Proving a negative best practices for prosecuting and defending Non-Use abandonment proceedings in the UK and EU

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Introduction

Revocation proceedings governed by:

*The Trade Marks Act 1994 (the 1994 Act) and Regulation (EU) 2017/1001* removal of registrations on a variety of grounds including the revocation of registrations for non-use.

Important provisions to remove/leverage non-use for conflicts with an earlier identical or similar mark registered for the same or similar goods or services.

Both standalone or as part of a branding/litigation strategy.

*Why does a trade mark need to be used in UK and EU?*

- Registered EUTMs or UKTMs not used within five years of registration, or if not used for five years during the life of the registration
- Any person can seek to cancel it on the grounds of non-use
- Also applies to UK and EU designations of International trade mark registrations (as from the date of protection)
- Effect registration ceases to have effect from *(a)* the date of the application for revocation, or *(b)* if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.
- Aside from a direct attack on a registration there is also the prospect of proof of use in the context of opposition proceedings, which means that if proof of use it not shown then the registration will be disregarded to the extent use has not been shown.
- Proof of use is a useful tool, but the effect on the registration is limited to the context of the proceedings
UK

Section 46(1) Trademarks Act 1994 sets out a variety of grounds

No-use most common, but also possible to revoke where a mark has become a generic or deceptive.

These grounds apply to all trade marks, including marks already registered when the 1994 Act came into force.

Section 46- Revocation of registration

(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;
(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.
(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:
Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that—

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and
(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from—

(a) the date of the application for revocation, or
(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.

EU

Article 58 (Regulation EU) 2017/1001 EUTMR sets out a very similar regime with the same consequences if the revocation is successful.
Non-use: Genuine and Commercial use

The proprietor must show what use, if any, has been made of the mark.

There must be some genuine, commercial use has been made of the mark.

The use does not need to be extensive, as long as it is genuine.

Neither the UK Act or the EUTMR define “genuine use”.

However the Court of Justice (CJUE) has laid several important principles as regards the interpretation of this term.


MINIMAX registered Benelux mark since 1971 for goods including fire extinguishers. By 1989, Ansul had stopped selling fire extinguishers, sold component parts and continued to service the equipment. The mark was used on invoices relating to equipment service and applied stickers bearing the mark on the equipment.

In 1994, Ajax began to use MINIMAX in the Benelux for fire extinguishers. In 1994, Ansul applied to register MINMAX for maintenance and repair of fire extinguishers. Ajax applied to revoke the registration for non-use and the services marks as having been registered in bad faith.

The Court established the following principles:

- genuine use means actual use of the mark (paragraph 35);

- genuine use denotes use that is not merely token, serving solely to preserve the rights conferred by the mark (paragraph 36);
Non-use: Genuine and Commercial use

- genuine use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end user by enabling the latter, without any possibility of confusion, to distinguish the product or service from others that have another origin (paragraph 36);

- genuine use entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned (paragraph 37);

- genuine use must relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns (paragraph 37);

- when assessing whether there has been genuine use, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark (paragraph 38);

- the circumstances of the case may, therefore, include giving consideration, inter alia, to the nature of the goods or services at issue, the characteristics of the market concerned and the scale and frequency of use of the mark (paragraph 39);

- use need not, therefore, always be quantitatively significant for it to be deemed genuine, as that depends on the characteristics of the goods or services concerned on the corresponding market (paragraph 39).
Non-use: Genuine and Commercial use

In *La Mer* 2004 (order of 27/01/2004, C-259/02, Laboratoire de la mer, EU:C:2004:50)

*La Mer* - two UK trademarks, registered in 1988 and 1989, for goods in Classes 3 and 5. The French proprietor specialised in seaweed products. Evidence of sales in the UK in the relevant period very limited with about £600 worth of Class 5 goods and about £800 of Class 3 goods. **Use was not shown that the sales were under the mark in question.** There were preparations to sell the products, but there was no evidence at all of sales to the public. The only sales which could directly be relied upon where the £600 and £800 worth of goods supplied to an agent.

