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A critical analysis of trademark vigilance under ANNEX III of the revised Bangui agreement

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Abstract

Trademarks are business tools that are used to effectively communicate the goods or services of a producer from the goods or services of other competitors in the marketplace. If used in an efficient manner by the mark owner it can even guarantee high quality and goodwill to the products and that mark. Trademark laws have always imposed to mark owners an obligation to be very vigilant in order to properly exploit their rights in the mark and police the mark to avoid infringement. Lack of vigilance on the part the trademark owner can create forceful cohabitation which is very bad for brand reputation and may lead to likelihood of confusion affecting the public interest. The recent revision of the Bangui Agreement on December 14, 2015 in Bamako Mali has drastically reduced the period of opposition from six months to sixty days, making it extremely burdensome for marks owners to properly oppose any similar or identical mark at the Organization. With the coming of the internet and the limited amount of time to oppose trademarks at the Organization, consumers are faced with goods which might be fake, or they may be purchasing goods thinking it emanates from their usual manufacturer. This also affects trademark owners who may suffer loss of brand reputation due to forceful cohabitation and the sale of counterfeit products similar or identical to theirs. This study seeks to examine the consequences of trademark negligence, forceful cohabitation and how mark owners prevent their marks from being infringed.

Keywords: Trademarks, infringement, opposition, counterfeiting, vigilance

Introduction

Marks are amongst the most ubiquitous and powerful symbols seen in the world today ^[1]. Any legal protection accorded to trademarks is mainly justified by the ability of the trademark to provide an undistorted information that reduces the search cost of the consumers ^[2]. It is therefore a globally accepted fact that the information that any mark provides is essential to most commercial transactions to enable consumers of trademarked goods identify what they desire in the market place correctly ^[3].

Our focus on trademark functions here is based on trade ^[4] since intellectual property and in particular trademarks are chosen for their business value ^[5]. As of now it is no longer reasonable to argue that a trademark has only one function ^[6], which is the designation of the source of goods and services ^[7]. Trademark therefore as a result of modern expansion has multiple roles it plays in the current market place ^[8].

¹JasemTarawneh (2016), A New Classification for Trademark Functions, University of Manchester Journal of Intellectual Property Quarterly, p. 1.

²William Landes & Richard Posner (1987), Trademark Law: An Economic Perspective, Journal of Law and Economics, vol. 30, p. 265.

³Michael Grynberg (2011), The Judicial Role in Trademark Law, Boston College Law Review, Vol. 52, No. 12, p. 1286.

⁴BerntHugenoltz (2010), Trademark Protection and Freedom of Expression: An Inquiry into the conflict between Trademark Rights and Freedom of Expression under European Law, Wolters Kluwer Law & Business, Vol. 22, p. 43.

⁵OMPI (2006), IP Development and Management: A Key Strategy for Economic Growth, Geneva, WIPO Publications No. 896E, p. 4.

⁶Dima Basma (2016), The Nature, Scope, and Limits of Modern Trademark protection: A Luxury Fashion Industry Perspective, PhD Thesis, University of Manchester, p. 102.

⁷Ibid.

⁸Ibid.

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Trademark law has both an economic and legal function^[9] and it is the duty of the mark owner to ensure protection of the mark for future purchase for their personal benefit. Any registration of a trademark by the owner is done because he/she wants to reap the exclusive benefits of their investments^[10]. Any negligence on the part of the mark owner to police his mark to deter infringers or forceful cohabitation is paramount for the continuous reputation of the brand and increase in economic benefits of the mark.

The need for recognizing signs as a prerequisite marks under annex iii of the Bangui agreement

Trademarks have been given many definitions by a series of different authors. The Bangui Agreement^[11] stipulates in its article 2 (1) that; “Any visible or audible sign used or intended to be used and capable of distinguishing the goods or services of any natural or legal person^[12] shall be considered a trademark or a service mark. It should be stated that before the coming of the amended Bangui Agreement of 2015 signed in Bamako, the organization of African Intellectual Property (OAPI) did not recognize the registration of any audible sign as a trademark and as a result of the 1999 Bangui Agreement Annex III, article 2 no protection can be conferred to any audible mark.

