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Brand Imitation. A *Cul-de-Sac* or an Opportunity for Fashion Lawyers?¹

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1. Introduction

It has long been anticipated that from the idea of an ‘information society’ operating in a data-driven economy we will shift to the idea of an ‘information-based economy’ and, subsequently, to that of a ‘knowledge-’ and ‘wisdom-based economy’.² Although it is challenging to put a specific date on these periods of civilization, one can easily speculate that the knowledge-based economy³ is a phenomenon that forces the entrepreneur to forge a distinct **intellectual** or **professional identity**. This is because the Internet and new technologies boost competition (via, e.g., Facebook, Instagram, etc.). They also change consumer experiences, expectations, and possibilities.⁴ Brand owners must operate in an increasingly hostile environment, as – and this will be discussed later – their brands are copied no longer just by their market competitors, but also by their own clients.

This paper presents a legal analysis of the idea of a brand with a view to identifying a path to stronger legal protection for business owners, along with an economic strategy that is complemented by social and marketing considerations. Also, the question what actually constitutes intellectual identity and whether any additional types of intellectual property can be accorded legal protection against **brand infringement** arises with respect

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² According to OECD definition, a knowledge-based economy is one that is based on the production, distribution, application of knowledge and information. See OECD, *The Future of the Global Economy. Towards a Long Boom?*, 82 (Paris 1999).

³ D. Marchiori, L. Mendes, L., *Knowledge management and total quality management: foundations, intellectual structures, insights regarding evolution of the literature*, Total Quality Management and Business Excellence, 1135–1169, 31(9–10), (2020).

⁴ J.M.T. Balmer, E.R. Gray, *Corporate brands: What are they? What of them?*, 37(7/8) European Journal of Marketing, 972–997 (2003); S.D. Hunt, *Truth in marketing theory and research*, 54(3) Journal of Marketing, 1–15 (1990); B. Merrilees, M.L. Fry, *Corporate branding: A framework for e-retailers*, *Corporate Reputation*, 5(2/3) Review, 213–225 (2002).

to the well-known intellectual property types (copyright, patents, industrial designs, utility patterns, and trademarks).

The author of this paper uses legal research methods that allow her to gather the data and knowledge necessary for in-depth legal analysis. She uses analytical-critical and legal-dogmatic methods, as well as analysis and criticism of, mostly Polish, economic and legal literature (critical approach and literature analysis). This is supplemented with a case study, which empirically proves the importance of decoding the term 'brand' and shows how the IPR regimes function (or malfunction).

2. Conundrum surrounding the concept of a 'brand'

2.1. Mere hot air or emotions?

There is a valid question about what really makes an intellectual identity and whether, apart from the intellectual property goods being part of the IPR canon, there is something else that sets the machine of success and sales in motion. Retail research conducted in social and economic sciences clearly shows that consumers buy an **emotion**. The image of the product, the creator's story (storytelling), being part of a subculture, the consumer's feelings related to the possession of a particular product and not any other one – all this adds up to produce emotions, a fact that great creators learn in expensive and prestigious design schools. The importance of emotions is proven in recent cases of designer stores (e.g., La Mania), which offered to sell products of generic brands, leaving their customers with the impression that they were buying branded products ('the tag scandal', Polish: *afera metkowa*).⁵ The scale of negative publicity and indignation caused by consumers' implied expectations made legal news.

2.2. A brand as a meta-good

Roman Meinhold, a sociologist and philosopher who created the concept of *imitatio prominens*, analysed the idea of imitating the external world in the context of fashion, which is so deeply rooted in society. One of his observations was that items considered 'sacred' in society become **meta-goods**. This concept is successfully monetized in the psychology of fashion and marketing, and it has long been known that creating an excellent product or service and achieving a million sales are two separate issues. As it appears, however, they can be locked in a chain of sacralization of goods **through a brand** that allows one to create associations, build values, meet needs, and respond to the fashion of the time. As Meinhold notes, by coating a consumer good (e.g., perfume) with **meta-goods**,

⁵ K. Dobrzyńska, *Afera metkowa. La Mania w ogniu krytyki*. „Doszło do publicznego naruszenia interesu naszej firmy”, kobieta.wp.pl, 9 Jun. 2020, <https://kobieta.wp.pl/afera-metkowa-la-mania-w-ogniu-krytyki-doszlo-do-publicznego-naruszenia-interesu-naszej-firmy-6519618839844481a>; M. Wąsowski, “Informacja mogła być niezrozumiała dla klientów”. Joanna Przetakiewicz komentuje burzę wokół La Mania. Słowo “przepraszam” nie pada, Business Insider, 14 Jun. 2020, <https://businessinsider.com.pl/firmy/strategie/afera-wokol-firmy-la-mania-odpowiedz-joanny-przetakiewicz-wywiad/0pyz3m6>.

namely **quasi-sacred appearance** (meaning), **brand name** (symbols, signs, signatures, etc.), the **ephemeral appearance of the sacred**, **pseudo-theophany** becomes a **hierophany through the constant experience of holiness in the symbol**. The brand of the offered product comes to the forefront, becoming a quasi-sacred symbol itself. The brand and the meta-goods are linked to the consumer product and are, in a sense, acquired by the consumer in the act of purchasing the product itself.

