FUSS OVER FUNCTION
An Office Party Piece

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Background

This essay is meant to be enjoyable and engaging. It involves some role-play on your part; just a little. Hopefully as well there is enough seriousness to go round, but not too much of that either.

To achieve this delicate balance — and in the sometimes dry plains of trademark and trademark law — I have tried to weave a familiar legal discussion into a festive setting. Hence, I stage an office IP party and place it (and the legal discussion) loosely in the ‘happiest’ of settings, Denmark, and at Christmas time (well, just after). A promising start, perhaps.

What emerges is a look at the main characters at ‘IP-World’ (where you work), and a special focus on trademark law through the office party. From there, you seek some counsel.

The office party piece (Part I) is an entry point into a fuller discussion (which begins in Part II); hence acting as aperitif to a main course. (For those readers somehow finding this essay without the help of IPKat’s mitts, you will need to attend the Christmas party in Part I, otherwise Part II will not make as much sense as I intend. Readers who have had the misfortune to attend the office IP party already via the IPKat on 30 December 2016 may wish to skip directly to the main course.)

An overall aim I have is to engage with readers interested in trademark matters and not only those concerned mainly with European affairs or specialists in the field. I hope to spark a temporarily reflective mood of what is important (as I do at this time of year) and a look ahead in bright mood to how the future might pan out (as I try to do at this time of year). It might be that this essay can be compared to Christmas: festive and fun at the surface, with a sober side beneath all the decoration. This essay’s content and style comprises an informal, non-technical, tongue-in-cheek, ever-so slight bee-in-the-bonnet swipe — regards trademark law, and certainly is meant not only for ‘trade-markers’. (Although some prior knowledge of some core aspects has been assumed.)

It might go without saying for any contemplative account of trademark law, but what comes below is an inherent work-in-progress, and hence labelled ‘Draft’. Moreover, this precise point, and my intended wider audience, also helps explain the inclusion of this essay on SSRN.

This draft essay has not been reviewed. Thus, any comments on its form and function are welcome, either via the IPKat post or direct with the author at mels@law.au.dk. Any errors are those of the author.

Above all, and just to reiterate my initial remark, I really do hope readers enjoy and engage.

Part I: An Aperitif

Imagine you work at IP-World. Today is the annual office Christmas party; sometimes referred to as “The Function”. (And no, you cannot get out of it.)
They are all going to be there: ‘The Big Four plus the one known simply as The One’; colloquially ‘the4plusthe1’. These admittedly rather descriptive if not clumsy designations comprise: Copyright Law, Design Law, Patent Law and Trademark Law, plus IP Sage. In light of Brexit, this year’s party is delayed and moved to Denmark for happiness reasons. You are politely informed the season of Danish julefrokost (literally ‘Christmas lunch’) is already underway in November and staggers on to January, and it is not unusual for people to partner several julefrokost during this festive phase. How liberating you think.

You stand at the entrance to the IP-World party (again): a delightful work canteen (again); a joyful night full of joy and joyfulness beckons (again). Hold on. Just hold on. You are in Denmark where cynicism is punishable by a smiling sentence. The party ‘shall be hygge’ the Danes say. How intriguing.

- Hygge more or less means ‘comfy cosy fun’. Hygge is a theory and practice of what and how it is to function as a happy individual and society. It has a known role and appears simple and accessible, but is not easily defined with no literal translation in English. Hygge is so very Danish; it could be something that ‘insiders’ get, whereas ‘outsiders’ do not get it.

At the canteen door, two minutes to go. You shall get hygge. You can do it: recall moments of clarity when IP-World was a positive and uplifting experience. Promptly it is 6pm on the dot; you are in Denmark after all. You step inside the canteen. It is pitch black outside and not much brighter inside: minimalist invention and aesthetics accompany the barely audible pulse of seasonal sounds. So evidently understated (and you are so evidently the last person to arrive). So very Danish.

