

# TRADEMARKS AND INDUSTRIAL DESIGNS MANAGEMENT IN EUROPEAN INDUSTRY IN THE CONTEXT OF INDUSTRIAL PROPERTY SAFETY

doi: 10.2478/czoto-2023-0030

Date of submission of the article to the Editor: 06/11/2023

Date of acceptance of the article by the Editor: 06/12/2023

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**Abstract:** Utilization of companies trademarks and industrial designs in the market strengthens activities of selected companies. Authors of the paper analyse the significance of a trademark and industrial design for the level of the company's industrial property safety. The threats resulting from the lack of trademark registration were identified and analysed, and selected cases from the case law in the field of trademark protection were reviewed to indicate the scope of protection and safety of products placed on the market.

**Keywords:** trademarks, industrial designs, management, case law

## 1. INTRODUCTION

In recent years, significant and dynamic periods of economic slowdown have been observed. The specificity of activities related to the protection of intellectual property objects of enterprises, such as trademarks or industrial design, at the national level is different. The economic situation in a given country, region or world will have a varying impact on the number of trademarks submitted for protection. The awareness of enterprises operating on the market and the tradition of protecting industrial property items are also important. It can be assumed that during the crisis, the demand for goods and services is limited and investment outlays are reduced. Entrepreneurs are also reducing expenses related to the protection of industrial property (e.g. filing fewer trademark applications). It should be emphasized, however, that the situation in individual countries is different, and the limitation in submitting applications occurs with some delay. Moreover, the change in the level of GDP does not correspond to the change in the number of trademark applications.

Currently, design is increasingly recognized as an indicator of the country's modern economy, an indicator of creativity and the level of scientific and technological development. Design in a unique way expresses the beauty of technology, helping designers create new styles and new living conditions in order to constantly raise its

standards and improve the physical and spiritual aspects of human life. It combines science and art and is a characteristic element of the modern knowledge-based economy. When technology reaches a high level of development, design shows its strength by implementing creative ideas and giving products original features, thanks to which both the value and competitiveness of products increase, the company's image improves and new user needs are met. Companies often have to answer the question of whether or not to protect intellectual property, and if so, to what extent? What type of protection should you apply for in the era of a global economy? What security strategy should the company pursue? Does the state's strategy influence this protection? Will intellectual property protection ensure product safety in the competitive market?

The authors of the article, through the analysis of case law, want to emphasize that in the intense competition era taking place in the global economy, the challenge for enterprises is the effective protection of trademarks and industrial designs, that is aimed to security of enterprises' intellectual property. In accordance with the applicable IP (intellectual property) protection law in each country, EU legislation, as well as the anti-unfair conferencing laws that apply in most countries, products with registered trademarks and industrial designs are safe in competition due to protection against copying. by other companies. However, the condition is to make maximum use of the existing legal possibilities in this area. It is important not to limit the enterprise only to seeking product protection in a country. This is important in developing an appropriate company strategy for protecting its products. Philips certainly represents this approach to its products. The company is aware of what, how and where it wants to protect, and has a long-term IP protection strategy. Currently, Philips has nearly 54,000 patents and almost 39,000 trademarks. Therefore, in addition to purely production activities, Philips is involved in the process of raising awareness of the dangers of counterfeits and plagiarism. By observing the market, they identify the countries where their products are most often copied, e.g. in China. To help these processes, Philips is investing, for example, in the training of Chinese customs officers, preparing, among others: special cards used to identify their most frequently counterfeited products. Philips also emphasizes that it is important to think about protection at the very beginning of the product creation process to protect against idea theft, but also to prevent plagiarism. The company implements a strategy: if we want to be present on the international market, we must have a good product that is multilaterally protected.

## **2. TRADEMARKS AND INDUSTRIAL DESIGN MEANING FOR COMPANIES**

Trademark rights are signs capable of distinguishing the goods and services of one firm from those of another. As intellectual property rights, they constitute critical assets that confer the exclusive right to use the trademark in a specific market. Trademarks establish the legal basis for protecting brands against competitors and for selling or licensing brands (Fish et al., 2022).

Being a source of visibility and reputation, trademarks become a strategic asset to firms competing on the basis of product differentiation and customer loyalty. When successful, trademarks become associated with perceived value to users and, consequently, are a source of higher margins for the firms that fill them (Çela 2015). Both innovative and non-innovative firms use trademarks, one of the main forms of intellectual property rights. The primary economic function of trademarks is not – as with patents – to give firms incentives to invest in research and development, but to signal quality and good will, to enhance

efficiency by reducing consumer search costs, and to support firm branding efforts (Davies and Davies, 2011).

