



An Overview of the Concept of Defensive Trade Mark Registration in Nigeria

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22th August 2025

A defensive trade mark registration is an important trade mark protection strategy that proprietors of well-known trade marks in Nigeria can employ. It extends legal protection beyond traditional trade mark classes, offering broader security against misuse, dilution, and infringement.



Legal Framework

Under Section 5 of the Trade Marks Act (TMA), a trade mark proprietor is granted rights over the registered mark for specific goods or classes. However, Section 32 TMA allows the registration of well-known trade marks as defensive marks, protecting them even in unrelated goods or services to avoid dilution. It provides that:

“Where a trade mark consisting of an invented word or invented words has, as respects any goods in respect of which it is registered and in relation to which it has been used (in this subsection referred to as the familiar goods), become so well known that its use in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the familiar goods, the trade mark may, on the application in the prescribed manner of the proprietor registered in respect of the familiar goods, be registered in his name in respect of those other goods as defensive trade mark, notwithstanding that the proprietor registered in respect of the familiar goods does not use or propose to use the trade mark in relation to those other goods, and notwithstanding anything in section 31 of this Act, and while so registered, the trade mark shall not be liable to be taken off the register in respect of those goods under section 31 of this Act.”

Significance and Purpose of Defensive Trade Mark Registration

A defensive trade mark registration prevents unauthorised use of a well-known trade mark in unrelated classes, preserving its distinctive character. It also avoids trade mark dilution and helps the proprietor prevent costly litigation or opposition processes. It is important to note that even where there is no use or proposed use of the trade mark in respect of those other goods or description of goods for which it was defensively registered, the defensive registration remains valid and cannot be cancelled on the grounds of non-use. This is an exception to the rule of use and non-use in Section 31 of the TMA.

The basis of a defensive trade mark registration is to prevent the exploitation of the goodwill and value associated with a trade mark by third parties in another class who wish to profit from the goodwill and well-known status of the proprietor's trade mark, and which may ultimately lead to trade mark dilution.

It also protects a trade mark proprietor against third-party applicants and dispenses with rigorous trade mark opposition and litigation that may arise from trade mark infringement, as the Trade Marks Registry will refuse an infringing trade mark application based on the existence of a defensive trade mark even though the trade mark is not being used in that class. It also serves to protect the distinctive character of the trade mark and prohibit persons who intend to take advantage of the absence of registration of the trade mark for unrelated goods or services.

Advantages of Registering a Defensive Trade Mark

Some of the advantages of registering a defensive trade mark are stated below:

- 1 It ensures maximum protection of the trade mark for the proprietor of the mark as it prevents trade mark dilution and other associated risks.
- 2 It ensures that there is no consumer confusion in the market.
- 3 It ensures that the trade mark is not exploited by third parties or potential competitors.
- 4 The successful registration of a mark as a defensive mark is an affirmation of the fact that the trade mark is well-known, and this might be useful in any litigation matter in Nigeria, given that Nigeria does not have a Register for well-known trade marks, and may be persuasive when used in other jurisdictions.
- 5 The Registrar of Trade Marks is obligated to refuse third-party applications to register a trade mark similar to a defensive trade mark for the goods and services covered thereby preventing lengthy and financially draining oppositions or rectification actions.
- 6 A defensive trade mark registration is an exception to the doctrine of non-use under the Trade Marks Act. It is not subject to removal or cancellation on the grounds of non-use; the Proprietor is also not required to use the defensive trade mark at the time of filing.
- 7 The registration can be relied upon in alleging trade mark infringement and may be afforded wider protection given its well-known status. See the case of **Procter & Gamble v. Global Soap & Detergent Industries Ltd & Ors (2012) LPELR - 8014 (CA)** on the protections offered to well-known trade marks in Nigeria.
- 8 Enforcing a defensive trade mark is more reliable and cost-effective when compared to lawsuits based on infringement or passing off.

Procedure for Registering Defensive Trade Marks in Nigeria

According to Regulation 39 of the Trade Marks Regulation, an application for the registration of a defensive trade mark under Section 32 of the Act is made, addressed, and sent to the Registrar of Trade Marks. The application must include:

1

Statement of Case stating full particulars of the facts relied upon by the Applicant in support of his application.

2

A verifying Statutory Declaration made by the Applicant or some other person approved for the purpose by the Registrar.

3

Additional evidence showcasing that it is a well-known trade mark as he may desire.

The Registrar then considers the evidence and decides on the application.

Once the application is examined and accepted, it proceeds to publication, and after the two-month opposition window under the TMA, the mark will be registered.

Conclusion

Registering a defensive trade mark helps protect the integrity and recognition of well-known marks. Although Nigeria lacks an exclusive register for well-known marks under Article 6 bis of the Paris Convention, defensive trade mark registration provides substantial legal protection. Brand owners are advised to register their marks defensively to safeguard their market identity and pre-empt unauthorised use.

Indeed, it is recommended that all well-known brands register their trade marks as defensive trade marks in Nigeria (including a registration in the principal class), as this also prevents trade mark trolls from registering such trade marks in other countries.



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