You immediately mark out the regulars, highly distinctive are they even with a dimmed and distant view. The Big Four have (clearly) been at it for a while with their respective gang in tow. It is well-known at IP-World that gangs of The Big Four members are loyal and they do not get each other; others don’t get it either. This has created misunderstanding inside and outside IP-World. You scan the room: ...Copyright Law (+CopyrightCrew) desperate to get mixing on the decks of steel in the DJ hot seat; Design Law (+DesignDetachment) looking, err, well ...designed; Patent Law (+PatentPosse) merged in an almost unified swagger; Trademark Law (+TrademarkTroop) keeping itself to itself; and The One sitting solemnly, soaking it up. Business as usual. How comforting.

Some hours later...

The julefrokost continues its epic and gruelling format. It must be nearly done...

Next to you is Trademark Law, distinctly colourful and buoyant by now. Trademark Law has gone through several costumes matching the courses of the marathon meal (are you being served karrysild (‘curried herring’)?) Starting off the evening in an inconspicuous outfit straight from daily IP-World, into a ‘Friday-at-work’ dress code, then an exclusive tailored suit, Trademark Law has progressed to ‘Professional Brand-Man’: a sort of specialist superhero. This latest incarnation – as Trademark Law hurriedly assures you – is not meant to be sexist, and is meant to represent the self-proclaimed champion of market economies and companies and consumers and everyone and... everywhere. Blimey.

The current get-up is something of a look-a-like mishmash of A-list crusaders both real and functional fictional. Recognised trademarks plaster every inch of Trademark Law’s persona and it looks ready to open ‘The Hungry Games’:

- (As Trademark Lobby describes it) a futuristic blunderbuss of Binge Buy-day in a sort of Olympics Games 2.0 meets FRIFA World Cup meets SuperBowelSuperstore, all via an interactive live feed on 2FaceBook. Heavens above...
By now, TrademarkTroop have, err, trooped over and hover on the coattails of Trademark Law’s costume. You see ‘Champion-Consumer’ with ‘Private-Purchaser’ and ‘End-User’ in tow, ‘Captain-Company’ followed closely by ‘Brigadier-Big-Business’ and ‘Sergeant-Small-Business’, and ‘Major-General-Market’. Also, ‘TRIPs-Trooper’ with a barely visible upper and lower section of their uniform; it is fairly worn but looks like it says ‘rade’ and ‘development’.

Trademark and Troop are out-of-sync with their day-to-day existence. Far from their usual unfussy, unobtrusive selves they are noisy, attention-grabbing and incoherent. Is it the atmosphere, the mix music (thanks +CopyrightCrew), the hygge, or is it the snaps?

- You are wary of the innocuous enough looking snaps – sipping (no longer gulping) the diminutive clear servings of this fiery ice-cold beverage n respectful alignment to toasts (13 and counting). A Swedish colleague eagerly reports that the Danes love toasts almost as much as snaps, which they consume at Christmas and Easter, midsummer, midwinter... um, well any ‘occasion’ really, like lunch.

Thinking about the transformation of Trademark Law, maybe The One’s trademark maxim is true: “All IPKats are grey in the dark”. The others of IP-World seem to be acting as their ‘normal’ selves, just louder and less sure of their footing. You spot the (we own the place) strut from Patent and Posse (still not unified). That’s certainly normal.

So what’s the ‘real’ Trademark Law? Is it this party behaviour or the ‘normal’ day-to-day behaviour? Perhaps there is more to Trademark Law than meets the eye. Or that Trademark and Troop are lightweights?

Well, the lighting has been dimmed right down, and you are almost in the dark now. You find a hygge chair and fall into it... Exhausted. Confused. Blurred vision.

Trademark Law comes over intently as if wanting to whisper something to you. Unsolicited comes the whisper bellow, “The thing is that Trademark Law – that is to say me, my namesake, or is it yours truly? – uh, what we call Trademark Law and what we mean by uh, trademark law, is in fact a complex and vital and complicated and essential... err, thing.” Fairly articulate given the circumstances; but accurate?

Trademark Law continues: “I am misunderstood... It is misunderstood...” (And motioning an arm to the Troops)
“We are misunderstood...”

