



Study Question

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Bad faith trademarks

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I. Current law and practice

Bad faith - prior third party use or filing

1 Does your Group's current law provide for an action against the application or registration for a trademark in a jurisdiction by a party (Party A), if that trademark or a similar sign is already used in one or more jurisdictions by another party (Party B), but is not registered in the jurisdiction where Party A has filed the trademark?

If yes, please answer questions 2) – 7). If no, please go to question 8).

Yes

Please Explain

In Poland there are no direct law provisions saying that a trade mark is not to be registered if it is liable to be confused with an earlier trade mark protected abroad (corresponding to art. 5(4)(c) of the EU Trademark Directive 2015/2436/EC). In a situation as described under question 1) general rules concerning the bad faith shall apply, which means that a specific case will be considered individually where various factors and circumstances will need to be assessed.

In Poland, the bad faith is not defined in the legal provisions. The notion of bad faith has been the subject of case law and jurisprudence. In the literature relating to trademark law, attention is often drawn to the purpose of the applicant's action as an important determinant of bad faith. It is emphasized that the mark is filed in bad faith, if it is filed for a purpose other than the acquisition of the right to distinguish one's own goods on the market or for purposes other than the use of trademark. Two most common situation of bad faith filing would be:

- when the mark is filed in order to block the registration or use of the mark by another person holding a trademark of a certain position on the market;
- when the trademark was filed for speculative purposes without the intention of using the mark and in order to benefit from such situation.

(judgement of the Supreme Administrative Court dated 3.09.2013, II GSK 730/12)

Since Poland is a member of the European Union also the EU case law concerning the bad faith will apply (including Lindt case and Malaysian Dairy case).

2 Is the application or registration as described under question 1) above denoted as "bad faith"? If not, what is it called?

No

It is called...

n/a

3 Are the following factors relevant for proving an application or registration as described under question 1) in your jurisdiction?

Please tick or fill in all boxes as applicable to your jurisdiction. If you select "other", please describe further.

- Party A knows, or should reasonably be aware, of use of an identical or similar sign abroad for identical goods or services

Please Explain

- Party A knows, or should reasonably be aware, of use of an identical or similar sign abroad for similar goods or services

Please Explain

- Party A knows, or should reasonably be aware, of use of an identical or similar sign in the same jurisdiction for identical goods or services

Please Explain

- Party A knows, or should reasonably be aware, of use of an identical or similar sign in the same jurisdiction for similar goods or services

Please Explain

- Party A intends to prevent Party B from continuing to use the earlier sign or to only allow such under certain conditions (e.g. a license)

Please Explain

- the degree of legal protection enjoyed by Party B

Please Explain

4 Is any one or more of the above factors sufficient on their own, or will the assessment instead always take the specific circumstances of the case into account? If one or more of those factors are sufficient on their own, please identify those factors.

No

Please Explain

The assessment always takes the specific circumstances of the case into account.

5 Which of the following factors are relevant to establishing whether there was or should have been knowledge as described under question 3) above?

Please tick or fill in all boxes as applicable to your jurisdiction. If you select "other", please describe further.

- whether Party A operates in the same or a similar field of business as Party B

Please Explain

- whether the earlier sign is well known or enjoys a reputation

Please Explain

- whether there have been formal or informal dealings or contact between Party A and B (such as an agreement, written communication etc.)

Please Explain

6 Is the degree of similarity between the signs relevant? Please explain why in either case.

Yes

Please Explain

Yes, the degree of similarity can be relevant as in most cases in order to prove the bad faith the degree of similarity should be high (signs are identical or similar to a great extent). In other cases where the degree of similarity is lower it would be more difficult to prove the bad faith.

7 Is the degree of similarity between the goods/services relevant? Please explain why in either case.

Yes

Please Explain

Yes, the degree of similarity between the goods/services can be relevant as well, however it's of lesser importance than the similarity between signs. This is would be the case of e.g. reputed trademarks, where the trademark protection goes beyond the requirement of goods/services similarity

Repeat filings

8 Can the filing of a trademark in your Group's jurisdiction by a trademark owner for a trademark identical or similar to a trademark it already owns in that jurisdiction be refused or cancelled on the ground that the previous trademark fails to meet applicable genuine use requirements?

