

Registration of Works belonging to the Public Domain as Trademarks

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The article addresses the issue of the increasingly frequent registration of public domain works as trademarks, points out the practical implications of such registrations, and acknowledges the conflicting decisions with respect to the same form of trade mark applied for, depending on whether it is the decision of the patent offices of the EU member states (or other than the EU regional systems) or the EU Intellectual Property Office. The analyzed topic should be considered in the context of the depletion of the public domain, the restriction of the freedom to use cultural goods, as well as the threat to the institution of the trademark itself. Thus, the admissibility of this type of registration should be carefully considered each time, taking into account the role played by the public domain, the motivation of the entity applying for such a trademark and a noticeable conflict of two systems: Copyright and Industrial Property Law.

Keywords: Copyright, Cultural Heritage, Intellectual Property System, Public Domain, Trademark

One person's right is another person's restraint and the cultural heritage from which all may draw should not be indefinitely diminished

Leslie A. Kurtz¹

Nowadays, we can notice the growing interest in the registration of works from the public domain as trademarks (TM). Some of such registrations are successful, and some of them end in refusal decisions. Unfortunately, the lack of uniform line of jurisprudence results in diverse decisions and the lack of legal certainty as to whether a work from the public domain can be a TM and if yes, whether this applies to all works or selected works and on what basis such qualification must be carried out. What also raises doubts, is the proper choice of the registration barrier on the basis of which a decision refusing the granting of the right to protect such TM should be issued. Another significant problem is the possibility of the occurrence of contradictory decisions with regard to the same form of the submitted TM, depending on whether it is a decision concerning patent offices of member states (or non-EU regional systems, as the Benelux Office for International Property) or the European Union Intellectual Property Office (EUIPO). The subject area in question remains significant because it must be considered in the context of the depletion of the public domain, the restriction of the freedom of using cultural property and in terms of the

danger posed by such registrations to the TM institution as such. To conclude, the purpose of the article is to analyze in detail the phenomenon of registering public domain works as TMs and the risks associated with it. The originality of the article is manifested in: 1) the selection of the subject matter, which has so far been addressed in the literature in a fragmentary and signalling manner, and which concerns the extremely important issue of collisions within the system of intellectual property law; 2) the specification of the entities that apply for this type of registration, alongside an indication of their motivations and a separate legal assessment in relation to each of them; 3) the proposal of the relevant registration obstacles that should be analyzed in the case of this type of registration.

Work and Copyright

The subject-matter of copyright is the work, which means every manifestation of individual creative activity established in any form, irrespective of its value, intended use and the method of expression. The aim of copyright law as a strict subjective law is to protect the creator's spiritual and material interests. Monistic and dualistic models of the copyright system, represented in the legislative systems of Germany and France correspondingly, are the most widely known models.² A feature of the monistic model is the treatment of moral and economic rights as components of a single, inalienable right serving the creator, and

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individual rights may be traded here. The dualism of understanding of copyright consists in the adoption of the division into transferable and time-limited economic rights and non-transferable personal copyrights unlimited in time. R. Markiewicz indicates that the monistic model tends to reflect the nature of copyright, but the dualistic model is a simpler and more “convenient” legal construction in practice.³ Both personal copyrights and the author’s economic rights arise at the moment of establishing the work in question. Moral rights are independent of the economic rights under copyright law and these consist of: the right to claim authorship and the right to object to modification and abusive treatment of the author’s work. In the result the author has some control over his work in the future. Economic rights on the other hand concern the possibility of using the work, disposing of it in various fields of exploitation and demanding remuneration for the use of the work.⁴ The author cannot waive his personal rights or transfer them to any other person, but he may undertake not to exercise them. Personal copyright lasts forever, although its protection obviously becomes weaker over the course of time. Author’s economic rights expire *ex lege* upon the lapse of a certain period – in principle, upon the lapse of 70 years from the author’s death (or the last of the co-authors) or 70 years from the date of lawful public disclosure of the work, which are counted in full years following the year when these events occurred. Importantly, the term of protection was harmonised in all EU countries under the Directive 2006/116/EC of 12 December 2006 regarding the term of protection of copyright and certain related rights.⁵ The same term of protection applies in the US, but for an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first.⁶

