriendly countries,’” including the United States.

Furthermore, the signing of the Russian decree by President Putin and Russia’s open business hostility towards “unfriendly countries” has given Russian entrepreneurs “nearly free rein to cop[y] iconic logos, names, and menus” and use them as their own. While Russia is only one country and the loss of profits from Russia will not paralyze most global companies, companies face a substantial risk of reputational damages for pulling out of the Russian market during this time. The Federal Service for Intellectual Property in Russia has received trademark applications of marks for Chanel, Christian Dior, and Givenchy, in addition to registration

79 Id.
81 Id. (quoting Executive Order of the President of the Russian Federation Vladimir Putin, Amendment to Executive Order on retaliatory special economic measures in connection with unfriendly actions of certain foreign states and international organizations, May 3, 2022, No. 252 (Russ.).
82 Ljubas, supra note 80.
applications for marks that are extremely similar to Ikea, Instagram, McDonald’s, and Starbucks.85

When Starbucks closed, one Russian rap artist saw an opportunity in buying the Starbucks assets and opening a very similar franchise called Stars Coffee.86 All former Russian Starbucks locations were vowed to reopen as Stars Coffee, featuring a recognizable menu and almost identical logo of a mermaid with long, wavy hair, a reserved smile, and a traditional Russian headdress on top of her head.87 McDonalds found itself in a similar situation when its Russian replacement, Vkusno i Tochka, which translates to “Tasty and That’s It,” began popping up in the same restaurant locations as the former McDonalds and selling a record of almost 120,000 burgers on its opening day.88 While many hope that McDonalds, along with other crowd-favorite brands, will return to the Russian market one day, Vkusno i Tochka’s CEO has alternate plans, preparing to open 1,000 stores across Russia in the next five years.89

A. Analyzing the Russian Copycat Brands

As previously mentioned, the likelihood of confusion test is extremely important in analyzing a potential infringement claim because it is intended to protect consumers from market confusion.90 The USPTO states that likelihood of confusion “exists between trademarks when the marks are so similar and the goods and/or services for which they are used are so related that consumers would mistakenly believe they come from the same source.”91 Thus, if two companies use similar names and are in

87 Id.
88 See Huileng Tan, The new McDonald's in Russia sold 120,000 burgers on its opening day, surpassing daily records in its past life, CEO says, BUS. INSIDER (June 22, 2022, 3:21 AM), https://www.businessinsider.com/mcdonalds-russia-sold-record-burgers-opening-day-vkusno-tochka-rebranded-2022-6#:~:text=The%20rebranded%20McDonald%27s%20in%20Russia,restaurants%20in%20under%20five%20years (explaining how a businessman bought several McDonald’s locations after the franchise left Russia due to the war in Ukraine and later rebranded 15 of those restaurants under the name, “Tasty and That’s It”).
89 Id.
91 Likelihood of confusion, supra note 43.
the same market, a likelihood of confusion analysis would be conducted to assess the risk of consumers mistaking the two products for each other.

A likelihood of confusion analysis considers multiple factors, including the similarity of the marks and the relatedness of the goods or services.92 Firstly, similarity of the marks can be examined through sound, appearance, and commercial impression.93 After Starbucks officially pulled out of the Russian market, Stars Coffee quickly took advantage of the opening in the market.94 When considering the Russian copycat brands, “Star Coffee” sounds very similar to “Starbucks Coffee” and the two brand logos bear a stark resemblance.95 Moreover, since the two marks include similar design elements, including the mermaid girl in the middle, stylized font, and positioning of each of the words above and below the logo, “Stars Coffee” and “Starbucks Coffee” create a similar overall commercial impression.96 Thus, normally, Starbucks would be able to block use of the “Stars Coffee” mark. However, the Russian decree allows Stars Coffee to take over the previously-Starbucks-owned coffee shops and use their mark in commerce without paying dime to Starbucks.

Secondly, relatedness considers how likely it is for consumers to mistakenly assume that the two goods or services come from the same source.97 However, it is important to note that the goods and services need not be identical to find relatedness.98 For example, if Apple was solely in the business of selling computer products and then another company also named Apple began selling smart phones, it is likely that consumers would mistakenly assume that the two products come from the same Apple. Thus, there is a likelihood of confusion where consumers may not be able to distinguish between the source of two different goods, services, or any combination.