2.3. Competitive advantage

The knowledge-based economy (or new economy) assumes that the entrepreneur builds a competitive advantage based on knowledge and new technology, including innovation.⁶ Economically speaking, as noted by D. Makulska after A. Koźmiński, competitive advantage can be analysed in a broader or narrower way, depending on how one understands the term 'knowledge'.⁷ In the broader sense of the word, a competitive advantage is built on knowledge understood as any useful information (e.g., about specific or unsatisfied demand), that the entrepreneur uses exclusively. In the narrow sense, knowledge refers to scientific and technical information that the entrepreneur uses, although without being the originator of it.⁸ One way or another, **knowledge** is understood as a **product** and as a **growth factor**, which can furthermore become an **object of trade** on the market as an economic good.⁹ Knowledge *per se*, understood statically, does not contribute to the entrepreneur's economic growth. Growth happens only when knowledge is used in the production of goods and services.¹⁰ Economic literature emphasises the importance of talent as a catalyst for outstanding potential (R. Florida).¹¹ The determinants of the new economy appear to be: knowledge as the most important production factor, intangible factors contributing to the creation of competitive advantage, innovation, and the flourishing of intellectual technology

⁶ M. Reid, S. Luxton, F. Mavondo, *The relationship between integrated marketing communication, market orientation, and brand orientation*, 34(4) *Journal of Advertising*, 11–23 (2005); M.L. Santos-Vijande, del A.B. Río-Lanza, L. Suárez-Álvarez, A.M. Díaz-Martín, *The brand management system and service firm competitiveness*, 66(2) *Journal of Business Research*, 148–157 (2013); C. Simões, S. Dibb, *Rethinking the brand concept: new brand orientation*, 6(4) *Corporate Communications: An International Journal*, 217–224 (2001); H.Y. Wong, B. Merrilees, *The performance benefits of being brand-orientated*, 17(6) *Journal of Product and Brand Management*, 372–383 (2008); W.J. Lee, A. O'Cass, P. Sok, *Why doesn't our branding pay off: Optimising the effects of branding through innovation*, 50(3/4) *European Journal of Marketing*, 509–529 (2016).

⁷ D. Makulska, *Kluczowe czynniki rozwoju w gospodarce opartej na wiedzy*, 88 *Prace i Materiały Instytutu Rozwoju Gospodarczego*, 175 (2012).

⁸ A. Koźmiński, *Jak zbudować gospodarkę opartą na wiedzy?*, 155, in: *Rozwój polskiej gospodarki. Perspektywy i uwarunkowania* (G. Kołodko ed., Wydawnictwo Wyższej Szkoły Przedsiębiorczości Zarządzania im. Leona Koźmińskiego, Warszawa 2002); cf. D. Makulska, n. 6 *supra*, at 175.

⁹ D. Makulska, n. 6 *supra*, at 178.

¹⁰ A. Kukliński, *Konkurencyjne społeczeństwo permanentnej edukacji jako twórca gospodarki opartej na wiedzy*, 204, in: *Gospodarka oparta na wiedzy. Wyzwanie dla Polski XXI wieku* (A. Kukliński ed., KBN, Warszawa 2001); cf. D. Makulska, n. 6 *supra*, at 178.

¹¹ D. Makulska, n. 6 *supra*, at 178–179; M. Noga, M. Stawicka, *Co decyduje o konkurencyjności Polskiej gospodarki?*, 127 (CeDeWu, Wydawnictwo Fachowe, Warszawa 2008).

(defined as the construction of new devices, technical systems, and the use of new raw materials).¹²

One of the factors driving success in the new socio-economic conditions is investment in intangible resources, including reputation and **branding**. Here, the question arises about the relationship between theoretically distant concepts – **knowledge** and **brand**.¹³ With the multiplicity of concepts, definitions, and approaches, I shall stick with the view of Ewa Skrzypek, who divides organizational knowledge into:

1. codified knowledge, that is, projects, documentation, databases, publications,
2. personalized knowledge: tacit and explicit, and
3. well-established knowledge, consisting of technology, brand, systems, relationships, processes, products, and services.¹⁴

Considering the above, standard marketing techniques are undergoing far-reaching changes. It is noted that the development of the Internet and new technologies increases competition on the one hand, but also shapes the expectations and possibilities of consumers on the other. For almost a decade, the iron rule of 4P marketing (Product, Price, Promotion, and Place) has been questioned in favour of the 8P rule (where additional determinants are: Personnel, Physical resources, Procedures, and Personalization).¹⁵

It should be noted that the TCLF (Textile, Clothing, Leather, and Footwear) sector dynamically draws on the wealth of technology and innovative business models. Diving into the history of fashion and, at the same time, the history of fashion law, we can see that 19th-century entrepreneurs built their empires and financial powers specifically on an innovative approach to the customer and employee, which was complemented by a strict intellectual property policy. Knowledge, as understood then, could be equated with the talent for anticipating consumer needs, market fluctuations and competition, which came almost intuitively to some well-known fashion designers (Worth and Lelong fashion houses, for example). After all, it is not necessary that the knowledge on which a brand is built be obtained from textbooks or specialized studies. It may just as well be tacit and intuitive.