The limited duration of author’s economic rights is the most significant and farthest-reaching limitation of author’s rights aimed primarily at providing society with access to cultural property.⁷

Public Domain

The public domain was designed to provide people with raw materials with which to work upon the expiration of copyrights.⁸ After the expiration of statutory protection, the work becomes a part of the public domain, and the hitherto represented individual interests of persons who disposed of an author’s

economic rights after the author’s death are replaced with the social interest and the common good. The concept of the public domain appears in Article 18 of the Berne Convention⁹ and in documents of international organisations, including UNESCO. According to information on UNESCO’s official website, this organisation promotes access to information belonging to the public domain, called also ‘common information’, i.e., publicly available information the use of which does not violate any law.¹⁰ The public domain should be defined most briefly as a collection of creative works that can be used by everyone in an unlimited manner. It is also supposed to serve as a source of inspiration for other artists, and its resources can be used for any purpose, including commercial purposes, but with respect for the author’s personal rights. It is necessary to distinguish between the following categories of intangible goods falling within the scope of the public domain: 1) goods that are commonly available knowledge already at the moment of their creation – they are products of the mind, but they do not fulfil the criteria for protection within the scope of intellectual property (e.g., discoveries, ideas, mathematical rules); 2) goods whose protection has expired due to the lapse of time or, in the case of industrial property rights, due to the waiving of the exclusive right by the entitled person, its invalidation or expiration; 3) goods that fulfil the criteria for protection, but lose this capacity because of actions of the entitled person or a third party (e.g., disclosure in a scientific); 4) goods having a special character – “exclusive rights with certain inclusions” due to social goals characterised by the possibility of their use by third parties (e.g., the researchers’ privilege, the use of a TM for information purposes).¹¹

The public domain was defined in the judgment of the Court of the European Free Trade Association issued on 6 April 2017 [EFTA Court Case E-5/16 (EFTA) Apr. 6, 2017] referring to registration as TMs of sculptures by Norwegian sculptor Gustav Vigeland (further called: “the EFTA judgment”), in which it was indicated that ‘the public domain entails the absence of individual protection for, or exclusive rights to, a work. Once communicated, creative content belongs, as a matter of principle, to the public domain. In other words, the fact that works are part of the public domain is not a consequence of the lapse of copyright protection. Rather, protection is the exception to the rule that creative content becomes part of the public domain once communicated’.¹²

M. Ocampo considers that what we need is a balance between IP and public domain as they are part of our intellectual ecosystem.¹³

Trademark

Works belonging to the public domain with a high degree of recognisability among society can serve as interesting signs for goods or services. S. Oddi claims that the creation of TMs would seem to follow a similar creative process, however, with some qualifications.¹⁴ In the first place, the public domain as the source of stimuli would seem to play a more direct role in creating TMs than with respect to other types of intellectual property.¹⁴ A TM is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.¹⁵ According to definition stated in Directive (EU) 2015/2436 of the European Parliament and Council of 16 December 2015 to approximate the laws of the Member States relating to TMs,¹⁶ a TM can be any sign capable of distinguishing the goods or services of one undertaking from those of other undertakings and capable of being represented on the register of TMs in a manner making it possible to determine the clear and precise subject matter of the protection afforded. It is important to note that the concept of the TM has changed significantly, because the statutory definition contained the requirement of its graphic representability. This requirement in Article 3 of Directive 2015/2436 was found to be actually anachronistic, so it was replaced with the obligation to represent a sign on the register in a manner enabling the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor. TM can be in particular a word, including a personal name, or a design, a letter, a numeral, a colour, the shape of goods or of the packaging of goods, or a sound.