The recognition of audible signs^[13] used or intended to be used and also capable of distinguishing goods and services as a trademark is a new very significant innovation of the Bangui Agreement striving to meet up with the ever-progressive technological protection most Intellectual property regimes offer their mark owners. A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors^[14]. Service marks help consumers to identify the variety of services offered on a national and even the international scale^[15].

The TRIPS Agreement^[16] that is applicable to all World Trade Organization (WTO) members^[17] has defined a trademark as; Any sign, or a combination of signs, capable of distinguishing the goods or services of one undertaking from those another undertaking, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours^[18] as well as any combination of such signs, shall be eligible for registration as trademarks^[19]. It will seem that the amended Bangui Agreement of 2015 was greatly influenced by the TRIPS

Agreement since all member states were encouraged to improve on rights of intellectual property owners and also ensure public interest rationales in the area of nutrition and health^[20]. Well known trademarks^[21] are very much protected under annex III of the Bangui Agreement^[22]. The 2015 Version of the Bangui Agreement Annex III also includes all audiovisual signs^[23], series of signs^[24] and collective certification marks^[25], guaranteeing their protection after registration if the conditions embedded in article 3^[26] are fulfilled.

Questioning and assessing the conditions to be conferred trademark rights under annex iii of the Bangui agreement

Within the OAPI zone in order for any natural or legal person to enjoy any rights of a trademark used or intended to be used in cause of trade, that mark must be registered at the special registry relating to trademarks at the organization. All signs recognized as marks embedded in article 2 of the Bangui Agreement and its various subsections, after registration become valuable tools to the mark owner^[27] who has title and can use or dispose of the mark^[28] within the protection accorded to him by the organization. Trademark protection within the OAPI Zone can only be discussed after any natural or legal person has filed an application to the organization and succeeding to acquire title or a priority claim^[29].

Article 4 of the Revised Bangui Agreement 2015 provides that; subject to the following provisions, ownership of a mark belongs to the person who first deposited it. A mark may be acquired in joint ownership^[30]. The Bangui Agreement makes registration an obligatory criterion for the

²⁰ Article 8(1) of the TRIPS Agreement 1994, stipulates that; all members may in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

²¹ Irene Calboli, (2020), “Protection of Well-Known Trademarks and Measures to Prevent Bad Faith Registrations”, Texas, EUIPO, p. 12.

²² Article 6 of the Bangui Agreement 1999.

²³ Art. 2 (1) (d) of Annex III of the Bangui Agreement.

²⁴ Ibid Art. 2(1) (e).

²⁵ Ibid Art. 2(2).

²⁶ Article 3 provides the categories of Marks not eligible for registration A mark may not be validly registered if:

(a) it is not distinctive, in particular because it is composed of signs or matter constituting the necessary or genetic designation of the product or its composition;

(b) it is identical to a mark that belongs to another owner and is already registered, or to a mark whose filing or priority date is earlier and which relates to the same or similar goods or services, or it so resembles such a mark that it is liable to mislead or confuse;

(c) it is contrary to public policy, morality or the law;

(d) it is liable to mislead the public or business circles, in particular as to the geographical origin, nature or characteristics of the goods or services in question;

(e) it reproduces, imitates or incorporates armorial bearings, flags or other emblems, the abbreviated name or acronym or an official sign or hallmark indicating control and warranty of a State or intergovernmental organization established by an international convention, save where the competent authority of that State or organization has granted its permission.

²⁷ Peter S. Sloane (2020), Trademark Vigilance in the Twenty-First Century: An Update, Fordham Intellectual Property, Media and Entertainment Law Journal, Vol. 30, No. 4, Article 5, p. 1201.

²⁸ Ibid.

²⁹ Article 4 (1) of the Bangui Agreement annex III, Relating to trademarks and service marks.

³⁰ Ibid.

⁹ Patricia Kimball Fletcher (1982), Joint registration of Trademarks and the Economic Value of a Trademark System, University of Miami Law Review, Vol. 36, No. 2, Article 5, p. 308.

¹⁰ Ibid.

¹¹ Article 2 (1) of the Bangui Agreement 1999.

