

Q285



National Group: Hungary
Title: **Proving trade mark use**
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Questions

I. Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

Evidence to Prove Trade Mark Use

- 1) Is there any quantitative or temporal threshold (minimum level) on evidence requirement to prove genuine use?

NO.

Case law requires evidence of use that is extensive in time and space, intensive and reaches a wide range of consumers. While a trade mark holder can evidence the use with various forms of evidences, the totality of the various pieces of evidence is appropriate if they form a coherent, logical system which proves use of the mark.

In particular, the use may be supported by invoice, delivery note or any other document proving the movement of goods.

If the trade mark holder provides only indirect evidence of use (e.g. catalogue, distribution contract, media coverage), although the combination of these documents may show a certain degree of domestic awareness of the product bearing the trade mark, it is necessary to prove that this is the result of actual domestic use, or that the products have actually reached Hungarian consumers.

On the basis of evidence relating to internet use, genuine use of the trade mark can be established where the sales of the trade-marked goods have generated substantial revenue as a result of use over a substantial period of time and on the basis of geographically wide use. It is not necessary that the trademark holder provides invoices to prove the sales, but it is

essential to provide some evidence that sales have actually been made, and that these sales have been made in respect of products bearing the trademark.

The internet opens up borders and can technically provide consumers with access without having to physically come into contact with the product or visit the shop, but this particularity does not exempt the trade mark proprietor from proving that it has actually carried out an economic activity, possibly trading, under the trade mark during the relevant period (for evidencing the use in Hungary, the language of the website shall be Hungarian). For this reason, it is irrelevant how many times Hungarian consumers have visited sites under .com domains or what figures can be shown on the basis of the pay-per-click model. The fact that the websites are also accessible to Hungarian consumers and that the products bearing the trade mark can be ordered and purchased there cannot be assessed in favour of the proprietor, but actual purchases shall be evidenced. Although a significant part of today's trade is carried out via the Internet, in such cases, the sale is completed in real time by the creation of invoices and receipts, so that the movement of goods can be proven here too by means of the usual documents. These cannot be replaced by the results of an internet search, even in the case of a high number of hits.

- 2) If there is a minimum level on evidence requirement to prove genuine use, is that minimum level different for well-known/famous/commonly known marks from a quantitative, temporal or any other perspective?

N/A.

In general, there is no minimum level, and the same standard applies to the use requirement for well-known/famous/commonly known marks.

- 3) Could evidence of one single advertisement likely to be sufficient to prove genuine use and if so, in what circumstances?

NO.

Temporal requirement is not met in case of one single advertisement.

- 4) When considering genuine use, are there specific types of evidence (A) always excluded, (B) always included, or (C) given weight according to the circumstances? Please consider the following types of evidence, and select category A, B or C for each of them and explain in each type why that category applies:

- a) declarations by or on behalf of the trade mark owner (e.g., corporate representatives)

C - in connection with other evidences

- b) declarations by unconnected and unpaid third parties

C - in connection with other evidences

- c) declarations by unconnected but paid third parties

C - in connection with other evidences (example: declaration of a marketing agency on the marketing activities and budget)

d) copies of current web pages

C - in connection with other evidences

e) copies of web pages from Wayback Machine (including entries from Wikipedia which cannot any longer be modified)

B - in connection with other evidences.

In the practice of the Hungarian Intellectual Property Office (HIPO), the Wayback Machine is considered as a reliable online evidence type.

Evidences from editable and collective online encyclopaedias, dictionaries, databases (e.g. Wikipedia, Acronym Finder) and the content/information taken from editable websites are considered as insecure evidence.

f) unpaid consumer surveys (no payment to the respondents)

B - if the consumer survey is compliant with the ESOMAR standards

g) paid consumer surveys (in which the respondents are paid in some means)

B - if the consumer survey is compliant with the ESOMAR standards

h) copies of invoices, bills, and accounts

B

i) copies of advertising materials

B

j) copies of distribution contracts

B - in conjunction with other evidences. In addition to the distribution contract, it shall be evidenced what kind of activities the distributor carried out and used the trademark.

k) evidence admitted by the adverse party in case of an inter partes proceeding

B

l) anything else: please name and explain.

