III. Justification for the call for protection of socialistic brands from unfair appropriation

A. Introduction

A call for treating socialistic brands differently from normal signs is not per se impermissible, as trademark law already recognises groups of signs that are excluded from registration, such as certain shapes or official hallmarks[29].

However, it is more than reasonable to question why socialistic brands should be treated differently. It could be argued that because both the market and the perception of end users have been subject to immense and rapid changes since the fall of the iron curtain – and the transformations that took place after it – signs belonging to the group of socialistic brands simply do not carry any extensive selling power and do not possess other characteristics that would justify different treatment from that of other signs.

If anything, it could be contended whether socialistic brands might evoke attractiveness in end users other than the limited group consisting of users old enough to have experienced socialism themselves. It might also be contended that such associations (if any) have been greatly eroded by the ever rapid exchange of the information in the decades that followed the break-up of the socialist bloc. It could be added that the markets of the post-socialist period were dominated by end users showing strong preference towards the new brands. This in turn made the socialist heritage of brands an unnecessary aspect, devoid of any special economic value. What is more, it might be rightly pointed that many of the socialistic brands were associated with low quality and in fact carry negative connotations. This negative association might have been further strengthened during and after market transformation, as most of the state owned enterprises which were entitled to these brands were privatised, the survivors of this process being subject to turmoil as they were often unable to effectively compete in the free market economy. In other words, it could be

29 Art. 4(1)(h) TMD and art. 7(1)(h) EUTMR.

claimed that these brands have lost their distinctiveness and their re-registration should be allowed in order to save them from becoming generic.

All of the arguments presented above are considered and addressed in this section of the thesis. Socialistic brands were and are used to differentiate commodities affixed with them from other commodities. Having this in mind, the analysis of the justification of granting trademark protection is a natural first step in determining whether differential treatment of socialistic brands is justified. However, it should be kept in mind that trademarks do not exist in a vacuum. Trademark policy is more and more becoming a cultural policy.[30] Therefore, other areas of social sciences are also evoked.

B. Socialistic brands as signs used to distinguish commodities

1. Trademark law

Trademarks are signs used to distinguish commodities.[31] Their primary function is to indicate the source of commodities.[32] There are further functions of trademark that have been acknowledged in the jurisprudence of the CJEU.[33] It might be questioned whether legal protection of other functions of trademarks is justified[34] and if so to what extent, however it is unequivocal that in modern culture the role of trademarks goes far beyond

30 Burton Beebe, "The Semiotic Account of Trademark Doctrine and Trademark Culture", Graeme Dimwoodie, Mark Jamis (eds*), Trademark Law and Theory: A Handbook of Contemporary Research* (Cheltenham 2008), 59; Wolgang Sakulin, "Trademark Protection and Freedom of Expression: An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under European Law" (Kluwer Law International, 2011), 6.

31 Art. 3 TMD; art. 4 EUTMR.

32 P. (16) TMD.

33 Inter alia: Case C-487/07 *L'Oréal SA v. Bellure NV* EU:C:2009:378, [2009] ECR I-05185, p. 58.

34 Frank I. Schechter, "The Rational Basis of Trademark Protection" (1927) 40 Harv. Law Rev. 6, 813. It has however been argued that trademark law was not designed with an aim of providing protection of the per se commercial achievements of the producer (Inter alia: Martin Senftleben, "Bringing EU Trademark Protection Back Into Shape – Lessons to Learn From Keyword Advertising", < http://www.epip.eu/conferences/epip06/papers/Parallel%20Session%20Papers/SENFTLEBEN%20Martin.pdf> accessed 27.5.2016).

their source indicating function. Before we delve deeper into that territory, let us focus on the trademark law and the role it plays.

Trademarks are obtained through registration. An owner of a trademark right has the right to prevent others from using the mark in the course of trade.[35] The length of protection can be potentially extended indefinitely. This is justified by arguing that it leads to lowering the consumers search costs, by allowing the consumer to minimize the time she needs to search for a commodity characterized by certain qualities[36], thus positively affecting her decision processes by limiting the possibility of confusion[37]. The potentially infinite term of this exclusivity also serves as an incentive for the owner to invest in the quality of the product.[38] This in turn encourages competition between undertakings with regard to the qualities of the offered commodities. Undertakings are able to benefit from their previous actions by 'reaping' the goodwill and the attractiveness accumulated within the mark through previous actions.

In accordance to traditional trademark doctrine, uniqueness and differentiation of a trademark is gained through the use of it in its primary and essential origin function.[39] The value of the trademark lies in what could be described as 'its selling power'[40], its attractiveness. However, today trademarks themselves have become vehicles of values associated with commodities. Their attractiveness depends not only on the merits of the commodities but also on the uniqueness and singularity of the trademark, its psychological hold upon the public. This hold is acquired through action of the owner of a sign and end users' reactions to the sign and trademarks owners' conduct. This dialogic process[41] based on emotions of end users[42] also shapes the sign's uniqueness and differentiation from

35 Art. 10 TMD, art. 9 EUTMR.

36 William M. Landes & Richard A. Posner, "The Economics of Trademark Law" (1988), 78 The Trademark Reporter 3, 267.

37 George A. Akerlof, "The Market For 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 Quarterly Journal of Economics 3, 500.

38 *Ibid*.

39 Schechter (*supra* n. 34), 813.

40 Schechter (*supra* n. 34), 819.

41 Wolgang Sakulin (*supra* n. 30), 7; Martin Senftleben, „Trademark Law and the Public Domain" <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280058> accessed 16.6.2016, 13.