The Paris Convention for the Protection of Industrial Property adopted in 1883 constituted the grounds of international trademark law. The Convention states that a trademark is a sign to indicate one enterprise from those of others. Moreover, it gives the proprietor the exclusive rights to use the trademark (Zaichkowsky, 2020). One of the Paris Convention article establishes rule for “well-known marks” that established principle for the international trademark law protecting trademarks across the borders. It means that countries shall give the right of a well-known mark to prohibit the use of a mark which is liable to create confusion (WIPO, 2020).

As the balancing of trademark law was an important issue in the European Union integration process, the first regulation on Community trademarks was established in 1993 (Schovsbo, 2018).

The concept of a trademark is included in Art. 2 of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks (former Directive 89/104/EEC). The literature emphasizes that a trademark is a special type of distinctive sign, belonging to the category of intangible goods and being a product of the human mind. In competitive conditions, trademarks are used to attract customers. They are a tool for advertising and market expansion. Trademarks also enable communication between producers (service providers) and consumers. It is important that their protection is possible based on an exclusive right, which can be obtained by filing a trademark application with a specialized public administration body. The condition is that a positive decision is issued by this authority. In such a case, the trademark is registered and the holder obtains a monopoly on the use of the mark in business transactions. An important factor remains the fact that obtaining protection is possible in the following systems: national, Community (EU) and international (under the Madrid system). It should also be noted that trademarks may also be protected as unregistered marks under competition law (in special cases also under copyright law).

What is important in this analysis is the fact that not only entities based in the EU, but also entities from outside the European Union (in particular from the USA, Japan and Switzerland) are interested in trademark protection in the European Union or its individual Member States. It is also important that applicants (usually large enterprises) often decide to protect the same trademarks both in the CTM system and in national (international) systems. Observing the data on the number of applications in the CTM (Community trademark) system, one may have the impression that the two subsequent economic crises indicated above only slightly influenced the number of applications submitted in the Community (EU) system (Kruk, 2012).

A trademark may be any sign enabling the goods or services of one entrepreneur to be distinguished from the goods or services of another entrepreneur and capable of being entered in the trademark register. Trademarks may be, among others: graphic, word, word-graphic, sound, or represent colours or patterns. Not every sign can be a trademark, which results from the basic function it performs, i.e. the distinctive function. The trademark must be sufficiently distinctive and must not contain generic or descriptive signs. Reservation of the right of protection for a trademark is of a territorial nature. In running a business, it is worth considering whether to register your brand not only in Poland, but also in the European Union, Great Britain or other countries outside the EU. Since 2016, a new system for examining trademark applications has been in force in

Poland, the so-called opposition system. On the one hand, it has very positive effects because characters are registered much faster. On the other hand, the opposition system assumes activity on the part of entrepreneurs who, when they notice the registration of a mark similar to the one they filed, should react and file an appropriate opposition (within 3 months from the date of announcement of information about the application in the Bulletin of the Patent Office of the Republic of Poland). If a company creates a fancy brand that stands out from the competition, it is definitely worth registering trademarks. Experience shows that many entities decide to take advantage of the reputation of other entities, which has been developed over the years.

There are several threats resulting from the lack of trademark registration, which thus affect the level of security of the company's industrial property:

1. Competitive impersonation in commercial activities. Undoubtedly, one of the most important advantages of registering a trademark is protecting the brand against unfair competition. The owner of a registered trademark has a number of legal instruments to enforce the rights to his trademark. In the event of violations on advertising or sales platforms such as Google Ads, Allegro, Amazon, having a registered mark affects the quick response of the service providers of these portals. However, the mark is still protected by copyright and the right to the company name. However, these rights guarantee a much smaller scope of protection and are more difficult to enforce.
2. Loss of the right to use the logo, product or service name or internet domain.
3. Costly rebranding. An entrepreneur who has been forced to stop using a trademark registered by competitors must face the challenge of rebranding the brand. Not only creatively, but also financially. Creating a new brand - creating a new name, preparing a logo may, of course, involve additional costs, but the main cost here is, of course, promotion. After all, the new brand must reach the previous recipients quickly enough so as not to disturb the continuity of the company's operations.
4. The need to withdraw goods violating a previously registered trademark from the market. The owner of a previously registered mark has the right to demand that goods or services that infringe the registered mark be withdrawn from trade. This situation alone may result in huge financial losses for the company. Unfortunately, this is not all. The owner of a previously registered mark may also demand the return of profits obtained as a result of the previous sale of goods infringing the trademark.
5. Protection against impersonation by competitors, especially as part of online advertising campaigns. It happens that the competition advertises on the competitor's name in search engines. With a registered trademark, a company has the ability to contact the service support and file a complaint, which, if reviewed, may result in the competition being removed from ads displayed when people search for your trademark. Moreover, such action may also constitute an act of unfair competition.
6. Civil and criminal liability. It refers, among other things, to the request to stop using the mark or the need to withdraw the goods along with the return of benefits. These demands may also be supplemented by a request to pay compensation for unlawful use of the mark. Criminal liability for unlawful use of another person's mark by marking goods intended for sale with it is also important. It is worth emphasizing that this applies not only to the act of marking goods, but also to their sale. An entrepreneur carrying out the procedure described may be subject to a fine or even imprisonment.