C

Examples:

- the Hungarian Trademark Act contains an exemplificative list on the method of use, and refers to business papers (including business correspondences);
- webanalytics;
- foreign court decision analyzing the use in other EU member state, however, it is for the discretion of the HIPO and/or the courts how to evaluate the factual elements of a foreign decision which is not binding in Hungary;
- newspaper articles and awards can indicate commercial and marketing activities in Hungary.

Use of the Mark in Forms Different from the Registered One and the Allowed Form Variation

5) What are the criteria when assessing the genuine use of a trade mark if the mark in actual use is in a form different from the trade mark as registered? In other words, how much form variation of the mark can be accepted in proving its genuine use?

The Hungarian Trademark Act provides in Section 18 (4) (a) that use of a trade mark in a form other than the registered form but which does not affect its distinctive character shall constitute use of the trade mark, notwithstanding whether the trade mark has been registered by the proprietor in the form in which it is used.

According to the Guidelines of the HIPO (which follow the EUIPO Common Communication CP8), the following steps shall be followed in assessing whether the sign used is an acceptable variant of the registered version:

Step 1: the registered sign must be assessed taking into account its distinctive and visually dominant elements;

Step 2: evaluate the differences in the sign used and the impact of the changes.

In the case of a sign consisting of a single element, the sign itself is the distinctive element. If a sign is composed of several elements, this assessment requires an analysis of the distinctive and visually dominant character of the elements, the intrinsic qualities of each element and their relative position within the sign, and their interaction.

Once the elements contributing to the distinctive character of the registered sign have been identified and their degree of distinctive character has been determined, it is necessary to examine whether they are present and/or modified in the sign used, on the basis of a direct (i.e. side-by-side) comparison of the two signs.

At this point, the added, omitted or modified elements should be assessed in terms of the intrinsic qualities and relative position of the different elements within the sign, and their interactions. The overall impression created by the signs shall also be taken into account.

As regards the effect of the modifications, account shall be taken of the degree of distinctiveness of the registered mark. Signs with average distinctiveness will generally be less affected by the changes. By contrast, signs of low distinctiveness (usually signs consisting mainly or exclusively of elements of low distinctiveness) are generally more likely to be altered.

The common practice establishes that the use of signs in combination with other commercial signs (e.g. in combination with a sub-brand and/or a company name) does not fall within the scope of "alteration of the distinctive character of a registered sign". If several signs are used together but remain independent of each other and perform their distinctive function as separate signs, the question of whether the distinctive character of the registered sign has changed does not even arise.

Whether the signs are perceived independently or as part of the same sign, should be determined on the basis of an overall assessment, taking into account various factors such as:

- the characteristics of the sign itself (dominant and distinctive elements; their positioning; use of different sizes, fonts or colours; syntactic or grammatical the presence or absence of syntactic or grammatical links, etc.);
- the way in which the signs are represented in the context of the evidence of use and context of use (the commercial sector concerned, the nature of the signs, i.e. company names, trademarks, product group identifiers, sub-brands, etc.);
- concrete evidence that the signs have been used by consumers are perceived independently by consumers.

6) What factors are considered when judging whether the use of a variation of the mark can be accepted as valid use of a registered trade mark in your jurisdiction? Please select one or more answers from the following choices and provide explanations as appropriate:

a) the distinctiveness of the registered trade mark and the variation

According to CP8, the distinctiveness of the registered mark and the variation shall be taken into account. See our response to Point 5.

b) whether such a variation alters the distinctive character of the registered trade mark;

According to Section 18(4)(a) of the Trademark Act, 'the use of the trademark in a form differing from the registered form only in elements which do not alter the distinctive character' shall also be deemed genuine use of the trademark in the domestic territory. When applying the above rule, the HIPO and the Hungarian courts take into account all relevant factors and examine the trademark in question to determine the extent to which it differs from the registered form of the trademark. See our response in Point 5.

c) whether consumers view them as the same mark;

See our response to Point 5.

d) whether the variation of the mark is also registered;

e) other, please name _____ .