42 Laura R. Bradford, "Trademark dilution and emotion" <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334925&download=yes> accessed 26.5.2016, 5.

other trademarks, which in turn translates to the economic value of a brand. Since trademarks carry rich layers of meaning and association[43] and thus play an essential role in social and cultural discourse[44], the uniqueness and differentiation of the trademarks should be understood as being shaped by a wide spectrum of emotions evoked in the minds of consumers[45]. Anthropological research, for example, indicates that trademarks serve as signatures of authenticity, showing that the commodity bearing it is true to its origin while at the same time they configure fidelity in another sense by registering a real contact, a moment of imprinting by the proprietor of the trademark.[46] Since trademarks function as figures of fidelity they also inspire fidelity in the minds of consumers, who endorse them by forming a bond with them.[47] A trademark, just as any other sign that evokes interest among end users, "is altered when the image one consumes is a mimetic version of one's self-when one's mass subjectivity, public subjectivity, and minority subject-position are conflictual" [48].

With the development of modern consumer culture, the market presence of actors to which the trademarks point has grown so much that in the majority of instances the proprietors of the trademarks are no longer natural persons but rather fictional, legal persons. Currently trademarks point not to a commodity's source but rather refer directly to the trademark. Trademarks should at least point to the goodwill associated with the source. This goodwill should function as a guarantee of quality, as the real source of the commodity is further obscured, in many instances to the extent that it becomes debatable whether trademarks in fact indicate any specific source.[49] In summary, many examples show that the attractiveness of a brand results primarily from the capacity of the mark to form a bond

43 Wolgang Sakulin (*supra* n. 30), 6; Johnathan E. Shroeder, "Brand Culture: Trade Marks, Marketing and Consumption" in L. Bently, Jennifer Davis & J.C. Ginsburg (eds) *Trademarks and Brands* (Cambridge 2008), 161.

44 Senftleben "Trademark law…" (*supra* n. 41), 13.

45 *Supra* n. 42.

46 Rosemary J. Coombe, "Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers" (1996) 11 Cultural Anthropology 2, 205.

47 *Ibid*.

48 *Ibid* 219.

49 Burton Beebe, "The semiotic analysis of trademark law" (2004) 51 UCLA Law Rev. 3, 646;Graeme Dinwoodie, "Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress" (1997) 75 North Carolina Law Review 2, 483.

with consumers and not the actual entity from which the commodity bearing a trademark originates.

As noted above, the justification for trademark protection is based on minimising consumer search costs and creating incentives for competition based on quality of commodities. However, consumer search costs are minimized only to the extent that a trademark actually refers to a product or source for which the end user is searching and the quality of product is enhanced only to the extent that the owner of a trademark attaches that trademark to products whose quality it actually controls.[50] Trademark owners' interest play a role in reducing the search costs only to the extent that they can be harnessed for the benefit of the consumer, namely to the extent the benefits of the goodwill encourage the mark owner to invest in quality.[51]

A grant of exclusivity to a sign should be limited to instances in which it encourages competition between undertakings on the ground of quality of the product, which translates to consumers associating the mark affixed on it with certain qualities.[52] In order to ensure such competition and limit the possibility of obtaining signs which would give an unfair advantage, trademark law envisages certain groups of signs that are excluded from trademark registration.[53] The question at hand ought to be if there is a public policy interest in limiting the possibility of registration of socialistic brands and if yes than to what extent. The registration of such sign will be unfair if it leads to confusion that deceives the end users[54] and thus does not lead to limiting the search costs, if it fails to create incentives to invest in the quality of commodities thus discouraging competition or if there are other reasons why a socialistic brand should not be a subject of trademark exclusivity. In order to determine this, we must first explore if socialistic brands possess a unique attractiveness that differentiates them from other signs.

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50 Beebe, "The semiotic account…", (*supra* n. 30), 48.

51 Mark P. McKenna, "A consumer Decision-Making Theory of Trademark Law" (2012) 98 Virginia Law Review 1, 77.

52 Akerlof, (*supra* n. 37), 500.

53 *See* art. 4 TMD and art. 7 EUTMR.

54 McKenna (*supra* n. 51), 124.

2. Empirical evidence

The continuous presence of socialistic brands on the markets[55] might be evoked as evidence of their special attractiveness. However, it could be equally plausibly counter argued that these brands exist due to the efforts of their proprietors who used them after the fall of the iron curtain; that these brands prosper not because of but rather in spite of their heritage.

On the other hand, if socialistic brands possess no unique type of attractiveness how could one explain their re-registrations?[56] Why would undertakings prefer signs that could arguably be considered as aesthetically outdated instead of opting for new and more attractive signs?

Re-launches of Pewex and Unitra and other vintage brands (practices of such re-launches are not limited to territories of the post-socialist countries[57]) could indicate that the registering undertakings believe that end users are attracted by these brands and the particular associations that they carry. As the business of the undertakings in the capitalistic markets is primarily centred on maximization of profits, it entails that these entities should act rationally, therefore at least some special selling power must exist. Strong interest in these signs is further proved by numerous legal disputes over the rights to these brands.[58]

Of course this evidence alone cannot be the basis of claims that the attractiveness of socialistic brands is different from that of other signs. However, it helps in identifying two main types of scenarios involving socialistic brands. The first one, a 'succession scenario', occurs in instances in which a socialistic brand has been or is being registered by a company that is a legal successor of the original state owned enterprise which was entitled to use the brand. The second type, an 'abandonment scenario', involves a fact pattern in which a socialistic brand is registered by a company that has no ties to the original state owned enterprise.

