

Question Q234

National Group:	Hungarian Group
Title:	Relevant public for determining the degree of recognition of famous marks, well-known marks and marks with reputation
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Questions

The Groups are invited to answer the following questions under their national laws.

I. Analysis of current law and case law

- 1) How is the relevant public for purposes of determining the degree of recognition of famous, well-known and reputed marks defined in your jurisdiction? Is it the general public at large or a relevant sector of the public that is considered to be the relevant public in determining the knowledge, recognition or fame of a mark?

The Hungarian Trademark Act recognizes only two categories of trademarks on the basis of degree of recognition by consumers, namely the category of 'well-known trademark' and the category of 'trademark with good reputation'. The Hungarian Trademark Act does not provide for legislative definitions of these types which are only referred to as earlier rights in Article 4 regulating the relative grounds for refusal of trademark applications as follows:

Article 4 of Hungarian Trademark Act

„(1) *The following may not be granted trademark protection:*

a) a mark with later priority which is identical to an earlier trademark and is registered for identical goods or services as the earlier trademark;

b) a mark which, due to its identity with or similarity to an earlier trademark or the identity or similarity of the goods or services covered by the trademark, consumers may confuse with the earlier trademark;

c) a mark with later priority registered for different goods or services that is identical or similar to an earlier trademark enjoying a good reputation in the domestic market, where the use of the later trademark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trademark.

(2) 'Earlier trademark' means any trademark that has been submitted for registration with an earlier priority, and - for the purposes of Paragraphs a) and b) of Subsection (1) - any trademark that has become well known in the domestic market at an earlier date, regardless of its registration status, on the basis of the Paris Convention for the Protection of Industrial Property. Earlier trademark - depending on the registration status - shall also mean an earlier trademark application".

The legal practice recognizes the category of 'famous mark' as well which is cited and evaluated in the course of assessing confusing similarity and distinctiveness of a mark.

The boundaries of these categories are not strictly and unambiguously set, but are continuously formulated by the actual practice.

The relevant sector of recognition is defined case by case and marked out by the goods and services of the mark in question. It can be either the general public or a certain group of people depending on whether the given products or services are satisfying public needs or offered for a narrower circle of consumers.

- 2) Please clarify whether your jurisdiction uses several of the terms discussed in sections 22-26. If so, is the "relevant public" construed differently when determining the recognition of famous marks, well-known marks and marks with reputation respectively (and, if applicable, marks subject to another term)? Is the assessment made based on the same criteria?

The terms well-known trademarks and marks with good reputation are mentioned in the Hungarian Trademark Act although not defined. The category of famous mark is also known but used rather by legal practitioners only as referred to in our answer given to Question 1.

The relevant public is determined case by case in all categories by considering the same parameters of the trademark - in particular the characteristics of the goods and services in relation with it enjoys protection including their nature, destination, way of use, price, market significance, marketing and distribution channels. The category of the mark formulated by the degree of recognition has no relevance or influence in that regard.

- 3) If the relevant public can be a limited sector of the public please respond (if applicable with reference to statutory provisions and/or case law) to the following questions.
 - a) Please briefly describe the criteria for determining the relevant public. Is consideration taken e.g. to age, gender, geography, culture, groups with special interests, sophistication/skill of the consumer? Is consideration taken to the way the goods or services with the trademark in question are marketed?

The characteristics, role, price, destination, area to be used of the goods and services determine how extended the relevant public shall be. Features of the public, e.g. age, gender, geographical location, culture, skills, are relevant only in light of the above. The ways the goods and services are marketed are of a greater importance. Certain methods, e.g.

multi-level-marketing system, raise concerns regarding whether they are able to furnish well-known character or good reputation of a trademark.

- b) Would the relevant public be populated by actual/potential consumers/buyers of the products/services in question only or a larger public? Please explain how the delimitation is made.