The chorus of Troops nod, chorus-like, mouthing “It is true” in muted orchestra. You catch yourself nodding. It is almost as if they have all been here before. Have you been here before?

“I see...” you belatedly say still nodding (except you do not of course see (anything really)).

“Except you do not.”

“Uh... Excuse me?”

“No. You do not see. Not at all. How can you? To be perfectly honest with you — I think I can be — I am not really slur I understand it myself, or even understand it (i.e. myself). It is like I keep going round in circles chasing my own tail.”

“Oh dear.” (And who actually says “open brackets i.e. close brackets” out loud?)

Come to think of it...

“Err, do you have one?”

“Have what?”

“A tail.”

“No.”

“Oh...”
“I meant on the costume.”
“No!”
“Oh I see. I mean I don’t see. Um…”

The dark Danish night is taking its toll. The soul-searching continues.
“I am infused with genuine intellectual perplexities… you know like..., ... and fraught with fragilities and conceptualities and... not enthused... But how could you possibly understand? You deduce that was meant rhetorically.
(You deduced correctly.)
“How could anyone understand or know what it feels like to be Trademark Law? What does Patent Law know! Even The One has been ignoring me.”

With that, an awkward silence. Even the music had stopped.
You like Trademark Law. Always have done. But you do not seem to know Trademark Law.
Trademark Law fell back into the adjacent chair; Resignation? Indignation?
This was getting heavy for your liking (where is hygge when you need it?). You spot The One heading to the balcony. Must be a good viewpoint up there, and a chance to get some fresh air. You head over.

Part II: A Main Course

The awkward silence did not last long. As you leave Trademark Law to its own devices, you hear:
“I’m different from the others... I’m complicated. What you see is that... what you see is not, uh, what you get....
Some of the TrademarkTroop are disbanding and streaming out into the bigger party that appears to be back in full swing as at last the julefrokost comes to a close – as far as the eating is concerned; PatentPosse have moved from the dinner tables to encourage a seemingly incorrigible Patent Law on the dancefloor.
And you think you hear:
“Let’s go see the elephant.”
You’re not sure who said it, but there was a hint of a North American accent; TRIPs-Trooper would be your guess.
Apparently unnoticed, you have left the ‘conversation’ with/about Trademark Law/trademark law. You’re not the only one. Sitting on the balcony now, you can see that Champion-Consumer is in a deep dark corner of the canteen; seemingly disconnected from it all. All the while, Trademark Law rattles on in what rapidly is looking like (from a distance now) a monotonous monologue.
At that precise moment, you are happy to have escaped seemingly unscathed. You wonder what The One will make of it all.
“What do you make of Trademark Law and its apparent trials and tribulations?”
You get straight to it. It is late, and a reputation of The One is a disliking for stuff that isn’t, you know, ‘special’. (Some at IP-World used to call The One, ‘The Special One’. But then someone else assumed that name too; someone already quite distinctive. People starting talking about that The Special One. And even though operating in a totally unconnected field, and even though no one with any grain of common sense thought it would cause confusion linking damage... Yeah, well anyway... the ‘Special’ was dropped (only in name of course.))
As you considered all this, The One simply smiles at you and your question – as if you and it has been presented a thousand times before. It suddenly dawns on you that that question might precisely be the type of trivial matter you had been warned about...

“The matter is complex.” The One stated in a sort of strangely quiet boom.

Thank goodness for that.

“But it is unnecessarily so.”

Oh dear...

“And yet the explanation is simple enough.”

Phew.

Hold on; how did you miss it?

IP Sage (you prefer that name; more seasonal) had barely said anything and already you could confirm that indeed, IP Sage is a spiritual type – casting a sort of otherworldly and reassuring presence. And over the next period of time, you were unsure how long, many apparently wise words were eloquently cast in your general direction. You barely uttered a word, though often gave what you hoped were thoughtful well-timed nods, and twice visited the toilet.

Part III: A Transcript

The next day you tried to write it all down from the night before, for fear of missing a potential nugget. Or even some better understanding of Trademark Law’s ‘trials and tribulations’, as you had framed it. On reflection, you happily concede that the account you give below may not fully reflect the gravitas or clarity or sense of what was actually said – but you think you got the main bits.