The attractiveness of the right to protect a TM consist in the fact that such protection is unlimited in time – although it is granted for a period of 10 years from its registration, it may be prolonged for further 10-year periods indefinitely upon fulfilment of relevant formalities. Therefore, when author's economic rights are about to expire, part of current keepers of these rights apply for the registration of the TM. This refers not only to works, but also other industrial property rights the protection of which has expired. Examples of this are ultimately unsuccessful attempts to obtain further protection through the registration of a TM for Lego blocks and Rubik's

cube after the expiration of patent protection.¹⁷ The content of the protective right is based on the exclusive right to use a TM for economic or professional purposes within a specific territory, depending on whether it is a national mark, an EU TM or an international TM. The protection of the interest of persons entitled to use a TM has clearly specified subjective borders, because an application for a TM must specify goods (services) for which it is intended. However, in consideration of the fact that applicants refer to many commodity and service classes that are often completely unrelated to one another, actually every activity of third parties referring to the content represented in the TM may be regarded as a violation of the protective right. This shows even more clearly that we deal with the issue of appropriation of creative works in the public domain, which is supposed to be generally available and to inspire other artists.

One creative act of a human being can be the subject of protection of various rights to intangible goods. In such a case, we can see the cumulative protection of intellectual products, and a work and a TM remain in this manner of conjunction. Not every TM will be a work, but in case of doubt it is better to assume that it is, out of caution. Unlike copyright, the TM law does not specify the requirement of novelty for protection, so it is possible to register works being a part of the public domain as TMs. The following three situations should be distinguished here: 1) an attempt to obtain the right to protect a TM due to the expiration of the author's economic rights by an entity holding these rights, 2) registrations referring to cultural goods for the purpose of their protection, 3) registrations of a work from the public domain as a TM aimed at the obtaining of an attractive and individualising sign that is already recognisable.

Trademark as a Method of Protection of Creative Works upon Expiration of Copyright Protection

In the first case, the person having copyright to a work makes efforts to register it as a TM in order to maintain the control of intellectual property rights, which serve as an important source of profit for this person. An interesting example of constant "escape" from the public domain is the character of Mickey Mouse. A film containing his character (Steamboat Willie) was shown in cinemas in 1928. According to the Copyright Act of 1909 that was valid in the USA at that time, the protection of this character expired in

1984,¹⁸ and its transition to the public domain would result in heavy material losses for the Disney corporation.¹⁹ In 1976, after the significant involvement of Disney in lobbying activities, the US Congress determined that the term of copyright protection would amount to 50 years after the author's death, following the example of solutions that were used in Europe already at that time. Interestingly, the act also extends the protection of previously published works, extending the 56-year term applicable before the adoption of the new act to 75 years, which meant the protection of Disney's cult character till 2003. In a further act issued in 1998, which was called "Sonny Bono Copyright Extension Act", the term of validity of copyright was extended once again – it was determined that the protection of works created after 1 January 1978 would expire 70 years after the author's death. This act is also defined as 'Mickey Mouse Copyright Act', because, as K. Grzybczyk indicates, it has "torn" Mickey Mouse and other Disney characters from the public domain.²⁰ The fact of shifting the time limit for the legal and copyright protection of works several times was commented upon as follows by American law professor James Boyle: "We are the first generation to deny our own culture to ourselves" since "No work created during your lifetime will, without conscious action by its creator, become available for you to build upon".²¹ The current time of expiration of the legal and copyright protection of the famous character of Mickey Mouse is 2023. However, the Disney Corporation has been prepared for this term for a long time, too, consistently registering both word marks, word-graphic marks and graphic marks with an image of Mickey Mouse in the domestic and international procedure. As early as 1948, Disney registered an international word-graphic mark presenting the character of Mickey Mouse.²² Thus, making attempts to protect its cartoon characters the copyright to which will ultimately expire, the corporation will still be entitled to use such protection on the basis of the TM, thereby making a smooth transition from copyright to the industrial property right. Thus, seeking protection on the basis of a TM can lead to keeping literary characters, fairy tale characters out of the public domain. A similar legal issue concerned the use of the name of the iconic detective Sherlock Holmes within a theatrical play and a feature film and the invocation in this respect of monopoly rights arising precisely from the "quasi-TM".²³

