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### **The Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition: Guiding Principles for the Further Development of EU Trade Mark Law**

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#### ***published in***

European Intellectual Property Review

2015

#### ***document version***

Early version, also known as pre-print

[Link to publication in VU Research Portal](#)

#### ***citation for published version (APA)***

Senftleben, M. R. F., Bently, L., Dinwoodie, G., Geiger, C., Griffiths, J., Kur, A., Ohly, A., Peukert, A., Ricolfi, M., Schovsbo, J., Weckström, K., & Zelechowski, L. (2015). The Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition: Guiding Principles for the Further Development of EU Trade Mark Law. *European Intellectual Property Review*, 37(6), 337-343.

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## Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade Mark Law

### *Introduction*

In recent years, the need to reconcile expanding trade mark rights and fundamental freedoms, in particular freedom of expression and freedom of competition, has been emphasized in various scholarly publications. There is a widely-shared view in the academic community that trade mark protection, while constituting a central instrument to ensure market transparency and the proper functioning of markets in a more general sense, must be reconciled with other core values, such as free expression enhancing consumer information and consumer choice, and free competition preventing unnecessary market entry barriers.<sup>1</sup>

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<sup>1</sup> For instance, see the dissertation by W. Sakulin, *Trademark Protection and Freedom of Expression – An Inquiry into the Conflict between Trademark Rights and Freedom of Expression under European Law*, The Hague/London/New York: Kluwer Law International 2010. See also L. Ramsey/J. Schovsbo, “Mechanisms for Limiting Trade Mark Rights to Further Competition and Free Speech”, *International Review of Intellectual Property and Competition Law* 2013, p. 671; M.R.F. Senftleben, “Free Signs and Free Use - How to Offer Room for Freedom of Expression within the Trademark System”, in: C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, Cheltenham: Edward Elgar 2015, p. 354; I. Simon Fhima, “Trade Marks and Free Speech”, *International Review of Intellectual Property and Competition Law* 44 (2013), p. 293; R. Burrell/D. Gangjee, “Trade Marks and Freedom of Expression: A Call for Caution”, *International Review of Intellectual Property and Competition Law* 41 (2010), p. 544; C. Geiger, “Marques et droits fondamentaux”, in: C. Geiger/J. Schmidt-Szalewski (eds.), *Les défis du droit des marques au 21<sup>e</sup> siècle/Challenges for Trademark Law in the 21<sup>st</sup> Century*, p. 163, Paris: Litec 2010; M. Nasser, “Trade Marks and Freedom of Expression”, *International Review of Intellectual Property and Competition Law* 40 (2009), p. 188; L. Bently, “From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property”, in: G.B. Dinwoodie/M.D. Janis, *Trademark Law and Theory: A Handbook of Contemporary Research*, Cheltenham: Edward Elgar 2008; W. McGeeveran, “Four Free Speech Goals for Trademark Law”, *Fordham Intellectual Property, Media and Entertainment Law Journal* 18 (2008), p. 1205; C. Geiger, “Trade Marks and Freedom of Expression – the Proportionality of Criticism”, *International Review of Intellectual Property and Competition Law* 38 (2007), p. 317; L.P. Ramsey, “Free Speech and International Obligations to Protect Trademarks”, *Yale*

The need to give adequate consideration to competing freedoms becomes more pressing as harmonized EU trade mark law increasingly absorbs the role traditionally vested in national unfair competition laws, in particular by offering broader protection of goodwill functions and growing control over “referential” (nominative) use.<sup>2</sup> Leading CJEU decisions do not foreclose taking account of countervailing interests;<sup>3</sup> indeed, they may even require that courts do so.<sup>4</sup> But without clear and explicit language in the new trade mark legislation, there is a risk that trade mark rights will expand further without regard to these important considerations.<sup>5</sup> Against this background, members of the academic community came together to bring these issues to the attention of EU policy makers by summarizing the main findings of research undertaken in recent years in a concise document: the Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade Mark Law.