If yes, please answer questions 9) -11). If no, please go to question 12).

Yes

Please Explain

There are no direct law provisions in Poland regarding this issue, so general rules regarding the bad faith would apply here. At the moment, it seems that the Polish courts and the Polish Patent Office are liberal as regards re-filing by the entity the trademark identical to a trademark it already owns, also even if the previous trademark fails to meet applicable genuine use requirements. Such standpoint can be related to art. 134 of the Industrial Property Law, which stated that it was possible to re-register the same mark by the same entity for the same goods (with no additional conditions set out in this article). As of 15.04.2016 this regulation was deleted from the Industrial Property Law. There might be that the Polish Patent Office and Polish courts change its practice in this regard, applying the rules worked out in the EU case law related to similar issues in future.

9 Is the application or registration as described under question 8) above denoted as "bad faith"? If not, what is it called?

No

It is called...

n/a

10 Which of the following factors are relevant when assessing whether a trademark as described under question 8) should be refused or cancelled?

Please tick or fill in all boxes as applicable to your jurisdiction. If you select "other", please describe further.

- the degree of overlap between the goods/services

Please Explain

- whether or not the signs are identical

Please Explain

- if the signs are different, the degree of difference

Please Explain

- absence or presence of intent to use

Please Explain

- other intentions (e.g. the filing of an updated version of a trademark to meet evolving market requirements)

Please Explain

11 Are the answers to questions 8) -10) above different if the previous trademark is no longer in force? Please explain.

No, the answers would be the same.

Defensive marks

12 Is it permissible under your Group's current law to file a trademark if the trademark owner does not have any intent to use that trademark for part or all of the goods/services claimed? If not, is there a timeframe (and if so, what) for such intention to use (e.g. must the intent be to start use immediately)?

If yes, please answer question 13). If no, please go to question 14).

Yes

Please Explain

Yes, this is possible. As a matter of principle, it is only the lack of genuine use of a registered trade mark for protected goods for an uninterrupted term of five years after the date a decision is issued to grant protection, may entail negative consequences for the holder in the form of revocation of the trademark protection right (unless there are some important reasons for the non-use) cf.: Article 169 (1) (1) Industrial Property Law Act of 30 June 2000.

13 Is the application or registration as described under question 12) above denoted as "bad faith"? If not, what is it called?

Yes

Please Explain

This is possible. For instance, in the judgement of the District Administrative Court in Warsaw as of 15th December 2008, VI SA/WA 1714/08,

it was decided that "it is assumed that the person who registers the trademark for reasons other than the willingness to have exclusive rights to its use with respect to one's own goods, as a result of which subjective rights of the third party are infringed, acts in bad faith" and that "one should espouse the view prevailing in the doctrine that the case when the person entitled has its trademark registered for the purpose other than using the trademark is considered an act of bad faith".

Other

14 Does any other conduct in respect of trademarks, as an independent ground for action, amount to bad faith ¹⁶ under your Group's current law? If so, what conduct and how is it denoted, ie as "bad faith" or something else?

¹⁶ Including fraud within the context of this Study Question, as explained on p. 1 at paragraph 5.

Application to register the trademark in order to block another application or use of the trademark by a person using the trademark, which holds a secure position on the market (see the judgement of the District Administrative Court (WSA) in Warsaw as of 26th February 2010, VI SA/WA 813/09), application to register the trademark in order to obtain benefits from the entity possessing the trademark (the judgement of the Supreme Administrative Court (NSA) as of 3rd September 2013, II GSK 730/12), application to register the trademark made by a subsidiary in case the parent company is not aware of that fact (or it is against its will), when the parent company is a controlling shareholder of the subsidiary and when the parent company uses the trademark registered in Poland by the subsidiary abroad (the decision of the Patent Office as of 28th June 2006, Sp. 315/03), application to register the trademark in Poland made by one of the members of the association of alcohol producers from Bulgaria, to the exclusion of all the others (the decision of the Patent Office (UP) as of 24th March 2006, Sp. 93/05), registering the trademark of a foreign contractor by its disloyal agent "without its consent" (the judgement of the Supreme Administrative Court (NSA) as of 9th May 2012, II GSK 883/11), application to register the trademark for the purposes of speculation without any intention to use the trademark, so that one could derive benefits from the entity possessing the trademark (the judgement of the Supreme Administrative Court in Warsaw as of 21st October 2015, II GSK 1912/14), when the application is made despite the person being aware or unaware, as a result of negligence, of the existence of a right or interest of the third party, deserving protection, which due to the above can be threatened, with an intention to jeopardize those interests (the judgement of the District Administrative Court in Warsaw as of 3rd April 2012, VI SA/WA 16/12).