However, you do recall that the IP Sage was trying – and as briefly as possible though with appropriate technical clarification, give an interpretation of the issues that matter. And how those issues might be better articulated, so we can move forward. An assumption was that the current predicament and regardless of causes was not having overall desirable effects on those affected by Trademark Law, including “the proper functioning of the market”. IP Sage was speaking mostly about Europe, but recognised the concerns in other systems, mature and maturing.

Thus, for what it’s worth (and you think it’s worth something; at least to spark reflection and discussion), here is your unedited transcript of your ‘conversation’ with the one known as IP Sage and The One.

Much has been said at The Function about the function; specifically, a function debate has emerged that surrounds trademark law, and perhaps even immerses it. I believe this has been detrimental overall and continues to be so, creating uncertainties. To categorise this process, I will refer to ‘fuss over function’ to give it all a name, and for ease of the listener’s reference. (It should be noted that by this stage other party goers including a host of IP-World newcomers, had gathered within earshot). This labelling is not meant to undermine the discussion; however, it is meant as gentle indication that we could do with a reconfiguration and fresh account of important matters at hand pertaining to trademark and trademark law. And it is not completely true that I have been ignoring trademark law; merely taken some time away precisely in order to reconfigure and freshen up my thoughts on those matters.

On one hand, it is not my intention to explain how we got to this position or anything resembling a ‘blame game’ regarding trademark law’s current predicament; at this time, I think it is more valuable to focus on the present. Suffice to note the views of others who have lamented the
inconsequential answers from court rulings, reflecting in turn the institutional set-up and processes, as well as the lack of clarity in the written law. I would also add a lack of congruence as to ideas and principles underpinning theories that guide trademark and trademark law. I mention these points as they come to feature in some of my remarks to come.

On the other hand, I believe the state of trademark law – at a conceptual or theoretical level – as still existing in the midst of an unsuccessful process of introspection; and that this been a major reason for what I refer to as trademark law’s ‘slow slide into quicksand’. Fuss over function is a festering force – almost on an obsessive scale – within trademark law and those within its inner circles. I regard this as wasteful expenditure to the extent it has distracted attentions and resources from other important matters.

I also happen to think this ongoing process has given trademark law a bad reputation and an impenetrability which turns people off the subject, which would be a great shame. I have found it difficult for instance, to explain in simple and accessible language what trademark law is about and what the current position is. And that also seems a rather troublesome position to be in. Like you, I have always liked trademark law – and sought to understand it better. I think its recent introspection – again I emphasise at a conceptual level, has distracted from its potential to be an overall force for good to users, consumers and the economy in general, and has also reduced its accessibility.

In addition, a deterioration of transparency of resulting from fuss over function has been precisely due to its gradual submergence into a deepening and darkening place. Encouragingly, a state of quicksand is far from an unsalvageable situation; not least for trademark law and notwithstanding such a melodramatic metaphor many may regard as far from the truth anyway.

My input is not to come up with a set of answers to a set of questions. Rather, it is to provide a perspective and process to hopefully promote progress. Slowly. And calmly. A thing to do in order to progress is not to panic and start flaying arms around and shouting over and at each other, or asking the same people the same question over and over again – albeit in differently worded formats. That approach will not help. Moreover, whilst I do not have specific answers, I do not think that the predominant question of the sort ‘what is a trademark?’ or the almost as vague ‘what do we want to protect in a trademark?’ is a helpful point of departure for progress. These are not realistic questions to ask; they cannot be satisfactorily answered in user-friendly accounts.

Finally, and before I get into my direct input, it ought to be emphasised that much of what has been said in fuss over function has been said by those inside IP-World, and especially trademark specialists, and notably amongst the judicial and academic members of the community. That is essential input. For my sake, I will come at the matters from a range of perspectives I have gathered through my experiences; for instance, in teaching, in business, in law – practice and academia, and not least, as a purchaser and consumer of products.