92 See id. (explaining that there is no strict mechanical test for determining the likelihood of confusion between trademarks but instead, a variety of factors will be considered).
93 See id. (providing examples for how marks with similar sound, appearance, and commercial impression can cause confusion).
94 See Nguyen, supra note 72 (reporting that Starbucks' exit from Russia in May prompted Stars Coffee to enter the Russian market by August).
95 See Reuters, Russia’s version of Starbucks reopens with a new name and logo, CNN (Aug. 19, 2022), https://www.cnn.com/2022/08/19/business-food/star-coffee-starbucks-russia/index.html (showing a similar design mark to that of Starbucks used in connection with Stars Coffee products).
96 See id.; see also DuPont, 476 F.2d at 1357 (explaining how having similar design elements in the logo can create an overall commercial impression).
97 Likelihood of confusion, supra note 43.
98 Id.
B. Trademark Infringement

To constitute infringement, a plaintiff must prove that it owns a valid mark, that it has priority (its rights in the mark(s) are "senior" to the defendant's), and that the defendant's mark is likely to cause confusion in the minds of consumers about the source or sponsorship of the goods or services offered under the parties' marks.  

Most commonly, the remedies for trademark infringement include a court granted injunction and monetary relief. In the context of trademark law, an injunction is usually issued “once plaintiffs establish likelihood of confusion — or, for preliminary relief, a likelihood of a likelihood of confusion.” Through injunctions, a party may completely be barred from using a specific trademark. Alternatively, monetary relief includes any payment of damages, attorneys fees, lost profits, and even reasonable royalties.

Re-visiting the example of Starbucks, in countries where Starbucks receives protection based on priority registration, the company could easily file a suit against a similarly-named company like “Stars Coffee” for trademark infringement because the “Stars Coffee” mark is likely to cause consumer confusion due to the almost identical Starbucks’ name and logo. In that example, Starbucks could elect to send Stars Coffee a cease and desist letter, asking them to stop their operations and end their use of

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100 Id.


102 Id.

If an infringement suit is decided, if the court finds Stars Coffee liable for trademark infringement, this is where it may choose to issue an injunction and/or hold Stars Coffee liable for monetary damages. However, the signing of the Russian decree added a new layer of difficulty in successfully proving trademark infringement overseas, even in situations where companies had previously obtained trademark protection based on priority registration. The decree allows Russian brands to use the intellectual property of the right holders who disseminated in information and telecommunication networks, including on the Internet, information expressing in an indecent form that offends human dignity and public morality, a clear disrespect for society, the state, the official state symbols of the Russian Federation, the Constitution of the Russian Federation or bodies exercising state power in the Russian Federation without requiring any payment of licensing fees to foreign companies from “unfriendly” nations. Thus, in the Starbucks example, Starbucks no longer has the option to ask Stars Coffee to pay them a licensing fee. Instead, Stars Coffee is free to use the ex-Starbucks store locations, logo, and name without having to compensate Starbucks for any use of their mark.

President Putin’s power to sign the decree may be equated to President Biden’s Executive Power to issue executive orders. In the United States, an executive order is “a signed, written, and published directive from the President of the United States that manages operations of the federal government.” Similarly, a Presidential Decree is “an official order or decision, especially one made by the ruler of a country.”

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105 Decree of the Russian Federation, supra note 6.

106 Id.


In Russia’s case, the legal basis for the signing of the March 2022 Decree came from Article 1360 of the Russian Civil Code, stating that,

in the event of extreme necessity related to ensuring the defense and security of the state, or protecting the life and health of citizens the Government of the Russian Federation is entitled to take a decision on the use of an invention, utility model or industrial design without the consent of the patent holder, with the patent holder being notified as soon as possible and with commensurate compensation being paid to the patent holder.109

The signing of Putin’s decree created an allegedly “temporary”110 war-time law, but Russian Courts have also played an instrumental role in the protection of intellectual property rights during wartime.

