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Legislation and practice on bad faith fillings of trademarks in the EU
欧盟关于商标恶意申请的立法和实践

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Introduction 简介

- The EU trade mark registration system is based on the 'first-to-file' principle, in the sense that property in a EU trade mark is not acquired through earlier use but through prior registration, but this principle is limited by *inter alia* bad faith
  欧盟商标注册体系基于"先申请"原则，欧盟商标所有权并不通过先使用获得，而是通过先注册获得，但该原则受到是否恶意注册等情形的限制
- **It is regulated in the EU Trade Mark Regulation No 2017/1001 ('EUTMR') 《欧盟商标条例》对此加以规制**
- **Bad faith as a separate legal ground is used only in cancellation proceedings (as invalidity action) - Art. 59(1)(b) EUTMR**
  恶意作为独立事由，仅用于撤销程序（请求宣告注册商标无效）—《欧盟商标条例》第59(1)(b)条
- It is a general expression of the principle that commercial transactions must be conducted in good faith
  上述条款是商业诚实信用原则的一般表述
- This principle is also reflected in **Art.8 (3) EUTMR (unauthorized filling by an agent)** which entitles trade mark proprietors to oppose the registration of their marks as EU trade marks by others (e.g. former distributors, licencees etc.)
  该原则也体现在**《欧盟商标条例》第8(3)条（代理人未经授权注册商标）**。对他人（如经销商、加盟商）将其商标注册为欧盟商标，商标权人有权提出异议
- It has a much narrower scope of application than Art. 59 (1)(b) EUTMR as it is limited to a particular scenario of bad faith, subject to certain conditions
  该原则应用范围远小于《欧盟商标条例》第59(1)(b)条，因为其局限于恶意注册这一特定场景，需满足特定条件。
- **In this presentation I will concentrate on Art. 59(1)(b) EUTMR**
- **本报告主要针对《欧盟商标条例》第59(1))b)条**

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Art. 59 (1)(b) EUTMR Bad faith fillings
《欧盟商标条例》第59(1)(b)条：恶意申请

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Art. 59(1)(b) EUTMR Bad faith fillings《欧盟商标条例》第59(1)(b)条：恶意申请

*"An EU trademark shall be declared invalid (…) where the applicant was **acting in bad faith when he filed** the application for the trade mark."*

*"申请人**恶意**提交商标**注册申请**的，该欧盟商标应被宣告无效....."*

- Bad faith is **not defined in the law** – definition **based on case law** of the Court of Justice of the European Union, consisting of:
- **法律并未定义"恶意"——基于**欧盟法院的**判例法**:
  - the **General Court** (1st Instance, cases marked with "T") and
  - **普通法院**（一审，案号中由"T"表示）
  - the **Court of Justice** (2nd Instance, cases marked with "C")
  - **欧盟法院**（二审，案号中由"C"表示）
- 'an autonomous concept of EU law that has to be interpreted in a uniform manner throughout the EU' (C-320/12, Malaysia Dairy, §29)
- "欧盟法中的自治概念必须在全欧盟得到统一解释" (C-320/12，Malaysia Dairy案，§29)

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Art. 59(1)(b) EUTMR Bad faith fillings《欧盟商标条例》第59(1)(b)条：恶意申请

- It is an absolute ground for invalidity which can be invoked only **post registration**
- 仅能在**商标注册后**用于无效宣告的绝对事由
- **Anyone can file** such action and it does not always have to be based on an earlier trade mark, or earlier right
- **任何人可以申请**无效宣告，并不总是基于在先商标或在先权利
- It is always carried out **per request**, the Office **does not carry** out such assessment **ex officio**
- 知识产权局**依申请**审查，**不依职权**审查
- Based on facts, evidence and arguments provided by the parties
- 以当事方提供的事实、证据和答辩为依据
- Burden of proof on the applicant – the good faith is presumed until proof to the contrary is adduced
- 举证责任在无效宣告申请人——相反证明前，作诚实信用推定
- The relevant point in time for assessment of bad faith is the filling date, but facts and evidence dated prior or subsequent to filing may be used to interpret the owner's intention at the time of filing the EUTM
- 对恶意申请进行审查的相关时间节点是商标申请日期，但可以使用申请日期之前或之后的事实和证据解释商标权人申请欧盟商标时的意图
- Consequences *ex tunc* – the trade mark is declared invalid **from the outset**
- 结果溯及既往——宣告商标**从最初**便无效

