

European Intellectual Property Review: Kevin Dugan on The Food & Drug Administration's Trademark Review Process

March 9, 2011

FDA's Trade Mark Review: A First Amendment Issue

The United States Food and Drug Administration (FDA) has the authority to approve the marketing of pharmaceutical products. As part of its review, the FDA will evaluate the sponsor's proposed trade mark from both safety and promotional aspects. Often the FDA will object to the submitted trade mark, thereby denying the sponsor the right to use its trade mark. This is true even if the trade mark is registered in the United States Patent and Trademark Office. A question that needs to be answered is whether the FDA in denying a right to use a trade mark could in some instances be violating the constitutionally protected free speech right of the sponsor.

Speech—a constitutionally protected right

In the United States, the right to speak freely without censorship by the government is a most cherished right. As recently as last year the Supreme Court has again recognized that free speech is an essential and protected right.¹ The legal protection of the right to speak is traced to the very founding of the country. When the United States Constitution was being proposed and debated there was concern that it failed to specify the fundamental rights of the people that could not be abrogated by the Federal Government. There was fear of unrestrained government power based upon the history of governments enacting laws that restricted and denied the rights of the people. Read more ...