The Court further elaborated the ‘Minimax’ (ANSUL) criteria and said the question whether use is sufficient to preserve or create market share for those goods or services depends on several factors and on a case-by-case assessment:
- the **characteristics** of those goods and services
- the **frequency or regularity** of the use of the mark
- whether the mark is used for the purpose of marketing **all** the identical goods or services of the proprietor or merely some of them
- or evidence that the proprietor is able to provide, are among the factors that may be taken into account (paragraph 22);
- use of the mark by a single client which **imports** the goods for which the mark is registered can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor of the mark (paragraph 24);
- a **de minimis rule** cannot be laid down (paragraph 25).
Nature of use

The term ‘nature of use’ refers to:

- use of a mark in accordance with its essential function;
- the use of the mark as registered, or of a variation thereof; and
- the use in connection with the goods and services for which it is registered

the proof of use must establish a clear link between the use of the mark and the relevant goods and services.

It is not necessary for the mark to be affixed to the goods themselves (judgment of 12/12/2014, T-105/13 TrinkFix, EU:T:2014:1070, § 28-38) A representation of the mark on packaging, catalogues, advertising material or invoices relating to the goods and services in question constitutes direct evidence that the mark has been put to genuine use.

Genuine use must be use as a trade mark and :

- not for purely illustrative purposes or on purely promotional goods or services,
- in accordance with its essential function, to guarantee the identity of the origin of the goods or services for which it is registered (judgment of 11/03/2003, C-40/01, Minimax, EU:C:2003:145, § 43).
Nature of use: Public use in the course of trade

Public use v internal use

Use must be public i.e. external and apparent to actual or potential customers of the goods or services.

Use in the private sphere or purely internal use within a company or a group of companies does not amount to genuine use (judgments of 09/12/2008, C-442/07, Radetzky; 11/03/2003, C-40/01, Minimax; 09/09/2015, T-584/14, ZARA).

The mark must be used publicly and outwardly in the context of commercial activity with a view to economic advantage for the purpose of ensuring an outlet for the goods and services that it represents (judgments of 12/03/2003, T-174/01, Silk Cocoon; 30/04/2008, T-131/06, Sonia Sonia Rykiel).

Outward use does not necessarily imply use aimed at end consumers. For instance, the relevant evidence can validly stem from an intermediary, whose activity consists of identifying professional purchasers, such as distribution companies, to whom the intermediary sells products it has had manufactured by original producers (judgment of 21/11/2013, T-524/12, RECARO).

Relevant evidence can also validly come from a distribution company forming part of a group. Distribution is a method of business organisation that is common in the course of trade and implies use of the mark that cannot be regarded as purely internal use by a group of companies, since the mark is also used outwardly and publicly (judgment of 17/02/2011, T-324/09, Friboi).
Nature of use: Public use in the course of trade

**Commercial activity v promotional activity**

Mere use of the mark on **promotional material for other goods is not normally sufficient**

For example, giving away articles of clothing such as T-shirts and baseball caps at promotional events with the purpose of marketing a certain other product, such as a drink, cannot be considered as genuine use of the mark at issue for clothing.

In *Silberquelle GmbH Case – 495/07 (2009)*, WELLNESS was registered in Austria for goods in Classes 16 (magazines and books), 25 (clothing) and 32 (non alcoholic drinks). To promote the sales of its clothing, the proprietor handed out alcohol-free drinks as gifts in bottles marked “WELLNESS - DRINK”, along with the clothing sold. It made no separate use of the mark for drinks.

The CJEU decided promotional items handed out to encourage the sale of other types of goods are not distributed with the aim of penetrating the market for goods in the same class as the promotional goods. As a result, use on the drinks was not genuine use.

The Court distinguished such use form cases in which the proprietor of a mark sells promotional items in the form of souvenirs or other derivative products.
Nature of use: Use in relation to goods or services

Use in relation to goods

Showing use on goods or their packaging is not the only way of proving use in relation to goods. If there is a proper connection between the mark and the goods, the mark can be validly used 'in relation to' the goods or services, such as on brochures, flyers, stickers, signs inside places of sale, etc.

For example, when the opponent sells its goods only through catalogues (mail-order sales) or the internet, the mark may not always appear on the packaging or even on the goods themselves. In such cases, use on the (internet) pages where the goods are presented — provided it is otherwise genuine in terms of time, place, extent and nature - will generally be considered sufficient. The owner of the mark will not have to provide proof that the mark actually appeared on the goods themselves.