Art. 59(1)(b) EUTMR Bad faith fillings《欧盟商标条例》第59(1)(b)条：恶意申请

- 'inherent defect in the application (rather than in the trade mark), which fundamentally vitiates the registration regardless of other circumstances.'
- "无论其他情形，从根本上减损商标注册程序（非商标本身）的固有缺陷。"
- **Bad faith relates to: 恶意:**
  - subjective motivation of TM owner (dishonest intention, sinister motive...),
  - which can be derived from conduct,
  - which departs from accepted principles of ethical behavior or honest commercial and business practices. (T-795/17, § 23)
  - 涉及商标权人的主观动机（不诚实的意图、险恶的目的……），
  - 可从行为中推断，
  - 与道德行为或诚实信用的公认原则相背离。（T-795/17，§ 23）

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Art. 59(1)(b) EUTMR Bad faith fillings《欧盟商标条例》第59(1)(b)条：恶意申请

- Bad faith presupposes a dishonest state of mind or intention.
- 恶意的前提是不诚实的想法或意图。

- It applies where it is apparent from relevant and consistent indicia that the proprietor of an EU trade mark filed its application for registration:
- **适用情形——相关且一致的迹象**显示，欧盟商标权人的注册申请：

- **Not with the aim of engaging fairly in competition**, but with the intention of **undermining the interests of third parties** in a manner
- **并非为参与公平竞争，而是意**图以某种方式**损害第三者利益**

- with the intention of obtaining, **without even targeting a specific third party**, an exclusive right for **purposes other than those falling within the functions of a trade mark**, in particular the essential function of indicating origin.
- 意图为**商标功能**（特别是标明商品和服务来源的基本功能）**以外的目的**获得专用权，**即便该意图未针对特定第三者**。

C-104/18 P, Stylo & Koton (fig) , C-371/18, SkyKick
C-104/18P，Stylo & Koton（图形）案、C-371/18，SkyKick案

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Art. 59(1)(b) EUTMR Bad faith fillings《欧盟商标条例》第59(1)(b)条：恶意申请

Two categories of cases 两类案例：

- **Misappropriation of the rights of others**: previous relationships giving rise to duty of fair play, moral or commercial obligations, intention to exclude from the market, undue exploitation of reputation
- **盗用他人权利**：导致下列情形的过往关系——公平竞争责任、道德或商业义务、市场排斥的意图、不当攀附知名度

- **Misuse of the EUTM System**: repetitive applications, hoarding of (famous) marks, blocking position, lack of intention to use, defensive applications
- **滥用欧盟商标制度**：重复申请、囤积（著名）商标、“占坑”、无使用意图、防御性申请

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Art. 59(1)(b) EUTMR Bad faith fillings《欧盟商标条例》第59(1)(b)条：恶意申请

- the applicant's **subjective intention** should be determined by reference to the **objective circumstances** of the case - very fact based
- 应当参考案件的**客观情形**，对申请人的**主观意图**进行认定——基于事实
- **overall assessment** of the relevant factors and factual circumstances of each case has to be performed
- 必须**整体评估**个案相关因素和事实情形
- examples of **frequent factors** to be considered are 需考虑的**常见因素**示例：
  - Knowledge of the existence of identical/similar sign (stemming from business relations, knowledge of the sector, reputation, long standing use etc.)
  - 知道存在相同/近似标识（基于商业往来、行业知识、知名度、长期使用等）
  - Likelihood of confusion is a factor to consider but it is not necessary
  - 混淆可能性是考虑因素之一，但并非必要因素
  - Dishonest intention on the part of the EUTM owner
  - 欧盟商标权人的不诚信意图
  - The degree of legal protection of the earlier mark / contested sign
  - 对在先商标/涉争标识的法律保护程度
  - Origin of the contested sign, its use since creation
  - 涉争标识的来源、产生以来的使用情况
  - Commercial logic underlying the application
  - 申请背后的商业逻辑

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Bad faith fillings-
Misappripriation of the rights of others
恶意申请：盗用他人权利

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Misappropriation of the rights of others (T-3/18-T4/18 Ann Taylor)
盗用他人权利（T-3/18-T4/18，Ann Taylor案）