¹² Jasem Tarawneh (2016), A New Classification for Trademark Functions, University of Manchester Journal of Intellectual Property Quarterly, p.2.

¹³ Article 2 (C) Annex III Relating to Trademarks and Service Marks of the amended Bangui Agreement of 2015 signed at Bamako.

¹⁴ WIPO (2008), Intellectual Property Handbook: Policy, Law and Use, WIPO Publication No. 489 E, P. 70

¹⁵ Ibid.

¹⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), Available at: https://www.wto.org/english/tratop_e/legal_e/27-trips.pdf.

¹⁷ WTO (2012), Frequently asked Questions about TRIPS. Available at: http://wto.org/english/traop_e/trips_tripfq_e/htm.

¹⁸ Irene Calboli (2018), “Introduction to the Protection of Non-Traditional Trademarks: Critical Perspectives”, Texas A&M Law Scholarship, Vol. 1, No. 1, p. 2.

¹⁹ Article 15 (1), of the TRIPS Agreement 1994.

protection of trademarks and exclusive ownership of any visible or audible signs recognized under the annex.

The position of trademarks rights conferred after the registration

After the registration of the trademark at the Organization the applicant is granted ownership of the mark for the goods and services that he designated ^[31]. As of the 2 January 2022, Annex III of the Bangui Agreement revised in 2015, makes it possible for trademarks to be jointly owned. The mark owner has the right to use his mark for the goods and services that the mark is designated to, and also prohibits all acts that may hinder his enjoyment of his rights or cause confusion ^[32]. The rights granted to the trademark holder permit him to affix the mark on the goods or services listed in the classes he chose are exclusive. Effect of trademark registration, in general terms, grants the proprietor an exclusive right to the trademark to;

1. Use the trademark in relation to the goods or services in respect of which the mark is registered (subject to other limitations),
2. Prevent other persons from registering the trademark or a confusingly similar mark in relation to the same or similar goods or services
3. Prevent other persons from infringing the trademark,
4. License the use of the trademark and
5. Transfer (assign) the trademark ^[33].

The Bangui Agreement Annex III article 6 provides rights after registration of the mark, and article 6 (1) stipulates that;

1. Registration of a mark confers on its owner a right of ownership of the mark for the goods and services he has designated
2. The following shall be prohibited unless authorized by the owner;
 - A. The reproduction, use or affixing of a mark, even with the addition of words such as “formula, manner, system, imitation, type, method” and use the use of a reproduced mark for goods or services that are identical to those designated in the registration;
 - B. The suppression or modification of a properly affixed mark;
3. The following shall be prohibited, unless authorized by the owner, if they are liable to create confusion in the public perception
 - A. The reproduction, use or affixing of a mark and the use of a reproduced mark for goods or services that are similar to those designated in the registration;
 - B. The imitation of a mark and the use of an imitated mark for goods or services that are identical or similar to those designated in the registration ^[34].

After registration the owner has the has to use his mark and also exclude others from illegally exploiting his mark without prior authorization. The court of first instance Abidjan Plateau in the case of SOCIETE S.I.P.A. (Société S)

c/ I.M. A ^[35] the enterprise in the name of SOCIETE S.I.P.A deposited the trademark titled LEOPARD, to use for goods (match box). The Enterprise in the name of I.M.A stated making use of the mark THE LEOPARD for the sale and distribution of similar goods, the plaintiff seized the court of first instance Abidjan Plateau on the grounds that article 7 (1) of the Bangui Agreement Annex III ^[36] stipulates that; registration of a mark confers on its owner the exclusive right to use the mark, or a sign resembling it, in connection with the goods or services for which it has been registered and similar goods or services.

The courts declared the acts of I.M.A as unfair competition prohibiting them from using the mark THE LEOPARD for similar goods or services or goods resembling the mark of the enterprise S.I.P.A with damages of 2000,000 frs CFA. Again, any mark that the owner allows to become the usual designation of goods and services can be cancelled. The cancellation of the mark by reason of the mark owner forfeiture might be for all the goods or services or for some goods or services.