Case T-30/09 Peterstorm is an example of this: “The intervener inter alia submitted two product brochures, which appeared in the United Kingdom, of the United Kingdom retailer, the company M. One of those catalogues dated from the autumn/winter 2002 season and the other from the spring/summer 2004 season. In that regard, it must be borne in mind that, under Rule 22(4) of Regulation No 2868/95, the evidence produced to show genuine use of the mark at issue may include catalogues. The applicant has not cast doubt on the authenticity of those catalogues. It is therefore common ground that they are genuine and reliable.

So far as concerns the autumn/winter 2002 product brochure which comprises 36 pages, it must be pointed out that, in addition to items of clothing designated by different marks, more than 80 different items are offered for sale in that catalogue under the mark PETER STORM. They comprise men’s and women’s jackets, jumpers, trousers, tee-shirts, footwear, socks, hats and gloves, the respective characteristics of which are briefly described. The earlier mark appears, in stylised characters, next to each item. In that catalogue, the prices of the items in GBP and the reference number for each item are stated. The catalogue contains an order form, and a telephone number, fax number, postal address and Internet address are given for mail order purchases. Furthermore, detailed information is given as regards the different ways of ordering, and the general conditions of sale comprising inter alia information on exchanges and returns are included. In addition, a list of more than 240 stores in the United Kingdom in which the items of clothing may be purchased is provided. Their postal addresses and telephone numbers are also stated".
Nature of use: Use in relation to goods or services

Situation is different, when a trade mark is used, for example, in a catalogue, on advertisements, bags or invoices to designate the retailer of the goods and not the goods themselves:

An example is: 183/08 Schuhpark

The GC found that the use of the sign Schuhpark for footwear on advertisements, bags and invoices was not meant to identify the origin of the shoes (which bore their own mark or no mark at all) but rather the company name or trade name of the shoe retailer. This was considered insufficient to establish a link between the sign Schuhpark and the shoes. In other words, Schuhpark may well be a mark for the retail of shoes, but it was not used as a trade mark for goods.

Use in relation to services

Marks cannot be directly used ‘on’ services.

Use generally on business papers, in advertising, or in some other way directly or indirectly related to the services – will be sufficient if it demonstrates genuine use according to MINIMAX and following cases.

An example is: T - 92/09 Strategies

Where an earlier mark was registered for business management services and used as the title of business magazines, the GC did not exclude that such use be considered genuine for the services in question. This could be the case if it is shown that the magazine provides support for the supply of the business management services, i.e. if these services are provided through the medium of a magazine. The fact that there is no ‘direct bilateral link’ between the publisher and the recipient of the services does not impair such a finding of genuine use. This is because the magazine is not distributed free of charge, which could give credibility to the claim that the payment of the price of the magazine constitutes remuneration for the service provided (paragraphs 31-35).
Place of use: Use on the “domestic” market

Trade marks must be used in the territory where they are protected (European Union for EUTMs, the territory of the Member State for national marks or Benelux for Benelux marks and the territories of the relevant countries for international registrations).

‘Leno Merken’ case - ‘territorial scope of the use is only one of several factors to be taken into account in the determination of whether that use is genuine or not’ (judgment of 19/12/2012, C-149/11, Leno, EU:C:2012:816, § 30). The Court further indicated that use of the mark in non-EU territories cannot be taken into account (paragraph 38).
Place of use: EUTMS, use in the European Union

If the earlier mark is a European Union mark, it must be used ‘in the Union’ (Articles 18(1) and 47(2) EUTMR). Metropolitan regions can be enough – See NOW (below)

Following ‘Leno Merken’, Article 18(1) EUTMR must be interpreted as meaning that the territorial borders of the Member States should be disregarded when assessing whether an EUTM has been put to ‘genuine use’ in the Union (paragraph 44).

All the relevant facts and circumstances must be taken into account:

including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and scale of the use as well as its frequency and regularity (paragraph 58).

Use of an EUTM in the UK (judgment of 15/07/2015, T-398/13, TVR ITALIA (fig.) / TVR et al., EU:T:2015:503, § 57) or even in London and its immediate surroundings may be geographically sufficient (judgment of 30/01/2015, T-278/13, now, EU:T:2015:57).