ANN TAYLOR

and ANN TAYLOR registered for clocks and watches in Cl 14
左侧标识和“ANN TAYLOR”为针对第14类钟表产品注册的商标

- Invalidity action (bad faith) filed by the holder of the word mark **ANN TAYLOR protected** in the USA, in particular for clothing in Cl 25.
- **在美国受保护**、针对第25类服饰产品的文字商标**ANN TAYLOR的**权利人提起无效申请（恶意）
- EUIPO Cancellation Division upheld the invalidity application and found bad faith confirmed by Boards of Appeal, confirmed by General Court
- 欧盟知识产权局撤销处受理了该无效申请，先后经上诉委员会和普通法院认定恶意情形
- The knowledge of the existence of the earlier mark by the EUTM proprietor was established (affidavits, an attempt to obtain a license)
- 认定该欧盟商标所有人知道在先商标的存在（宣誓书、曾试图获得许可）
- The EUTM proprietor also registered a trade mark in Mexico
- 该欧盟商标权人同时在墨西哥注册了商标

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Misappropriation of the rights of others (T-3/18-T4/18 Ann Taylor)
盗用他人权利（T-3/18-T4/18，Ann Taylor案）

- a deliberate strategy of misappropriation of third parties' rights may be substantiated by evidence relating to facts which occurred outside Europe
- 可以通过与欧洲以外发生的事实相关证据，证实存在故意盗用第三者权利的策略
- a simple proximity or 'correlation' between dissimilar goods does not bar a finding that the applicant was acting in bad faith when applying for the mark 'Ann Taylor' in respect of watches if circumstantial evidence support the conclusion that **he deliberately sought to create an association with an earlier mark enjoying market recognition in the United States in respect of clothing**
- 不同商品间的简单“接近”或“关联”并不妨碍认定申请人在针对手表申请“Ann Taylor”商标时存在恶意，前提是有间接证据支持**其故意寻求与在美国享有市场认可的服饰类在先商标建立关联的**结论
- no commercial logic in extending protection of a mark registered in Mexico: the filing of the Mexican mark, also part of a dishonest strategy
- 扩大对墨西哥注册商标的保护并无商业逻辑：墨西哥商标的申请也是不诚信策略的一部分

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Misappropriation of the rights of others (T-795/17 NEYMAR)
盗用他人权利（T-795/17号，NEYMAR案）

- EU word mark “NEYMAR” was filed in December 2012 for goods in Class 25 (clothing etc) and registered.
- 某人于2012年12月申请将“NEYMAR”注册为第25类（服饰等）商品的商标并获得核准。
- Mr **Neymar Da Silva Santos Júnior**, Brazilian football player, filed invalidity application invoking bad faith.
- 巴西足球运动员**内马尔**以恶意为由请求宣告该商标无效。
- The owner argued that in 2012 Neymar was not yet known in EU and that he did not have much knowledge of the world of football so he did not know Neymar was a rising star;
- 商标权人表示，内马尔在2012年在欧盟境内尚不为人所知，而且他对足球界不熟悉，不知道内马尔是足球新星；
- He chose the word because it sounded well.
- **他之所以**选择这个单词，是因为其发音好听。
- EUIPO Cancellation Division and BoA found bad faith because Neymar was a rising star in football and the EUTM proprietor had no motive other than to exploit the intervener’s renown to benefit from it.
- 欧盟知识产权局撤销处和上诉委员会认定该欧盟商标权人存在恶意，因为内马尔是一名足球新星，商标权人除了意图攀附内马尔的知名度以从中获利外，不存在其他动机。

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Misappropriation of the rights of others (T-795/17 NEYMAR)
盗用他人权利（T-795/17，NEYMAR案）

- General Court confirmed bad faith.
- 普通法院认定存在恶意。
- Neymar was already recognized as a very promising football player years before it joined FC Barcelona in 2013
- 内马尔在2013年加入巴萨足球俱乐部前，早就被认为是前途非常光明的球员。
- EUTM owner had more than a little knowledge of the world of football. He knew that Neymar was a rising star in football.
- 欧盟商标权人并非对足球界一无所知。他知道内马尔是一位足球新星。
- EUTM owner applied for registration of trade mark IKER CASILLAS, based on a name of another football player.
- 欧盟商标权人还根据足球运动员卡西利亚斯的姓名，申请注册了商标“IKER CASILLAS”。
- The commercial logic behind the application for registration of an EU trade mark was to create an association with the Neymar’s name in order to benefit from its attractive force.
- 申请注册欧盟商标的商业逻辑是建立与内马尔姓名的联系，从而利用其吸引力获利。