Two main components of function
I have noted that the focus on ‘what is a trademark’ type question is an unfortunate and possibly inaccurate assessment of what needs to be thought about. To begin with, I might suggest we break down the concept of functionality, and apply that to trademark and trademark law. It ought to be recalled that I am addressing mainly what I regard as a need for greater conceptual clarity in the account and doing so in a primarily normative manner.

At the first stage, is what I call ‘natural function’. By which, I mean an activity that is natural to something; and hence that something is naturally functioning. IP Sage gave plenty of examples of this natural functionality including animals and objects and human organs, and names of things such
as chemical elements and even musical notations. IP Sage promised to elaborate on this another time. IP Sage also suggested that a scientific interpretation of natural function is suggestive of both bilateral and multilateral relations through elements to the something in question; and that this interpretation could be useful to understand interactions as a result of the natural activities of a functioning trademark given the various actors involved.

At the second stage, is what I call ‘purpose function’. By which, I mean the operation of something in a proper or particular way. These two sets of functions outlined of a given something may not coincide. And that is because of the form they take and the context behind them. The form of the natural function and its context is market-driven; whereas the form of the purpose function and its context is policy-driven. Once more, IP Sage gave examples of this purpose functionality, including building materials and buildings, and spoke about form and function in an architectural sense, and partly to elucidate the interaction of the two sets of functions. And again, there was a promise of elaboration at some future point. You look forward to that.

Seen this way, the purpose function is the primary domain of the legislature and the legislative process and legislation; as the initial manifestation of policy. And hence, there will a ‘trademark policy’. The natural function is dominated by the marketplace and the way in which producers and sellers and markers of products would prefer to design and deliver and use trademarks (which might also manifest, at least from the supply side, of a ‘trademark policy’). It is in this sense the purest arena for trademark.

Identify and Inform: If we consider the natural function analysis, I believe there are a host of activities that naturally occur through a trademark. Among these are what might be referred to as the ‘identify activity’ and the ‘inform activity’. Other activities may or may not be inherently desirable, in their natural form, and this may be judged by consequences. Clearly this evaluation could influence the purpose function.

At this stage, IP Sage suggested that another time could be used explain in more detail the market natural condition of trademarks; as otherwise it might sound odd to talk about trademarks acting or functioning in exclusion of trademark law or policy. IP Sage recognises this, but equally, believes that much can be learned from understanding the essence of trademark natural function, which to an extent would be seen activated in the absence of specific purpose function or the intervention of the law at the third stage (which is mentioned below).

Competition and consumers: If we consider the purpose function analysis, it is not possible or prudent to simply let trademarks loose (in their natural function). The policy – and hence the designated purpose function – must reflect what they can in fact do. I have identified the identify activity and the inform activity. Hence, the policy could be to, as much as possible, secure the natural function so as to enable trademarks collectively to operate in a proper or particular way that identifies and informs the market (according to the policy priorities). These priorities might comprise the enhancement of competition and the protection of consumers, broadly stated. (It is not my intention to get into those goals now; though I will briefly return to this stakeholder concern.)

Evidently this approach is to inflate the positive activities as part of the natural function. However, there may also be negative activities as part of the natural function, as seen in consequences, and which would presumably need to be deflated. IP Sage gave the example of ‘chilling activity’ whereby trademarks can have the effect of limiting the otherwise positive natural activities of other trademarks.
A third stage
At the third stage, we see the most dominant impact of trademark law. Because in my account, it is at this stage that the legislation comes into life. And primarily this is seen through the agency of administrative and judicial bodies assigned the responsibility for trademark affairs. And here the role of judicial interpretation and application – on and to a given set of facts – assumes an essential role (as we have seen for instance, in European jurisprudence and especially as I have noted, if there is a lack of clarity and broad consensus as to the ideas underpinning what we might call ‘trademark theory’). Moreover, there is the input of practical case commentaries on significant rulings including from practitioners, as well as ongoing debates found in scholarship.

Hence the function of trademark law, by which I mean to include the trademark system which comprises all the actors I have just mentioned, is what I call ‘legal function’. Legal function is precisely to supervise and where necessary equalise the natural function and purpose function. In this sense, a role of the law is to balance market and policy.