3. Business identity and intellectual identity

The concept of the identity of an economic entity is the subject of interdisciplinary research, although it occupies an important place in the literature of management sciences. An approximation of this concept may help in decoding and understanding the term 'brand', which will be the subject of analysis further in this study. In the Polish literature, there are attempts to analyse the concept of enterprise identity, which Anna

¹² E. Skrzypek, *GOW jako wyzwanie współczesności*, *Myśl Ekonomiczna i Polityczna*, 24–25.

¹³ *Ibid.*, 26; J. Wieprow, *Gospodarka oparta na wiedzy*, <https://analizafinansowa.pl/wycena-przedsiębiorstw/gospodarka-oparta-na-wiedzy-3188.html> (access: 12 Jan. 2023).

¹⁴ E. Skrzypek, n. 11 *supra*, at 33.

¹⁵ J.H. Gilmore, B.J.II Pine, *Markets of One: Creating Customer-Unique Value through Mass Customization*, Boston 2000; R.E. Goldsmith, *Current and Future Trends in Marketing and Their Implications for the Discipline*, 12(4) *Journal of Marketing Theory and Practice*, 12 (2004).

Lis defines as ‘a mixture of those tangible and intangible elements that distinguish the enterprise on the market and emphasise its distinctiveness’.¹⁶

The literature review shows that there are many nomenclature and definition attempts to describe the specific good which makes the entrepreneur function on the market in an independent, noticeable, and unique way. Among these, there appeared such concepts as: Corporate Identity – Balmer 1998; Organizational Identity or Corporate Personality – Wheten, Godfrey 1998, Olins 1978; Visual Identity – Chajet and Schachtman 1998; Corporate Image – Grunig 1993; Corporate Reputation – Fombrun, Vann Riel 1997; Corporate Communications – Van Riel 1995, Corporate Brand – Macrae 1999.¹⁷ The multiplicity of concepts shows that the concept of enterprise identity functions along such goods as reputation or image; it is also sometimes identified with the brand itself.¹⁸

According to Anna Lis, an **entrepreneur’s brand** should be **derived from their identity** and fully consistent with it. In this approach, the entrepreneur’s brand is associated with their image and reputation, and the triad is connected by the fact that ‘all three are based on the subjective perception of the organization by other entities operating on the market’.¹⁹ In the economic sciences, many attempts have been made to analyse the identity of an entrepreneur, the most convincing of which comes from Balmer and Soenen, who divide business identity into *soul*, *mind* and *voice*.

The **soul** is the subjective element of identity, including staff values. The **mind** is made up of conscious decisions about organizational ethos, vision, strategy, and product presentation. The **voice** can be understood as a multi-faceted way for an entrepreneur to communicate inside and outside the organization, that is a communication and visual identification system.²⁰ According to the author of this study, this concept may have an interesting (also legal) overtone.

Taking a fashion atelier as an example, the soul can be understood as the so-called designer’s signature, something that consists of style, creativity (in a broad sense, as a personal interests—sometimes referred to as personal goods, personal rights or personality rights²¹), and artistic and industrial creativity (in a narrower sense, including intellectual property goods only). An in-depth analysis of the essence of the entrepreneur’s soul allows us to claim that it includes the vast majority of personal goods, including

¹⁶ A. Lis, *Zarządzanie tożsamością w organizacjach na różnych poziomach zagregowania*, 11(4) *Zarządzanie i Finanse*, 205–219, 2013.

¹⁷ *Ibid.*, 219–220; cf. M. Reid, S. Luxton, F. Mavondo, n. 5 *supra*, at 11–23, M.L. Santos-Vijande, del A.B. Río-Lanza, L. Suárez-Álvarez, A.M. Díaz-Martín, n. 5 *supra*, at 148–157; C. Simões, S. Dibb, n. 5 *supra*, at 217–224; J.M.T. Balmer, E.R. Gray, n. 3 *supra*, at 972–997; S.D. Hunt, n. 3 *supra*, at 1–15; B. Merrilees, M.L. Fry, n. 3 *supra*, at 213–225.

¹⁸ H.Y. Wong, B. Merrilees, *An empirical study of the antecedents and consequences of brand engagement*, 33(4) *Marketing Intelligence and Planning*, 575–591 (2015).

¹⁹ A. Lis, n. 15 *supra*, at 221.

²⁰ *Ibid.*, 225.

²¹ Article 23 of the Polish Civil Code: ‘Personal goods of a human being, such as in particular health, freedom, dignity, freedom of conscience, surname or pseudonym, image, confidentiality of correspondence, inviolability of home as well as scientific, artistic, inventive and rationalizing creativity shall be protected by the civil law regardless of the protection provided for by other provisions’. Act of 23 April 1964 – The Civil Code, consolidated text: official gazette *Dziennik Ustaw* (Dz.U.) 2022, item 1360.

a good reputation or name, which can radiate into the area of mind and voice through such personal goods as clientele, reputation and image, and intangible goods such as a logo. The mind includes innovative functioning of the company, but also a strong IP strategy, which, since the mid-nineteenth century, has been an inseparable ally of the financial success of designers and entrepreneurs. Finally, the voice includes logos, trademarks, fonts, and colours.