Trademark as a Form of Protection of Appearance of Cultural Goods

The second group that must be distinguished consists of registrations or attempts to register TMs referring to cultural goods for the purpose of their protection against unauthorised use. Using specific examples, we must note at the very beginning the inconsistencies taking place in the Polish Patent Office (hereinafter "PPO"), where TMs referring to the appearance of historic real properties (both the property as a whole and individual architectural elements) are registered, whereas refusal decisions are issued with regard to movable historic objects. The following TMs for example have been registered in the PPO: 1) a word-graphic mark representing a fragment of the building of Palace of Culture and Science in Warsaw;²⁴ a graphic mark presenting an outline of the whole block of this Palace;²⁵ and a drawing representing the clock on this Palace;²⁶ 2) word marks: "Wawel Royal Castle"²⁷, "Royal Wawel tapestries"²⁸ and the "Szczербiec Coronation Sword"²⁹ as well as graphic marks representing the Wawel Royal Castle³⁰, all registered to the Wawel Royal Castle, the State Art Collection in Kraków; 3) the word mark "Wilanów Royal Palace"³¹, registered to the Museum of the Palace of King John III Sobieski in Wilanów.

Within the limits of the above registrations, we must note the diversified scope of submitted goods and services according to the Nice Classification³² to which registered marks refer. For example, publishing activity, making premises available to the audience for the purpose of sightseeing of interiors and museum collections, the organisation of training courses and workshops or the renting of interiors for meetings and conferences refer to the word TM "Wilanów Royal Castle"; with regard to the graphic mark presenting the Wawel Royal Castle, it is a definitely broader scope encompassing, e.g., figures, key rings, statuettes, badges (of non-precious metals), finger rings, necklaces, bracelets, decorative pins, antique jewellery, china and glass figures, books, maps of cities and of Wawel, postcards and photographs, but also advertising services, expert opinions and other opinions on works of art, etc. Thus, we can notice strictly commercial activity here, although these objects are parts of a cultural heritage and access to them is constitutionally guaranteed; at the same time, these are works belonging to the public domain and – in the case of buildings – architectural

works exhibited permanently in public areas that are covered by the “panorama right”³³. This problem has a practical dimension, because there are situations in which authorities refuse to approve the dissemination of photographs of such objects -not necessarily due to commercial purposes - while referring to the TM institution. Quite apart from the justifiability of registration of TMs referring to the appearance of these objects, it is necessary to point out the problem of attributing the unlimited scope of protection to the TM institution. In fact, the scope of exclusivity determined by the granted protective right results in the permissibility of all actions not falling within this scope.³⁴

Moving on to movable goods, the case of registration of sculptures by Norwegian artist Gustav Vigeland located in the park named after him in Oslo by the Oslo Municipality turned out to be an interesting case. This municipality wanted to obtain the right to protect TMs presenting Vigeland’s sculptures that had become a part of the public domain in 2014. Actually, it had held author’s economic rights to works covered by the request, because the author had assigned them to the municipality in his lifetime. After their expiration, the authorities of Oslo, in fear of the loss of control of their native artist’s output, filed an application specifying many of his sculptures to the Norwegian Patent Office. The Norwegian Patent Office refused to register most of these works, referring, e.g., to the lack of distinguishing capacity of the mark. The above decision was appealed to the Board of Appeal, which filed a request to the Court of the European Free Trade Association for the resolution of the issue of obtaining the right to protect the TMk encompassing the presentation of the work belonging to the public domain.

In its decision of 6 April 2017, the Court of the EFTA made a detailed analysis of the grounds for the refusal of requests of this kind (concerning works being a part of the public domain) and indicated potential consequences of granting rights to protect such TMs. The analysis covered five grounds for refusal to the registration of a TM that are specified in Article 3 of Directive 2008/95/EC,³⁵ but I think the most important presumption from the viewpoint of this subject area is that of inconsistency with public policy or with accepted principles of morality. The Court of the EFTA indicated that the registration of TMs regarding works protected by copyright for which the term of protection