- 7) Which of the following variations may be viewed as not altering the distinctive character of the registered trade mark in your jurisdiction?

Please choose one or more answers from the following choices:

- a) in which the typeface, size, and/or colour of the registered trade mark is changed, partially or wholly;

Changing the color, proportions of the elements of the trademark may alter its distinctive character, but it depends on all the circumstances of the case.

In general, the difference in the color does not constitute an alteration affecting the distinctive character, provided that the color and/or contrast do not themselves have distinctive character.

b) in which distinctive elements are added to the registered trade mark;

Usually not altering, but it depends on all the circumstances of the case. Example: for the use of the trademark "Mobil", the HIPO accepted evidences relating to use as "Exxon Mobil".

c) in which non-distinctive elements are added to the registered trade mark;

Usually not altering, but it depends on all the circumstances of the case.

- d) in which part of the distinctive element is omitted from the registered trade mark;

Usually altering, but it depends on all the circumstances of the case.

e) in which the non-distinctive element is omitted, partially or wholly, from the registered trade mark;

Usually not altering, but it depends on all the circumstances of the case.

- f) in which the word of the registered trade mark has been changed other than adding or omitting words but constitutes similar mark to the registered trade mark;

Usually altering, but it depends on all the circumstances of the case.

- g) in which the layout of the different elements in the registered mark is changed, for instance, changing the up-and-down arrangement into left-and-right arrangement;

Usually altering, but it depends on all the circumstances of the case.

- h) in which one composite element is omitted in case of a combined trade mark, for instance, the figurative element is omitted in use when it is a word/figurative combined trade mark;

Usually altering, but it depends on all the circumstances of the case.

i) in which the registered mark is used in conjunction with another mark;

see b) The use of the trademark with other commercial signs (e.g. in combination with a sub-brand and/or company name) usually does not fall within the scope of the “alteration of the distinctive character of a registered sign”.

j) others, please name and explain .

Trade Mark Use on the Internet and Virtual World

8) Is the use of a mark on the internet/on a website taken into account for genuine use, and if so, what are the criteria?

Yes, the use of a mark on the internet is taken into account for genuine use, however, actual sales/orders (real economic activity) must be demonstrated by the right holder as well.

9) Can a single use of a mark on the internet/on a website be attributed only to a specific single class of goods/services, or can it be attributed across a range of goods/services?

Please select:

a) only a specific single class of goods/services

b) can be across a range of goods/services – please explain

c) other answer: please explain

10) What is the effect (in terms of genuine use) by the use of a mark in the virtual world (such as in a Metaverse), and in particular does the use of a mark in the virtual world also signify use of the mark on physical goods/real-world services?

There have not been any cases in Hungary yet in connection with the use of a mark in the virtual world and assessing whether that use signify use of the mark on real-world goods or services.

11) What factors are taken into account when assessing whether the use of a trade mark in a virtual world (such as the metaverse) can be accepted as use in your jurisdiction in terms of the geographical coverage? Please select one or more answers from the following choices and provide explanations as appropriate:

a) whether the consumers in your jurisdiction can access the virtual world;

b) whether there are users or participants from your jurisdiction in the virtual world;

c) whether the virtual world provides the option of using a local language of your jurisdiction;

d) whether the virtual world provides the option of using a local currency of your jurisdiction;

e) whether the virtual world provides an environment mimicking the local real environment of your jurisdiction;

f) whether the organization who created or provides the virtual world is located in your jurisdiction;

g) whether any physical facilities used to provide the virtual world are located in your jurisdiction;

h) whether there are any promotional activities targeting consumers in your jurisdiction by the user of the trade mark or the provider of the virtual world;

i) other, namely

The above factors might be relevant if they in conjunction evidence use vis-à-vis consumers in Hungary, and indicate real economic activity.