When asked about the brand's place in this approach, one can be tempted to say that the **brand** is the legal equivalent of **business identity**. Further attempts to describe it will allow us to verify this statement. Based on an analysis of economic texts, looking from the perspective of intellectual property law, the concept of business identity can be superimposed on the concept of intellectual identity, which is broader than that of intellectual property law. It covers all the components of the company in tangible and intangible terms, such as intellectual property goods, personal goods (including artistic, scientific, inventive, and rationalizing creativity, as well as the brand), but also innovations and technologies – something that can be conceptualized in the form of recognized intellectual property goods. The development of technology, economy and marketing shows that the conceptual framework of personal goods and intellectual property goods is insufficient; however, an in-depth exegesis and dynamic interpretation of the law can be used to deal with this *impasse*.

4. Brand – reconstruction of the concept and its meaning

4.1. Business approach

This concept exists in social sciences, especially in economics and marketing. By definition, the concept of a 'brand' is heterogeneous, and a closer analysis of literature allows us to distinguish many attempts to describe it, from very broad to selective and narrow ones. One thing that connects them is the agreement on the financial and marketing importance of this conceptual category, as well as its high position on the list of constitutive elements of an enterprise.

The Polish language dictionary says that a brand is: 'a company's hallmark; trademark, factory mark; the quality of the company's products; the book definition of good opinion and recognition'.²² Similarly, the American Marketing Association says: 'A brand is a name, term, design, symbol or any other feature that identifies one seller's goods or service as distinct from those of other sellers'.²³ Philip Kotler drew attention to the fact that it is 'A name, term, sign, symbol, or design, or a combination of these, that identifies the products or services of one seller or group of sellers and differentiates them from those of competitors [...] Consumers view a brand as an important part of a product, and branding can add value to a consumer's purchase. Customers attach meanings to brands and develop brand relationships. As a result, brands have meaning

²² Słownik Języka Polskiego, <https://sjp.pl/marka>, (access: 11 Jan. 2023).

²³ <https://www.ama.org/topics/branding/> (access: 11 Jan. 2023).

well beyond a product's physical attributes.²⁴ To begin, we can assume in agreement with Wally Olins that brands enable us to define ourselves, because they are a kind of associative and informational shortcut that is immediately understandable to the outside world.²⁵ One of the phenomena that has not been analysed in legal literature is **the case of products that are so characteristic that they become a major part of the brand itself**. The world of IP law clashes with business theories, which makes the distinction between product and brand even more blurry. One fact that cannot be escaped is that a product, although characteristic, might be quite minimalist in its design. Therefore, copyright or industrial design protection might be out of reach.

As noted by Wally Olins, 'at one level, *brand identity* and *corporate identity* and *reputation*—all of these words—stand for the same kinds of things. But there is no doubt though that the semantic difference between brand identity and corporate identity is profound. '*Corporate identity*' is an academic, almost loose woolly term, whereas a '*Brand*' is about money. So when you start talking about a brand you start talking about a subject that is very close to a corporation's real interests.'²⁶

The starting point for understanding the meaning of a brand is the theory of accounting, in which brand is defined as a concept 'integrating various factors resulting in a competitive advantage of the examined business entity'.²⁷ Its value is presented as the main determinant of intellectual capital, being a component of intangible assets, which integrate elements affecting the value of the enterprise.²⁸ Decoding the concept of a brand involves digging down to the very 'genotype' of the company, and, therefore, the goal of its existence, which will always be profit. In economic literature, it is noted that an enterprise's ownership of a recognizable **brand** is tantamount to **intellectual capital**, which in turn is identified with a company's above-average ability to generate profits.

In economic sciences, it is claimed that 'a brand is a legally protected instrument of distinguishing from competitors through an identification system that builds relations and connections with the customer through its unique personality, which is a combination of functional and added values'.²⁹ Legally speaking, this is a cumbersome finding, especially since these authors do not give away what they mean by legal protection, nor do they give any more specific information in this regard.

4.2. Legal approach

According to legal literature, a brand is not a legal concept. This means that it is neither defined nor conceptualized by law. It does, however, appear as a term the instruments

²⁴ P. Kotler, G. Armstrong, *Principles of Marketing*, 250–251 (Pearson 2017).

²⁵ W. Olins, *Brand New. The Shape of Brands to Come* (Thames & Hudson 2014).

²⁶ <https://designerd.info/features/wally-olins-branding-is-the-greatest-gift-that-commerce-has-given-to-culture/>, (access: 11 Jan. 2023).

²⁷ M. Jędrzejczyk, M. Mikosz, *Marka kreatorem kapitału intelektualnego organizacji*, 440 *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu*, 230 (2016).

²⁸ *Ibid.*, 230.

²⁹ H. Szulce, K. Janiszewska, *Zarządzanie marką*, 50 (Uniwersytet Ekonomiczny w Poznaniu, Poznań 2012).

below statutory level: regulations³⁰ and ordinances³¹, but without any specific understanding given as to its use.

