

AIPPI Study Question Q285 – Proving trade mark use

Report of the Swiss Group Part II (Part I published in sic! 11/2023)

IV. 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.

We consider the current law and practice in Switzerland to be generally adequate in that it does not contain any limitations with regard to the type of proof/evidence that can be filed and does also not pose unnecessarily strict formal requirements (for example no legalization of evidence is required).

However, the Group agrees that in proceedings before the Swiss Federal Institute of Intellectual Property (hereinafter "IPI"), the threshold to reach prima facie evidentiary requirements regarding genuine use is unnecessarily high for trade mark owners (it seems to the Group that the practice of the IPI is stricter than is required by law).

The same applies to the rather strict practice of the IPI regarding the assessment of whether the use of variations of a trade mark is still rights-preserving. This is somewhat in contradiction to the interest of trade mark owners to develop their brands (modernization) or to use their trade marks in combination with other signs, e.g., using their logo with their company name.

Also, the Group would find it helpful from an industry point of view if the IPI provided more practical guidelines/examples on what is considered sufficient evidence to show rights-preserving use (for example, on what is considered "adequate" and "recent" use).

Finally, it would be helpful if the probative value of stamped digital proofs of use was clarified in law or practice. In particular, it remains unclear whether blockchain proof is admitted in Switzerland as this is already recognized in China, Europe and the US.

Members of the Group: Ada Altobelli, Manuel Bigler, Frédéric Brand, Isabelle Bruder, Nathalie Denel, Louisa Galbraith, Elif Keskes, Pierre-Alain Killias, James Merz, Fabienne Zehäusern.

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 Group does not believe that a change in the current law is necessary. However, the prerequisites of genuine trade mark use in the virtual world must be developed in practice based on an interpretation of current law. In particular, the most important open question is not whether the use in the virtual world as such could consist in genuine use, but rather whether the use in the virtual world extends to real-world goods and services, i.e., whether the use for virtual chocolate is also considered a use for chocolate in class 30, or only for virtual chocolate.

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.

There are no reasons for disqualifying online/internet use in our Group's law.

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?

See the answer to question 14 above.

V. Proposals for harmonisation

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.

Evidence to Prove Trade Mark Use

19.

Should there be any quantitative or temporal threshold (minimum level) on evidence requirement to prove genuine use? Please answer YES or NO. Please comment.

No, apart from the requirement that the trade mark must have been used during the grace period, there should not be any quantitative or temporal thresholds in absolute terms (meaning, for example, absolute amounts of revenues earned with the trade mark use).

However, from the industry's viewpoint, examples of what is considered "recent use" or "serious use" issued by the trade mark offices would bring more certainty, keeping in mind that the trade mark owners must set up a system for collecting suitable proof and must therefore define during what periods of time how much evidence should be collected.

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.

Yes. In the opinion of the Group, no category of evidence should be excluded per se. Rather, the weight of any evidence should always be assessed according to the circumstances in the individual case (see the answer to question 4).

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); b) declarations by unconnected and unpaid third parties; c) declarations by unconnected but paid third parties; d) copies of current web pages; e) copies of web pages from Wayback Machine (including entries from Wikipedia which cannot any longer be modified); f) consumer surveys; g) copies of invoices, bills, and accounts; h) copies of advertising materials; i) catalogues; j) copies of distribution contracts; k) witness evidence; l) private documents, including private opinions; m) anything else: please name and explain.

In the opinion of the Group, no category of evidence should be excluded per se (see the answer to question 20). Evidence consisting of objective documents or statements by independent parties should generally be given more weight than any statements made by or on behalf of the trade mark owner or by parties connected/related to the trade mark owner in any way.

22.

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

No, such trade marks should be treated the same way when it comes to genuine use. An exception might apply in cases where it is accepted general knowledge that a trade mark is genuinely used for the goods or services in question. In such cases, no further evidence of use should be necessary.

23.

Please explain what should be probative value of the following:

a. a single use of a mark on the internet/on a website
b. mere advertising (real commercial advertisement rather than just advertising the ownership or information of the trade mark) –with no sales

a) The probative value of a single use of a trade mark on the internet/on a website should depend on the circumstances of the individual case. If, for example, a service, such as "personnel recruiting" is claimed in the list of goods and services, the only possible use of the trademark might be a single use on the trade mark owner's website. The decisive question should be whether the use can be qualified as "serious" use, i.e., with the intention of meeting a demand on the market.

b) The use in real commercial advertising should be taken into consideration, but additional evidence of use will need to be provided showing a real intention of the trade mark owner in developing the market for the advertised product.