Type of proceedings

15 In which proceedings can the grounds, insofar as they are available under your Group's current law, described in your response to questions 1), 8), 12) and 14) above be invoked in your jurisdiction?

Please tick or fill in all boxes as applicable to your jurisdiction. If you select either of the last two boxes, please describe further.

- ex officio by the trademark/IP office

Please Explain

in – presumably rare – clear instances, eg. *casus* of Tchibo, appeals nr 1023/95, 1046/95

- a cancellation action (before the trademark/IP office)

Please Explain

- court proceedings concerning a bad faith application

Please Explain

- court proceedings concerning a bad faith registration

Please Explain

- other

Please Explain

The third party may express its observations concerning the existence of circumstances referred to in Article. 129¹– Article. 146¹ (4) industrial property law

II. Policy considerations and proposals for improvements of your current law

6.a Could any of the following aspects of your Group's current law be improved?

The possibility of taking action against the application or registration of a trademark in a jurisdiction by a Party A, if that trademark or a similar sign is already used in one or more jurisdictions by a Party B, but is not registered in the jurisdiction where Party A has filed the trademark

Please tick or fill in only the applicable box. If you select "yes", please explain.

No

Please Explain

6.b Could any of the following aspects of your Group's current law be improved?

The possibility of taking action against or refusing the refiling of a trademark by a trademark owner as described above under question 8) above

Please tick or fill in only the applicable box. If you select "yes", please explain.

No

Please Explain

6.c Could any of the following aspects of your Group's current law be improved?

The possibility of taking action against or refusing the filing of a trademark by a trademark owner without an intent to use such for part or all of the goods/services claimed as described above under question 12) above.

Please tick or fill in only the applicable box. If you select "yes", please explain.

No

Please Explain

6.d Could any of the following aspects of your Group's current law be improved?

The possibility of taking action against other conduct as described in your response to question 14) above.

Please tick or fill in only the applicable box. If you select "yes", please explain.

No

Please Explain

17 Are there any other policy considerations and/or proposals for improvement to your current law falling within the scope of this Study Question?

It might be necessary to establish whether bad faith should be evaluated in terms of objective or subjective criteria (relatively by means of a

combined evaluation method), also considering how this can affect the application of presumption of good faith under the Civil Code (which will not be applicable if one invokes the objective criteria).

Proposals for harmonisation

18 Does your Group consider that harmonisation in any or all of the four areas described in question 16) above is desirable?

If yes, please respond to the following questions without regard to your Group's current law.

Even if no, please address the following questions to the extent your Group considers your Group's current law could be improved.

Yes

Please Explain

19 Does your Group consider there should be a harmonised definition of bad faith?

Please tick or fill in only the applicable box. If you have different reasons for selecting "no" or "yes" to those identified, please explain.

No; identifying circumstances that can be relevant in assessing whether the types of conduct identified above under question 16) are allowed can be helpful, but a definition as such does not allow sufficient flexibility

Please Explain

Bad faith - third party use or filing

20 Should it be possible to take action against the application or registration for a trademark in a jurisdiction by a Party A, if that trademark or a similar sign is already used in one or more jurisdictions by a Party B, but is not registered in the jurisdiction where Party A has filed the trademark?

If yes, please answer questions 21) – 25). If no, please go to question 26).

Yes

Please Explain

Trademark rights are limited territorially and thus the intention of Trademark law is to provide trademark protection based on its registration only in the particular jurisdiction.

It follows that the mere fact of trademark registration does not give right to effectively act against a filing of this sign or a similar sign in other jurisdictions.

