＜日本＞

商標出願に伴う社会的リスクについて

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本年の 5 月頃、ある商標登録（第 6518338 号）を巡り、一部ネットコミュニティーを中心に、権利者と目される人物に非難が集中するという事件があった。

この事件は、第三者が、動画制作に係る他人の二次創作において総称的に用いられてきたタイトルを商標出願し、登録異議申立て期間の経過後に登録の事実を SNS 上で公表し、さらに、商標権行使（収益化）の意思を表明したことに端を発し、一部ネット上の共有財産とみなされてきたものを、第三者が個人で不当に独占化しようとしたことに対する非難のように報道され、批判を受けた第三者は、商標登録自体を既に放棄している。

さらに、批判の矛先は、商標登録を認めた特許庁の審査体制のみならず、当該商標出願を受任した代理人にも向けられ、代理人所属事務所が、出願経緯等に係る見解をホームページ上で表明し、出願の段階で不正の目的があったことを看過したわけではないことを釈明する事態にまで発展した。

日本のように先願主義に基づく商標制度を有する国においては、原則、“早い者勝ち” で商標権を取得することが認められ、「他人の商標が当該国・地域で登録されていないという事実を利用して，不正な目的で当該商標を出願する行為」、すなわち「悪意の商標出願」[1] については、審査段階で登録を排除し、登録後には異議申立てや無効審判を通じて有効性を争う途を残している。

一方、何人も、基本的に、如何なる商標であれ、法が認める範囲において、自由に出願し、審査を経て登録に至った商標については、権利者が自由に使用、収益、処分することが出来る。

商標出願という行為自体、あるいは、その結果としての商標登録という事実に

1　上野達弘「悪意の商標出願」 パテント 73 巻 15 号 17 頁（2020 年）参照。
https : //system.jpaa.or.jp/patent/viewPdf/3696

対して、何らかの社会的な批判が向けられるという事例は、出願手数料を支払わずに他人の商標の先取りとなるような商標を大量出願するといった悪質な例を除き、件数的には多くないが、権利化前の実体的内容に係るものであれば、過去にもなかった訳ではない（「ギコ猫」（商願 2002-19166）、「のまネコ」（商願 2005-69971）等）。

このようなケースは、上述した「悪意の商標出願」に該当するものであるかと問われると、ときに判断が難しく、多くの代理人は、明らかに該当すると言えるような事実を把握していない限り、出願により特許庁の判断を得ることをクライアントに奨めるであろう。

そうした中、今回のケースは、特許庁の審査を通ったことにより、当然に権利を行使しようと考える権利者にとって、法的な枠組みを超えた社会的リスクが存在し得ることを改めて認識させるものであり、代理人にとっては、出願代理という業務に伴う外的なリスクについて考えさせられる契機となっている。

＜ Japan ＞

Social Risks Associated with Trademark Applications

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Around May of this year, there was an incident in which a certain Japanese trademark registration (No. 6518338) was criticized by some online community and others, and the criticism was directed at an individual who were considered to be the right holder.

This incident started with a third party (the individual) having applied for a trademark for a title that had been used as a generic term in other people's derivative works related to online video production, publicized the fact of registration on an SNS after the period for filing an opposition to registration had passed, and furthermore expressed an intention to exercise (monetize) the trademark right. Some media reports said that the third party was condemned for its attempt to unfairly monopolize what has been regarded as common property on some online sites, The third party, who was criticized, has already abandoned the trademark registration itself.

Furthermore, the criticism was then directed not only at the examination system of the JPO, which approved the trademark registration, but also at the agent who represented the third party in filing the trademark application, and the incident even developed into a situation in which the agent's office expressed its opinion on the application process on its website, explaining that it had not overlooked the existence of a nefarious purpose at the application stage.

In countries like Japan, where the trademark system is based on the first-to-file system, in principle, the "first to file" is the winner, and the "act of filing an application for another person's trademark with a nefarious purpose by taking advantage of the fact that the trademark is not registered in the country or region concerned," i.e., "malicious trademark application"[1](1) is excluded at the examination stage, then leaving open the possibility of contesting the validity of the trademark after registration through opposition or invalidation trial.

On the other hand, any person is basically free to apply for any trademark, to the extent permitted by law, and the right holder is free to use, profit from, and dispose of the

1　UENO Tatsuhiro, "Malicious Trademark Applications," Patent Vol.73, No.15, p.17 (2020).
https : //system.jpaa.or.jp/patent/viewPdf/3696

trademark once it has been examined and registered.

There have not been many cases where the act of filing a trademark application itself, or the fact resulting from it that the trademark is registered, has been subject to social criticism in any way, except for malicious cases such as the filing of a large number of applications for trademarks that are preempts of others' trademarks without paying the application fee. However, there were some cases seen in the past where the substantive aspect of a trademark before registration is concerned (e.g., "Gikoneko" (Japanese trademark application No. 2002-19166), "Nomaneko" (Japanese trademark application No. 2005-69971), and so on).

Many agents sometimes find it difficult to judge whether or not an application falls under the above-mentioned "malicious trademark application" unless they are clearly aware of facts that would indicate that the application falls under it, and they may prefer to recommend their clients to obtain a decision from the JPO by filing an application.

Meanwhile, this case reminds the right holders who are thinking of exercising their rights after passing the examination by the JPO that there may be social risks beyond the legal framework, and it is an opportunity for agents to think about the external risks involved in the business of application representation.