### 3. ASSESSING THE RISK OF THE RECIPIENT MISLEADING

The concept of the risk of misleading recipients as to the origin of the goods is also important, which is the central institution of trademark law related to the infringement of the trademark right. Its meaning comes down to the fact that an infringement of the trademark protection right consists in the unlawful use in business transactions of a mark identical or similar to a registered trademark in relation to identical or similar goods, if there is a risk of misleading the recipients, which includes in particular the risk association of the mark with a registered trademark (Article 296(2)(2) of the Industrial Property Law). It has long been accepted in Community jurisprudence that the assessment of the risk of misleading consumers should be comprehensive and carried out taking into account all the circumstances of the case.

The case law of the Community bodies indicates a catalogue of the most important and most frequently occurring circumstances that should be taken into account when assessing the risk of misleading consumers. These are the following basic factors:

- a) the degree of similarity between the marks and between the goods/services;
- b) recognizability (distinctive power) of the earlier mark
- c) the impact of the type of products/services on the assessment of similarity;
- d) the degree of experience and attentiveness of potential recipients;
- e) coexistence of opposing signs in the same territory;
- f) cases of actual confusion;
- g) previous decisions issued by Community or national authorities regarding conflicts between identical or similar marks;
- h) no confusion between the marks themselves, but confusion in determining the source of origin (indirect confusion).

This catalogue is not closed, which means that, depending on the specific situation, other factors should also be taken into account when carrying out the so-called global assessment. The conclusions arising from Community case law are currently being developed and organized in a document called Guidelines for Examination in the Office (published on the website of the Office for Harmonization in the Internal Market in Alicante).

The analysis of the risk of misleading consumers very often comes down to determining whether the goods/services for which opposing signs are used are identical/similar, and then whether the similarity between the marks is so significant that it may lead to confusion between the marks. Against this background, terms "misleading similarity" or "confusing similarity" are often used in the justifications of judgments.

The similarity of signs should be one of the (initial) stages of conducting a comprehensive assessment of the risk of misleading consumers. The purpose of carrying out a similarity analysis is to determine whether there is any degree of similarity between the marks, which should then be taken into account in the overall assessment of the risk of misleading the recipients. The result of the analysis should be the determination of the existence of similarity or its lack, and only the obvious lack of similarity exempts a comprehensive assessment of misleading the recipients. It is hoped that one of the judgments of the Supreme Court in Poland (of December 11, 2013, IV CSK 191/13) will contribute to promoting a comprehensive assessment of the risk of misleading consumers under our law, where the Court stated: "The examination of the danger of confusion includes not only the similarity of the goods (services) and signs and the degree of their similarity, but also the recognition of the earlier mark and other factors, in particular the manner and

circumstances in which the goods (services) are offered. Such a complex, comprehensive method of assessment in terms of the considered form of violation of protection law has been developed both in the case law of the Court of Justice and in the case law of the Supreme Court." In this case, the Supreme Court found that the high degree of similarity of two opposing signs (signs almost identical in terms of meaning and phonetics, although significantly different in the visual layer) used to mark a restaurant does not necessarily lead to the risk of misleading consumers.

#### **4. ANALYSIS OF CASE LAW – RESULTS AND DISCUSSION**

The subject of the analysis below is selected case law in the field of trademarks and industrial designs registered in the years 2009–2018 and judgments issued by the CFI and the ECJ throughout the European Union, which constitute a binding interpretation of the provisions also for national authorities. Case law provides information important for entrepreneurs who want to manage their product taking into account registered trademarks and industrial designs.