Justification of Non-use

12) What can be the justification of non-use in your jurisdiction? Please select one or more answers from the following choices and provide explanations as appropriate:

As a general principle, the established Hungarian court practice considers non-use properly justified if its cause can be traced back to external circumstances that constitute an objective obstacle to the use of the trademark. The trademark holder's own breach of duty is not a reason for exemption.

a) None;

b) Force majeure;

By examining this question, the Hungarian Group is of the opinion that it is appropriate referring to the general legal concept of "vis maior/force majeure". Force majeure is not expressis verbis defined in any laws, but Section 6:179(1) of the Civil Code states that: "If performance becomes impossible, the contract shall be terminated." Further, three conditions must be met for exemption from the liability for breach of the contract:

- (i) the breach of contract was caused by circumstances beyond of the parties' control which
- (ii) was not foreseeable at the time the contract was concluded; and
- (iii) it could not reasonably have been expected to avoid the occurrence of that circumstance or to prevent the damage.

Hungarian courts take a strict position when examining force majeure. Usually serious natural disasters, pandemic or war and the extraordinary legislation applied as a result of them are qualified as force majeure, however, this is not automatically a reason for exemption: courts examine all circumstances of the case, among others whether performance has become objectively impossible in relation to the subject matter of the contract. In binding decision no. BH2014. 147. the Curia declared that it is a matter of judicial discretion to determine whether a particular event constitutes force majeure. Economic crisis phenomena do not qualify (automatically) as "force majeure" and therefore do not render impossible the performance of contracts.

c) Policy restriction in your jurisdiction:

In the FILM+ case (Metropolitan Court of Appeal, FILM+, No. 8.Pkf.26.148/2008/12), the trademark was registered for telecommunication and related services (entertainment, broadcasting, creation of movies and television programs etc.). The trademark proprietor intended to apply the trademark as a name of a thematic television channel planned to be launched later. During the five-year grace period, however, the same sign was registered as a name of a television channel on behalf of a third party before the National Radio and Television Commission (licensing and registration body of broadcasting services). Since the media law rules, effective in the relevant time, provided that only one medium might operate under a given name to avoid confusion on the part of the public, the Metropolitan Court of Appeal held that this rendered the use of the trademark by the trademark proprietor legally impossible and accepted the excuse for non-use.

d) Policy restriction in other jurisdictions, for instance in the jurisdiction of the trade mark proprietor if it is out of your jurisdiction;

e) Bankruptcy/insolvency of the trade mark proprietor;

f) The trade mark proprietor being in financial difficulty (but not insolvent);

g) Requirement of a licence or marketing authorization which takes long time to obtain:

According to Article 19(1) of the TRIPS agreement:

'If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.'

Hungary adopts an approach similar to the EUIPO: import restrictions include a trade embargo affecting the goods protected by the mark. Other government requirements can be a state monopoly, which impedes any kind of use, or a state prohibition of the sale of goods for reasons of health or national defence.

Typical cases are regulatory procedures such as:

- clinical trials and authorisation for new medicines; or
- the authorisation of a food safety authority, which the owner has to obtain before offering the relevant goods and services on the market.

Since the HIPO follows the same principles as EUIPO, we refer to the summary of case no. R 155/2006-1, LEVENIA / LEVELINA:

“The concept of ‘proper reasons’ refers to reasons based on the existence of obstacles to use of the trade mark or to situations in which its commercial exploitation proves to be excessively

onerous. Such obstacles may result from national rules imposing restrictions on the marketing of the goods covered by the trade mark. Therefore, the concept of 'proper reasons must be considered to refer essentially to circumstances unconnected with the trade mark owner. Hence, as a general principle, only situations arising independently of the owner of the trade marks should constitute proper reasons for non-use.