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. All filed evidence considered as a whole should at least show the place, time and nature of use. The *place* is necessary to assess whether the trade mark has actually been used in the country of interest. The *time* is necessary to assess whether the trade mark has been used within the relevant period of time. The *nature of use* should be evident as it serves to assess whether the trade mark is used for the goods/services claimed.

It is noted that not every single piece of evidence would necessarily have to include all of the above information, but that this information must be derivable from the sum/composition of all pieces of evidence.

25.

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

The thresholds to prove genuine use should be lower before the IP offices than before civil courts, since the proceedings before the IP offices are usually intended to be quicker, simpler and cheaper than proceedings before a civil court.

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 Paris Convention and Swiss law allow certain variations in trade mark use as long as the form of use does not alter the distinctive character of the registered mark. The purpose of a trade mark lies in its distinctive character.

Therefore, the Group is of the opinion that when it comes to assessing the genuine use of a trade mark, if the mark is used differently than registered, the only relevant question should be whether the distinctive character of the registered mark is preserved in the variations.

The Group thus believes that the acceptable degree of variation should therefore be considered taking into account the distinctive strength of each of the components of the registered mark as well as of the relative position of the various elements within the arrangement of the mark.

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

In assessing whether or not a trade mark variation can be accepted, an assessment of the distinctive character and whether the variation alters the distinctive character of the registered mark should be decisive factors (Proposals a and b). This means analyzing whether consumers view the registered mark and the used mark as the same marks (Proposal c).

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 (Proposal e) should be considered in assessing distinctiveness. Indeed, distinctive character should always be assessed in relation to the designated goods and services. If a component is currently used in the course of trade to describe some characteristic of the good/service, this circumstance should be taken into account.

Proposal d) should not be a factor in the view of the Group. The comparison between the registered mark and the used version should be made regardless of whether or not the used mark is registered. The fact that the new version is also registered only means that this new version complies with requirements that need to be fulfilled for trade mark protection. The mere registration, however, does not mean that the “distinctive core” of the registered trade mark is preserved in this new version and that consumers will recognize the registered mark in the used version.

Proposal f): The fact that the registered trade mark is well-known should not have any impact on the assessment of whether a variation of this mark is considered genuine use. Furthermore, it does not seem to the Group that the existence of a high degree of distinctiveness should in practice allow more freedom to modify the sign than for marks with normal distinctiveness.

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:

a) in which the font, size, and/or colour of the registered trade mark is changed, partially

or wholly; b) in which distinctive elements are added to the registered trade mark; c) in which non-distinctive elements are added to the registered trade mark; d) in which part of the distinctive element is omitted from the registered trade mark; e) in which the non-distinctive element is omitted, partially or wholly, from the registered trade mark; 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; 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; 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; i) in which the registered mark is used in conjunction with another mark; j) others, please name and explain

In the Group’s opinion, the assessment should be made on a case-by-case basis, without any categorizations in order to allow a margin of interpretation and a degree of discretion. The proposed variations should be viewed as not altering the distinctive character of the registered trademark,

as long as they are minor (which should be interpreted on a case-by-case basis). Additional comments on the individual choices are provided below:

- a) Change in font size and color, partially or wholly: Practice should be less rigorous when the registered mark is a word mark since a word mark protects the word independently of its graphical design. For example, the decision of the Swiss Federal Administrative Court (FAC) of 15 September 2022, No. B-3250/2021 – SET ONE/se: one-der deutsche Messestuhl is considered too strict by the Group.
- b) Addition of distinctive elements should be considered as altering the distinctive character of the registered mark.
- c) Addition of non-distinctive elements should be considered as not altering the distinctive character of the registered mark.
- d) Omission of a part of the distinctive elements of the registered mark should be considered as altering the distinctive character of the registered mark, unless the overall impression of the mark remains the same, which seems unlikely in practice.
- e) Omission of a part of non-distinctive elements should be considered as not altering the distinctive character of the registered mark, provided that the overall impression of the mark remains the same.
- f) A change of the word of the registered mark to a word which is similar to the registered mark should be considered as not altering the distinctive character of the registered mark, provided that the overall impression of the mark remains the same.
- g) Changes in the layout of the different elements of a mark should be considered as not altering the distinctive character of the registered mark, provided that the overall impression of the mark remains the same.
- h) Omission of one composite element in case of a combined mark should be considered as not altering the distinctive character of the registered mark, provided the omitted element is not distinctive.
- i) Use in conjunction with another mark: A comparison of the marks should be made regardless of whether or not the mark is registered.