Trademark infringement, a continuous nightmare affecting party's right in trademark dealings

Trademark infringement has a tripartite classification. Trademark infringement consist of primary infringement, secondary infringement of trademarks ^[37] and lastly in cases of well-known marks, protection is accorded against the unauthorized use of the mark taking unfair advantage of or is detrimental to the distinctive character or reputation of the mark ^[38]. Generally, the use of the term trademark dilution is used as the shorthand way of this type of infringement ^[39]. A very clear distinction must be made when analyzing trademark infringement, this is because cognate concepts that infringe trademarks are handled under some different areas of law such as trade secrets, or unfair competition laws. The rules that govern unfair competition do not in general form part of trademark law ^[40] but the Bangui agreement in Annex VIII makes provisions for the protection against unfair competition. The primary infringement of trademarks still makes emphasis on the notion of use of a registered mark in trade.

The court of Appeal of Abidjan in Ivory Coast was in agreement with the court of first instance in the case of *Affaire Société N. et WBF c/ Société S.O. CORP* ^[41] Mr. T.C exercised a business within Ivory Coast and the subregion under the name Les Establishments C and got registered at the registry of Commerce since the 18th December 1988. He registered the mark SUNWATT at OAPI under the name of his company Les Establishments C since 1994, the judge emphasized that the exclusive rights of Société S.O. CORP be respected since article 5 of Annex

³⁵ Judgement No. 11/2002 of Court of First Instance Abidjan Plateau, Ivory Coast, SOCIETE S.I.P.A v. I.M.A.

³⁶ Article 7 (1) of the Bangui Agreement of 1999.

³⁷ Graeme W. Austin, (2008), “Tolerating Confusion about Confusion: Trademark Policies and Fair Use”, *Arizona Law Review*, p. 162.

³⁸ Anne M. McCarthy (1999), *The Post-Sale Confusion Doctrine: Why the General Public should be Included in the Likelihood of Confusion Inquiry*, *Fordham Law Review*, Vol. 67, No. 6, Article 13, p. 3337.

³⁹ WIPO (2018), *A Casebook on the Enforcement of Intellectual Property Rights*, op cit. 24.

⁴⁰ WIPO (1993), *Introduction to Trademark Law and Practice: The Basic Concepts*, A WIPO Training Manual, 2nd Ed, Geneva, WIPO Publication No. 653, p. 97.

⁴¹ Court of Appeal, Civil Division, Abidjan, Cote d'Ivoire, Judgment No. 182 du 02 March 2007 (Unreported).

³¹ Bruce A. McDonald (2004), *International Trademark Registration Under the Madrid Protocol*, electronic source see. [https:// mas13593-ch04](https://mas13593-ch04). P. 119.

³² Article 6 (1) of the RBA 2015) Annex III.

³³ WIPO (2018), *A Casebook on the Enforcement of Intellectual Property Rights*, 4th Ed, L.T.C Harms, Geneva, WIPO Publication No. 791E.

³⁴ Art 6 of the Revised Bangui Agreement Annex III of 2015.

III of the Bangui Agreement grants ownership of a mark to any person who first files the mark at the Organization. Société N. et WBF were prohibited from using the mark SUNWATT for the sale and distribution of batteries^[42]. This is because the goods in question were identical goods and for identical marks. The courts ordered the cancellation of the trademark in the special register of marks of the Organization. The Organization cancelled the use of the trademark AZITHRIN^[43] registered under no. 70826, the mark was deposited at the Organization on the 19th of August 2010 by Société STRIDES ARCOLABS LTD for goods listed in class 5 of the Nice Agreement. The mark was registered and later published in the BOPI on August 30th 2013. Les LABORATOIRES THEA insisted to the organization that they are the rightful owners of the mark named AZYTHER registered no. 57943 deposited at the organization on the 21st December 2007 for goods in class 5. Their argument was based on the fact that the mark AZITHRIN was similar to their mark and that the representation of the mark is an imitation of the mark AZYTHER. Les LABORATOIRES THEA made mention of article 7 (2) of the Bangui Agreement^[44] which provides that; registration of the mark likewise confers on the owner the exclusive right to prevent all third parties from making use in business without his consent, of identical or similar signs for goods or services that are themselves similar to those for which the trademark or service mark has been registered where such use is liable to cause confusion. Where an identical sign is used for identical goods and services a risk of confusion shall be presumed to exist. The opposition emphasized that phonetic resemblance of the far to stricken and that when verbal marks are used the risk of confusion is higher for the average consumers who are presented with both goods sold in the same territories. Les LABORATOIRES THEA I their application for opposition reminded the Organization that STRIDES ARCOLABS LTD have failed to ascertain that their mark is distinctive. That Article 3 (b) of the Bangui Agreement provides that; a mark will not be validly registered if it is identical to a mark that belongs to another owner and is already, or the filing or priority date of which relates to the same or similar goods or services, or where it so resembles such a mark that it is liable to mislead or confuse. The mark AZITHRIN was cancelled from the Special register of marks in 2015. Reputation of the brand is very important if dilution is to be established^[45].