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Misappropriation of the rights of others (T-33/11 BIGAB) - no bad faith
盗用他人权利（T-33/11，BIGAB案）——无恶意

- In 2005 EU word mark **'BIGAB'** was applied for goods in Cl 6, 7 and 12 and registered in 2006.
- 欧盟文字标识“**BIGAB**”于2005被申请为第6类、第7类和第12类商品的商标，于2006年获得核准。
- The owner of the mark **'BIGA'** filed an invalidity action against it claiming that the only objective to register **'BIGAB'** was to prevent it from continuing to market agricultural machinery under '**BIGA**' trade mark.
- “**BIGA**”商标权人对此提出无效申请，认为注册“**BIGAB**”的唯一目的是阻碍其继续使用“**BIGA**”商标销售农业机械。
- The owner replied that the **'BIGAB'** trade mark originated from the company name of a business it had acquired ('Blidsberg Investment Group BIG AG') and it was **in use since 1991**, whereas the owner of **'BIGA' trade mark began using its mark in 1996**.
- “**BIGAB**”商标权人答辩称，该商标源于其收购的一家公司的名称（“Blidsberg Investment Group BIG AG”），**从1991年就开始使用，而“BIGA”商标权人从1996年才开始使用“BIGA”标识。**
- The **'BIGA'** trade mark was **not registered**
- **“BIGA”未被注册**为商标。
- EUIPO Cancellation Division and rejected the application for invalidity and Board of Appeal dismissed the appeal.
- 欧盟知识产权局撤销处驳回无效申请，上诉委员会驳回上诉。

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Misappropriation of the rights of others (T-33/11 BIGAB) - no bad faith
盗用他人权利（T-33/11，BIGAB案）——无恶意

- Even if the owner knew or should have known of the existence of the unregistered **'BIGA'** trade mark at the time of filing, the invalidity applicant failed to establish that the owner had been acting in bad faith.
- 即使商标权人在申请时知道或者应当知道存在未注册的“BIGA”商标，无效申请人也无法认定该商标权人存在恶意。
- '*account may also be taken of the origin of the sign at issue and its use since its creation, and of the commercial logic underlying the filing of the application for registration of that sign as a EU trade mark*'
- *“还可考虑涉争标识的起源及其产生以来的使用情况，以及申请将该商标注册为欧盟商标的商业逻辑”*
- Before the filling date the **goods have been sold under 'BIGAB' trade mark is various EU member states**, thus it is understandable, from a commercial point of view, that the owner wished to extend the protection of the mark at issue by registering it at EU level
- 在申请日前，**载有“BIGAB”商标的商品已在多个欧盟国家销售**。因此，该商标权人希望通过在欧盟注册商标，扩大其保护范围。这从商业逻辑角度可以理解。
- The trade mark was also used after the registration, so it was not established that the sole purpose of the registration was to block the use of the 'BIGA' trade mark
- 该商标在注册后也处于使用状态，所以无法认定注册该商标的唯一目的是阻碍“BIGA”商标的使用。

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Bad faith fillings-
Misuse of the EUTM system
恶意申请：滥用欧盟商标体系

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Misuse of the system – ‚ever-greening' or ‚repetitive fillings'
滥用商标制度：“长青化”或“重复申请”

- EUTMs have to be used 欧盟商标在注册后必须加以使用
- After 5 years from registration owners may be asked to prove genuine use in context of revocation proceedings or opposition/invalidity proceedings based on likelihood of confusion/reputed trade marks
- 商标注册五年后，在基于混淆可能性/知名商标的撤销程序或异议/无效程序中，可以要求权利人证明商标的实际使用。
- Some companies periodically refile their trade marks every 5 years to avoid the proof of use obligation – **so-called 'ever-greening'**, what alludes to the practically infinite grace period which those marks enjoy as a result
- 有些企业每五年便重新申请商标，以避免履行使用证明义务，此即所谓商标“**长青化**”，相当于使商标享有无限宽展期。
- Such practice may constitute bad faith, if a trade mark is filed for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating commercial origin
- 如果申请商标的目的在商标功能（特别商标用于表明来源的基本功能）之外，则可能构成恶意。
- However, there may be a commercial logic in filling for updated version of the trade mark or updated list of goods and services – to be assessed on a case by case basis
- 但是，如果申请注册的是商标的更新版或商品和服务清单的更新版，可能存在商业逻辑——需个案分析。