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? Please answer YES or NO and explain.

Yes, the use on the internet should be taken into consideration when determining whether a trade mark is genuinely used in a specific jurisdiction, provided that such online use can be regarded as use in that jurisdiction (see also Article 5 of the WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet; hereafter the “Joint Recommendation”). Online use should be regarded as use

in a specific jurisdiction if such online use has commercial repercussions or, in other words, a commercial effect in that jurisdiction (see also Article 2 of the Joint Recommendation). Whether online use has a commercial effect in a jurisdiction should be determined on a case-by-case basis, taking into account all relevant circumstances. Factors to be considered should include, without limitation (see also Article 3 of the Joint Recommendation):

- access to the online presence (website, online platform, social media account, etc.) by users of the jurisdiction;
- directing consumers in the jurisdiction to the online presence (e.g., promotional activities in the jurisdiction referring consumers to the online presence);
- use of a top-level domain associated with the jurisdiction;
- option to use a local language of the jurisdiction or a language frequently used by the relevant consumers in the jurisdiction;
- offer or supply of goods or services to consumers located in the jurisdiction via the online presence;
- advertising on the online presence of goods or services offered (offline) in the jurisdiction;
- option to pay in the local currency of the jurisdiction or a (fiat or crypto) currency frequently used by the relevant consumers in the jurisdiction;
- use of local contact details of the jurisdiction, such as telephone numbers, addresses, etc.;
- level and character of commercial activities of the user of the trade mark in the jurisdiction.

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

It should be possible to attribute online use of a trade mark to a range of goods or services (proposal b). In general, use should be attributed to those goods and services in relation to which the trade mark is used. A trade mark should be deemed to be used in relation to those goods or services for which the use in question is such as to establish, in the view of the relevant public, a link between the trade mark and the relevant goods or services. If the online use is such that it creates a link between the trade mark and a range of goods or services, the online use should be attributed to all of those goods or services.

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?

Use in a virtual world should be taken into account to determine whether a trade mark has been put to genuine use in a particular jurisdiction, provided that the use in a virtual world can be regarded as use in that jurisdiction (see the answer to question 32).

Genuine use requires that the use in question takes place in relation to the goods and services for which the trade mark has been registered. If the goods and services claimed by the trade mark are not linked to the physical world, use in a virtual world should be deemed as use for the claimed goods or services (in particular where the virtual world serves as a means of providing a service to the consumer behind the avatar). For example, if a trade mark is protected for entertainment services related to concerts, use of the trade mark in relation to concerts in the metaverse should count towards genuine use of the trade mark.

If, by contrast, the goods and services claimed by the trade mark are linked to the physical world, namely if the trade mark has been registered for physical goods (e.g., leather handbags) or real-world services (e.g., architectural or hairdressing services), the question arises whether the use of the trade mark for the “corresponding” virtual goods (e.g., virtual handbags) or services (e.g., designing malls in the metaverse or creating hairdos for avatars) may constitute genuine use for the claimed (real-world) goods and services. In the opinion of the Group, as a general rule, use of a trade mark for certain goods or services should extend to those goods or services which, by their nature and in the view of the relevant public, are not in essence different from them (AIPPI, in its Resolution on Q218, point 5, has resolved that while a trade mark should in principle only be maintained for those goods and services for which it has been used, use may, under certain conditions, extend to a properly restricted broader range of goods or services). Use for virtual goods and services should therefore extend to their real-world “counterparts” if they are, in essence, the same. In general, this will not be the case (e.g., use of a virtual watch should not be considered use for a physical watch; see also ANTRESYAN, *Réseaux sociaux et mondes virtuels*, Dissertation, 2016, para. 513).

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

As for online use in general (see the answer to question 29), use of a trade mark in a virtual world should be regarded as use in a specific jurisdiction if the use in the virtual world has a commercial effect in that jurisdiction (see also WIPO, SCT/25/4, para. 52). This should be determined on a case-by-case basis, taking into account all relevant circumstances.

The factors used in relation to (traditional) online use may not be equally pertinent for use in virtual worlds (HOLZER, *Real Trademark Issues in Virtual Worlds*, in: *IP Litigator* 3/2009, p. 5). For example, virtual goods are not delivered to a real-world location, and there are no offline post-sale activities such as warranties or service.