The Board of Appeal decision (decision of 07/03/2013, R 234/2012-2, NOW, confirmed by the judgment of 30/01/2015, T-278/13, now, EU:T:2015:57) considered the use of an EUTM for wireless broadband services in Class 42 in the geographical area comprising London and the Thames Valley sufficient to constitute genuine use in the United Kingdom and also in the European Union, taking into account: the ‘territorial extent’ [being London ‘the largest city in the United Kingdom and the largest urban zone in the European Union’ with ‘a metropolitan area of an estimated total population of between 12 million and 14 million people’, ‘the world’s leading financial centre along with New York’, ‘a leading centre of arts, science, tourism and media and information technology’, with a profile on the European commercial scene ‘disproportionately high in respect to the services in question’ (R 234/2012-2, § 47) and being the Thames Valley ‘200 miles long and 30 miles wide’ including ‘populous towns and cities of significant economic activity’ (R 234/2012-2, § 45-46)], the ‘scale, frequency, regularity of use’ and the ‘characteristics’ of the market concerned (R 234/2012-2, § 52).
Extend of use: Examples of insufficient use taken from examples given on the EUIPO website

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<tr>
<th>Case No.</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Judgment of 18/03/2015, T-250/13, SMART WATER, EU:T:2015:160</td>
<td>The test sales of 15,000 water bottles are considered symbolic in the light of the size of the European market (§ 34-35).</td>
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<td>WALZERTRAUM®, paragraph 32 ff. (confirmed by C-141/13 P)</td>
<td>The opponent, a German bakery located in a city of 18,000 inhabitants, proved constant monthly sales of approximately 3.6 kg of exclusive, handmade chocolates over a period of 22 months. Despite being advertised on a web page accessible throughout the world, the chocolates could only be ordered and bought in the opponent’s bakery. In view of the territorial and quantitative limits, the GC considered that use had not been sufficiently proven.</td>
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<td>Judgment of 30/04/2008, T-131/06, Sonia Sonia Rykiel, EU:T:2008:135</td>
<td>54 units of women’s slips and 31 units of petticoats were sold over a period of 13 months, for a total sum of EUR 432. The GC considered these modest quantities with regard to the relevant market (everyday consumption goods, sold at a very reasonable price) to be insufficient</td>
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**Extend of use:** Examples of sufficient use taken from examples given on the EUIPO website

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<tr>
<td>Judgment of 08/07/2010, T-30/09, Peerstorm, EU:T:2010:298, § 42-43</td>
<td>As evidence of use, the opponent (merely) provided several catalogues for end consumers, featuring the relevant trade mark on clothing articles. The Court held that ‘...it is true that those catalogues provide no information on the quantity of goods actually sold by the intervener under the trade mark PETER STORM. However, it is necessary to take into account ... the fact that a large number of items designated by the trade mark PETER STORM were offered in the catalogues and that those items were available in more than 240 shops in the United Kingdom for a significant part of the relevant period. Those factors support the conclusion, in the context of a global assessment ... that the extent of its use was fairly significant.’</td>
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<td>Judgment of 10/09/2008, T-325/06, Capio, EU:T:2008:338, § 48, 60</td>
<td>Evidence (invoices, lists of sales) proving that the intervener sold 4 hollow-fibre oxygenators with detachable hard-shell reservoirs in Finland in 1998, 105 in 1999 and 12 in 2001, for a total amount of EUR 19 901.76, was deemed sufficient proof of genuine use of the EUTM registered for oxygenators with integrated pump; controllers for integrated pump; regulating devices of air pressure for integrated pump; suction pumps; blood flow meters, in Class 10.</td>
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Use of the mark in forms different from the one registered

Section 46 (2) Trademark Act 1994 and Article 18 EUTMR, provide:

use made of the trade mark need not to be exactly in the form in which it is registered, as long as the use is “in a form differing in elements which do not alter the distinctive character of the mark”.

So small variations are allowed

In BUD and Budweiser Budbrau trade marks, mark was “Budweiser Budbrau” in a stylised script. No use made of the mark as registered, but the proprietor had used a neck label with a device of a wax seal on which the words were printed in capital letters in a circle. The UK Court of Appeal held that the hearing officer was entitled to find that the dominant feature of the mark was the name, not the font, so that the mark had been used in a form which did not alter its distinctive character.