### *New Legislation Under Way*

With the legislative process for new EU trade mark legislation having entered the final stage of trilogue discussions among the Parliament, the Council and the Commission, it is important to provide a clear signal about the reconciliation of conflicting norms not only to improve the draft text but also to provide guidelines for the interpretation of the new legislation. This is not to say that indications were wholly missing in the past. In *Google/Louis Vuitton*, Advocate General Poiares Maduro pointed out that

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*Journal of International Law* 35 (2010), p. 405; K. Weckström, “The Lawfulness of Criticizing Big Business: Comparing Approaches to the Balancing of Societal Interests Behind Trademark Protection”, *Lewis & Clark Law Review* 11 (2007), p. 671; P. Gulasekaram, “Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works”, *Washington Law Review* 80 (2005), p. 887; R. C. Dreyfuss, “Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity”, in: G.B. Dinwoodie/M.D. Janis (eds.), *Trademark Law and Theory: a Handbook of Contemporary Research*, Cheltenham: Edward Elgar Publishing 2008, p. 261; C. Rohnke/K. Bott/K.-U. Jonas/S. Asschenfeldt, “Konflikte zwischen Markenrechten und dem Recht auf freie Meinungsäußerung”, *Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil* 2005, p. 419.

<sup>2</sup> CJEU, 18 June 2009, case C-487/07, L’Oréal/Bellure, para. 58. For comments on this development, see M.R.F. Senftleben, “Trade Mark Protection – A Black Hole in the Intellectual Property Galaxy?”, *International Review of Intellectual Property and Competition Law* 42 (2011), p. 383.

<sup>3</sup> The decision CJEU, 18 June 2009, case C-487/07, L’Oréal/Bellure, para. 63, for instance, left it to the referring judge to decide whether the advertisement and investment functions were negatively affected. The core problem in that case, thus, can be seen in the interpretation of the rules on comparative advertising. See the analysis A. Kur/L. Bently/A. Ohly, “Sweet Smells and a Sour Taste – the ECJ’s L’Oréal Decision”, *Max Planck Institute for Intellectual Property, Competition and Tax Law Research Paper Series No. 09-12*, Munich: Max Planck Institute 2009, online available at <http://ssrn.com/abstract=1492032>.

<sup>4</sup> For instance, see CJEU, 22 September 2011, case C-323/09, Interflora/Marks & Spencer, para. 91.

<sup>5</sup> See the detailed analysis of these developments provided by R. Knaak/A. Kur/A. von Mühlendahl, *Study on the Functioning of the European Trade Mark System*, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-13, Munich: Max Planck Institute 2011, online available at [http://ec.europa.eu/internal\\_market/indprop/tm/index\\_en.htm](http://ec.europa.eu/internal_market/indprop/tm/index_en.htm); M.R.F. Senftleben, “Adapting EU Trademark Law to New Technologies – Back to Basics?”, in: C. Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives*, Cheltenham: Edward Elgar 2013, p. 137. As to the protection of branding efforts and trade mark goodwill, see L. Bently/J. Davis/J.C. Ginsburg (eds.), *Trade Marks and Brands – An Interdisciplinary Critique*, Cambridge: Cambridge University Press 2008; G.B. Dinwoodie/M.D. Janis, *Dilution’s (Still) Uncertain Future*, *Michigan Law Review First Impressions* 105 (2006), p. 98; B. Beebe, “Search and Persuasion in Trademark Law”, *Michigan Law Review* 103 (2005), p. 2020; M. Strasser, *The Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context*, *Fordham Intellectual Property, Media & Entertainment Law Journal* 10 (2000), p. 375.