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55 *Supra* n. 4, 4.

56 An extreme example of re-registrations is the case of an Armenian sweets manufacturer Grand Candy which seems to have based part of its business model on registering various socialistic brands as trademarks, including brands from other post-socialist territories (*See*: Դուք «Գրանդ էնդիի» շա՞տ եք սիրում (168 ժամ, 24.10.2015) <http://archive.168.am/am/articles/20366> accessed 26.5.2016.

57 Jerome Gilson, Anne Gilson LaLonde, "The Zombie Trademark: A Windfall and A Pitfall"(2006) 98 Trademark Reporter 6, 1280.

58 *See* part IV of this thesis.

In post-socialist societies it is common knowledge that the vast majority of the socialist state enterprises were subject to various transformations after the fall of the iron curtain.[59] Thus, in instances of 'succession' it is unlikely that the use of socialistic brands would result in confusion of consumers with regard to given commodities still being produced by the original state enterprises. However, in instances of 'abandonment scenarios' it is possible that some end users, due to the strong cultural meaning of these signs, could assume that the branded commodities are produced by a legal successor of the state entity. In addition to this there is also a risk, in both scenarios, that consumers could also be under the impression that the commodities are produced domestically or even in particular historical locations in which they used to be produced. At this point it should be noted that confusion with regards to the quality could affect choices of the consumers to a very limited extent as the socialistic products were often synonymous with low quality.[60] Since it is unlikely that consumer confusion will occur in 'succession' scenarios and because it only might occur in 'abandonment' scenarios in limited instances, potential confusion of consumers cannot be evoked as a sole justification of a call for differential treatment of socialistic brands.

The dominance of the so-called emotional branding in the contemporary marketing might help explain how the particular character of socialistic brands translates to their popularity among both the undertakings and end users. Today, the most successful commodities are the ones which manage to form a bond between the consumer and the commodity by engaging with the consumer's emotion.[61] That bond is more easily formed if brands possess a lasting history which translates to cultural connotations which resonate within the minds of consumers. Naturally, in order for the brand to acquire a genuine cultural connotation it needs to be used for an extensive period of time. This means that such unique meanings are highly sought after as forming them is highly time and resources consuming. For a proof of the value of cultural connotations, we need not look father than

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59 On privatisation in Poland, inter alia: Piotr Kozarzewski, "Corporate Governance and Secondary Privatisation in Poland: Legal Framework and Changes in Ownership Structure" (Center for Social and Economic Research 2003) <http://ssrn.com/abstract=1443803> accessed 25.5.2016.

60 Berdahl (*supra* n. 6), 195.

61 Bradford (*supra* n. 45), 5; Also in general *see* Edward L. Bernays, "Biography of an Idea: Memoirs of Public Relations Counsel" (Simon and Schuster 1965).

at practices commonly employed by proprietors in order to evoke the history of the brand in the minds of the end users[62] such as the prominently used phrases like 'since' or 'established in'. Additionally, cultural connotations rooted in history make socialistic brands less prone to being affected by other circumstances that could affect the end user's preference. The attractiveness of such brands can be rebuilt by evoking their unique attractiveness rooted in their cultural connotations, for example through promoting 'coming back to the roots'.

In case of socialistic brands, the emotional bond of consumers, which is the core of their cultural connotations, is based on highly complex relation to the peculiarities of socialism and could be attributed to feeling of nostalgia, national sentiment, status of the purchaser or longing for a past that offers a national identity that no longer exists.[63] What differentiates socialistic brands from majority of other 'vintage' brands is that their cultural connotations did not result from the efforts of their owners but rather from their shared historical pedigree.

Socialistic brands were used as semantic links that pointed to the origin of the commodities, through utilising their commercial connotations. Both the cultural connotation and commercial connotation of the socialistic brands are subject to change. These changes will depend on the scale and other properties of the use of such brands.

For example, a use of the Unitra brand by its successors for the purposes of export services and real estate had a very limited effect on the cultural connotation of this sign and its limited commercial presence (as compared to the times of socialism) weakened its commercial connotation. Brand owners will naturally act to maintain or even strengthen the cultural connotation. Unlike the commercial connotations the cultural connotations are usually strengthened over time. However, it should be noted that since the cultural connotations of the socialistic brands spur from their commercial connotation, even in cases of abandoned brands both of these connotation will most likely remain strong.

As it is further shown in the section dedicated to semiotic analysis, in many instances continues use of certain socialistic brands or just references to socialism positively affect the preferences of the end users towards other socialistic brands. Abandoned or forgotten socialistic brand

62 For examples of such brands *see*: Matt Haig, "Brand Royalty: How the World's Top 100 Brands Thrive & Survive" (Kogan Page Publishers 2006).

63 Berdahl (*supra* n. 6), 195.

will remain in use through non-commercial communication. This could for example take form of a reference to past times in which consumption of one branded commodity was connected to the consumption of other branded commodities.