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Misuse of the system – T-663/19 MONOPOLY - 21.04.2021
滥用商标制度 – T-663/19，MONOPOLY案，2021年4月21日

- Registration of EUTM ‘MONOPOLY’ for g/s in Cl 9, 16, 28, 41, reg. in 2011
- 申请人于2011年针对第9、16、28和41类商品和服务，申请注册了欧盟商标“MONOPOLY”。
- At the time of filling the EUTM already owned 3 word marks ‘MONOPOLY’ registered in 1998 (Cl 9, 25, 28) , 2009 (Cl 41) and 2010 (Cl 16)
- 在申请该欧盟商标时，已有三个文字商标“MONOPLY”，分别注册于1998年（第9类、25、28类）、2009年（第41类）和2010年（第16类）。
- Action based on bad faith filed in 2017
- 2017年，以恶意为由提出无效申请。
- Cancellation Division rejected the application as it did not find evidence of bad faith on file
- 撤销处驳回申请，因为未发现可认定恶意的证据。
- Boards of Appeal conducted oral proceedings to clarify the issue of particular circumstances underlying the applicant’s strategy
- 上诉委员会开展口头程序，以确定申请人策略的特定情形问题。
- Boards of Appeal found bad faith for g/s identical to those covered by the 3 earlier registrations
- 针对与三个在先商标所涉的商品和服务相同的商品和服务，上诉委员会认定存在恶意。

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Misuse of the system – T-663/19 MONOPOLY - 21.04.2021
滥用商标制度 – T-663/19，MONOPOLY案，2021年4月21日

- *In assessing bad faith consider: (i) the origin of the contested sign (ii) its use since its creation, (iii) the commercial logic underlying the filing (iv) the chronology of events leading up to that filing (§ 38)*
- *评估恶意时，要考虑：（i）涉争标识的来源；（ii）其自产生以来的使用情况；（iii）商标申请背后的商业逻辑；（iv）注册申请前的一系列先后关联事件（§ 38）*
- repeat filing of a mark is not prohibited and does not constitute bad faith in itself but when coupled with evidence that it was pursued in order to circumvent the proof of used requirement, then bad faith can be found;
- 重复申请商标并不为商标制度所禁止，其本身亦不构成恶意。但存在申请人意在规避商标使用证明要求的证据时，可以认定存在恶意
- in this case EUTM proprietor **admitted** that this was one of the advantages sought after in the repeat filling (§ 70, 71)
- 在该案中，欧盟商标权人**承认**其重复申请的意图之一是规避商标使用证明要求（§ 70, 71）
- It was apparent that the applicant **intentionally** sought to circumvent a proof of use rule, in order to **derive an advantage** therefrom to the detriment of the balance of the system resulting from that law
- 显然，申请人为从中**谋利**，**故意**规避商标使用证明规则，有损商标制度的衡平性
- The simple fact that other companies may be using a specific filing strategy does not necessarily make that strategy legal and acceptable. (§ 94)
- 其他企业也在使用特定注册申请策略的简单事实，并不必然使该策略成为合乎法律、可予接受的策略（§ 94）

Misuse of the system – T-663/19 MONOPOLY - 21.04.2021
滥用商标制度 – T-663/19，MONOPOLY案，2021年4月21日

Abuse of law 法律滥用

- *circumvention of **the rule relating to proof of use** is **inconsistent with the objectives** pursued by law*
- *规避**商标使用证明相关规则**，**不符合**法律所追求的**目标***
- *despite formal observance of the conditions laid down by the EU rules, the **purpose of those rules has not been achieved**,*
- *尽管欧盟规则设定的条件在形式上得到遵守，但**规则的目的并未实现***
- *intention to **obtain an advantage** from those rules by creating **artificially** the conditions laid down for obtaining it* (§ 72)
- 通过**人为**制造条件，意图从规则中**谋利**（§ 72）