*whatever the protection afforded to innovation and investment, it is never absolute. It must always be balanced against other interests, in the same way as trade mark protection itself is balanced against them. I believe that the present cases call for such a balance as regards freedom of expression and freedom of commerce.*<sup>6</sup>

While supporting broad trade mark rights to further harmonize trade mark law in the EU and prevent a “mosaic” unfair competition approach,<sup>7</sup> the Study of the Max Planck Institute on the Overall Functioning of the European Trade Mark System – the main preparatory work carried out for the amendment of EU trade mark legislation – also highlighted the need for appropriate counterbalances and suggested, *inter alia*, the combination of a general fair use clause with several more specific provisions.<sup>8</sup>

### *Problem Areas in the Proposed New Legislation*

Although the need to take competing fundamental freedoms into account can hardly be contested, the present debate in the European Parliament and the Council can be criticized for not devoting as much attention to limitations of trade mark protection as the issue deserves. The proposals tabled by the Parliament and the Council support the enhanced protection of goodwill functions such as trade mark-based investment, advertising and communication.<sup>9</sup> On this point, the Parliament and the Council rejected the initial Commission proposal which sought to limit trade mark protection to the traditional understanding of trade marks as a badge of origin in cases where a sign identical with the mark is used for the same goods and services.<sup>10</sup> This means that, in line with current CJEU case law,<sup>11</sup> non-confusing modes of use

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<sup>6</sup> AG Poireres Maduro, Opinion of 22 September 2009, cases C-236/08-238/08, Google France and Google/Louis Vuitton et al., para. 102.

<sup>7</sup> Max Planck Institute, *supra* note 3, para. 2.221-2.222.

<sup>8</sup> Max Planck Institute, *supra* note 3, para. 2.266.

<sup>9</sup> This became apparent at earlier stages of the deliberations. See Council of the European Union, 18 July 2014, Presidency Compromise Proposal, Interinstitutional File 2013/0088 (COD), no. 11826/14 PI 95 CODEC 1620, Article 9(2)(a), and File 2013/0089 (COD), no. 11827/14 PI 96 CODEC 1621, Article 10(2)(a); European Parliament, 25 February 2014, Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council to Approximate the Laws of the Member States Relating to Trade Marks (recast) (COM(2013)0162 – C7-0088/2013 – 2013/0089(COD)), Article 10(2)(a); where both institutions rejected the proposed confinement of the double identity rule to cases affecting the origin function.

<sup>10</sup> European Commission, 27 March 2013, COM(2013) 161 final, 2013/0088 (COD), Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 207/2009 on the Community Trade Mark, Article 9(2)(a); European Commission, 27 March 2013, COM(2013) 162 final, 2013/0089 (COD), Proposal for a Directive of the European Parliament and of the Council to Approximate the laws of the Member States Relating to Trade Marks, Article 10(2)(a). As to the debate on this point, see A. Kur, “Trademarks Function, Don’t they?”, *International Review of Intellectual Property and Competition Law* 2014, p. 434; M.R.F. Senftleben, “Function Theory and International Exhaustion: Why it is Wise to Confine the Double Identity Rule in EU Trade Mark Law to Cases Affecting the Origin Function”, *European Intellectual Property Review* 2014, p. 518. As to the traditional focus of CJEU jurisprudence on the origin function, see CJEU, case C-206/01, *Arsenal Football Club* [2002] ECR I-10273, para. 51; case C-245/02, *Anheuser-Busch* [2004] ECR I-10989, para. 59; case C-48/05, *Adam Opel* [2007] ECR I-1017, para. 21. For commentary, see P.J. Yap, “Essential Function of a Trade Mark: From BMW to O2”, *European Intellectual Property Review* 2009, 81 (86-87); I. Simon Fhima, “How Does “Essential Function” Doctrine Drive European Trade Mark Law?”, *International Review of Intellectual Property and Competition Law* 36 (2005), p. 401; Y. Basire, *Les fonctions de la marque, Essai sur la cohérence du régime juridique d’un signe distinctif*, Paris: Litec 2014.

