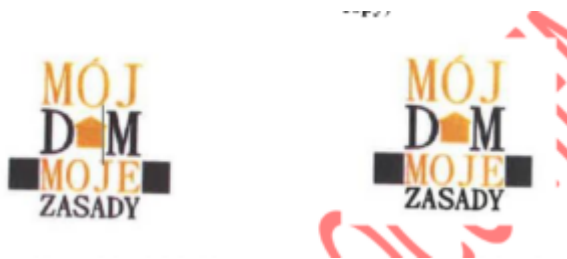


# Kluwer Trademark Blog

## Request for information à la polonaise

Agnieszka Sztoldman (Osborne Clarke, University of Wrocław) · Monday, June 6th, 2022

Poland introduced specialized IP Courts on July 1, 2020, resulting in significant changes to preventive measures, including the conditions for requesting information regarding an infringement of an intellectual property right. The IP Court in Warsaw has in the meantime referred a preliminary question to the Court of Justice (CJEU), namely: **does one have to demonstrate the existence of an intellectual property when applying for an information injunction, or is *prima facie* evidence that the measure relates to an existing intellectual property right sufficient?** (see [referral C-628/21 – Castorama Polska and Knor](#)).



The new provisions on the information claim read that *at the request of the right holder, if the right holder **credibly demonstrates** circumstances indicating the infringement, the court may, before the commencement of the infringement proceedings or in the course thereof until the conclusion of the trial in the first instance, summon the infringer to provide information on the origin and distribution networks of the goods or services, if it is necessary to assert the claim.* The Polish court asks if, in light of the purpose of Article 8 of the Enforcement Directive (2004/48), the request for information requires that the right holder's intellectual property right has been confirmed in any proceedings. If not, whether it is sufficient to substantiate the fact that that measure refers to an existing intellectual property right rather than proving that circumstance, especially in cases where a request for information about the origin and distribution networks of goods or services precedes the assertion of compensation claims based on an infringement of intellectual property rights.

In the past, Polish judges have taken opposing positions on the standard for justifying an infringement when submitting a request for information. Under Polish law (which now complies with EU law), one may file a claim for information against the infringer and the third party. According one viewpoint, the circumstances indicating an infringement must be demonstrated

“convincingly.” These circumstances must be proven, and nothing more than circumstantial evidence suffice. The contrary interpretation says that it is not necessary to prove the infringement, but rather to establish “plausibility”.

According to the IP Court in Warsaw, a request for information may be imposed on a claimant only if the existence of an intellectual property right is established in the information proceedings or other proceedings establishing an infringement of an intellectual property right. Even if the CJEU did not follow this viewpoint, the Warsaw IP Court, suggests that it is not sufficient to provide *prima facie* evidence. It is necessary to demonstrate the existence of an infringed IP right.

## Comment

The Warsaw IP Court applies a strict interpretation of the standard of evidence for a request for information, although there is no basis for this in the provision wording or the goal of this ancillary remedy, which, after all, implements Article 8 of Directive 2004/48. According to the new laws, the threshold (degree) of evidence for a request for information from the alleged infringer or a third party is reduced when the premise of “high possibility” is replaced with the “plausible circumstances indicating an infringement.” Therefore, the requirement of “very probable infringement” (high probability) concerned the circumstances of the infringement of the IP right as such, and also the existence of the allegedly infringed IP right. This standard differs from “demonstrating” as valid for the main (infringement) proceedings. In any case, one may note that the Polish law imposed a requirement on an IP right holder who has accomplished an information claim to initiate a process to prove the infringement (and the existence of an IP right at stake). Failure to lodge the infringement proceedings, results in a monetary responsibility of the IP right holder to the party ordered to provide requested information. Thus, there is no way for Polish IP courts to interpret the requirement of initiating proceedings concerning an information claim narrowly, instead of apply “the high probability” standard also for existing of the IP right.

Hell is paved with good intentions. Let us not enter the fifth circle of Dante’s hell.

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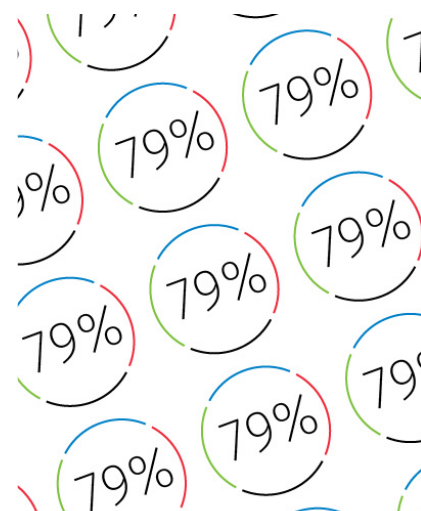
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