In early March of 2022,111 Russian courts attempted to use a family favorite cartoon character “to retaliate against [the] economic sanctions” imposed by the world against Russia.112 In the early stages of the Peppa Pig lawsuit, Entertainment One, the owners of the Peppa Pig trademark, filed a complaint against the Vietnamese media company, Sconnect, which owns a number of Youtube channels, claiming the company created a “reworked” version of the characters on Peppa Pig.113 Ultimately, The Arbitration Court of the Kirov Region in Russia decided to deny the original copyright holder rights based on its origin in an unfriendly country—the United Kingdom.114

While the Arbitration Court specifically addressed the copyright issue over Peppa Pig, whose copyright registration was based in the United Kingdom, the decision nonetheless posed a threat to all forms of

109 Law No. 107-FZ [Civil Code] amendments to art. 1360 (Russ.).
110 Decree of the Russian Federation, supra note 6.
intellectual property from any “unfriendly country.” Essentially, the Arbitration Court based their decision to allow Peppa Pig to be “legally copied in Russia without fear of claims of infringement” on war-time politics. Not only did the verdict hold that Russian courts would no longer recognize intellectual property rights from specific, “unfriendly nations,” it also allowed for “the unauthorized infringement of protected works.”

Unsurprisingly, many lawyers feared that the lower court’s decision would lead to “an uncontrolled growth in the volume of counterfeit products on the Russian market.” Companies were also worried that “their goods [would] be subject to rampant infringement in Russia.” However, fears were also relieved by the legal assumption in Russia’s Intellectual Property Court, which stated that “location of the plaintiff in an unfriendly country is not a reason to refuse judicial protection of the right.” Regardless of the presumption, brand owners may have had good reason to fear the unknown possibilities that could potentially come if more courts began to follow in the Arbitration Court of Kirov Region’s footsteps with the Peppa Pig decision.

Thankfully, a few months later, Russia’s Second Arbitration Court of Appeal canceled the lower court’s decision, turning to the country’s Constitution, which affords intellectual property protections to both citizens and organizations. The Second Arbitration Court of Appeal wrote,

[the equal protection of intellectual property of foreign organizations, including those registered in the UK, is guaranteed on the territory of the Russian Federation. Consequently, the filing of a claim in itself cannot be recognized as an act of bad faith in relation to Article 10 of the Civil Code of the Russian Federation. The motives given

115 Id.
117 Id.
119 Peppa Pig Verdict, supra note 116.
120 Zuykov, supra note 118.
121 Kass, supra note 111.
in the decision of the court of the first instance are not based on the correct application of substantive law.\textsuperscript{122}

Essentially, the Second Arbitration Court of Appeal used Russia’s Civil Code to reassure trademark owners, even if they are from “unfriendly nations,” that they are legally entitled to protection.\textsuperscript{123} Of course, this holding calmed many who previously expressed worries after the lower Court’s decision, but still, the decree cast an overarching shadow of worry. With suspended payments of royalties and licensing fees for an undefined period of time contingent on the ending of a war, Russian copycat brands continued to tip toe the line of infringement, in many instances crossing it, with no worries of any repercussions.

III. LOOKING TOWARDS THE FUTURE

Naturally, business owners face many difficulties while operating in a country involved in war. The safety of employees and customers is constantly at risk in combat zones,\textsuperscript{124} business supplies may arrive damaged, with great delay, or maybe not at all,\textsuperscript{125} and there is a big possibility the business could be destroyed in an attack or come into contact with violent groups.\textsuperscript{126} Most recently, the suspension of intellectual property rights has become a popular topic of discussion in regards to the difficulties business owners may face while operating in a country that is at war. Interestingly, Cuba is the only other country that jeopardized the intellectual property rights belonging to foreign nations during a time of war.\textsuperscript{127}


\textsuperscript{123} Peppa Pig Verdict, supra note 116.


\textsuperscript{125} Id.

\textsuperscript{126} Id.

has been a consequence of the U.S. trade embargo against Cuba, and the topic of trademark harmonization would necessarily require the attention of both countries and their businesses."

Notably, [...] the Cuban government ha[d] traditionally characterized piracy as a byproduct of the embargo, [although] that excuse continue[d] fading in the face of growing diplomatic relations . . . . While such piracy raise[d] more concerns for U.S. copyright holders, it [was] foreseeable that a surge in trade [would] lead to a rise in counterfeit goods.

With growing tensions between the US and Cuba on these trademark issues, it was predicted that the return of diplomatic relations would undoubtedly be an initial step toward the revitalization of trade." Similarly, the return of diplomatic relations could be a significant initial step in helping the United States and Russia return to their pre-invasion normalcy with regards to intellectual property rights.