An example of exploitation of this commercial effect of the cultural connotations was the two-stage lunch of the Pewex e-platform. Firstly, the domain pewex.pl[64] hosted a user-driven platform for sharing pictures connected to the times of socialism, including pictures of socialistic brands other than Pewex. Through this, the new owners of the Pewex brand were able to expand the brand's attractiveness before the launch of their core service. They accomplished this by employing an emotional branding strategy based on referring to nostalgic memories of socialistic brands through both user generated and edited content, both of which had the watermark 'pewex.pl' embedded into them. A less direct example would be the articles evoking brands associated with forgone times. Another example of exploiting the effect that the cultural connotations have on consumers comes in form of a retail strategy of one of the biggest Polish chains of supermarkets: Biedronka, which announced an assortment of vintage branded products.[65]

In some common law jurisdictions, it has been recognised that an ability of a trademark to identify the source of a commodity can reside in a sign long after branded commodities are no longer offered. The 'residual goodwill' is claimed to justify protection of such signs many years after the relevant trademark has been abandoned, as it is claimed that the use of such would cause damage to the previous owners.[66] Such reasoning has limited application to the case of socialistic brands. Firstly, because in almost all instances the socialistic producers of the commodities that were originally branded with such signs no longer exist in their original form. Secondly, the unique attractiveness of socialistic brands is anchored to their shared historical pedigree. It cannot be explained purely by pointing

64 Currently the platform is available at <http://retro.pewex.pl/> accessed 26.5.2016.

65 *See* official announcement of the launch of the vintage assortment <http://www.biedronka.pl/pl/news,id,877,title,biedronka-zaprasza-w-podroz-sentymentalna-z-produktami-vintage> accessed 26.5.2016.

66 Valerie Brennan, T.J. Crane "Gone But Not Goodbye: Residual Goodwill in Abandoned U.S. Trademarks" (Inta Bulletin, 15.8.2015) <http://www.inta.org/INTABulletin/Pages/GoneButNotGoodbyeResidualGoodwillinAbandonedUSTrademarks.aspx> accessed on 26.5.2016.

to the goodwill, by evoking the reputation of the previous user of a trademark and the confidence of the repeat customers with regard to quality of the branded commodities. In many instances the commodities affixed with the signs were in fact of inferior quality. If their quality is fondly remembered it is mostly due to the nostalgic reproduction and falsification of the experiences of the past.[67]

The evidence presented in this part show that socialistic brands possess unique attractiveness that is attributed to their cultural connotations gained through their use in unique circumstances – their shared historical pedigree. However, in order to determine whether this unique characteristic justify a call for additional protection of these signs, a more thorough understanding of it is needed.

C. Implications of semiotics

Semiotics is a branch of social science dedicated to studying signs and their systems, investigating „the process and effects of the production and reproduction, reception and circulation of meaning in all forms, used by all kinds of agents of communication"[68]. For the purpose of semiotics a sign is defined as every object which in some respect or capacity has a meaning to somebody for something.[69] As trademarks are in their essence signs used to distinguish commodities, semiotics provides a wide variety of tools that can be employed in exploring the role and the boundaries of these signs.[70] Semiotics focuses on the sign nature of these concepts, not their legal status, thus the analysis presented below is applicable not only to trademarks but also to other signs used to distinguish commodities. However, highlighting the semiotic relevance of trademarks is not intended as a suggestion that the economic account of trademarks should be discarded in favour of the semiotic account[71]. Both of these accounts

67 Berdahl (*supra* n. 6), 202.
68 Beebe, "The Semiotic Account…" (*supra* n. 30), 261.
69 Charles Sanders Peirce in Charles Hartshorne and Paul Weiss (eds) "Collected Papers of Charles Sanders Peirce: Vol. II, Elements of Logic" (Belknap Press 1932), 228.
70 Beebe, "The Semiotic Account…" (*supra* n. 30), 43-44.
71 *Ibid*.

should be used complementarily, with semiotics being employed to guide us in filling the gaps in the economic account.

Trademarks, brands and other signs possess an internal structure.[72] A triadic mode introduced by Charles Sanders Pierce[73] seems to be intuitively suited for the purposes of explaining the semiotic structure of trademarks. It identifies three subsign elements: a signifier (which is the perceptible form of the sign, such as a word 'pen'), a signified (a meaning to which the signifier refers, such as the idea of a pen) and a referent (the tangible pen). In the realm of trademarks this translates to the perceptive form of the trademark being the signifier, attractiveness to which the trademarks refer to are signified and the commodity to which the mark refers is a referent. The elements of this system are mutually constitutive of and at the same time independent.[74] Users of the signs share a signified with other users through use (communication) of a signifier. The referent (the commodity itself) is the most stable of these elements as it belongs to the corporal world. The signifier (the brand, trademark) is less stable as it could be a combination of words, sounds or shapes that point to the meaning. Whilst the signified, the meaning (the attractiveness), will vary depending on many factors, including the circumstances of the use of the sign and the context of it. It is important to keep in mind that a sign is a system with relational characteristics and users can only perceive some element of this system.[75]

Today we are experiencing the breaking of the triadic structures of trademarks due to expansion of the scope of trademarks by actions of legislators, courts and the proprietors of the trademarks. This highly complex discourse[76] take many forms including enacting law, amending it, its interpretation as well as various actions of the trademark proprietors[77]. As any other discourse it "combines signs which have referents, of course, but these referents can be and are most often 'chimeras'" [78]. The widening of the scope of protection of trademarks, expansion of emotional branding

72 *Ibid*, 44.
73 Peirce (*supra* n. 69), 228.
74 Beebe, "The Semiotic Account…" (*supra* n. 30), 45.
75 *Ibid*, 45, *see* also: Jason Bosland, "The Culture of Trade Marks: An Alternative Cultural Theory Perspective" (2005) 10 Media & Arts Law Review 99.
76 *Ibid* 48, 49.
77 Jason Bosland, (*supra* n. 75), 7.
78 Roland Barthes & Richard Howard (tr) "Camera Lucida: Reflections on Photography" (Farrar, Straus and Giroux 1981), 73.

