

Post-sale confusion, parasitic competition and the boundaries of imitation freedom of the external appearance of a product

Author's name: **Marek Salamonowicz**

Title and affiliation: Ph.D. (dr jur.) University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration, Chair of Civil Law II and Commercial Law

Abstract

In the material, the problem of post-sale confusion with regard to the imitation of the external form of the product has been addressed. The argumentation of both supporters and opponents of this doctrine refers to morality. In the event of a post-sales confusion, there is no element of confusion on the buyers' side, who knows that he does not buy the original, but the purchased goods are attractive to him in terms of price with quality and aesthetic value. At the same time, one can see in the actions of the imitator certain features of parasitism. The question arises whether it is immoral to cause a mistake in the public as to the origin, reputation of the good that the consumer uses. Should consumers be restricted to access to products that imitate reputable goods? Consequently, what are the limits of imitation freedom? Answering these questions, the analysis of legal acts of trademark law, unfair competition of selected jurisdictions (the US, EU, UK, Germany, Poland) was made. There is a tendency to expand the protection of the external appearance of the product, occurring both in the sphere of legislation and case law. The fight against imitation can lead to maintaining and strengthening the strong market position of existing players by exclusive appropriation of the products' aesthetic features. Thus, such far-reaching protection is debatable from the perspective of moral foundations and assumptions of the intellectual property system. Identifying the trade dress with the trademark often leads the courts to take an approach aimed at protecting property rights. The doctrine of aesthetic functionality formulated in jurisprudence is a manifestation of a different tendency aimed at narrowing the protection of the external form of the product, which should not lead to combating against imitation in general.