

# Well-known facts VS Right to be heard

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**Well-known facts**

**VS**

**Right to be heard**

- **Board does not have to ,hear‘ the party on facts which are well-known -**

More in detail:

1. What is a 'well-known fact' ?
2. What means the 'right to be heard' ?



## Well-known facts:

### **FACT VS. FICTION**

‘Fact’:

s.th. that occurred

- In the outer sphere
- - or in the inner sphere of a person (intent)

As opposed to

- Legal assessment
- Issues subject to an expert opinion

## Well-known facts:

‘Fact’ vs expert opinion:

Facts to be proven by **witnesses**.

**Witnesses** can’t be replaced, **experts** can.

*Obs: not the same concept as in ECJ procedural law regarding the scope of assessment*

## Well-known facts:

Synonymous to:

Office-known facts

Obvious facts



## Well-known facts:

Cases:

Dictionary meaning of a word:

GC T-424/07 of 20.1.2009, Optimum, § 46

Language skills in a Member State:

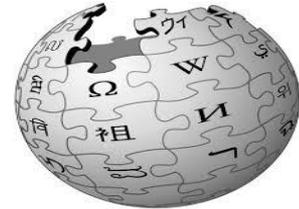
T-451/07 of 26.11.2008, New Look, § 23

*‘...a basic understanding of English on the part of the general public, in any event, in the Scandinavian countries, the Netherlands and Finland must be regarded as a well-known fact.’*

## Well-known facts:

Wikipedia:

Is not a dictionary and not a reliable source.



Well-known facts vs rules of experience:

Rules of experience also do not need proof; such as

- How consumers perceive the shape of the goods
- Whether consumers focus more on the beginning of a mark.

## National Law

- Relevant in the context of Art 8 (4) – right under national law in an unregistered sign
- And in the context of Art 8 (3) – mark filed by an agent of an owner of a mark registered or protected as unregistered mark in another country (not necessarily in the EU)

## National Law

- Must be proven by opponent
- Including the content of the national law
- Save to the extent the facts are known to the Office (from where? General knowledge, Guidelines, other cases ?)

## National Law

Cases:

- T-184/2 of 9.7.2014, Heatstrip, § 18-31:

Opponent had to prove Australian national law.

Partial presumption that it corresponds to UK law (as Common Law), the features of which are known, in concreto: reputation is goodwill and not a well-known mark.

## National Law

Cases:

- C-530/12 of 27.3.2014, Hands logo, EU:C:2014:186, § 34:

Opponent ‘must provide the Office not only with particulars showing that he satisfies the necessary conditions, in accordance with the national law of which he is seeking application, in order to be able to have the use of an EU trade mark prohibited by virtue of an earlier right, but also particulars establishing the content of that law.’

## National Law

Cases:

- C-263/09 of 5.7.2011, Elio Fiorucci, EU:C:2011:452, § 50:  
(the same)

## National Law

Cases:

- C-530/12 of 27.3.2014, Hands logo, EU:C:2014:186, § 34:

But ... The Office is free to examine whether the statements made by the opponent are correct – not bound by ‚false‘ presentation of the law.

## National Law

Opposition Guidelines:

- **Strict:** opponent must not only cite the relevant provision, but submit the very text, accompanied by a translation.

But ... The Office is free to substitute this from its knowledge and experience ?.

Opposition must always be rejected if no exact provision is cited.

## Right to be heard:

On ‘facts’

Not on ‘arguments’

Not on the content of the law

Not on the position the Office intends to take

## Right to be heard:

No need to hear the party if the decision will be based on another mark or ground for opposition than the one OD took into account:

T-176/13 of 9.12.2014 Generia/Generalia, § 32

## Right to be heard:

No need to hear the party if the decision of OD is annulled on the basis of a provision not examined by OD (here: Art 8 (3)), as long as the parties could discuss the point before OD, and no concept of a ‘loss of instance’:

T-184/12 of 9.7.2014, Heatstrip/Heatstrip, § 52

## Right to be heard:

Yes:

If BoA wants to base the decision on another absolute ground for refusal;

If BoA wants to base the decision on Internet or Wikipedia evidence not submitted by the Examiner.



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Thank you