has expired is not contrary to public policy or to accepted principles of morality. And, whether the registration of signs consisting of works of art should be refused on the basis of this presumption, depends on the status or manner of perception of a work of art in a European Economic Area state, with the risk of embezzlement or profanation having a potential impact on this assessment. Sybila Stanisławska-Kloc stresses that this decision is important because it concerns fundamental rules for the system of TMs, i.e., presumptions for refusal to register TMs that should be interpreted in the light of public interest, and the same interest serves as a basis for the protection of cultural heritage and access to the public domain.³⁶ In this context, we must recall the right decision of the PPO that refused to register a TM representing *The Battle of Raclawice* painting by Jan Matejko for the National Museum in Kraków. The applicant referred to the protection of the painting in the social interest, stating that the registration would prevent its depreciation as a cultural good and would serve the prosecution of cases of unauthorised use of reproductions of the painting by third parties. When refusing to register the painting, the PPO indicated that “the subject mark being a reproduction of *The Battle of Raclawice* painting by Jan Matejko constitutes a national treasure and as such should not be used for commercial purposes (...)A national treasure cannot be appropriated by one entity because this violates the social interest and the rules of social co-existence”.³⁷

A TM fulfils certain functions in the economy, such as the designation of origin, or an informative, quality, advertising or aesthetic function. Trying to protect historic works of art by means of the TM institution is unacceptable. Such activity of museums and other entities disposing of these works is a contradiction in itself because they should not control the manner of use of a work belonging to the public domain by third parties. This may lead to the restriction of constitutionally guaranteed freedom of access to cultural goods, inconsistency with the principle of the time-limited validity of the author’s economic rights, the “removal” from the public domain of goods to which access should be unrestrained, and going beyond the functions assigned to TMs. The primary role of a TM is to distinguish between goods from one entrepreneur and goods from another entrepreneur, not to protect historic objects being a part of cultural heritage from unauthorised use and potential depreciation. For example Polish Law does not

regulate the reproduction of the appearance of cultural goods in any manner, but such solutions are included, among others, in the Code of Cultural Property and Landscape of the Italian Republic, specifying reproduction (e.g., copying, photographing, filming) as a special form of using cultural goods. Therefore, reproduction permissions concern cultural goods falling within the sphere of the ministry, regions and local government and refers to museum collections and archives, but also to architectural and archaeological objects.³⁸ Thus, there are no uniform solutions at EU level in this area.

Unique Identification of an Entrepreneur: A Unique Work from the Public Domain as a Trademark

The third group that must be distinguished in the case of registration of works from the public domain as TMs is the registration of such work by an entrepreneur who has never had any legal title to it (he was not entitled with respect to the author's economic rights, and he is not a cultural institution in possession of this work of art). In this case, it is difficult to talk about attempts to exercise the further control and protection of profits and the alleged protection against unauthorised use. What we can see, is the will to draw the recipients' attention to one's goods (services) by means of a unique TM in the form of a recognisable work of art. Such individual visual identification of the brand can certainly reduce the product placement process or evoke positive associations and the feeling of contact with art by stressing the uniqueness of the product being purchased. Here we can quote such examples as a TM presenting *The Milkmaid* painting by Jan Vermeer that was registered for Nestle S.A.³⁹ and is printed on packages of products offered by it and a TM presenting another painting by Jan Vermeer: *Girl with a Pearl Earring* that was registered for Food Investments Group B.V. – a Dutch company specialising in the sale of fruit and vegetables.⁴⁰ In the first case, we are still able to notice a relationship between the TM and products offered for sale (e.g., dairy products), but this is difficult in the second case. Another example concerns *The Night Watch* – a valued painting by Rembrandt,⁴¹ the image of which was submitted for registration as a TM by a Danish law office in 2017. This registration was not dictated by commercial purposes and served as a kind of verification of the possibility of obtaining a TM referring to a historic work of art that failed in the

Benelux Office for International Property and succeeded in the EUIPO. The former did not grant the protective right due to the “excessive complexity of the sign”, although this registration barrier was not noticed in the case of the registration of this work as an EU TM. Quite apart from the grounds on the basis of which the registration was refused by the Benelux Office for International Property, we can notice inconsistency between decisions of these two offices and, at the same time, the identicalness of registration barriers. This may lead to situations when an unsuccessful attempt to register a national TM will be followed by a successful attempt to register an EU TM. It must be noted here that a work of art recognisable in a specific member state and constituting a historical cultural good may not be recognisable in other member states or the community as a whole, so the elaboration of common standards would be recommended here.

