



Evidence of Use guidelines

Evidence that a trade mark has been, and still is in use, is required in legal proceedings to demonstrate that a trade mark is valid, has a reputation, is distinctive and has obtained a level of goodwill from consumers. It is therefore imperative for trade mark owners to produce and maintain a database of evidence to be in with the best chance of maintaining and enforcing their trade mark rights.

What constitutes evidence?

Use can be required in relation to a product itself or in relation to a service being provided. Therefore the following documents can constitute 'Evidence of Use' of a trade mark ('Mark'):

- Packaging, labels
- Catalogues
- Invoices
- Advertising materials such as adverts or posters
- Price lists
- Business papers
- Brochures
- Stickers
- Leaflets, pamphlets
- Photographs
- Newspaper/magazine articles
- Witness statements, affidavits
- Accounts information
- Turnover figures
- Survey evidence such as AC Nielsen data
- Expert evidence

What should evidence demonstrate?

Place of use - Evidence of Use must demonstrate use in a substantial part of the territory concerned.

- If the Mark is a European Union Trade Mark (EUTM), use must be demonstrated in a substantial part of the EU. Use in one member state may not be sufficient. Use solely for export purposes is deemed genuine use in the EU.

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- If the Mark concerned is a National Trade Mark, the Evidence of Use must show that the Mark has been used in a substantial part of the territory where it is registered.

Dates of use - Evidence of Use must demonstrate use within the relevant time period in question.

- All evidence should be dated to confirm that the use is within the relevant period. Dates shown on evidence are carefully examined. Evidence submitted without any indication of the date may not be taken into account.
- Despite the above, undated evidence or evidence filed which shows use outside of the relevant time frame may be relevant when assessing the evidence provided. As a whole it may help illustrate the context of the use of the Mark, and may indirectly prove the Mark has been used within the relevant time frame. In particular, undated evidence may be relevant where use relates to such industries where it is common for evidence not to be dated, for example, on restaurant menus.

Extent of use - use does not need to be quantitatively significant.

- Case law has confirmed that there is no de minimus rule. Evidence of Use can be use by only one consumer.

Nature of use - use of the Mark must be genuine, and not merely token use, in order to preserve rights.

- Use must be trade mark use i.e. use that allows consumers of the goods/services to determine the origin of those goods/services
- Use must be use of the Mark in the course of trade e.g. use in the context of an ongoing business in the public domain
- Use must be use made by the proprietor or by a third party who has the consent of the proprietor
- Use must be use of the Mark as registered or a variation of the Mark that does not significantly alter the distinctive character of the Mark

Word Marks - Usually a difference in letters or words constitutes an alteration of the Mark. Adding elements to a Mark or omitting elements from a Mark are more likely to alter the distinctive character of a Mark.

Figurative Marks – A change in a figurative element of a Mark will be held to alter the distinctive character of the Mark if that figurative element is the dominant element of the Mark, when assessing the Mark as a whole.

Colour Marks – In order for a colour Mark to be considered as being used as registered, it must be used in the colours the Mark is registered for. Use in black and white may be held to alter the distinctive character of the Mark.

- Use must be use on the goods/services the trade mark is registered for. If use can only be shown for some of the goods/services the Mark is registered for, then the Mark will only be deemed valid for those particular goods/services.

What has been considered insufficient Evidence of Use?

- One invoice for 180 pairs of shoes
- Two invoices for a total of 122 items of clothing and four undated labels with no indication of the goods they had been affixed to
- One bill of lading showing delivery of 40 packages of sherry

What has been considered sufficient Evidence of Use?

- The continuous sale of fruit juice during a period of eleven and a half months with a total volume of sales of €4800
- Evidence of sales for around 2000 furry toy animals in the high-priced market sector
- One invoice referring to the sale of one high-precision laser cutting machine for a high price, a catalogue describing its performance and some photographs depicting the product.