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Keeping the Faith: the role of good and bad faith in IP Disputes

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Venue: Freshfields LLP, 100 Bishopsgate, London EC2P 2SR

Speakers: Anna Edwards-Stuart KC, 11 South Square Chambers
Christopher Stothers, Freshfields LLP

Chaired by Giles Parsons, Browne Jacobson LLP

Introduction

The seminar explored the role of good and bad faith in intellectual property (IP) disputes, focusing on the distinct approaches under trade mark and patent law. Drawing on recent case law, statutory frameworks and practical examples, the speakers examined how bad faith allegations arise, their legal tests, and the broader policy objectives underlying these doctrines.

Trademarks and Bad Faith – Anna Edwards-Stuart KC

Legal Landscape and Key Developments:

- Section 3(6) of the Trade Marks Act 1994 provides that a trade mark shall not be registered if the application is made in bad faith.
- There is no statutory definition of "bad faith"; the courts interpret it through a mix of subjective intention and objective standards typical in the field.
- Bad faith involves dishonest intention or conduct that falls below acceptable commercial behaviour.

Case Law Focus – Sky v SkyKick:

The Supreme Court clarified that applying for trade marks with no intention to use them, especially for a wide range of goods/services, may constitute bad faith.

Overly broad specifications with no genuine commercial rationale can amount to a misuse of the system (register "cluttering").

Key points from the case:

- The assessment of bad faith is made as of the application date.
- Applicants may be required to justify their chosen goods/services if challenged.
- Failure to provide a credible explanation could lead to invalidation of the mark for the affected goods/services.
- The UKIPO is now more empowered to intervene ex parte if confronted with over-broad specifications.

Practical Insights:

- Applicants should ensure claims over goods/services are reasonable and defensible.



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- Policy emphasis is on balancing effective competition and a transparent register with fair protection for businesses.
- Post-SkyKick, guidance encourages careful drafting and documentation of genuine commercial intentions.

Patents and Good/Bad Faith – Christopher Stothers

Statutory Framework and Scope:

The Patents Act includes multiple references to good/bad faith, functioning largely as:

- (i) A basis for allowing prior use or continued use after certain events, provided the use was in good faith (e.g., s.64 prior user rights, s.28A(4) restoration).
- (ii) A consideration in limiting or restricting damages following amendment of a patent, depending on whether the patentee or proceedings were conducted in good faith (e.g., s.62(3)).

Good/bad faith is also relevant in special cases like entitlement claims (s.37(9)), supplementary design right entitlement (Regulation 6/2002), and the context of SEP/FRAND licensing under wider legal principles.

Key Discussion Points:

- **Prior use rights:** Users who unknowingly began acts later covered by a patent, in good faith, may have a statutory right to continue.
- **Restoration and transfer:** Good faith is needed to benefit from protections if a patent is restored or transferred following entitlement litigation.
- **Infringement and damages:** Where specifications are amended, damages may be restricted if the patent was not formulated or asserted in good faith.
- In practice, very few cases turn on these doctrines—often due to proof difficulties (subjective matters cloaked by privilege) or the rarity of disputes over prior user rights or entitlement out of time.
- In FRAND/SEP litigation, “good faith” is critical, often based on civil law codes (German, French) or TFEU concepts, indicating a broader role where patent and competition law intersect.

Thematic and Policy Considerations

- **Trade marks:** The courts and registry are taking a more robust approach against misuse, emphasising true commercial intention and a fair, uncluttered register.
- **Patents:** Good/bad faith acts primarily as a safety valve, protecting good faith actors and curbing unreasonable conduct, but rarely a centrepiece of litigation.
- Across both, policy aims are to ensure the IP system works for its intended purpose and not as a tool for commercial abuse, with increasing willingness by tribunals and agencies to scrutinise broad or strategic filings.