In consideration of the specificity of the intellectual property, it must be stressed that only the unification of protection between individual states is a guarantee of effectiveness. Because of the nature of the subject of protection and its intangible dimension, which results in easier violations, working out relevant mechanisms for protection on a supranational level that would refer both to law-making as such and to the application of laws under registration procedures and in legal proceedings is a *sine qua non* of the protection of authorisations resulting from exclusive rights. This is particularly important because Directive 2015/2436 refers to the co-existence of the TM system on the national and EU level and to the balance between them, which is the foundation of the EU's intellectual property protection policy.

Selected Grounds for Refusal to Register a Public Domain Work as a Trademark

When analysing grounds for refusal to register a TM that would apply to requests covering works that belong to the public domain, it is most important to indicate the inconsistency with public policy or with principles of accepted morality that is analysed *ex officio*. The concept of public policy stands for order, social peace, living in accordance with laws and rules adopted in the state and society, and principles of accepted morality are established and commonly accepted moral standards that basically form a part of public order. A mark's inconsistency with public policy arises due to the relationship between the

content of the mark and the legal norm that makes its dissemination impossible.⁴² In the case of inconsistency with principles of accepted morality, we can consider not only the content or form of the mark, but also the consequences that its use on the market may bring about.⁴² This barrier usually applies to obscene or vulgar marks. Thus, we can ask if it can apply to TMs that represent works from the public domain. According to the decision of the Court of the EFTA, the fact that a given work was subject to legal and copyright protection does not automatically disqualify it as a TM. Refusal to register a mark on the grounds of inconsistency with public order is subject to evaluation based on objective criteria, and the presumption of the principles of accepted morality refers to subjective values related to circumstances specific to a given country, in which consumers form a relevant group of recipients. Registrations of such marks must be considered in terms of the risk of appropriation or profanation that may occur as a result of their use for goods or services that do not match the output of the artist concerned or his person as such. The judgment of the EFTA indicates that refusal to register a mark based on the presumption of inconsistency with public policy may occur when the mark consists only of a work belonging to the public domain, and such registration would pose a serious threat to the fundamental interest of society.⁴³ Refusing to register the TM containing the image of *The Battle of Raclawice*, the PPO stated in the grounds that this painting is a national treasure and cannot be appropriated by one entity.⁴⁴ I think that in decisions like this the concept of the national treasure may also be replaced with the concept of the common good⁴⁵, or a “set of constitutionally and legally distinguished values, the rules of their weighting and resolving collisions between them”.⁴⁶ In the case of a TM presenting a work from the public domain, this collision occurs between exclusive rights that the entitled person will acquire under the right to protect the TM and the rest of society, which is entitled to use it both for private and commercial purposes within the scope of time-limited protection of author’s economic rights. This, in turn, should stimulate the further development of culture and art and inspire new generations of artists.

In the view of S. Stanisławska-Kloc, the judgment of the Court of the EFTA “actually enlarged the possibility of using grounds for refusal to register a mark, which is >merely< a work belonging to the

public domain, and seems to stand up for this domain”.⁴⁷ In the presumption under discussion, the restrictions of exclusive rights have apparently become more flexible. Ł. Żelechowski rightly argues that the presumption of inconsistency with public policy and principles of accepted morality forms a quasi-unclosed basis for refusal to protect a TM.⁴⁸ It can be certainly regarded as the proper ground for refusal in the case of attempts to register works belonging to the public domain.