<sup>11</sup> CJEU, 23 February 1999, case C-63/97, *BMW/Deenik*, para. 42; CJEU, 17 March 2005, case C-228/03, *Gillette/LA-Laboratories*, para. 28; CJEU, 18 June 2009, case C-487/07, *L’Oréal/Bellure*, para. 53; CJEU, 23 March 2010, cases C-236/08-238/08, *Google/Louis Vuitton et al.*, para. 70.

will continue to fall within the ambit of the so-called double identity clause. The new legislation may also provide for control over goods in transit in the EU.<sup>12</sup>

The limitation infrastructure, however, has not been updated and broadened in a comparable way. The Commission saw no need to broaden the currently limited scope of the open-ended “due cause” defence in EU trade mark law. Traditionally, this “due cause” defence is only available in respect of protection of marks with a reputation against dilution.<sup>13</sup> It serves as a central safeguard for artistic, political and commercial freedom of expression in this context.<sup>14</sup> Instead of broadening its scope, the Commission’s proposals only contain a defence for the aforementioned “referential” use, covering use for the purpose of “identifying or referring to goods or services as those of the proprietor of the trade mark”, with the long-standing exemption of use to indicate a product’s intended purpose constituting a specific example.<sup>15</sup> Parliament’s current proposal for new trade mark legislation seeks to further clarify this concept of “referential” use by providing additional examples, such as comparative advertising, information about the resale of genuine goods after the exhaustion of trade mark rights and trade mark parody.<sup>16</sup> The Council, by contrast, has refrained from taking additional steps in the area of limitations. Regardless of the expansion of protection, it has maintained only the referential use exemption proposed by the Commission.<sup>17</sup>

Another point is highly problematic. In the present text of the proposals, the limitations to trade mark protection are subject to a honest practices proviso based on conditions that resemble the criteria applied to establish infringement in the first place.<sup>18</sup> If understood in a literal sense this leads to circular reasoning with absurd results: how can a defence be effective in practice if its application depends on criteria corresponding to those used to find infringement? The only way to make sense of the wording would be to clarify that although the basic *concepts* (likelihood of confusion, abuse of reputation) informing the evaluation of honest business practices are the same as those governing infringement, their *application* is different in that the leeway for using a basically conflicting mark is much broader where applications or limitations apply, thereby confining the proprietor’s right to oppose such use to cases of disproportionate harm. Again, such clarification could be spelled out either in the preamble or in the black letter of the provision. The very purpose of a defence is to provide

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<sup>12</sup> Article 10(5) of the proposed new Trade Mark Directive, *supra* notes 7 and 8, and Article 9(5) of the proposed new Community Trade Mark Regulation, *supra* notes 7 and 8. As to the present position taken with regard to goods in transit, see in particular CJEU, 1 December 2011, case C-446/09, Philips/Nokia, para. 56-57. For commentary on the proposed transit seizure provision, see H. Große Ruse-Khan, “An International Trade Perspective on Transit Seizures”, *BMM Bulletin* 2013, p. 142.

<sup>13</sup> Article 5(2) of the present Trade Mark Directive 2008/95/EC and Article 9(1)(c) of the present Community Trade Mark Regulation 207/2009.

<sup>14</sup> For instance, see CJEU, 6 February 2014, case C-65/12, Red Bull/Bulldog, para. 46; CJEU, 22 September 2011, case C-323/09, Interflora/Marks & Spencer, para. 91; German Federal Court of Justice, 11 March 2008, case VI ZR 7/07, “Gen-Milch”, *Neue Juristische Wochenschrift* 2008, p. 2110; German Federal Court of Justice, 3 February 2005, case I ZR 159/02, “Lila Postkarte”, *Gewerblicher Rechtsschutz und Urheberrecht* 2005, p. 583; French Supreme Court, 8 April 2008, case 06-10961, Greenpeace/Esso; French Supreme Court, 8 April 2008, case 07-11251, Greenpeace/Areva; Court of Appeals of Amsterdam, 13 September 2011, case LJN BS7825, Mercis and Bruna v. Punt, para. 4.1. Cf. V. Di Cataldo, “The Trade Mark with a Reputation in EU Law – Some Remarks on the Negative Condition “Without Due Cause””, *International Review of Intellectual Property and Competition Law* 42 (2011), p. 833.