But in Fruit of the Loom, no use was made of the mark “fruit” by use of the distinctively different trade mark “Fruit of the Loom” (Fruit of the Loom, Inc v OHIM, case T-514/10).
Resumption of use

Section 46 (3) in the UK Act (mirrored in the EU) deals with the position where there has been five years non-use but use of the mark recommences prior to the application for revocation being made.

Resumption of use saves the mark from revocation as long as that use is genuine.

The proviso to s 46(3) requires the tribunal to disregard any commencement or resumption of use after the five years of non-use but within the period of three months before the application for revocation is made, unless preparations for it began when the proprietor was unaware that the application for revocation might be made.

This prevents a proprietor from preserving his mark by hastily starting to make use of it just because he knows that an application for revocation is threatened.

An applicant for revocation need not wait for five years and three months before bringing the application to revoke; it can be made immediately after the expiry of the five year period.
Proper/Justifiable Reasons for Non-Use

These can save the registration from revocation but are interpreted narrowly and arise infrequently.

Generally speaking these are circumstances arising independently of the will of the owner of the trade mark and constitute an obstacle to the use of the trade mark.


Import restrictions or other government requirements are two examples of proper reasons for non-use

*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 in this respect are regulatory procedures such as:
- clinical trials and authorisation for new medicines (**decision of 18/04/2007, R 155/2006-1, LEVENIA**); or
- the authorisation of a Food Safety Authority, which the owner has to obtain before offering the relevant goods and services on the market.
Proper Reasons for Non-Use

R 997/2009-4 Manpower

The UK trade Marks Act and the EUTMR provide conditions and remedies for infringement.

The requirement not to infringe trade marks applies to any person using a name in the course of trade, regardless of whether it has itself applied for or been granted trade mark protection for that name. But it is not a proper reason.

A person refraining from such infringements is acting not for ‘proper reasons’ but as ordered by law. Hence even refraining from use that would otherwise infringe a right is not a proper reason (decision of the Boards of Appeal of 09/03/2010, R 764/2009-4, HUGO BOSS/BOSS, § 22) (§ 27).
Proper Reasons for Non-Use

Defensive registrations

The GC has clarified that the existence of a national provision recognising what are known as ‘defensive’ registrations (i.e. of signs not intended to be used in trade on account of their purely defensive function in relation to another sign that is being commercially exploited) cannot constitute a proper reason for non-use of an earlier trade mark invoked as a basis of an opposition (judgment of 23/02/2006, T-194/03, Bainbridge, EU:T:2006:65, § 46).

Force majeure

Further justifiable reasons for non-use are cases of force majeure that hinder the normal functioning of the owner’s enterprise.
Partial Revocation

The effect of revocation varies and often results in a partial revocation. If so, revocation may be ordered in respect of the unused goods or services.

Finding a fair specification not straightforward. And applicant for revocation will not always be successful in “knocking out” the conflicting parts of an earlier registration.

This can leave the applicant exposed to an opposition/infringement action.

The tribunal must try to find a fair specification for the mark which defines not the particular examples of goods for which there as been genuine use, but the categories or subcategories of goods they represent. 

Reckitt Benckiser v OHIM (Aladin) T-126/03

The GC held that this required identification of goods or services which are sufficiently distinct to constitute coherent categories or subcategories.

Pan World Brands Ltd v Tripp Ltd (Extreme) 2008 RPC 2

In the Extreme the essence of the UK approach was said to be consider how the average consumer would fairly describe the goods in relation to which the trade mark has been used.
Partial Revocation – further example

*Thomson Holidays Ltd V Norwegian Cruise Lines Ltd 2003 RPC 32.*

Thomson, a large tour operator, had 2 registrations covering a range of services connected with the provision of holidays. It sued for infringement by Norwegian for use of the identical mark for luxury cruises. The defendant counterclaimed for partial revocation of the marks. The judge in the lower court found that the mark had been used only on package holidays, and decided to revoke parts of the mark and to exclude “services in relation to cruises on a cruise ship”.

The Court of Appeal held that the specification should be limited to reflect the circumstances of the particular trade and the way that the public would perceive the use. The average consumer would describe the claimant’s services under the marks as “package holidays” so that was the appropriate wording to add to the specifications. It was not appropriate to exclude cruise holidays.

Thomson therefore still had an infringement case as Norwegian was using the identical mark in relation to package holidays (including those on cruise ships).
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<th>NON-USE PERIOD (YRS)</th>
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<td>Austria</td>
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