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Misuse of the system –no intention to use the trade mark (T-273/19, Target Ventures)
滥用商标制度——无使用商标意图（T-273/19，Target Ventures案）

- Trade mark '**Target Ventures**' was registered for services in Class 36
- 某公司将“**Target Ventures**”注册为针对第36类服务的商标
- Invalidity application was filed against it based on bad faith by another company which was using this trade mark before the filling date
- 在申请日期之前使用该商标的另一家公司以恶意为由提交无效请求
- It was established that the EUTM owner operated under **'target partners'** and even though they had the domain name 'targetventures.de' it was only used to redirect the public to the active site 'targetpartners.de'
- 经确认，该欧盟商标权人的经营名为“**Target Partners**”，其虽然持有“targetventures.de”域名，但仅利用该域名将公众重定向至“targetpartners.de”网站
- The EUTM proprietor **admitted that it did not have an intention to use** the trade mark, thus the General Court concluded bad faith
- 欧盟商标权人**承认其并无使用该商标的意图**，普通法院据此认定存在恶意
- 'The intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark […] may be sufficient for it to be held that the trade mark applicant was acting in bad faith"
- “意图为商标功能以外的目的获得专用权，即便该意图未针对特定第三者……也足以认定该商标申请人的恶意行为”

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Misuse of the system – obtaining a blocking position (T-82/14 LUCEO)
滥用商标制度——“占坑” (T-82/14，LUCEO案)

- EU trade mark ‘Luceo’ was applied for in 2009 when its owner noticed the application for the trade mark ‘Lucea Led’
- 当事人注意到“Lucea Led”商标的注册申请，便于2009年申请将“Luceo”注册为欧盟商标
- It was used in opposition proceedings against ‘Lucea Led’ even though it was filed later, but it relied on an earlier priority of an Austrian trade mark
- 之后，当事人（商标权人）籍此对“Lucea Led”的申请提出异议，并辩称依据“Luceo”在奥地利的另一在先申请，在德国的在后申请应享有优先权
- In Germany and Austria the grant of a filing date for trade mark applications does not depend on the payment of the filing fee
- 在德国和奥地利，商标申请日期的确定并不取决是否缴纳了申请费
- Thus, a person had developed a scheme consisting of making successive fillings in Germany and Austria within 6-month periods to preserve the earlier priority date, while watching third parties’ applications for similar EUTMs.
- 有人就投机取巧，在六个月期限内在德国和奥地利相继连续提交商标申请，以保留优先权日，同时观察是否存在第三者对类似欧盟商标的注册申请
- Most of those applicants had been later cancelled, due lack of payment
- 此类申请多数由于未及时缴纳申请费而被撤销

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Misuse of the system – obtaining a blocking position (T-82/14 LUCEO)
滥用商标制度——“占坑” (T-82/14，LUCEO案)

- After the opposition was filed an offer was made to transfer to the applicant the EU trade mark ‘Luceo’ enjoying an earlier priority date.
- 提出异议申请后，“Luceo”商标权人发出要约，提出将享有优先权的“Luceo”商标转让“Lucea Led”商标的申请人
- Both EUIPO Cancellation Division and Board of Appeal found bad faith
- 欧盟知识产权局撤销处和上诉委员会均认定存在恶意
- The General Court confirmed bad faith as well and found this filling strategy to be **‘incompatible’ with the objectives of EUTMR**
- 普通法院也认定存在恶意，并认为该等申请策略**与《欧盟商标条例》的立意不符**
- This filing strategy is qualified as an **‘abuse of law’** since, **despite formal observance of the conditions** laid down by European Union rules, their **purpose was not achieved** as there had been **no intention to use** any of the marks applied for in Germany and Austria and there was the intention to obtain an **artificial advantage** to the detriment of others, a blocking position.
- 该等申请策略**尽管形式上遵守**相关欧盟规则的设定条件，但**并未实现相关规则的设定目的。**申请人**并无使用**在德国和奥地利申请的商标的**意图**，其申请目的是**人为制造**损人利己的**优势**，即“占坑”，故而其策略符合“**法律滥用**”情形

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Thank you