It is also worth indicating that the Polish regulation of the TM law additionally involves a strict barrier in the form of a sign that contains an element of high symbolic value, particularly a religious, patriotic or cultural element the use of which would offend religious or patriotic feelings or the national tradition.⁴⁹ This barrier is a clear supplement to the principle of respect for universal values that are common to a given community. It addresses not only the general interests, but also smaller circles, such as local communities. This barrier is aimed at the protection of national and patriotic, but also religious and cultural symbols. Thus, if registration does not concern a famous and commonly recognisable work, but, e.g., a local niche artist highly esteemed in his circle, the blocking presumption may apply towards national signs.

Another presumption that may apply during the registration of works from the public domain as a TM is the lack of distinguishing capacity; this barrier directly refers to the definition of TM (distinguishing between goods offered by one entrepreneur from goods offered by another entrepreneur). It is difficult to perceive a TM quickly in the form of, e.g., an image presenting a battle scene. Such a sign should not act as a communicator in trade. We can, however, ask what happens if the request covers only a small part of such a painting. But the most important thing is that refusal to register a TM due to the lack of distinguishing capacity does not guarantee the stability of the decision, because it involves the risk of acquiring secondary distinguishing capacity because of the long-term use of the sign.

Taking into account a registration barrier in the form of bad faith, I think it may not fully correspond to cases when works from the public domain are submitted for registration. Bad faith usually serves as a basis for refusal if a given sign is already in trade and has become established in the awareness of recipients. Although, it is a question of knowledge not

only about another entity's subjective right, but also about an interest protected in a different manner that may be violated by registrations, which may be theoretically a social interest, but the presumption of inconsistency with public policy or principles of accepted morality seems to be more appropriate and easier to prove here. Z.Ochońska indicates that the presumption of bad faith should be evaluated jointly with inconsistency with public policy and principles of accepted morality during the registration of works from the public domain.⁵⁰ In the author's opinion, it may be necessary to extend the concept of the existence of bad faith to situations that will refer not only to knowledge about the presence of the given work of art in trade, but also to knowledge about its popularity and function in society.

Conclusion

The subject area discussed in this paper is very complex, and the drawing of categorical conclusions in this respect is difficult. Each case should be analysed separately in consideration of various refusal presumptions, but the presumption of inconsistency with public policy and principles of accepted morality deserves special attention here. The registration of such work as a TM may contradict the social interest, regardless of whether this is done by an entrepreneur or an institution responsible for the protection of cultural heritage that justifies its actions with the need for protection. Another, different situation happens when works whose copyright protection has not yet expired are registered as TMs for the purpose of controlling profits generated by them. The registration of works of art as TMs for the purpose of their protection is certainly a false assumption and should never take place. On the other hand, strong controversy is aroused by entrepreneurs looking for unique signs who register works that have belonged to the public domain for a long time. Actions undertaken in this respect have a direct impact on the creation of works that are derivative or inspired by such work of art, thereby leading to the depletion of the public domain and potential limitations regarding the further development of culture and art. It should be noted that the institution of a TM, which entitles one to unlimited time exclusivity within a certain scope, can effectively remove too much from the public domain, potentially giving backdoor protection to subject matter more appropriately dealt with in copyright or patent.⁵¹ Looking at the practical dimension of this issue, we can quote the example of a British entrepreneur who,

having protective rights to TMs containing the expression "Alice Through the Looking Glass", which he used for marking his products (e.g., shirts and stationery products), sued The Walt Disney Company, claiming that the adventure film *Alice Through The Looking Glass* violated his rights to TMs, which delayed the distribution of the film by eight months.⁵² During the dispute, the possibility of misleading recipients was invoked, but the parties completely ignored the status of Lewis Carroll's world-famous novel, which has long been in the public domain.

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- 32 The Nice Classification is the International Classification of Goods and Services intended for the registration of TMs, approved pursuant to the Nice Agreement on 15 June 1957. It is used not only by signatories to the Nice Agreement, but also by countries participating in the Madrid Agreement concerning the international registration of marks and in the Protocol to the Madrid Agreement and member states of the African Intellectual Property Organisation (OAPI), member states of the African Regional Intellectual Property Organisation (ARIPO), the Benelux Bureau for TMs (BBM) and the European Union Intellectual Property Office (UIPO).
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