On the other hand, if a mark registered in one jurisdiction has been genuinely used, than taking action against said filing in another jurisdiction, although in general contradictory to the territorial character of trademark rights, should be admissible under certain conditions. Taking such action should be conditioned by a cross-border reputed character of the prior trademark acquired by its intensive use in more than one jurisdiction. The same should apply to a non-registered trademark, which, due to its intensive use, has acquired reputation in other jurisdictions.

In each case, notwithstanding the fact of the prior registration of a trademark or its prior use, the decisive factor for giving such mark protection in another jurisdiction, where it has not been registered or used in a genuine manner, should be the acquired strong distinctiveness of such earlier mark.

Moreover, referring to the subject of this report, the sole condition of bad faith should not be recognized as sufficient for possibility of taking such action. In most cases it is at least difficult to establish bad faith of the applicant in the moment of filing. It follows, that the possibility of action against a defensive application should be additionally determined by more objective conditions, both for the applicant and for the trademark owner.

21 Which of the following should be relevant factors for proving an application or registration as described under question 20)?

Please tick or fill in all relevant boxes. If you select "other", please describe further.

- Party A knows, or should reasonably be aware, of use of an identical or similar sign abroad for identical goods or services

Please Explain

- Party A knows, or should reasonably be aware, of use of an identical or similar sign abroad for similar goods or services

Please Explain

- Party A knows, or should reasonably be aware, of use of an identical or similar sign in the same jurisdiction for identical goods or services

Please Explain

- Party A knows, or should reasonably be aware, of use of an identical or similar sign in the same jurisdiction for similar goods or services

Please Explain

- Party A intends to prevent Party B from continuing to use the earlier sign or to only allow such under certain conditions (e.g. a license)

Please Explain

- other

Please Explain

Apart from the abovementioned factors, the reputation and the degree of distinctiveness acquired by use of Party B's trademark as well as the likelihood of confusion on the public in the territory in which Party A operates, should be seen as important aspects for proving bad faith. These factors, after their overall analysis, may provide an objective view as to the applicant's intention in the moment of filing, as well as the effects of such filing for the earlier trademark.

22 Should any one or more of the above factors be sufficient on their own, or should the assessment instead always take the specific circumstances of the case into account? If one or more factors should be sufficient on their own, which should they be?

The assessment should always take the specific circumstances of the case into account, as the evaluation of the same factor may differ as to the intention of the applicant, especially that bad-faith, as a subjective factor, is difficult to prove.

However, in each case a clear, proven bad faith intention of the applicant should be the decisive factor for possibility of action against a trademark filing.

Moreover, as likelihood of confusion between Party A's and B's trademarks are the essential conditions of opposition or cancellation actions, these should also be considered as essential.

23 Which of the following should be relevant when establishing whether there was or should have been knowledge as described above under question 21) above?

Please tick or fill in all relevant boxes. If you select "other", please describe further.

- whether Party A operates in the same or a similar field of business as Party B

Please Explain

- whether the earlier sign is well known or enjoys a reputation

Please Explain

- whether there have been formal or informal dealings or contact between Party A and B (such as an agreement, written communication etc.)

Please Explain

24

Should the degree of similarity between the signs be relevant? Please explain why or why not.

Yes

Please Explain

The similarity between the signs should be taken into account, as it may be an important clue as to the knowledge of the applicant about the earlier mark. The degree of the similarity, however, should be at least such that it enables to make a link between them.

The confusing similarity of the signs or at least such similarity that enables making a link between them may serve as a clue that the applicant has not been acting coincidentally while choosing the filed sign, but had knowledge about the earlier mark.

This should be the case especially when the reputed earlier mark has never been genuinely used in the jurisdiction of the filing, but its reputation has a cross-border character and is recognized also on this territory

25

Should the degree of similarity between the goods/services be relevant? Please explain why or why not.

Yes

Please Explain

The degree of similarity between the goods and services, although it should be seen as an important factor for the possibility of taking action against the filing, nonetheless it may be less important for establishing the fact of the applicant's awareness of the earlier mark.

Especially when the signs bear a higher degree of similarity, the lower similarity of the goods of services should not be seen as a decisive factor to establish the fact of knowledge about the earlier mark. In this case, the interdependence rule should be taken into account.