and the modern culture of consumption has led to a transformation of trademark system into a system in which signs no longer refer to commodities (referents), which are the primary subject of consumption, but rather to signs themselves.[79] An often evoked example of this trend is that of the Nike trademark. It no longer tells the end user where a product bearing it has been produced, who designed or who made it but rather suggest that the trademark itself produced the commodity[80]. The role the modern trademark plays in branding could be described as the role of obscuring the origin of the commodity, covering it over with a myth of the origin[81]. The origin function is obscured by layers of connotation which create a superior myth. In the case of the Nike brand, this myth consists of connotations of success or style. Socialistic brands are signs that naturally, due to their accumulated cultural connotations, communicate such a 'mythical' origin. It could be argued that this is very well the essence of the magnetism they have in the minds of end users.

If businesses can no longer rely on the strength of the commodities-referents, namely the qualities of the commodities offered, the focus naturally shifts to the 'chimeras', the signifieds. This translates into a strong preference or even necessity of obtaining signs with extensive magnetism. The more this magnetism is characterised by unique circumstances close to the end user the better. As trademarks no longer serve a role of lifeless symbols, they become autonomous, complex figures that in their own right carry with them relations of the end user to them[82]. Socialistic brands already possess such complex relations to end users, rooted in cultural connotations shaped by their use in the circumstances of socialism.

In order to determine if there is a need for additional protection of socialistic brands we need to investigate how their magnetism translates to trademark distinctiveness. Beebe employs semiotics in arguing that the trademark doctrine should recognise that trademark distinctiveness consist of two separate aspects. He identifies the 'source distinctiveness', which seems to mirror the concept of distinctiveness widely recognised in the trademark doctrine, and the 'differential distinctiveness', an extent in which a trademarks' signifier is distinctive from signifiers of other signs in

79 Burton Beebe, "The Semiotic Account…" (*supra* n. 30), 50.
80 Ibid 52; Paul Manning (*supra* n. 1), 45.
81 Burton Beebe, "The Semiotic Account…" (*supra* n. 30), 52.
82 Manning (*supra* n. 1), 45.

the trademark system[83]. Differential distinctiveness is based on Saussier's concept of value of a sign, in accordance to which sign value issues from the internal relations between the parts of the structure of the sign and other signs existing in the system.[84] This value of a sign is affected by varied circumstances. These include not only circumstances of how a given sign functions but also other existing signs, their value and the value of the groups they belong to.[85] This concept of value and the concept of differential distinctiveness offer a more comprehensive explanation of what constitutes magnetism of socialistic brands. A sign in most instances will increase its value the more often it is being used and the more unique that use it. During socialism, socialistic brands had usually little competition on their relevant markets, thus they held a strong position in the sign groups they belonged to, namely the brands of a given type of commodity and brands on the market in general. As they have been in use for a substantial time and in peculiar circumstances, which affected their connotations, they currently belong to many other groups. They exist not only as commercial signs but also as cultural signs. Due to these affiliations, these signs are still used today in movies, books and other cultural means. Furthermore, some of the socialistic brands, due to the scarcity of alternatives, were used so often in the daily socialist culture that in some instances they became synonymous with certain types of commodities. Another factor that affects the sign value of them was the limited access to the sources of information in socialism. The few media available were functioning under the watchful eye of the government, which made sure that socialistic brands were repeatedly praised, as they constituted an integral part of propaganda. All of this shows that because of their extensive use and a firm place in the memory of the post-socialist societies, today socialistic brands possess a unique level of differential distinctiveness accumulated in the cultural connotations they carry. The time factor also plays and important role as brands, which have acquired differential distinctness and have steadily kept it through time are more likely to retain it[86].

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83 Beebe "The Semiotic Account…" (*supra* n. 30), 52.

84 Ferdinand de Saussure, Weds Baskins (tr.), Charles Bally and Albert Sechehaye (eds.) "Course in General Linguistics" (1966 McGraw-Hill Book Co), 112.

85 Beebe "The Semiotic Account…" (*supra* n. 30), 53.

86 Anne Meneley, "Time in a Bottle: The Uneasy Circulation of Palestinian Olive Oil" (2008) Middle East Reporter 248, <http://www.academia.edu/474517/Time_i

In contemporary practice, the main goal of any branding attempts of an undertaking is to establish, strengthen and stabilise associations in the minds of end users.[87] Socialistic brands offer a unique emotional link to the history of the post-socialist nations and since the access to the commodities in the socialist era was scarce they also carry certain positive connotation of the sought after signs of times gone by or identity that was stripped from the end users in the modern times.[88]

A possible example of this unique magnetism can be found in the warm reception of the comeback of the Unitra brand, despite that arguably the old products of the Unitra could not rival the quality of craved imported west counterparts. Conclusions from the previous part find affirmation here. The majority of new trademarks could not possibly offer such a high degree of differential distinctiveness. In some aspects, efforts to compete with the socialistic brands would be futile, as their magnetism spurs from circumstances belonging to a historical era long gone. This limited availability of such signs with genuine socialist attributes further increases their differential distinctiveness.