<sup>15</sup> Article 14(1)(c) of the proposed new Trade Mark Directive, *supra* note 8, and Article 12(1)(c) of the proposed new Community Trade Mark Regulation, *supra* note 8.

<sup>16</sup> Parliament proposal, *supra* note 7.

<sup>17</sup> Council proposal, *supra* note 7.

<sup>18</sup> Article 14(2) of the proposed new Trade Mark Directive, *supra* notes 7 and 8, and Article 12(2) of the proposed new Community Trade Mark Regulation, *supra* notes 7 and 8.

room for justified, but *prima facie* infringing, use. As the limitations of trade mark rights serve the purpose of reconciling trade mark protection with other fundamental guarantees – freedom of expression and freedom of competition – it is difficult to understand why policy makers have not attached greater significance to the proper functioning of limitations of trade mark protection, thereby ensuring that the new legislation offers a balanced and effective framework for courts in future.

### *Balanced and Effective Limitation Infrastructure*

Against this background, the Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade Mark Law provides guidelines for the establishment of an appropriate limitation infrastructure that can inform the present legislative process and ensure a balanced application of resulting norms in the future. Taking the need to ensure that trade mark protection does not unnecessarily limit freedom of expression and competition as a starting point, the Recommendation clarifies that at stake are not only the interests of trade mark proprietors and consumers but also those of competitors and the public at large, and that none of those interests must be disregarded when the prerequisites and scope of protection are examined.

With regard to the existing legal framework, the Recommendation points out that the law already contains certain flexibilities to accommodate freedom of expression and freedom of competition and that these flexibilities have, to some extent, already been used by courts. The crucial point is, however, that the existence and scope of flexibilities together with their mode of operation must be made sufficiently clear and transparent to create a resilient framework for harmonized practice, encouraging courts to continue to employ existing flexibility tools to arrive at appropriate solutions in individual cases. Against this background, the Recommendation makes it clear that – irrespective of existing safeguards – flexibilities in EU trade mark law ought to be further clarified and developed:

- One further clarification, for example, could concern the analysis of allegedly infringing use. Given the broad concept of actionable use “as a trade mark” which has evolved in the jurisprudence of the Court of Justice,<sup>19</sup> it appears appropriate to draw a fundamental distinction, when examining an allegedly infringing use, between situations in which a trade mark is used to indicate the commercial origin of goods or services that do not originate from the trade mark proprietor, on the one hand, and situations in which a mark is used to identify goods or services as those of the trade mark proprietor or to designate goods or services that are legitimately commercialized in the EU, on the other.<sup>20</sup> These latter situations arise, for instance, in the context of

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<sup>19</sup> CJEU, 23 February 1999, case C-63/97, BMW/Deenik, para. 42; CJEU, 17 March 2005, case C-228/03, Gillette/LA-Laboratories, para. 28; CJEU, 11 September 2007, case C-17/06, Céline, para. 21-23; CJEU, 12 June 2008, case C-533/06, O2/Hutchison, para. 36-37; CJEU, 18 June 2009, case C-487/07, L’Oréal/Bellure, para. 53; CJEU, 23 March 2010, cases C-236/08-238/08, Google/Louis Vuitton et al., para. 70. As to the debate on the requirement of use in a trade mark sense, see A. Kur, “Confusion Over Use? Die Benutzung “als Marke” im Lichte der EuGH-Rechtsprechung”, *Gewerblicher Rechtsschutz und Urheberrecht International* 2008, p. 1; M. Davison/F. Di Giantomasso, “Use as a Trade Mark: Avoiding Confusion When Considering Dilution”, *European Intellectual Property Review* 2009, p. 443; S.L. Dogan/M.A. Lemley, “The Trademark Use Requirement in Dilution Cases”, *Santa Clara Computer & High Technology Law Journal* 24 (2008), p. 541; G.B. Dinwoodie/M.D. Janis, “Confusion Over Use: Contextualism in Trademark Law”, *Iowa Law Review* 92 (2007), p. 1597.