Factors to determine whether use in a virtual world has a commercial effect in a particular jurisdiction should include, without limitation (see also ANTRESYAN, *loc cit.*, para. 524):

- access to the virtual world by users of the jurisdiction (proposal b);
- directing consumers of the jurisdiction to the virtual world (e.g., promotional activities in the jurisdiction or websites targeted at the jurisdiction referring consumers to the virtual world) (proposal h);
- option to use a local language of the jurisdiction (proposal c) or a language frequently used by the relevant consumers in the jurisdiction;
- offer or sale of virtual goods linked to physical goods located in the jurisdiction;
- option to pay in the local currency of the jurisdiction (proposal d) or a (fiat or crypto) currency frequently used by the relevant consumers in the jurisdiction;
- advertising in the virtual world of goods or services offered (offline) in the jurisdiction;
- use of local contact details of the jurisdiction, such as telephone numbers, addresses, etc.;
- level and character of commercial activities of the user of the trade mark in the jurisdiction.

Accessibility of the virtual world (proposal a) should be a prerequisite for a commercial effect in the jurisdiction, but should not in itself be a relevant factor to determine whether use in the virtual world has a commercial effect in the jurisdiction. Providing an environment mimicking the local real environment of the jurisdiction (proposal e) should not be a relevant factor either, since such environment may be equally relevant for visitors from that jurisdiction and from abroad. Likewise, the location of the provider of the virtual world (proposal f) or the physical infrastructure used (proposal g) should not be relevant to assess whether use of a trade mark in the virtual world has a commercial effect in a specific jurisdiction.

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

As to the definition of justification for non-use, it is the Group's view that the notion mentioned by Swiss case law and doctrine seems to be fair (see the answer to question 12). Indeed, the justification of non-use should only be possible in exceptional circumstances that are beyond the control of the owner and which make the use of a trade mark impossible.

Furthermore, in order for the notion of justification for non-use to remain adjustable to future unpredictable events, a list of circumstances should not be mentioned in the law.

The circumstances considered by Swiss case law and doctrine as a justification for non-use, seem reasonable and fair by the Group (see the answer to question 12). Indeed, cases of force majeure, policy restrictions or marketing authorizations as well as current disputes regarding trade marks should be considered as valid reasons for non-use.

Policy restrictions should be justifications for non-use whether they are in the jurisdiction where the trade mark is registered or in other jurisdictions as far as they remain an obstacle to the use of the trade mark in Switzerland.

Other justifications could be a massive internet breakdown or other major technological issues, especially for trade marks used solely in e-commerce.

Furthermore, for companies active in the metaverse, the question of whether the possible failure of this virtual world could constitute a justification should be examined.

In addition, circumstances covered by force majeure should be quite broad in order to cover future environmental concerns which could significantly impact business.

On the other hand, bankruptcy/insolvency of the trade mark owner should not be considered as valid reason for non-use because, in such case, the owner should not be able to keep a monopoly on the trade mark.

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? Please answer YES or NO and explain.

Yes. However, the circumstances of each case should be taken into account. Indeed, during the COVID-19 pandemic for instance, some industries were highly impacted (such as airlines, automobiles, hotels or restaurants) whereas some others were able to benefit from the circumstances (such as companies active in e-commerce).

Therefore, the industry in which the trade mark owner is active should be considered when assessing the burden of proof to prove justification of non-use as well as the ability of the holder to explain the reasons why it was impacted by the event.

Another proposition could be to provide a grace period starting from the beginning of such a widely known event of this kind and terminating a few months after its end, during which no proof of justifications of non-use should be provided by trade mark owners.

The first proposition would be fairer, but the second would be more predictable.

Others

35.

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

Regarding the grace period, as a complement to AIPPI Resolution on Q218 (see the answer to question 11), the starting date is the day following the expiry of the opposition deadline, which is three months after the publication of the registration (or once opposition proceedings have finished). For Swiss designations in international trade mark registrations, the grace period begins when the grant of protection by WIPO has been published or, if a provisional refusal took place, on the date a grant of protection is given (Article 50(a) TmPO; Part 6, Section 5.2.1 and Part 7, Section 2.4 of the IPI's Trade Mark Guidelines). In case the use is interrupted, the grace period begins when the use ceases (FSC Decision 4A_265/2020 of 28 December 2020).