Remarkable Implications affecting Trademark Negligence

Most often trademark owners believe after registration of their marks at the Organization and rights are conferred, there is no need to keep examining the official Gazette. Trademarks is a company's prime assets (intangible, but of great value) and mark^[46] owners only think of protecting it

when faced with illicit infringement^[47]. NESTLE S.A^[48] a limited company, holds two trademarks registrations: No. 40092 filed on the 3rd of November 1998 for goods in class^[49] 32, and No. 54492 filed on the 20th of June 2006 for goods in class 5 and 29. On the 6th of November 2008, another company in the name of *Preparados Alimenticos*, filed at the Organization^[50] a registration similar to that of NESTLE' S.A in the same class 29; and the mark was registered under No. 60772. The issue surrounding this pertinent case is that NESTLE S.A did not oppose the registration of the trademark No. 60772 in the name of *Preparados Alimenenticos*. Later on, the 5th of March 2013, NESTLE S.A filed another Mark identical to its earlier registration No. 40092 and 54492 (identical to *Preparados Alimenticos* Company's mark No. 60772, which was registered under No. 74457. NESTLE S.A claimed in her defense that it held a pre-existing right on the mark by virtue of its earlier registrations No. 40092 and 54492, they called for the quashing of the opposition. The Director General was in accordance with NESTLE S.A and he relied on article 7 (1) of the Bangui Agreement Annex III which provides that "Registration of a trademark confers on its holder exclusive rights to use it or a sign resembling it on products and services for which it was registered and therefore on similar products or services" the opposition was rejected.

Strangely on appeal, *Preparados Alimenticos* filed at the OAPI High Commission of Appeals held a different view deeming that "when an opponent's earlier rights to a trademark are not challenged and when the clear risk of confusion of two trademarks protecting products in the same classes is not refuted or, at least demonstrated as nonexistent, and should the depositor fail to indicate in what way marks listed by him although earlier than that of the opponent, can lead to the latter being denied the right to usefully demand corresponding legal protection against any earlier registration that is similar or might lead to confusion, the depositor's mark shall be cancelled".

It was also emphasized by the High Commission of Appeals that "the holder of an earlier registration cannot deny the holder of a subsequent registration that he had failed to oppose the right to usefully claim corresponding legal protection against any subsequent trademark registration that is similar or carries the potential risk of confusion. He cannot subsequently invoke article 7 paragraph 1 of the Bangui Agreement Annex III to justify his decision". This is the key jurisprudence that shows the pertinence of trademark vigilance because mark owners' content themselves with just filing their trademarks or service marks and no longer pay any attention to the numerous diligence and infringements to which these valued marks may be exposed^[51].

⁴²Dashaco J. Tambutoh, (2012), "Study on Misappropriation of Signs, Report on OAPI, Committee on Development and Intellectual Property (CDIP)", WIPO, 9TH Session Geneva, p. 40.

⁴³ See Decision No. 092/OAPI/DG/DGA/DAJ/SAJ Cancellation of the mark AZITHRIN January 2015.

⁴⁴ Bangui Agreement Annex III article 7 (2) 1999 version.

⁴⁵ Stacey L. Dogan and Mark A. Lemley (2008), The Trademark Use Requirement in Dilution Cases, Santa Clara High Technology Law Journal, Vol. 24, Issue 3, Article 5, p. 541.