The relevant public may consist of actual/potential consumers or may involve a larger public depending on the characteristics of the goods and services in question. Providing some examples: in the event the trademark enjoys protection in relation with goods or services of everyday use or mass production, e.g. food products, the relevant public necessarily implies the large scale of public, while if the goods or services are of an exclusive nature, e.g. luxury products, or satisfy specific needs, e.g. military equipment or used only by orthopedic surgeons, the relevant public may be limited to actual/potential buyers.

It shall be also noted that delimitation shall be made cautiously, case by case, with consideration of the circumstances of the legal matter, as in certain cases not only those consumers can be attracted by the trademark who use or buy the goods or services offered under it, but others outside of this circle can be familiar with the trademark as well.

- c) Could the relevant public be composed of business /professional end consumers?

Yes, the relevant public may involve business/professional end consumers depending on the characteristics of the goods and services in question: see our answer given to Question 3.b) above.

- d) Could the relevant public be composed of people in the trade of the goods or services in question, such as distributors, licensees and retailers?

Yes, the relevant public may be composed of, however, not limited to people in the trade of the goods or services, e.g. distributors, licensees, retailers, depending on the characteristics of the goods and services in question.

- e) Could the relevant public be "mixed" in a sense that it is composed of persons involved in trade, professional/business end customers and private end customers?

Yes, the relevant public may be mixed and can imply both persons involved in trade, business/professional end consumers and private end customers depending on the characteristics and purpose of the goods and services in question.

- f) How limited in terms of quantification can the relevant sector of the public be to constitute the relevant public? Is there a clear established "lowest level"?

There are no quantitative terms or measurements, accordingly not any clear lowest level, either which can be used in determining the relevant public, so the size of the public is depending on the characteristics of the goods and services in question. In addition, some precedent cases reflect the evaluated size of the relevant public differentiated also by the features of the market of the concerned goods and services. For example, if the market of the goods or services in question is of a monopolistic nature, larger number of consumers can constitute the relevant public, and this also relates to products being of everyday use, while in case of very specific products or services already a small number of consumers may be considered as relevant public. As an indirect feedback on the relevant public we may note

that a consumer survey used as evidence in front of the Hungarian Intellectual Property Office (HIPO) or courts are usually considered as reasonably representative at a minimum size of 800-1000 persons questioned.

- g) Is it possible to see any differences for different products/ industry sectors in respect of the delimitation of the relevant public?

Yes, the size and composition of the relevant public may be different depending on the products /industry sectors in question. Products or industries corresponding to special needs attract a smaller group of consumers naturally and consequently their relevant public indeed formulates a narrower circle within the group of larger public.

- 4) Are there any differences between the "relevant public" concept when assessing the recognition of trademarks in respect of e.g. dilution, free riding, or when determining likelihood of confusion in infringement proceedings?

Relevant public of a mark is determined the same way by considering the parameters of the trademark, in particular the characteristics of the goods and services in relation with it enjoy protection. In general the definition of the relevant public is independent of what kind of proceedings it is evaluated in.

- 5) When does the assessment of the relevant public come into play e.g. in registration matters, proceedings in respect of wrongful use such as free riding, dilution, infringement proceedings, and opposition proceedings?

Relevant public is assessed when the trademark and its position on the market is evaluated. It can be either a registration proceeding where the distinctiveness of the trademark is to be supported also by a claimed acquired distinctiveness, an opposition proceeding where a broader protection on the basis of good reputation is sought or when adjudicating confusing similarity, a dilution or revocation on the basis of non-use process when the consistent, coherent and genuine use of the trademark is investigated or an infringement matter where the conflicting marks and their similarities are of a primary importance and where much is depending on the brand awareness of consumers.

- 6) Is the relevant public determined by a test, a specific procedure or in some similar manner, or rather on a case-by-case basis? Please give a brief description of how the test or analysis is made.

Relevant public is determined on a case by case basis; there is no test or similar proceeding applied. The goods and services marketed under the trademark in question define basically the circle of relevant public. Further circumstances or parameters of the case (e.g. way and channels of marketing and distribution; commercial or consumer customs in marketing and purchasing in that particular field of goods or services; number of players of that market sector etc.) are taken into consideration only to refine this approach when necessary.