One of the analysed judgments is the issue of legal protection of trademarks in the light of the jurisprudence of the experts of the Patent Office in Poland who create the official jurisprudence of the Republic of Poland in the field of industrial property rights. Dispute proceedings before the Dispute Adjudicating Boards of the Polish Patent Office of the Republic of Poland constitute one of the most important elements of the national system of protection of exclusive rights, enabling the parties to obtain a ruling in the event of a conflict of interest, threat to market competitive position or other circumstances requiring resolution of industrial property matters based on the rules of adversarial proceedings.

A spatial form that reflects the product and is determined solely by its functional properties does not have primary distinctiveness and cannot acquire secondary distinctiveness required for trademark registration. The Supreme Court, after hearing at the hearing on January 8, 2003, the case brought by the company "Kirkbi" A/S Billund, Denmark against the decision of the Patent Office of the Republic of Poland regarding the invalidation of the right to register a trademark, as a result of an extraordinary review of the President of the Patent Office of the Republic of Poland against the decision Appeals Committee of the Patent Office of the Republic of Poland in Warsaw of March 12, 2001. The Patent Office of the Republic of Poland, by decision of February 4, 1998, registered for the applicant - Kirkbi A/S with its registered office in Billund, Denmark, a three-dimensional trademark for marking game programs computers, toys, games and play items, in goods classes 9 and 28. The mark was filed as black and white (actually monochromatic, i.e. without any colour) and described as: "A three-dimensional sign in the form of a three-dimensional form of a rectangular prismatic building element - a toy on whose flat surface there is a rectangular series of cylindrical projections - according to the attached prints.

Company C objected to the application to register this trademark, claiming that the applied spatial form represents a block, and therefore clearly indicates the type of goods for which it is intended, which means that this sign does not meet the statutory conditions required for registration. trademark and in accordance with Art. 7 section 2 of the Trademark Act cannot be registered. By decision of September 15, 1998 issued in the dispute proceedings, the Patent Office of the Republic of Poland invalidated, pursuant to Art. 49 section 1 point 3 in connection with Art. 4 and 7 of the Act of January 31, 1985 on trademarks, the right to register a spatial trademark [...] "partly in the field of blocks". The Patent Office shared the position of the owner of the trademark Kirkbi A/S that it does not

violate the provisions of Art. 4 and art. 7 of the Act registration of a spatial sign in a plastic, three-dimensional form and that pursuant to the provisions of Art. 4 of the Act there is no prohibition to register as a trademark a spatial form that is also a product, i.e. a mark that is itself a commodity. However, not every spatial form can be registered as a trademark. The provision of Art. 4 clearly sets out the criteria that a trademark should meet in order to be registered. A trademark subject to registration is only a sign that is capable of distinguishing the goods and services of a given enterprise from the goods and services of the same type of other enterprises, i.e. a sign that has sufficient distinctive features in ordinary conditions of business. In the case under consideration, the subject of the registration right is a three-dimensional sign in the form of a block with protruding protrusions, used, among other things, to mark construction blocks (toys). According to the Patent Office, the mark, which is itself a product - a block and is used to mark goods - blocks, does not have sufficient distinctive features because it is a three-dimensional sign resulting from the nature of the object. It is a form whose form is determined by the functions of the object - a block, as evidenced by the protrusions that act as hooks; moreover, it is a form that is intended to achieve a specific practical result and provides information about the structure and appearance of the marked product (it is of a general information nature). Registration of a mark representing a specific product for one entity violates the provisions of Art. 4 and art. 7 of the Act and prevents the production of blocks with hooks by other entities, monopolizing the Polish market.

One of the conditions for an absolute obstacle to registration of a trademark is the descriptive nature of the trademark. In the current legal situation, such a condition is regulated in national law by Art. 1291 section 1 point 3 of the Act of June 30, 2000, industrial property law (Journal of Laws of 2020, item 286) (hereinafter referred to as "IPL"). The obstacle in question pursues the objective of protecting the public interest, which is to ensure that signs that can be used to describe categories of goods or services remain free to use by all entrepreneurs. The assessment of the descriptive/informative character of a mark should be the result of a carefully conducted analysis, for which the interpretative reference point is found in the extensive case law of the Court of Justice of the European Union. By decision, the Polish Patent Office dismissed the application for invalidation of the protection right for the word trademark "CARP GOLD" registered at the Polish Patent Office since 2004 (R. 184986) for class 28 goods, fishing equipment. The authority found unfounded the applicant's claim that protection for the disputed mark was granted in violation of Art. 129 section 2 point 2 of the IPL (currently Art. 1291(1) point 3 of the IPL). In the opinion of the authority, the disputed mark had sufficient distinctive features to distinguish the authorized person's goods marked with it from goods of the same type originating from other enterprises. Placing such a word mark on various types of fishing equipment does not evoke clear associations in the context of the goods on which it is placed. According to the authority, the disputed mark is a fanciful mark. The Office did not share the view that the disputed mark was solely descriptive of the goods it was intended to mark, as it was not proven that there was a variety or species of golden carp. Therefore, it was unfounded to claim that the marking of the name of a fish species on fishing equipment would make the average recipient believe that the goods were intended for catching that particular species of fish. The Supreme Administrative Court dismissed the cassation appeal and found that: "both in the literature on the subject and in the jurisprudence of administrative courts, it is recognized that a descriptive mark is a sign that has the features of current, specific and direct descriptiveness. The validity of