It is possible that in our current situation, Russia is merely acting out of spite in response to the many countries that imposed economic sanctions on them because of their invasion of Ukraine. It is also possible that Russia is acting to do what is best for them in light of their current situation. Whatever their motivation may be, Russia’s decision to suspend the enforcement of foreign intellectual property rights has definitely given a new meaning to the use of intellectual property rights as a war strategy. Although the present, on-going situation between Russia and Ukraine still leaves many unknowns, we can only help but think about the future implications on trademarks during times of war and what other ways governments can manipulate intellectual property protections. Eventually, the Russian-Ukrainian War will come to an end and intellectual property rights, contingent on economic sanctions being dropped, will likely revert back to their normal operations and payment of licensing fees. However, this transition back to “normal” will be an interesting one to witness. How easily will the infringed upon trademarks be able to receive compensation for use of their mark and lost profits during this time? Will there be any type of waivers to avoid lawsuits? Will deals between the so-called

128 Id.
129 Id.
130 Id.

“unfriendly nations” need to be made with Russia to correct this whole mess? How long will negotiations take to come to a mutually desirable outcome? Clearly, there are many unknowns regarding how Russia will bounce back after the war. Some of these brands may choose to cut their losses entirely and never return to the Russian market. Others may elect to similarly follow the footsteps that Apple took in China and buy-back their own trademark. Of course, one major difference distinguishes these two situations—war.

Russia’s strategic suspension of intellectual property rights may have been the first of its kind on this grand scale, but, unfortunately, it may likely not be the last. After witnessing how powerful and impactful the signing of the decree ended up being, giving copycat brands the ability to do what they want without paying anything, who knows how other countries will utilize and manipulate this strategy in the future. While any suspension of intellectual property rights would logically result in lost profits, not all countries at war may choose to follow this tactic. Bigger countries that dominate the majority of the world’s markets may pose a much more significant threat of loss if foreign intellectual property rights were to be suspended there. For example, if Canada deemed the United States an “unfriendly nation” and signed a decree allowing businesses to use foreign intellectual property without paying licensing fees, it would have a much different effect than if a smaller country suspended the payment of licensing fees for use of intellectual property. Regardless, it will be interesting to watch countries navigate through the use of intellectual property as a weapon of war and find new ways to combat foreign nations who do not voice their support in future wars.

CONCLUSION

When we think about weapons of war, our minds immediately wander to grenades, guns, and tanks, but could intellectual property be the next focus for weapons of war? Though a non-traditional “weapon” by its definition, the Russian-Ukrainian War has manipulated intellectual property to become a powerful tool for the strategies behind war.\footnote{Enrico Bonadio & Alina Trapova, How Russia is using intellectual property as a war tactic, CITY UNIV. OF LONDON (Mar. 21, 2022), https://www.city.ac.uk/news-and-events/news/2022/03/how-russia-is-using-intellectual-property-as-a-war-tactic (reporting on Russia’s weaponizing of intellectual property).} What began with the Russian government allowing a re-creation of Peppa Pig
has expanded in the form of official decrees and a suspension of compensation for any use of protected material.\footnote{Peppa Pig Verdict, supra note 116; see also Decree of the Russian Federation, supra note 6.}

Eventually, it is likely that abandoned trademarks will be able to re-enter the Russian market, contingent on the United States dropping economic sanctions on Russia, but, at what cost? Perhaps brands that wish to re-enter the market and register their brands again will be forced to buy their brands back from squatters, as Apple did in China. Maybe brands will complete a deeper analysis to determine how much of their overall revenue was derived from Russia and decide to stay out of that market rather than buying their trademark rights back. Maybe a new solution will be created to deal with the suspension of intellectual property rights during wartime situations that differs from the precedent from Cuba. Of course, it is still unclear what the future implications on trademarks will be once the Russian-Ukrainian war is over, and it will likely be a difficult journey for foreign companies to embark on. However, this battle does not end here.

The Russian response to the United States economic sanctions explicitly targeted intellectual property rights.\footnote{Decree of the Russian Federation, supra note 6.} Russian business owners took advantage of an opportunity that they saw with the signing of the Russian decree, all while setting a precedent not just for Russia, but for the entire world.\footnote{Bonadio & Trapova, supra note 131.} The impact of the Russian invasion will now extend to future wars and altercations between nations, no matter how big or small. Eventually, governments may not even wait for the imposition of economic sanctions against them before temporarily, or even permanently, suspending the trademark rights of foreign intellectual property holders.