However, when the goods and services are identical or highly similar to the earlier mark's goods and services, than together with the high similarity or identity of signs, this should be considered as an important clue that the applicant was aware of the earlier mark

Repeat filings

26

Should it be possible to refuse or cancel the filing by a trademark owner of a trademark identical or similar to a trademark it already owns in your Group's jurisdiction on the grounds that it fails to meet applicable genuine use requirements?

If yes, please answer questions 27) – 28). If no, please go to question 29).

Yes

Please Explain

The essential role of a trademark is to distinguish on the market goods or services of a certain manufacturer/provider. Essentially, a trademark filing made for other purpose than genuine use or at least intention of such use, should not be subject of exclusive rights.

In the case given, an important factor should be the identity or similarity of the signs applied for. When the secondary filing is for identical sign and identical goods or services, then it should be possible to take action against such filing, as not meeting the requirement of at least intention of genuine economic use.

Contrary, when the secondary filing shows certain differences with the prior mark, even if these may be seen as not major changes, this filing should be seen as legitimate.

To sum up, yes, it should be possible to take action against a repeat filing on the grounds of the genuine use requirement in these cases, when the sign is identical to a prior registration. However, when the secondary filing shows certain differences, such as the shape of the sign or the list of goods or services, than the possibility of acting against such sign on the grounds of lack of genuine use intention, should be seen

as doubtful.

27 Which of the following factors should be relevant when assessing whether a trademark as described under question 26) above should be refused or cancelled?

Please tick or fill in all relevant boxes. If you select "other", please describe further.

- the degree of overlap between the goods/services

Please Explain

In case of the double identity of the repeat filing to the registered but not genuinely used trademark occurs, this should be the main factor influencing the possibility of taking action against such filing. In this case, a conclusion about the lack of intention of genuine use, but merely artificially extending the trademark right's life should be seen as justified.

On the other hand, when a posterior identical sign is filed for goods/services which are not identical with the prior registration, especially when it covers a broader or different categories, than this should be seen sufficient for considering this posterior filing as legitimate. In this case, filing of even an identical sign, but covering different goods/services, may be motivated by lack of possibility of extension of the scope of application or registration after the date of filing.

This should also be the case, when the registered non-used trademark show certain differences with the sign applied for. Even if these changes may be seen as not altering its distinctive character, it cannot be excluded, that they are justified from the market point of view.

- whether or not the signs are identical

Please Explain

- if the signs are different, the degree of difference

Please Explain

- absence or presence of intent to use

Please Explain

Although this criterion would clearly be unambiguous to establish the legitimate character of a trademark filing, nevertheless it would also be the most difficult to prove. The applicant's intention in the moment of filing is a subjective factor. In these cases, when it is possible to recognise the applicant's intention, by means of e.g. his clear statement made in correspondence, this clearly should be sufficient to reject the application. However, such clear-cut cases are rather exceptional.

- other intentions (e.g. the filing of an updated version of a trademark to meet evolving market requirements)

Please Explain

Trademark filings in which the sign applied for differs from the prior mark only in minor elements, still may be intended to tailor the sign's shape to the current market requirements or trend in design. Even if these changes may not influence the trademark's distinctive character as a whole or do not alter it significantly, these still may be important for the applicant's point of view and, therefore, the mere fact of insignificance of changes in the sign should not on its own be decisive for rejecting the sign.

28 Should the answers to questions 26) - 27) above be different if the previous trademark is no longer in force? if so, how?

When a prior mark in the moment of such repeat filing is no longer in force, than the applicant, even if it is the expired trademark right owner, should not be prevented from such filing. As the prior trademark's protection has ended, there is no continuity between these rights and thus, the 'new' filing should not be seen as artificially extending the expired protection.

However, in certain circumstances, such as the clear repetitive character of such filings, accompanied by lack of genuine use of any of those repetitive trademarks, it should be possible to evaluate it as bad-faith act.

Defensive marks

29 Should it be permissible to file a trademark if the trademark owner does not have any intent to use that trademark for part or all of the goods/services claimed? If not, should there be a timeframe (and if so, what) for such intention to use (e.g. must the intent be to start use immediately)? Please explain.

Filing a trademark primarily without any intention of its use should be seen as contrary to the trademark's essential function and, thus, not permissible. A filing made merely in order to acquire a right, even if not intended as defensive filing, should not be permissible.