Additionally, Beebe identifies a concept of 'sign value' which he describes as commercial magnetism, uniqueness, singularity and identity of the sign.[89] Beebe points out that this value differs from the economical and use sense of value. It is rather a "'commodities' differential value as against all other commodities, and thus the commodity's capacity to differentiate the consumer"[90].

The identity of the sign forms a particularly important part of the magnetism of a socialistic brand, as modern consumers use trademarks in order to communicate with each other through the commodities they consume.[91] Socialistic brands offer certain truly unique messages that convey identity, varying from endorsement of the national history, sophistication expressed through choices of vintage commodities, style evoking the bygone days or simply an identity that is rooted in past personal experiences. These messages do not have to be true to the reality of the socialis-

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n_a_Bottle_The_Uneasy_Circulation_of_Palestinian_Olive_Oil> accessed 25.6.2016, 18.

87 Moore, (*supra* n. 3) 343.

88 Berdahl (*supra* n. 6), 199, 200.

89 Beebe "The Semiotic Account…" (*supra* n. 30), 62.

90 *Ibid*.

91 Bosland (*supra* n. 75), 13.

tic times. They can be nostalgic reproductions and falsifications of the experiences of the past[92].

To show the uniqueness of the messages that socialistic brands offer we could once again employ the example of Unitra. Since there were almost no Polish competitors in the market for audio equipment, the sign Unitra has 'a monopoly' to certain messages.

Today a person wearing a replica of Sn-50 or another Unitra product communicates through this endorsement her savvies of Polish popular audio culture. Since this message can't be communicated through consumption of other brands, exclusivity to it and with it it's cultural connotations, would give a proprietor of an unjustifiably appropriated brand a far reaching advantage over its competitors. This advantage would be gained without bringing any benefits to consumers, as today a magnetism of proportional strength would have had to been 'earned' through years of providing consumers with quality commodities.

The extent that these semiotic findings affect the situation of various undertakings will vary depending on the characteristics of a given product market and the sophistication of the end users. However, empirical evidence of advertising methods employed by Ursus, a Polish producer of agricultural equipment and machines[93], suggests that even in cases of markets characterised by specialised end users the magnetism of a socialistic brand conveys extensive value.

Semiotics offer a sound explanation of how cultural connotations of the socialistic brands can make them highly distinctive and valuable today. An abundance of unique messages and references, which are semiotically connected to these signs through their cultural connotations, contribute to their magnetism.

Signs, as with the language and the culture they belong to, cannot exist without people. This has been recognised in semiotics, which identifies the phenomenon of answerability.[94] It is through the answerability of the user that a sign gains life, shape and meaning. Recognising this, modern branding aims to create an active emotional response of consumers through use of the distinctiveness and uniqueness of socialistic brands.

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92 Berdahl (*supra* n. 6), 202, 207.

93 See: History of Ursus on their official web page <http://en.ursus.com.pl/History> accessed 25.6.2016.

94 Mikhail Bakhtin, Vadim Liapunov (tr), Michael Holquist & Vadim Liapunov (eds) "Art and Answerability" (University of Texas Press, 1990), 2.

This is most effective through creating understanding of the brand in users' minds by referring to their memory, identity, feelings, in all of which cultural connotations play a vital part.[95] To be able to fully answer whether the unique social connotations of socialistic brands justify a call for their additional protection, we must consider how such magnetism translates to individual and group behaviour.

D. Implications of social psychology

One would be right to ask how the magnetism of a socialistic brand translates to human behaviour. Moreover, if only a marginal group of end users feels such magnetism, how does it affect the views of the majority? The 'minority influence', a phenomenon first described by Serge Moscovici[96] offers a potential answer to these questions.

Minority influence is a phenomenon of social influence attributed to an exposure of the majority to a consistent minority view. This influence is felt by the majority only after a period of time and generally leads to private acceptance or even internalisation of the views expressed.

Certain conditions have to be met in order for the minority effect to take place: consistency of the minority in their opinion, confidence that the views expressed are correct, the opinion must appear to be unbiased to the remaining part of the society and it must be resistant to the social abuse and pressure of the majority. It should be noted that Moscovici's theory has been the subject of criticism.[97] However, since it is the most established theory debunking the one-sided conceptualization of social

95 Mikhail Bakhtin, Vern W. McGee (tr), Caryl Emerson and Michael Holquist (eds) "Speech Genresand, Other Late Essays" (University of Texas Press, 2006), 163.

96 Serge Moscovici, Maria Zavalloni, "The Group as a Polarizer of Attitudes" (1969) 12 Journal of Personality and Social Psychology 2, 125; Serge Moscovici, Social influence and social change (Academic Press 1976); Serge Moscovici, "Toward a Theory of Conversion Behaviour" in Leonard Berkowitz (eds), *Advances in Experimental Social Psychology vol 13* (Academic Press 1980).

97 Peter Kelvin, "Book Review: Social Influence and Social Change by Serge Moscovic" (1979) 9 European Journal of Social Psychology, 441; Saul McLeod "Moscovici and Minority Influence" (*Simple Psychology*, 2007) <www.simplypsychology.org/minority-influence.html> accessed 26.5.2016.

influence[98], it seems most suited to serve as the basis of our consideration. Furthermore, results of other behaviourist experiments[99] suggest that some of the requirements indicated by Moscovici, most notably the consistency of views, might not even be prerequisite for the minority effect to take place.