In addition, in Switzerland, non-use claims can be raised by the defendant in an opposition proceeding. It is sufficient to simply invoke non-use of the opposing trade mark (Art. 32 TmPA); this differs from a cancellation action, which requires proof that non-use is likely (Art. 12 para. TmPA). Instead, the burden of proof is on the opponent, who must submit prima facie evidence of use or provide proper reasons for non-use. Failing this, the opposition is dismissed. Any objection of non-use must be invoked in the first response to the opposition, not later (Art. 22 para. 3 TmPO). If non-use is invoked, be it in an opposition or cancellation action, trademark use must be shown to be

likely during the five years preceding the non-use claim (Art. 32 TmPA).

The Agreement between Switzerland and Germany on Reciprocal Protection for Patents, Designs and Trade Marks, hereinafter “the Agreement”, terminated on 30 April and 29 December 2021. The termination was published on 9 March 2022 in the Official Compilation of Federal Legislation (AS 2022 156). It took effect on 31 May 2022. According to the IPI’s practice, the Agreement still applies, i.e. evidence relating to acts of use in Germany prior to 31 May 2022 are admissible, in opposition and non-use cancellation procedures if the period for examining use is prior to the termination of the agreement (The IPI’s Newsletter Trade Marks and Designs 2022/05).

The invocation of the five-year grace period is excluded for trade marks which are not filed with the intention of being used, but in order to prevent third parties from registering the corresponding signs or in order to extend the

scope of protection of trade marks which are actually used (FSC Decision 4A_265/2020 and 4A_267/2020 of 28 December 2020, para. 6.3.2. – Luminarte/Lumimart, published in sic! 2021/7+8, p. 400 and seq.).

In civil proceedings, the claimant who could not use the contested trade mark in any case is not entitled to request the cancellation for non-use of this trade mark (no legitimate interest) while in administrative proceedings under Art. 35(a) TmPA, this argument is irrelevant (Decision of the FAC of 23 March 2021, No. B-2627/2019 – Sherlock published in sic! 9/2021 p. 487 and seq.).

36.

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

Zusammenfassung

Aktuelle Themen betreffend den rechtserhaltenden Gebrauch von Marken sind die Benutzung von Marken in virtuellen Welten (Metaverse), die Rechtfertigung des Nichtgebrauchs unter ausserordentlichen Umständen, insbesondere während einer Pandemie, sowie die Sammlung von Benutzungsnachweisen mittels technischer Hilfsmittel. Hinsichtlich des ersten Punkts stellt sich die zentrale Frage, ob die Benutzung einer Marke für ein virtuelles Gut auch als Benutzung des entsprechenden Guts ausserhalb der virtuellen Welt gelten soll. Die Schweizer Gruppe ist der Meinung, dass dies regelmässig nicht der Fall sein sollte.

Grundsätzlich sollten in Bezug auf den rechtserhaltenden Gebrauch von Marken die wirtschaftlichen Begebenheiten berücksichtigt werden. Wünschenswert wären weniger strikte Anforderungen an Benutzungsnachweise sowie Unterstützung von technischen Hilfsmitteln zur Sammlung solcher Nachweise, eine weniger strenge Beurteilung des Gebrauchs einer Marke in abweichender Form, um dem Bedürfnis der Wirtschaftsakteure nach Modernisierung ihrer Marktauftritte Rechnung zu tragen, sowie Berücksichtigung der wirtschaftlichen Umstände im konkreten Einzelfall bei der Rechtfertigung des Nichtgebrauchs.

Résumé

Les thèmes actuels concernant l’usage propre à maintenir le droit à la marque sont l’utilisation des marques dans les mondes virtuels (métavers), la justification du non-usage dans des circonstances exceptionnelles, notamment pendant une pandémie, et la collecte de preuves d’usage au moyen d’outils techniques. En ce qui concerne le premier point, une des questions centrales est de savoir si l’utilisation d’une marque pour un bien virtuel doit également être considérée comme un usage du bien correspondant en dehors dudit monde virtuel. Le groupe suisse est d’avis que cela ne devrait pas être le cas en règle générale.

En principe, les circonstances économiques devraient être prises en compte en ce qui concerne l’usage propre à maintenir le droit à la marque. Il serait souhaitable de limiter les exigences relatives aux preuves d’usage et de soutenir les moyens techniques permettant de recueillir ces preuves. Il serait également préférable d’évaluer moins strictement l’usage d’une marque sous une forme divergente, ce afin de tenir compte du besoin des acteurs économiques de moderniser leur présence sur le marché. Finalement, en ce qui concerne les justes motifs pour le non-usage, les circonstances économiques dans chaque cas concret devraient être prise en compte.