The opponent was made to follow a specific administrative procedure. This is a situation that arose independently of the opponent. The Board is satisfied with both the explanation and the validating documentation and considers that the opponent was justified in not using the registered trade mark until the administrative decision from the relevant authority.”

h) A still-pending trade mark transfer;

i) A still-pending trade mark dispute regarding ownership, validity, etc.;

HIPO's Guidelines refer to long-pending trade mark dispute regarding ownership.

j) A sufficiently high existing reputation of the trade mark, such that further use is commercially pointless/futile because it would not significantly increase or enhance that reputation;

k) Others, please name: in case of a natural person as holder, his/her long standing, serious illness

13) Would the burden of proof to prove the justification be reduced if it relates to a widely known event, such as the COVID 19 pandemic?

YES. State measures may restrict providing the goods/services, and such measures may exclude or limit the use of the trade mark.

By this very day, we are not aware of any cases where the justification of non-use was easier due to the fact that any of the parties has referred to the COVID 19 pandemic.

Concerning the proof of force majeure in commercial matters, the Hungarian Chamber of Commerce is entitled to issue a "Vis major attest". The Chamber's certificate of force majeure may be used as evidence in any dispute to excuse the party claiming force majeure as an obstacle to performance.

As to the burden of proof, we refer to Section 266(2) of the Civil Procedural Code: "The court shall take into account facts which it considers to be common knowledge and facts of which it has official knowledge, even if they have not been relied on by the parties." If the court is intended to consider any circumstance as common knowledge, parties must be notified on this, so that they have the opportunity to provide counter-evidence.

During Covid, the Hungarian Government and the Parliament have introduced special legal regime. This evidences the pandemic as such, however, the trademark holder shall evidence why the pandemic prevented the use of the trade mark.

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

- 14) Do you consider your Group's current law or practice relating to genuine use and proving trade mark use adequate or do you consider that the law should be changed? Please explain.

The current law and practice relating to genuine use and proving trade mark use is considered as adequate for the requirements of the business participants.

In the recent guidelines, the HIPO has summarized the requirements for assessment and presentation of evidence, with the purpose of defining clearly the criteria for proving the use.

- 15) Are the rules regarding genuine use and proving use adequate for the issue arising in relation to the use of trade marks in the virtual world? If not, what changes should be made? Please explain.

The Hungarian Group is not aware of a well-established Hungarian case law with regard to use of trademarks in the virtual world. However, the Group does not see any reason to apply different rules for the virtual world.

- 16) If there are specific reasons for disqualifying online/internet use in your Group's law so that it does not count as genuine use of a mark, please explain those reasons.

No, the Hungarian Group is of the opinion that online/internet use shall not be disqualified per se in case the high level of use requirement is justified.

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

It is advisable that the HIPO implements the EUIPO CP12 in its trademark guidelines.

III. Proposals for harmonization

- 18) Do you believe that there should be harmonisation in relation to issues regarding genuine use and proving use? Please answer YES or NO.

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

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

Yes, the Hungarian Group is of the view that harmonization in relation to issues regarding genuine use and proving use is necessary in order to support trademark owners present on

the market of several jurisdictions and to support collecting and presenting evidences for multijurisdictional disputes.

Evidence to Prove Trade Mark Use

- 19) Should there any quantitative or temporal threshold (minimum level) on evidence requirement to prove genuine use?

Please answer YES or NO. Please comment.

No. There is no need to have any minimum level, the IP offices or the courts shall have wide room for assessing the evidences, in light of all circumstances.

- 20) When considering proof of genuine use, should there be specific types of evidence (A) always excluded, (B) always included, or (C) given weight according to the circumstances? If yes, please give the types of evidence for A,B and C above and explain why they should be treated differently.

No, any evidence shall be used in light of the circumstances of the actual case. The Hungarian Group is of the view that the types of evidences generally cannot be simply categorized as such.