Let us imagine an extreme hypothetical scenario of a fictional socialistic brand Comrade in a post-socialistic country in which a small minority of end users expresses the view 'I desire Comrade-branded sweets'. It is based solely on the magnetism of the brand. This minority is limited to some end users who remember the Comrade-branded commodities from the times of socialism. After the fall of socialism all socialistic brand have been abandoned in this hypothetical country. Currently there are no brands of sweets or any other brands on this market which evoke connections to the times of socialism. The view has been expressed by the minority consistently since the Comrade branded sweets disappeared from the market.[100]

Due to the low level of complexity of the view 'I desire Comrade-branded sweets'[101], the bar for the minority effect to take place would be set rather low. Firstly, the minority view in our case would easily meet the consistency requirement. The minority has to be consistent in its view as to the desire itself, not in the reasoning behind their craving of the Comrade-branded sweets. It is of little relevance whether the Comrade-branded sweets are desired due to such circumstances as fond memories associated with these commodities or general nostalgia for socialism, as long as the end user express the view. Secondly, the requirement of confidence in the fact that the views presented are correct would also be easily met. It would be very difficult to question correctness of consumer preferences unless

98 Charlan Jeanne Nemeth, „ Minority Influence Theory" in Paul A. M. Van Lange, Arie W. Kruglanski and E. Tory Higgins (eds), *Handbook of Theories in Social Psychology vol 2* (Sage 2011), 364.

99 Nemeth (*supra* n.98), 364; Charlan Jeanne Nemeth „The Differential Contributions of Majority and Minority Influence" (1986) 93 Psychological Review 1, 30.

100 The minority size would be subject to change through time. Some would abandon their views; others would revert or even re-discover the view through the experiences with the new brands or other experiences.

101 Compared to other views such as for example 'The Roman Catholic Church should accept divorces' which bring with them much more complex considerations which in turn make them in some circumstances harder to accept by the majority.

there are some additional extreme circumstances. Thirdly, the opinion would most likely appear unbiased to the majority as it would be judged as no more biased that other typical consumer preferences. Finally, the opinion must be resistant to the social abuse and pressure of the majority. Again, this view is no more biased than other consumer preferences. Furthermore, due to specific characteristics of the socialist market and the lack of alternatives, the Comrade brand would have been used often and with high intensity. This would translate to its strongly vested presence in the collective memories of the society. The brand would have been referred to in cultural media. The majority end user would be affected by these sources, thus making them receptive to the magnetism of the brand. Due to the abundance of cultural connotations, the majority would be very likely to accept the view. Only in particular strong cases, characterised by extreme historical aversion to a sign and its connotations, would the majority strongly oppose such views.[102] It should be noted that even in societies that have been widely known to perceive the socialist period negatively, socialistic brands possess strong magnetism. Mere years into unification of Germany, so many East German consumers showed such strong preference towards eastern socialistic brands that specialty shops offering them emerged.[103]

Taking all of this into the account, it is highly likely that even a socialistic brand characterised by magnetism felt only by a limited minority could gain a wide appeal through the minority influence. Even in extreme examples, there would be a strong incentive for the undertaking to obtain such socialistic brands.

Brand owners benefit from the minority effect through exposure of the majority to the minority views. This could be achieved through marketing actions but also indirectly through channels of information, such as news articles. In many instances due to the minority views concerning a given socialistic brands, news of a 're-launch' of it will be considered newsworthy.[104]

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102 A real-life example of similar circumstances would be the Palestinian fair trade olive oil. Through circumstances of hardship in producing it, its image has become so strongly associated with the Israeli occupation that it is almost impossible for it to become free of this meaning. It has become a 'brand' of the Israeli occupation. (See. Meneley (*supra* n. 91), 18).

103 Berdahl (*supra* n. 6), 200.

104 *Supra* n. 4, 5.

An example of a successful use of such channels would be the above presented case of Pewex.

Another example of utilisation of the minority would be the case of the audio equipment brand Unitra. Its owners have utilised a particularly interesting strategy by actively moderating a social media page that purposefully unites both the fans of the old products and the purchaser and fans of the new post-2014 products.[105]

The example of the Pan Tu Nie Stał brand could also be used. The majority of buyers of the commodities of the brand are aged 18-34[106], of which only a small proportion are likely to remember the socialist period. Pan Tu Nie Stał can serve as an example of how strongly the cultural connotations residing in signs associated with socialism translate to their magnetism, in turn allowing for the formation of strong emotional bonds in the minds of consumers through such social phenomena as minority effect.

Lastly, it should be noted that the minority effect is but one of many social phenomena that can help facilitate a more comprehensive understanding of the complexity of processes that are behind the attractiveness of a trademark. While the constraints of the format of this thesis mean that it would be impossible to name all such phenomenon, let alone present or analyse them here, it is paramount to point out that the phenomena observed by sociologists, psychologists and anthropologists show that the attractiveness of a sign is never a result of just the effort of the proprietor of the trademark. It is a result of collective use of the sign by all its users.

