

V. The socialistic brands dilemma

As it has been shown in this thesis, the current legislation might at best provide an uncertain patchwork-like solution for addressing the appropriation of the socialistic brands. This is mainly due to the fact that trademark law was not designed having in mind its implications for the public domain¹⁹⁸, the ever intensified use of trademarks or their changing nature. Before we summarise, there are two policy suggestions that should be made.

Firstly, in cases of systems in which trademark applications are substantially examined *ex officio*, the easiest solution would be to amend the guidelines for trademark examiners, by including the category of socialistic brands and other signs with strong cultural connotations with explanation of the rationale behind curbing their registrations.

Secondly, national legislators should also fully recognise the profound and complex role trademarks play in influencing end user decisions and allow for a wider group of actors to have legitimacy to raise grounds of invalidity of trademark. One potential solution could involve competition authorities. They could be obliged to monitor registration of such signs and raise such grounds whenever it is justified. This competence could easily fit into the role of these watchdogs of anticompetitive behaviour, as obtaining unjustifiable exclusivity over such signs results in gaining unfair advantage over competitors¹⁹⁹. As limiting the caseload of trademark offices and courts is probably among the main reasons for limiting the group of actors who have the legitimacy to lever registrations, competition authorities would also serve as a sieve. The amount of cases could be limited and the quality of the legal arguments raised would likely improve if a procedure obliging authorities to access complaints submitted by the public would be established.

198 Senftleben, “Trademark law...” (*supra* n. 41), 2.

199 In Poland the Office of Competition and Consumer Protection has been involved in certain disputes regarding the signs used in commerce. This includes the above addressed case of the dispute between Hortex and Hortino in which the office issued an interpretation in response to a request of a member of the parliament.

By way of summary, if both the Polish Patent Office and the courts would recognise the need to treat socialistic brands differently on the grounds of the existing law, only ‘succession scenario’ socialistic brands should be allowed to remain subject to trademark exclusivity. Attempts to unjustifiably appropriate socialistic brands in cases in which these have become generic or descriptive would be addressed as any other signs. Cases in which abandoned socialistic brands or signs confusingly similar to them are distinctive would have to be addressed either on the grounds of bad faith registration, in cases in which they are registered and used for the same or similar commodities, or on the grounds of being contrary to public policy, in cases of registration for different commodities. The issues of scenarios in which multiple entities are justified to claim exclusivity over a socialistic brand could be addressed on the grounds of unfair competition law.

Before we pronounce this interpretation scenario as a ray of sunshine in this otherwise gloomy panorama, we should keep in mind that results of raising all of the grounds and torts mentioned above are highly uncertain and will depend on facts of a given case and the court’s interpretation. For example, having in mind the intrinsic characteristic of unfair competition law, namely its flexibility, this area of law should not be deemed as a reliable legal mean sufficient to address the issues at the heart of the socialistic brands dilemma.

Socialistic brands subject to the ‘abandonment scenario’ should remain outside of the scope of trademark exclusivity. This ought not to be understood as synonymous to leaving these brands at the mercy of the wraith of the ‘tragedy of the commons’ – to be forgotten and to lose all their magnetism. The availability of these signs will encourage undertakings to use these highly attractive symbols in different ways, for example to offer replicas or other inspired commodities. As such commodities would be subject to competition, since anyone could use these ‘free’ socialistic brands, entities producing them would have to rely more on the quality and other characteristics of the commodities and not on the socialistic brand itself.