The Court of Appeal in Warsaw ruled in a judgment dated 3 September 2020 that '[e]mphasizing in jurisprudence the external perception of the sphere of non-material values of a legal person leads to the display of such personal rights of legal persons as good name (reputation, prestige, authority, commercial opinion, brand, or well-established position)'.³² This judgment is one of the first decisions to acknowledge a brand as a separate and autonomous personal interest.

It is crucial to keep in mind that each separately specified personal good/interest (such as renown, good reputation, or prestige) has its own meaning and place within the group of interrelated personal interests. There is ongoing discussion whether personal interests should be protected fully or only in relation to recognized intellectual property goods, because according to Article 23 in conjunction with Article 24(3) of the Polish Civil Code, personal interests 'shall be protected by civil law independent of protection envisaged in other provisions' and that '[t]he above provisions shall not prevail over the rights envisaged by other provisions, in particular by the copyright law and the law on inventions'. A characteristic trend in this respect is the **shift** from the once firm and inflexible protection **towards** new, more **flexible models of protection available without registration**. A good example would be an unregistered trademark or Community design. There are spheres, however, that escape simple conceptualizations, especially in private law and IP protection. One such sphere could be a so-called 'trademark style', which is an unwieldy mix of a work of authorship, industrial design, and trademark. Examples of such practice are the houses of Louis Vuitton, Prada or Gucci, whose products are so characteristic and aligned with the house style that their brand literally 'screams' through them. They are not the best actors to look up to, because these are top-notch enterprises with no money constraints for not only legal protection, but also IPR strategies. It is no secret that the best business specialists are paid enormous salaries, but a company will expect to recoup this investment through increased revenue. Despite all their resources, companies are not always able to protect themselves against simple acts of unfair competition, as competition law proves to be quite harsh in terms of the burden of demonstrating legal applicability of its provisions.³³

³⁰ Rozporządzenie Ministra Finansów z dnia 27 grudnia 2010 r. w sprawie informacji o liczbie papierosów poszczególnych marek i ilości tytoniu do palenia oznaczonych maksymalną ceną detaliczną [Regulation of the Minister of Finance of 27 December 2010 on information on the number of cigarettes of individual brands and the amount of smoking tobacco marked with the maximum retail price], Dz.U. 2018 item 476; Rozporządzenie Ministra Cyfryzacji z dnia 7 kwietnia 2016 r. w sprawie prowadzenia katalogu marek i typów pojazdów homologowanych oraz dopuszczonych do ruchu na terytorium Rzeczypospolitej Polskiej [Regulation of the Minister of Digitization of 7 April 2016 on keeping a catalogue of brands and types of vehicles approved and admitted to traffic in the territory of the Republic of Poland], Dz.U. 2016 item 483].

³¹ Zarządzenie nr 2 Prezesa Rady Ministrów z dnia 3 stycznia 2020 r. w sprawie ustanowienia Pełnomocnika Prezesa Rady Ministrów do spraw promocji polskiej marki, [Ordinance No. 2 of the Prime Minister of 3 January 2020 on the appointment of the Plenipotentiary of the Prime Minister for the promotion of the Polish brand], official gazette Monitor Polski 2020, item 3].

³² Judgment of the Court of Appeal in Warsaw of 3 September 2020, V ACa 29/20 LEX No. 3069836; see judgment of the Court of Appeal in Warsaw of 10 April 2019, I ACa 17/18, LEX No. 2689776. Cf. judgment of the Court of Appeal in Warsaw of 13 April 2021, I ACa 93/21, LEX No. 3189041.

³³ Z. Kamińska, *Fast fashion z perspektywy ustawy o zwalczaniu nieuczciwej konkurencji – zagadnienia wybrane*, 3 ZNUJ. PPWI 133–147 (LEX/el. 2021).

A practical example is Guess brand, which is well known to be very keen on ‘copying’ luxurious brands, such as Louis Vuitton, Gucci, Prada, Coach, Michael Kors, and many others, yet hardly any legal action is ever taken against them.



Fig. 1. Hybrid cross-body bag: Black Brown Logo Arie by Guess vs. the Multi Pochette Accessories by Louis Vuitton³⁴

The practice of small ateliers cannot withstand any comparison with the big players, as they effectively lack everything in terms of their assets: resources, strategies, suppliers, legal and business directors, designers and staff with know-how and credentials from the top expensive fashion schools. Small Polish atelier designers, often self-employed individual entrepreneurs, have to make their way to their consumers through many toils and snares. For many reasons, no matter what the social stratum of the designer house, fashion is known to be one of the most stressful business sectors. The experience of fashion lawyers in Poland proves that these small ateliers are unprepared to perform well in a hostile market environment, as they double their efforts in the area of design, leaving IPR strategies untouched. Therefore, when a jurisprudence provides the new concept that a brand can constitute a separate and autonomous personal good, this may be singularly beneficial for many designers for whom the complexity of previous provisions precluded any practical recourse in cases of infringement.