- 21) Please consider the following types of evidence, and select category A, B or C for each of them and explain for each type why that category should apply:

- a) declarations by or on behalf of the trade mark owner (e.g. corporate representatives) (affidavits)

C

- b) declarations by unconnected and unpaid third parties

C

- c) declarations by unconnected but paid third parties

C

- d) copies of current web pages

C

- e) copies of web pages from Wayback Machine (including entries from Wikipedia which cannot any longer be modified)

B

f) consumer surveys

B

g) copies of invoices, bills, and accounts

B

h) copies of advertising materials

B

i) catalogues

C

j) copies of distribution contracts

C

k) witness evidence

C

l) private documents, including private opinions

C

m) anything else: please name and explain.

22) Should reputable/well known/famous/historical trademarks be treated differently in terms of proof? If so, in what respects?

No, the same criteria shall be applicable as to trademarks without reputation.

23) Please explain what should be probative value of the following:

a) a single use of a mark on the internet/on a website:

No probative value

- b) mere advertising (real commercial advertisement rather than just advertising the ownership or information of the trade mark) - with no sales:

No probative value

- 24) Please explain if evidence of use should include specific information, for example place, time, extent or nature of use? If yes, should all the evidence show all of the above information or whether this is not necessary and the evidence should be considered and assessed as a whole?

Yes. Generally, it is reasonable if the majority of evidences show all of the above information, that is the place and time of use of the trademark and shall reflect the extent or nature of the use. However, the evidences shall be assessed in overall manner, taking into account all factors of the case at hand.

- 25) Should evidence of use be the same or different in courts and IP offices/administrative tribunals?

The evidence of use shall be the same in courts and IP offices.

Use of the Mark in Forms Different from the Registered One and the Allowed Form Variation

- 26) What should be the criteria when assessing the genuine use of a trade mark if the mark in actual use is in a form different from the trade mark as registered? In other words, how much form variation of the mark should be accepted in proving its genuine use?

The Hungarian Group considers the current law and practice (aligned with EU practice) to be satisfactory.

- 27) What factors should be considered when judging whether the use of a variation of the mark can be accepted as valid use of a registered trade mark? Please select one or more answers from the following choices and provide explanations as appropriate:

—

a) the distinctiveness of the registered trade mark and the variation;

b) whether such a variation alters the distinctive character of the registered trade mark;

c) whether consumers view them as the same mark;

d) whether the variation of the mark is also registered;

e) the features of the industry in which the trade mark is used and the business customs of the industry in relation to trade mark use;

f) other, please name _____ .

- 28) Which of the following variations should be viewed as not altering the distinctive character of the registered trade mark?

Please choose one or more answers from the following choices: in which the font, size, and/or colour of the registered trade mark is changed, partially or wholly;

- a) in which distinctive elements are added to the registered trade mark;
- b) in which non-distinctive elements are added to the registered trade mark;**
- c) in which part of the distinctive element is omitted from the registered trade mark;
- d) in which the non-distinctive element is omitted, partially or wholly, from the registered trade mark;
- e) in which the word of the registered trade mark has been changed other than adding or omitting words but constitutes similar mark to the registered trade mark;
- f) in which the layout of the different elements in the registered mark is changed, for instance, changing the up-and-down arrangement into left-and-right arrangement;
- g) in which one composite element is omitted in case of a combined trade mark, for instance, the figurative element is omitted in use when it is a word/figurative combined trade mark;
- h) in which the registered mark is used in conjunction with another mark;**
- i) others, please name and explain _____ .

Trade Mark Use on the Internet and Virtual World

- 29) Should the use of a mark on the internet/on a website be taken into account for genuine use, and if so, what should be the criteria?

Yes, the use of a mark on the internet should be taken into account for genuine use, provided that the website/online use shows the place, time and extent of use or this information is otherwise provided, and if there is evidence demonstrating real economic activity in the relevant territory (e.g. sales figures, invoices, online orders etc.).

- 30) Should a single use of a mark on the internet/on a website be attributed only to a specific single class of goods/services, or should it be attributed across a range of goods/services?

Please select:

- a) only a specific single class of goods/services**
- b) should be possibly across a range of goods/services - please explain
- c) other answer: please explain

- 31) What should be the effect (in terms of genuine use) by the use of a mark in the virtual world (such as in a Metaverse), and in particular should the use of a mark in the virtual world also signify use of the mark on physical goods/real-world services?