On the other hand, the common practice of applying for multiple classes of goods/services and for broad lists of items should also be seen as undesirable. Current changes in the Polish Industrial Law practice, in which filing fee is calculated from each class (earlier the filing fee was payable for three classes and then for each class above three), should be seen as positive change of practice. Said change in the fee charging restrains the applicants from applying for goods and services which are not the subject of their business activity

Other

30 Should any other conduct in respect of trademarks, as an independent ground for action, amount to bad faith¹⁷? If yes, please explain.

¹⁷ Including fraud within the context of this Study Question, as explained on p. 1 under paragraph 5 above.

The concept of bad faith is not defined and is most often referred to as a conduct which departs from accepted principles of ethical behaviour or honest commercial and business practices (opinion of Advocate General E. Sharpston dated 12/03/2009, in case C-529/07, 'Lindt Goldhase', p.60). While it may be helpful indeed to name and classify the most common types of bad faith conduct that occur on the market, as a rule of thumb, the bad faith should be assessed with respect to all the relevant factors of each individual case.

The role of bad faith as an independent ground for action in trade mark matters should not be limited to some specified types of conduct. The concept of bad faith plays a crucial role in trade mark law since it protects its very basic principle i.e. that a monopoly to use a certain designation may be granted on the condition that it is used in accordance with its purpose and not for gaining unjustified advantage on the market. The bad faith should encompass all of conduct that may lead to misuse of a monopoly acquired through trade mark registration.

Type of proceedings

31 In which proceedings should it be possible to invoke the grounds described in your response to questions 20), 26), 29) and 30) above, insofar as they should be grounds for action in your view?

Please tick or fill in all boxes. If you select either of the last two boxes, please describe further

- ex officio by the trademark/IP office

Please Explain

- opposition proceedings (before the trademark/IP office)

Please Explain

- a cancellation action (before the trademark/IP office)

Please Explain

- court proceedings concerning a bad faith application

Please Explain

- court proceedings concerning a bad faith registration

Please Explain

Other

32

Please comment on any additional issues concerning bad faith (or equivalent concepts) in the context of trademark law you consider relevant to this Study Question.

As mentioned in reply to question 30 the concept of bad faith plays crucial role in trade mark law as it ensures that a monopoly acquired through trade mark registration is not misused in order to gain unjustified advantage on the market. It should encompass every manner of conduct which departs from accepted principles of ethical behaviour or honest business practices. Hence, it should not be limited to certain types of conduct, such as actions directed against trade mark registrations (or filings) acquired in bad faith. Instead it should also be applied with respect to all those actions that are taken in bad faith and directed against trade mark proprietors in good faith. For example, such as request for invalidity filed in bad faith or request for revocation filed in bad faith.

In some jurisdictions there is a prerequisite to show that an applicant for invalidity (or revocation) has the so-called "legal interest" (interes prawny in Polish) in demanding invalidation or revocation of a trade mark registration. Just recently, however, in April 2016 the need for establishing a legal interest was waived in the Polish industrial property law. As a result it is now even more difficult to defend a trade mark proprietor in good faith that was attacked by the requester for invalidation (or revocation) in bad faith. Such application may be now filed by anyone and irrespectively of their legal interest to do so. Although this model of regulation is preferable in the context of protection against trade mark registrations acquired in bad faith (because it allows anyone the possibility to eliminate bad faith trade mark registrations). It is disadvantageous, however, in terms of application for invalidity (or revocation) filed in bad faith which is directed against a trade mark proprietor in good faith. In such cases, the very basic concept of bad faith in trade mark law should also be applied. Bad faith should include every manner of conduct which departs from accepted principles of ethical behaviour or honest business practices and therefore it should also apply to invalidation (or revocation) proceedings initiated in bad faith (against a trade mark proprietor who is in good faith)

Please indicate which industry sector views are included in part "III. Proposals of harmonization" on this form:

Please enter the name of your nominee for Study Committee representative for this Question (see Rule 12.8, Regulations of AIPPI). Study Committee leadership is chosen from amongst the nominated Study Committee representatives. Thus, persons not nominated as a Study Committee representative cannot be in the Study Committee leadership.

Klaudia Blach-Morysinska