5. Paloma Negra case

Paloma Negra is a jewellery brand created by Donata Marczak, based in Stalowa Wola, Poland. The designer comes from a jeweller’s family, which shaped her mind about fashion and accessories. As she planned to establish her own brand, she was looking for a hook that would let her inject her ‘trademark style’ into each creation. Having spent quite some time and money, she finally found her inspiration in Morocco. The owner

³⁴ https://guess.com.au/products/black-brown-logo-arie-crossbody-bag-pv788570?variant=39620987945032&gclid=CjwKCAiA2fmdBhBpEiwA4CcHzb3WtHN8fDDzkDDDS7qF74v3wQuKB2bb1Wwnv07wFzwdC3oJX3dWVihoCML0QAvD_BwE&gclid=aw.ds; https://au.louisvuitton.com/eng-au/products/multi-pochette-accessoires-monogram-nvprod1770359v/M44840?campaign=sem_GG-AU-ENG-EC-SHOP-BRAN&gclid=CjwKCAiA2fmdBhBpEiwA4CcHzbK1OzvZXkYfPYZRAO05jEZvQw3wlmI561GsJTFM6LTPgKxDrP4ahR0CHTUQAvD_BwE (access: 11 Jan. 2023).

used her skills and resources to conceptualize her ideas, draw the shapes, make mock-ups, and find suppliers and producers that could cut the shapes in the specified material. It required months of injected energy and delayed income, as the project called for a lot of involvement. The brand was very active on social media (Facebook and Instagram), which was used as a selling channel, so it became well-known and recognizable among other brands. At one point, a client ordered two pairs of earrings. It soon emerged that the client copied the product she purchased nearly 1:1 and offered it for sale on Instagram. Soon after, she offered similar earrings in many other colours and styles. As one knock-off would not be enough, she started her own production using the same shapes, materials, and colours as Paloma Negra's. She started off with one copy to move on to her own variations based on the decoded elements.



Fig. Paloma Negra's original design (courtesy of Paloma Negra).



Fig. Client's copy of Paloma Negra product (courtesy of Paloma Negra).

This case is just one of many, but it shows perfectly well intellectual property in action. As, in this case, the brand had not filed any industrial design or trademark registrations, it could mostly consider copyright or unfair competition regimes. In this particular case, an unregistered Community designs regime³⁵ would not be beneficial, as the brand owner:

- did not have any valid proof of the place and time of making the product available to the public,
- did not express any willingness to take this case to court in a short period of time (as this is the major legal remedy available in case of Community design infringement),
- did not express any willingness to register the product as an industrial design (as the registration fee for one design would be out of proportion to the expected revenues).

Extending personal goods protection to include the ‘brand’ in this case would let the party who suffered a loss strengthen the legal position resulting from the mix of personal goods protection in general with copyright and unfair competition law. Given that the damages resulting from infringements of personal goods and moral rights are worded alike, the same proof of infringement can serve both purposes when suing. In practice, it could sometimes be easier for a court to understand the claim if the goods at issue were subject to personal goods protection in addition to other legal regimes.

In this case the pre-suit legal notice could be substantiated by the following claims:

- **plagiarism** (Article 16(1) and (2) in conjunction with Article 78(1) and Article 115(1) of the Polish Copyright Law),
- **infringement of the right to integrity of the work and to control over the work** (Article 16(3) and (5) in conjunction with Article 78(1) of the Polish Copyright Law),
- **infringement of the copyright holder’s economic rights** – (Article 17 in conjunction with Article 79 and Article 115(3) of the Polish Copyright Law),
- **creating a derivative work and disseminating it without the copyright holder’s consent** contrary to Article 2 in conjunction with Articles 17 and 41 of the Polish Copyright Law;
- **infringement of the copyright holder’s personal goods (artistic creativity, good name, reputation and brand)** (Article 23 in conjunction with Article 24 of the Polish Civil Code);
- **loss resulting from infringement of personal goods** (Article 24 in conjunction with Article 448 of the Polish Civil Code).

6. Brand as a personal good

The concept of a personal interest in general relates to both natural and legal persons, however its definition and the scope of the respective goods pertaining to each class of persons can be different. Depending on the class of persons, these goods are not identical and the use of the concept of a personal good can by no means be automatic.³⁶

³⁵ Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs, Official Journal L 003, 5 Jan. 2002, p. 0001–0024.

³⁶ T. Grzeszak, *Dobro osobiste jako dobro zindywidualizowane*, 4 PS, 7–41 (2018).

The most often cited definition of personal goods for natural persons was coined by Stefan Grzybowski, who, in 1985, wrote that these are ‘individual values of the world of feelings and mental state of a person’.³⁷ The Polish scholarship has widely approved this approach with a reservation that these values should be an expression of the physical or mental separateness of an individual and that they cannot be dependent on an individual’s personal beliefs but rather should be universally recognized and accepted by a given legal system and society (J.S. Piątowski³⁸, A. Szpunar³⁹, A. Kopff⁴⁰, A. Cisek⁴⁰, M. Pazdan⁴¹, or S. Kalus⁴²).