II. Proposals for harmonisation

Is harmonization desired? If yes, please respond to the following questions.

The Hungarian legal practice is harmonized with the Community legal practice. Decisions of the European Court providing guidelines in assessment of relevant public and other parameters when determining the degree of recognition of trademarks are observed and cited by the decisions of the HIPO and of the courts dealing with trademarks. Precedent community legal matters and their conclusions naturally are built into the national trademark

system through these decisions. This process is encouraged by the growing number of community trademarks appearing in national proceedings and also by the need of permeability of the community market. For the reason of this existing process and as long as it is maintained we believe that no harmonization in the form of legal acts is needed.

- 1) Is it the general public at large or a particular sector of the public that should be considered as the relevant public in determining the knowledge, recognition or fame of a mark?

We refer to our general answer given above under Question II.

- 2) Please briefly set out the criteria to be used when establishing the relevant public for determining the degree of recognition of famous marks, well-known marks and marks with reputation.

We refer to our general answer given above under Question II.

- 3) Should the relevant public be construed differently for famous marks, well-known marks or marks with a reputation? If so, please define the terms used and describe what criteria is to be used for the different types of marks.

We refer to our general answer given above under Question II.

- 4) Would it be possible or desired to establish a test or a specific method of establishing the relevant public or should this be done on a case-by-case assessment? How should the test or analysis be made?

We refer to our general answer given above under Question II.

Summary

The Hungarian legal practice is harmonized with the Community legal practice. The most important community cases and their conclusions are referred to as precedent matters in Hungary by practitioners and authorities as well.

In accordance with this harmonization, the national legal practice recognizes all three mentioned categories of trademarks with a higher degree of recognition and follows the community approach in concern of determination of relevant public of these trademarks.

For the reason of this already existing harmonization process with the community legal practice we believe that no specific harmonization in the form of legal acts is needed, in particular since this automatic harmonization is continuously generated and maintained by the high number of national proceedings referring to community trademarks.

Zusammenfassung

Die ungarische Rechtspraxis ist der Gemeinschaftsrechtspraxis angeglichen. Die wichtigsten Gemeinschaftsfälle und ihre Ergebnisse werden in Ungarn sowohl von praktizierenden Anwälten als auch von Behörden Präzedenzfälle benannt.

Entsprechend dieser Angleichung versteht die nationale Rechtspraxis die drei erwähnten Schutzmarkenkategorien mit einem höheren Anerkennungsgrad ein und folgt dem Ansatz

der Gemeinschaft in Bezug auf die Bestimmung dieser Schutzmarken durch einen relevanten Verbraucherkreis.

Wegen dieses bereits vorhandenen Angleichungsprozess an die Gemeinschaftsrechtpraxis meinen wir, dass in der Form der Rechtshandlungen keine spezifische Angleichung erforderlich ist, insbesondere weil diese automatische Angleichung in Bezug auf die Schutzmarken durch zahlreiche nationale Verfahren beständig generiert und aufrecht erhalten wird.

Résumé

La pratique légale hongroise est harmonisée avec la pratique légale communautaire. Les juristes et les autorités se réfèrent en Hongrie à titre de précédents juridiques aux cas juridiques communautaires les plus importants ainsi qu'aux conclusions de ceux-ci.

Conformément à cette harmonisation, la pratique légale nationale reconnaît l'ensemble des trois catégories mentionnées de marques déposées ayant un degré de reconnaissance plus élevé, et elle suit l'approche communautaire en ce qui concerne la détermination du public pertinent de ces marques déposées.

En raison de ce processus d'harmonisation déjà en cours avec la pratique légale communautaire, nous considérons qu'aucune harmonisation spécifique sous forme d'actes légaux n'est nécessaire, en particulier parce que cette harmonisation automatique s'effectue continuellement et se maintient grâce au grand nombre de procédures nationales se référant aux marques déposées communautaires.