

Intellectual Property**Capturing the flag: Who owns national symbols?**By **Emanuela Truffo**

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(July 5, 2022, 9:23 AM EDT) -- Flags are symbols, unspoken language that have been allowing people to communicate for centuries. Flags could be signals, warnings, letters composing words as on a Scrabble board, or the symbols of communities or nations.

Being the flag of nation symbolizes the values and principles that characterize a specific community gathered together defining itself as a nation. Despite any attempt perpetrated by the chosen few managing the (political) power through centuries, no nation could exist and prosper unless it is self-determined and self-created. The birth of a nation is a bottom-up phenomenon, no matter if the outcome of such a process is democratic or not.

That is the reason why any protest against the incumbent administration of a country finds the flag and its violation the most powerful iconography. From sport events to public celebrations to protests, flags are an integral and paramount part of people's lives.

Marketing strategists could not refrain themselves from including flags among their tools to promote and sell merchandise, particularly those which leverage on their geographical source to get premium prices.

A trademark and a flag share one peculiarity: they are telling us the origin of something, the former the manufacturer of a product and the latter the nation to which a person belongs, no matter the place of birth. In a nutshell, both trademarks and flags distinguish someone — a market player or a country — from the others — competitors or other nations. They have a distinctive power and function.

A trademark, including a collective one, belongs to a private legal entity owning the exclusive faculty to use such a trademark in its own business. But, who does own a flag? A state, the political entity chosen by the people of a country to lead it. Hence, the administration or the parliament of a state is not the owner of a flag, but the mere keepers, as consortiums are mere keepers of Geographical Indications of Origin. They have to defend the integrity, the consistency to the principles they represent and the dignity of what they have been entrusted with.

As a consequence of this, all the international treaties approved inside and outside the World Intellectual Property Organization (WIPO) expressly deny the possibility of getting a valid and enforceable trademark registration having as its exclusive object a flag or any other symbols — including coats of arms — directly or indirectly linked to a state. Furthermore, if a flag is one of the components of a complex mark, the use must be fair; i.e. it must not mislead consumers about the origin of the product supposed to be identified by the trademark.

Nobody could argue that. But, what about the use or misuse of flags that might have a negative impact on the flag's — and hence the nation's — reputation? In other words, how can a balance be found between freedom and protection of the values and integrity of a nation? To what extent can a group "steal" the flag to identify their own position thus wrecking the *super partes* role of the flag? And to what extent does the right to publish — strictly related to the freedom of speech/thinking/press — prevail over the safeguard of a symbol?

The pandemic years tested everybody's resilience and western countries were forced to handle two battlefronts: the pandemic and people's anger caused by fear and economic troubles. Basically, two factions were confronting each other: staying opened vs. staying closed, in earlier days of the pandemic, vaccines vs. no vaccines later on. And both sides based their position on their love for their country, on their patriotism, represented by the flag. The main point is that only one side went down the streets protesting against what they considered unjust, hence the press coverage and the Internet footage showed more often than not those against the incumbent administration alongside their countries' flags. The unifying symbol of a community turned to be a partisan one.

In business, detecting a misleading use of a flag is easy: we have constant caselaw in each WIPO member state identifying as misuse of a flag or of any other symbol of a country as any potential direct or indirect link to a specific area of origin of the product which is not based on

- (a) Truth;
- (b) Relevance;
- (c) Consistency;
- (d) Transparency.

When it turns into society and politics, it turns hard: we have caselaw punishing any outrage to a flag, but we have no decisions — court decisions — facing the delicate problem of founding a balance between principles, which happen to be equally protected by constitutions.

The final choice is reserved to sensibility and common sense.

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