For Poland, the most recognized definition tailored for legal persons is the one presented by the Polish Supreme Court in the judgment of 14 November 1986, which encompasses ‘intangible assets, allowing a legal person to function in accordance with its scope of activities’.⁴³ As asserted by the Court of Appeal in Warsaw ‘[f]or example, as for natural persons the protection will be accorded to human life, health, freedom, freedom of conscience, name, image or inviolability of the home, and it is obvious that not all of these goods apply to a legal person (e.g., life or health). The catalogue of personal goods of legal persons is open, therefore, when establishing it, their particularities should be taken into account. For their characteristics the emphasis is put on the objective criterion (renown, good name) as opposed to the subjective criterion (personal dignity, self-esteem), attributed only to a human being. The most often infringed personal interests of a legal person are its good name (that is, reputation), renown, public opinion, commercial opinion, **brand**, authority’⁴⁴ (my emphasis – MJ).

It is important to note that, as much as the aforementioned terms may appear synonymous, each has a separate and distinct meaning. They interact and supplement each other but are not the same. Therefore, the term ‘brand,’ used above, cannot be viewed as just a ‘fancy’ synonym for reputation or renown. As established by the Court of Appeal in Warsaw: ‘In terms of infringement of personal rights of legal persons, the sphere of **good reputation** should be differentiated depending on the nature and basic directions and goals, activities of legal persons, all factors that create the broadly understood good name, prestige and reputation of a legal person can be listed here. Personal interests of legal persons are non-property goods allowing a legal person to function in accordance with its scope of activities. The **good name** of a legal person is combined with the opinion that other people have about it due to the objectives of its activity. This includes not only the so-called **reputation** resulting from its activities to date, but also the assumed

³⁷ S. Grzybowski [in:] *System Prawa Cywilnego*, vol. 1, *Część ogólna*, 297. 7 (S. Grzybowski ed., Ossolineum 1985); cf. A. Wolter, K. Stefaniuk, *Prawo cywilne*, 182 (Warszawa 2001); A. Brzozowski, W. Kocot, E. Skowrońska-Bocian, *Prawo cywilne. Część ogólna*, 118 (Warszawa 2015).

³⁸ J.S. Piątowski, *Glosa do wyroku SN z 16.01.1976 r., II CR 692/75, 7–8 NR*, 144 (1977).

³⁹ A. Szpunar, *Ochrona dóbr osobistych*, 106 (Warszawa 1979).

⁴⁰ A. Cisek, *Dobra osobiste i ich niemajątkowa ochrona w kodeksie cywilnym*, 167 AUWr, 39 (1989).

⁴¹ M. Pazdan [in:] *System Prawa Prywatnego*, vol. 1, *Prawo cywilne – część ogólna*, 1118 (M. Safjan ed., Warszawa 2007).

⁴² S. Kalus [in:] *Kodeks cywilny. Komentarz. Tom I. Część ogólna (art. 1–125)*, art. 23 (M. Fras, M. Habdas, eds. Warszawa, lex/el. 2018).

⁴³ Article 43 in connection with Article 23 of the Polish Civil Code, cf. Supreme Court judgment of 14 November 1986, II CR 295/86, OSNC No. 23/1988, item 40.

⁴⁴ Judgment of the Court of Appeal in Warsaw of 13 April 2021, I ACa 93/21, LEX No. 3189041.

reputation of that legal person from the moment of its establishment. The good name of a legal person is infringed by statements which, objectively assessed, attribute to it improper conduct that may cause the loss of trust necessary for its proper functioning. In the case of infringement of personal interests of legal persons, the decisive, but also the only, criteria are the objective criteria of the infringement of personal interests. Legal persons cannot feel, like people, the harm done to them, and it is impossible to consider the negative feelings of persons forming the personal substrate of a legal person in this regard. The protection of personal goods of legal persons depends only on the objectively established fact of infringement of personal goods as an unlawful activity⁴⁵ (my emphasis–MJ). Does a knock-off ruin the reputation of the infringed brand? Most likely so, but another hindrance in making the claim a reality is the assessment of the harm.

6.1. ISO definition of a brand

If one agrees that a brand is an individual personal good all by itself, the definition of a brand in the ISO standard takes us to a totally new scope of discussions. According to the ISO definition (10668:2010), a brand is an intangible asset related to the marketing function, including (but not limited to) names, terms, signs, symbols, logos and graphic designs or their combinations, to identify goods, services, or units or to create distinctive images and associations among stakeholders, thus generating economic benefits. A brand as a personal good can be perfectly applicable to both legal and natural persons. In Poland, most fashion ateliers are run by self-employed individuals. A brand as a concept can be defined or assessed in the same way for any class of persons. From the financial point of view, it is important that the economic sciences have offered their own methods of brand valuation, which might be of use for legal proceedings as well.

Brand value is one of the elements that make up the company's value. It should be noted, however, that the value of an enterprise is also generated by a number of other factors. In terms of resources, a brand is also created by:

- the value of the human factor (of its employees),
- tangible and intangible assets used by the enterprise,
- technologies available to the company,
- the value of relationships with customers and suppliers.⁴⁶

Nowadays, in many business entities, the brand is one of the major determinants of the cash flows achieved, which makes it one of the basic factors influencing the value of the enterprise. There are many methods of brand valuation, of which the most important are cost approach and income approach.