The use of a mark in the virtual world should not qualify as use of the mark on physical goods/real-world services, and vice-versa, the use of a mark on physical goods/real-world services should not qualify as use in the virtual world due to the different nature of goods.

- 32) What factors should be taken into account when assessing whether the use of a trade mark in a virtual world (such as the metaverse) can be accepted as use in a jurisdiction in terms of the geographical coverage? Please select one or more answers from the following choices and provide explanations as appropriate:
- a) whether the consumers in your jurisdiction can access the virtual world;
 - b) whether there are users or participants from the jurisdiction in the virtual world;
 - c) whether the virtual world provides the option of using a local language of the jurisdiction;**
 - d) whether the virtual world provides the option of using a local currency of the jurisdiction;**
 - e) whether the virtual world provides an environment mimicking the local real environment of the jurisdiction;**
 - f) whether the organization who created or provides the virtual world is located in the jurisdiction;
 - g) whether any physical facilities used to provide the virtual world are located in the jurisdiction;
 - h) whether there are any promotional activities targeting consumers in the jurisdiction by the user of the trade mark or the provider of the virtual world;**
 - i) other, namely

Justification of Non-use

- 33) What should be valid justifications of non-use? Please select one or more answers from the following choices and provide explanations as appropriate:
- a) none;
 - b) force majeure;**
 - c) policy restriction in the jurisdiction where the trade mark is registered;**
 - d) policy restriction in other jurisdictions, for instance in the jurisdiction of the trade mark proprietor if it is out of trade mark registration jurisdiction;
 - e) bankruptcy/insolvency of the trade mark proprietor;
 - f) the trade mark proprietor being in financial difficulty
 - g) requirement of a licence or marketing authorization which takes long time to obtain;**
 - h) in the process of a trade mark transfer;

- i) in the process of a trade mark dispute regarding ownership, validity, etc.;
- j) a sufficiently high existing reputation of the trade mark, such that further use is commercially pointless/futile because it would not significantly increase or enhance that reputation;
- k) others, please name in case of a natural person as holder, his/her long standing, serious illness.**

34) Should the burden of proof to prove the justification be reduced if it relates to a widely known event, such as the COVID 19 pandemic?

YES. State measures may restrict providing the goods/services. However, the trademark holder shall explain how and/or why COVID 19 pandemic hindered the actual use of the trade mark.

The Hungarian Group is of the opinion that the current regulation and practice is satisfactory.

Others

35) Please comment on any additional issues concerning any aspect of trade mark use you consider relevant to this Study Question.

According to the Hungarian Trademark Act, use of the mark with the consent of the trademark holder is deemed to constitute use by the holder. The typical case for this provision is use by licensees which can be proven by submitting the license agreement between the parties. However, the HIPO and the Hungarian courts also accept evidence of use carried out by companies that are economically related to the trademark holder, e.g., members of the same group of companies, affiliates, subsidiaries, etc., without requiring any relevant proof of license or consent from the trademark holder. In our opinion, the practice and case-law related to this topic in Hungary and in the EU is not unified. This is a particularly relevant issue in Hungary due to the fact that after the 1989/1990 regime change many state-owned enterprises were privatized and were divided into smaller companies. These companies often continued operating in parallel under the same name/trademark, however, they are not necessarily connected to each other or are in a business relationship with each other anymore; therefore, the use of a mark by one of these companies should not, at least not automatically and without any relevant proof of license or consent, necessarily be accepted as use of the mark by another company (trademark holder) merely due to the fact that once they belonged to the same group of companies.

We believe that the practice of the HIPO is not uniform and a common practice would be desirable in cases where the mark is protected for a more general category of goods, but the proprietor can only prove use for a subcategory of these goods.

36) Please indicate which industry/cultural sector views provided by in-house counsel are included in your Group's answers to Part III.

N/A.