E. Conclusion

Socialistic brands were used as carriers of commercial connotations in highly specific historical circumstances. As a result of this, they have acquired very strong cultural connotations, which in many instances have dominated their commercial connotation. Both types of connotation are strongly intertwined, since socialistic brands originated primarily as commercial signs. Thus, neither the cultural nor the commercial connotations are likely to fully overshadow the other. The unique magnetism of these

105 Unitra – official facebook page <https://www.facebook.com/unitrapl> accessed 25.6.2016.

106 Author's interview with the owners of Pan Tu Nie Stał (5.9.2015.).

brands derives from both of these groups of connotations, however it is the cultural ones that make these brands so unique and shape their magnetism and thus their value. Their value should be primarily attributed not to the effort of the entities that used these brands during socialism, but rather to the peculiar type of historical circumstances that increased the prominence of signs and the memory of the society relying on the collective replay of their cultural connotations. Emotional branding is highly dependent on utilising social, psychological and cultural phenomenon, which rely on the connection between a brand and a person. In other words, cultural connotation of these signs translate to their commercial value. Therefore brand owner's interests are strongly vested in maintaining and strengthening these connotations. Furthermore, due to the strength of the cultural connotations and the fact that they were gained through commercial use, the commercial connotations are unlikely to dominate the meanings of socialistic brands. This is true even in cases in which a brand has been in continuous commercial use after the fall of the socialism and its market presence was constantly equally strong as the one in socialism.

Generally speaking, socialistic brands have been and are registered as trademarks by two types of entities, those which are in relations of succession to the earlier users of the brand from the times of socialism; and others which have no such relations. The fact that a socialistic brand was never registered or was abandoned after the fall of socialism might play a role in how such relation of succession is defined in a given case.

Taking into the account the economic justification of trademarks, it seems that in cases of clear direct succession such registrations should be allowed, as it leads to limiting the consumer search cost by showing them which company is the legal successor and provides incentives for the successors to invest in the quality of the commodities. However, there is a strong public policy interest in preventing cases of registration in which there is no clear case of succession between the registrant and the original socialist user. In these cases, there is no connection of the registrant to the commercial connotations of the sign that could justify gaining trademark exclusivity over the magnetism. Allowing for such registrations is in conflict with the need for the trademark to remain competition-neutral[107], as it

107 "Study on the Overall Functioning of the European Trade Mark System" (Max Planck Institute for Innovation and Competition Law Munich 2011) <http://www.ip.mpg.de/fileadmin/user_upload/mpi_final_report.pdf > accessed 25.6.2016, 52, p. 1.30.

promotes 'hijacking' abandoned socialistic brands, magnetism of which can easily be 'awoken' thus discouraging investment in quality of the products, which itself should be the main force shaping the magnetism of trademarks. Such grant of rights would be unjustifiable as they do not reward the 'labour' of the registrant but rather a savvy business decision of appropriating a sign.[108] Trademark law should not to be used as a facilitator of appropriation of signs with strong cultural connotations from the public domain. It should be used as it was intended, namely, to allow proprietors protection for the connotation they have nurtured themselves.[109]

Although cultural significance as such does not constitute an obstacle to registration, recognition of the cultural connotations of signs is not alien to the trademark doctrine. Such connotations already play a vital role in accessing many grounds of revocation and validity of the trademarks, such as descriptiveness. Furthermore, recognition of the need to limit registration of socialistic brands is in line with one of the foundations of the recent reform of EU trademark law. Namely, a call for the trademark law to more fully recognise the public and private interests affected by the acquisition of distinctive signs.[110] Since trademark law regulates use of signs it should recognise the implications that other social sciences have with regards to distinctiveness and uniqueness of signs.[111] Cultural signs are often described as belonging to society as a whole.[112] The fact that they are nurtured by an entire community, rather than a single individual or undertaking, entails that they should remain outside of the scope of trademark law.[113] There are also indications that the unencumbered com-

108 Katya Assaf, "The Dilution of Culture and the Law of trademarks" (2009) 49 IDEA – The intellectual Property Law Review 1 <http://ssrn.com/abstractc=1410590> accessed 25.6.2016, 77.

109 Jennifer Davis, "Between a Sign and a Brand" in L. Bently, Jennifer Davis & J.C. Ginsburg (eds) *Trademarks and Brands* (Cambridge 2008), 82.

110 "Study on…" (*supra* n. 107), 55, p. 1.40.

111 Susy Frankel, "Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights", 1 Victoria University of Wellington Legal Research Papers 6, 30, <http://papers.ssrn.com/abstract=1003608> accessed 16.6.2016.

112 Assaf (*supra* n. 107), 77.

113 Jonathan E. Schroeder, "Brand Culture: Trade Marks, Marketing and Consumption" in Jane Ginsburg, Lionel Bently & Jennifer Davis (eds) *Trade Marks and Brands An Interdisciplinary Critique* (Cambridge University Press 2008), 174.

mercial availability of cultural signs creates added value for the economy.[114]

It might be argued that since socialistic brands originated as commercial signs they should not be allowed the same treatment as the purely cultural ones. It would be a mistake to embrace such stance. In a world of rapidly advancing commoditisation of culture one is at loss to find signs with purely commercial or cultural origins or connotations. It might also be argued that socialistic brands are 'too young' to be considered as truly valuable cultural symbols, that they are purely an episodic phenomenon. In response to this we should ask ourselves this: if the current trend of belittling the impact of trademark law on culture and society continues will it be even possible for any of such 'mature' distinctive cultural symbols to emerge? Because of their magnetism they will surely be appropriated on their way to obtaining that 'mature' status. Trademark law should recognise the public policy interest in keeping signs outside of its exclusivity not only for the sake of facilitating the cultural exchange but also for the sake of preventing trademark law from warping into a field of law that facilitates behaviours contrary to its justification.

114 See among others: Kristofer Erickson, Paul Heald, Fabian Homberg, Martin Kretschmer and Dinusha Mendis, "Copyright and the Value of the Public Domain" (CREATe 2015) < http://www.create.ac.uk/publications/copyright-and-the-value-of-the-public-domain/> accessed 16.9.2016.