⁴⁵ *Ibid.*; cf. P.F. Piesiewicz, *Zarys problematyki odpowiedzialności cywilnej za naruszenie dóbr osobistych w postaci wpisów umieszczanych na forach internetowych*, 10 PiP, 91–104 (2019); K. Zygrzak, *Ochrona dobrego imienia (renomy) jednostek samorządu terytorialnego na gruncie dóbr osobistych*, 10 Samorząd Terytorialny, 72–84 (2019).

⁴⁶ D. Stronka, R. Kolata, *Wycena wartości marki na przykładzie przedsiębiorstwa z branży usługowej*, 57 *Finanse i Controlling* (2018), <https://www.financecontrolling.pl/finanse/wycena-wartosci-marki-na-przykladzie-przedsiębiorstwa-z-branzy-usługowej> (access: 14 Jan. 2023).

The only question that remains open is whether the broad ISO definition of a brand might interfere with Article 23 of the Polish Civil Code, ‘protected by the civil law regardless of the protection provided for by other provisions’.⁴⁷ As observed by Stanisława Kalus, ‘[i]n Article 23 of the Civil Code, scientific, artistic, inventive, and rationalizing creativity was undoubtedly included among the protected personal rights, while providing that it remains under the protection of the Civil Code, regardless of the protection provided for in other provisions. As a rule, this type of creativity is primarily governed by the provisions of the Act on Copyright and Related Rights [and the Act on Industrial Property Law – my addition – MJ], which protects both moral and property rights of authors. Therefore, it may be considered whether scientific, artistic, inventive, and rationalizing creativity should not be excluded from the catalogue of personal goods provided for in Article 23 of the Civil Code, especially since the provision itself recognizes that they are subject to the protection provided for in specific provisions. Moreover, their proprietary nature is very clear and they are an increasingly important sphere noticed in case law. Hence, A. Wojciechowska’s postulate in this regard should be reconsidered.’⁴⁸

This, however, is a subject for a broader analysis that is yet to come.⁴⁹

7. Summary

Contemporary research proves that legal sciences are no longer a standalone area of research. There are many valid questions about conceptual interactions between law and technology, psychology, or medicine. As much as interdisciplinary discourse in law and technology was preposterous two decades ago, the value is now clear due to the rise of technology law. The same pattern applies to law and business, especially the fact that economics makes use of many terms and concepts that may resemble their counterparts in the legal area, even though the similarities are superficial. Closer scrutiny proves how far apart legal and economic reasoning and definitions are. This paper opens a discussion about the concept of a brand, which has recently been noted by the Court of Appeals in Warsaw in several judgments in which a brand is classified as a personal good. This simple legal qualification may, however, have more far-reaching consequences than expected. The major issue is how a brand should be defined for legal purposes, especially since brands as a concept have not so far received any extensive attention from lawyers. The concept is, however, broadly used in economic studies. Nonetheless, this might not be sufficient cause for celebration, as economists decode the term in a way that seems hardly acceptable in law. This is because, in economics, the term is broad and blurry, while covering already well-defined legal concepts, e.g., those of trademark, entrepreneur’s business name (Polish: *firma*) or copyright.

This paper offers a sneak peak of the research that is designed to check the relationship between the respective concepts of a brand in the economic and legal sense. It is

⁴⁷ Cf. K. Czub, *O konstrukcji intelektualnych dóbr osobistych*, 1 ZNUJ. PPWI, 19–42 (2012).

⁴⁸ S. Kalus, n. 41 *supra*; A. Wojciechowska, *Czy autorskie prawa osobiste są dobrami prawa cywilnego?*, 3 *Kwartalnik Prawa Prywatnego*, 371 (1994).

⁴⁹ M. Jankowska, M. Pawelczyk, ‘Brand’ as a personal interest. *Legal and economic insights*, 59 *Studia Prawnoustrojowe*, 137–161 (2023).

also intended to establish whether a brand can truly constitute a separate personal good independent in its scope of protection from intellectual property goods. Might a new personality good, such as a brand, override the conceptual framework of the IPR system? Or maybe the term should detach itself from its economic definition and accommodate a new one that can interact with the legal patchwork of already defined terms.

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Abstract

Brand Imitation. A Cul-de-Sac or an Opportunity for Fashion Lawyers?

The most recent research demonstrates that the legal sciences are no longer a distinct field of study. The differing interpretations of common terms by practitioners of, respectively, law, technology, psychology and medicine, often leads to confusion when legal practitioners attempt to reuse this terminology in a strict legal context. Even if interdisciplinary discussion in the fields of law and technology seemed preposterous twenty years ago, the need for it is today clear due to the development of technology law. The relationship between law and business follows the same pattern, in part because many phrases and ideas used in economics superficially resemble those used in law. In a world where different professionals who serve entrepreneurs use the same terminology in different ways, an expectation gap arises and business owners may be misled about the possibilities for protecting their assets. This paper begins a debate of a concept of brand that the Warsaw Court of Appeal has identified as a personal interest in a number of distinct judgments.

Keywords: brand, personal interest, copyright, fashion, branding, jewellery

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