meanings is subject to an objective assessment and comes down to determining whether, from the point of view of current market conditions, the mark is useful for describing the product and as such should be available to all its participants. The rule of specific descriptiveness indicates that only a mark that indicates specific features of the product for which it is intended may be excluded from registration as descriptive. Directness of description occurs when a descriptive mark conveys information about the features of a specific product directly, clearly and unambiguously, so that it can also be read directly and not through associations.

The general principles for assessing the similarity of complex marks were set out in the *Matratzen* judgment, in which the Court stated, among others, that there can be no similarity between a composite mark and another mark which is identical or similar to one of the elements of such a mark, unless that element constitutes the dominant element in the overall impression conveyed by the composite mark (70). It seems that this thesis can also be extended to situations of similarity within the dominant elements of two composite signs. It follows from the above statements that the key issue in this context is to determine the dominant elements in complex signs. Protection of weak marks in this configuration would be possible if this non-distinctive element was dominant in the disputed sign.

The case in which the ECJ considered the application of the concept of an independent distinctive feature was the *Gateway* judgment. In this case, the owner of the word trademark *Gateway* and a series of other related marks filed an opposition to the registration of the word trademark *ACTIVY Media Gateway*. However, the opposition was rejected by decision of both the Opposition Division of OHIM and the Board of Appeal of OHIM. According to these authorities, the signs at issue are not similar and therefore it is impossible to find a likelihood of confusion between them. In its judgment, the Court clearly stated that the word "Gateway" cannot be considered dominant in the mark applied for.

## 5. CONCLUSION

When analyzing the issues of protection of an enterprise's industrial property, it should be noted that, as a rule, they are subject to protection resulting from the legal provisions themselves. The basic legal acts that regulate the protection of broadly understood intellectual property are the Industrial Property Law and the Copyright and Related Rights Act. The first one focuses on issues related to the protection of, among others, trademarks, industrial designs and inventions. The second one concerns the protection of the broadly understood work. In areas not regulated by the above legal acts, the provisions of other acts also apply, including in particular the Civil Code and the Act on Combating Unfair Competition. According to the provisions of the so-called company law, which can be found in the Civil Code, each entrepreneur using a given company has the exclusive right to use it. Protection of the company's name can also be sought in the provisions of the Act on Combating Unfair Competition. This Act generally defines an act of unfair competition as an action contrary to the law or good practices if it threatens or violates the interests of another entrepreneur or customer. This is a general, general statutory definition of an act of unfair competition. In addition, the Act directly describes specific activities that constitute an act of unfair competition. Considering the above, it might seem that the company name or brand is protected so strongly under the law that it is not necessary for entrepreneurs to take any action. Nothing could be further from the truth. In the event of any dispute over a brand, it is necessary to prove one's rights in order to be able to claim the claims arising from the provisions of the previously discussed acts.



Therefore, industrial property law and the case law of relevant institutions are of great importance, as they provide protection to entrepreneurs who have registered a trademark or industrial design in order to, among other things, distinguish their products on the market.

### ACKNOWLEDGEMENTS

Paper is a result of the Erasmus+ traineeship mobility of recent graduate Imane Ben Halima at Department of Production Engineering and Safety, Faculty of Management (supervisor Eng. Renata Stasiak-Betlejewska, PhD.) based on Higher Education Learning Agreement for Traineeships between Czestochowa University of Technology and Bilecik Seyh Edebali University done in period 20.07.2023 – 20.09.2023 within GfNA-II-C-Annex IV-I-Erasmus+ HE-2015. Research findings analysis has been supported by student of Nicolaus Copernicus University in Toruń, Faculty of Law and Administration in Poland.

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