⁴⁶ Deborah R. Gerhardt (2010), Consumer Investment in Trademarks, North Carolina Law Review, Vol. 88, No. 2, Article 3, p. 428.

⁴⁷Glynn S. Lunney, Jr (2018), Trademark's Judicial De-Evolution: Why Courts Get Trademark Cases Wrong Repeatedly, California Law Review, Vol. 106, Issue 4, Article 4, p. 1195.

⁴⁸ Decision No. 2/18/CSR/OAPI/ of 9 March 2018 Appeal for the Cancellation of Decision No. 261/OAPI/DG/DGA/DAJ/SAJ of 31 December 2015 Rejecting the Opposition to Registration No. 74457 for the Mark 'FIGURATIVE'.

⁴⁹ the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of June 15, 1957, as revised at Stockholm on July 14, 1967 and at Geneva on May 13, 1977, and amended on September 28, 1979.

⁵⁰ OAPI Meaning Organization Africaine de la Propriete' Intellectuelle, referred here as the Organization.

⁵¹ Ibid.

The exist a remedy when a party files an application for the registration of a mark identical to an already existing in bad faith the Organization may decide to still cancel the mark even if the opposition was filed after the date line, the case of G'FIVE^[52] is illustrative to this effect. It is way too much resources on the mark owners to successfully police the ever expanding use and filing of trademarks sometimes in bad faith in hopes of benefiting from a marks notoriety^[53].

The trademark Annex came into force on the 2 of January 2022, mark owners are hoping that it will be advantageous to their brand and it will promote competition amongst traders. It is very stressful that the Bangui Agreement irrespective of it protection given to mark owners in areas of counterfeiting has reduced the duration period for registered mark owners to oppose infringing signs. There are no serious sanctions to deter applicants for file signs in bad faith with the expectation that the trademark owner will not oppose on time, or are any strict and quick mechanisms to prevent the sale and use of counterfeit trademark products in the territory of member states. The OAPI member states still very high rates of counterfeits in circulation making the Zone playground for mark piracy. Damages to be paid is still left at the discretion of the court seized of the matter which in most cases has no static metric of measurement. The trademark owner is mostly at a loss due to the uncertainty of damages offered by the courts. Any trademark holder who wants to search for information is under financial compulsion by the court which is another burden on the financial resources of the producer.

It is recommended that the trademark holder be in the front line whenever his rights are infringed. A vigilant control of this intangible asset by the mark owner is vital for the preservation of brand reputation which helps in differentiating goods or services in the market.

The amount of money required by the courts before issuing an order for search of information should be reduced and payable according the size of the said commercial company. The damages for illegal use, bad faith filing at the organization and counterfeiting of registered trademark products should be given a fixed sum of money for infringers to know up front what they risk losing whenever they file applications in bad faith to create forceful cohabitation. The problem of criminal sanctions implementation is also not taken serious encouraging recidivist to continue illegal exploitation of registered trademark.

Conclusion

It is pertinent at this point of technological advancement and online filing of trademarks at the OAPI, that a trademark owner exercises a lot of vigilance in order to avoid forceful cohabitation. This position can greatly affect brand reputation if the recent producer's goods are inferior, the consumers might believe they are from the same source and thus bad for economic reasons. Trademark owners are therefore advice to dedicate a portion of their resources to policing counterfeiting and illegal use of their marks and

also constantly monitoring abuse and enforcing their rights. Effects like that will be efficient in preserving mark rights. In a situation where the trademark owner does not oppose the registration of an identical mark on time, the is still a possibility for the mark owner to seize any competent court in any of the 17 member states where the goods are distributed or sold to claim the ownership of his rights. The challenge with regards to trademark counterfeiting and forceful cohabitation as a result of negligence is that it is not easy for trademark owners to continuously spend huge amounts of money to oppose bad faith applicants, and secondly the exist no possible mechanism available as of now to stop the illegal use of a registered trademark. The question that remains unanswered is will trademark owners still have any incentive to register marks that are constantly infringed by recidivist and bad faith applicants? a better sanction to infringers is needed to close the gap.

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⁵² Decision No. DECISION N° 098/OAPI/DG/DGA/DAJ/SAJ cancellation of the Mark G'FIVE from the special register of Marks.

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