Accordingly, even ideally, and to begin with, these three stages as I have described them occur chronologically and cumulatively. This is because I greatly believe that it is sensible to observe something, as much as possible, in its unadulterated environment if one is trying to discover its (natural) function. It is sensible because there is little point in trying to get some given purpose functionality out of trademarks that is out of the naturally occurring range of its activities. I fully accept there is a subtle distinction of want and need; and this is also informed by comments below about stakeholders. Hence, with an understanding of what trademarks tend naturally to do – for example, identify and inform – this subsequently equips the policy-driven stage of purpose function. In turn, in line with my classification, this should inform the legal function.

From there, the three stages merge into a process. A process of constant to-and-fro, of feedback, where law – more precisely legal function, is a barometer of and to what extent market and policy coincide. Where there are clear gaps or uncertainties, that might invite a reconsideration of purpose function, or a more interventionist attempt to somehow alter natural function; incentivise a pre-determined function-related behaviour. As well as this, the process might involve an adjustment to how legal function is designed and carried out.

And this is where the whole function matter becomes more complicated, and of course, more realistic. But equally, that is not to say that trademark law is inherently complex any more than other areas of law. Hence, this brief account is not to suggest that purpose function does not, through its implementation through the legal function, affect the natural function. For example, a policy priority that favours one interest over another might influence the natural function and so on.

Moreover, this brief account has not delved into the more conventional topics of the specific legal functions of a trademark. I have merely mentioned two activities within the natural function. Perhaps IP Sage should also return to that matter.

Elephants in the corner...
*IP Sage was most reluctant to use this ‘tired idiom’. Thus it was hastily re-presented as, ‘Some elephants sitting in a deep dark corner of the canteen’.

The point is that to better understand the three categories of functions I have listed, it is of the utmost importance to articulate who exactly we are talking about at any given moment. As we have seen with TrademarkTroop, there are a range of actors – covering business and consumer groups, as well as the economy generally – all somehow connected to trademark and trademark law.
In turn, we would want to properly think about the consequences of function, and how that feeds back into the overall perspective and analysis.

A good starting point might be to ascertain the essential and binding characteristics of the three functions and three stages I have described: I would humbly suggest (and as a point of departure), ‘an undistorted message’ could be one. Evidently, this builds on the identify and inform activities of the natural function. In this regard, we could also enter a discussion of what policy and law can realistically do or hope to achieve through ‘manipulation’, given the natural function.

Thus, it might not be a very helpful starting position to think that all of those interests of TrademarkTroop (and possible more besides) as well as circumstances can be equally accommodated under one roof. We might also consider that the range of trademark-related transactions is actually widening and should be forcing us to reconsider if the purpose function and legal function is appropriate, as currently set-up. Also, we ought to consider that the natural function has also adapted as demand and supply patterns change across goods, services and Internet-specific contexts. Once more, this bumps and bounces into and with the other functions.

What now?

The hour was late, IP Sage was tiring and keen to bring this particular discussion to a close.

There are at least two things to consider from here. First of all, there are many matters which I need to consider more, including the issue of ‘who?’ (and TrademarkTroop) as I have just raised, as well as the matter of functions that are regularly cited, including origin, quality, advertising and investment. As mentioned, I have not provided any answers as such (partly because I have not posed any questions); merely I have attempted to offer another perspective with which to record and analyse what is going on. I would like to have time to think about these concerns a bit more therefore, and even to begin to address some significant themes about form and function regarding trademark law. From there, we could also start comparing what we would like to see with what actually is, to the extent we can decipher that.

Secondly, there is some partying for you all still to do. And I must rest. So, those other matters and lines of enquiry I have touched upon – and which I know you have shown a keen interest in pursuing yourself, must be saved for another time, which is fine. Because one of the beauties of IP-World is that the need to think things over never goes away and can always be rested for the next day. And with that IP Sage turned to you simply to say,

“All IPKats are grey in the dark; it is important to drag them into the light now and again to get a really good look at them. I hope I have given you reason to do that.”

END OF DRAFT