<sup>20</sup> Max Planck Institute, *supra* note 3, para. 2.178.

comparative advertising and the resale of genuine goods.<sup>21</sup> Where the trade mark is used in the latter sense, use of the mark should only be held to infringe where it is manifestly unfair.

- A further development of existing balancing tools could take place in the area of the limitations of trade mark protection. In this regard, the Recommendation lists several modes of free use that should be expressly secured in trade mark legislation and in future court decisions. In order to keep pace with technological developments and allow the adaptation of the law to changing circumstances, it is also recommended that an open-ended clause should be added to the catalogue of privileged uses – a clause offering room for the courts to develop appropriate new defences on a case-by-case basis in circumstances that are comparable to those expressly exempted in the legislation.<sup>22</sup> Addressing the aforementioned problem of circular reasoning that may neutralize statutory limitations altogether, the Recommendation also points out that the “honest practices” proviso should not be applied in a way that erodes the effectiveness of limitations. In particular, the honest practices requirement must leave room for courts to enter into a balancing of all rights and interests at stake. It must not focus unreasonably on the protected interests through a simple repetition of the infringement criteria.

### *Conclusion*

In a nutshell, the Recommendation highlights existing and potential flexibilities for the reconciliation of property, speech and competition interests at various stages: the grant of trade mark rights, the analysis of trade mark infringement, the interpretation of limitations, and the distribution of the burden of proof. The Recommendation thus provides a toolkit for the establishment of a well-functioning trade mark system in the EU. The proposed measures might valuably be incorporated in the new legislation itself. As guiding principles, they may also offer support for courts seeking to strike a proper balance in EU trade mark law.

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<sup>21</sup> CJEU, 12 June 2008, case C-533/06, O2/Hutchison, para. 36-37; CJEU, 4 November 1997, case C-337/95, Dior/Evora, para. 38.

<sup>22</sup> Cf. G.B. Dinwoodie, “Lewis & Clark Law School Ninth Distinguished IP Lecture: Developing Defenses in Trademark Law”, *Lewis and Clark Law Review* 13/1 (2009), p. 99 (152): “However, as the scope of trademark protection expands and the metes and bounds of protection become more uncertain, we cannot rely exclusively on creative interpretation of the prima facie cause of action to establish limits. Trademark law must more consciously develop defenses that reflect the competing values at stake in trademark disputes.”

## RECOMMENDATION ON MEASURES TO SAFEGUARD FREEDOM OF EXPRESSION AND UNDISTORTED COMPETITION IN EU TRADE MARK LAW

The Signatories,

- *Emphasizing* that, whatever the protection afforded to trade marks, it must always be balanced against general interests, in particular the fundamental freedom of expression and the guarantee of undistorted competition;
- *Recognizing* that the need for an appropriate balance is inherent in trade mark law and is an issue of particular importance in the light of ongoing technological, economic and social developments;
- *Pointing out* that in order to achieve an appropriate balance, the legitimate interests of trade mark proprietors, consumers, competitors and the public at large must be taken into account at all stages by legislators, trade mark registration offices and courts, meaning in particular that:
  - the grant of trade mark rights should not of itself confer a competitive advantage apart from the establishment of an exclusive link with a sign that can be used to distinguish goods and services in the marketplace and obtain a reputation. This principle must be respected independently of the kind of sign and the ground for refusal invoked;
  - the analysis of trade mark infringement must proceed not solely from the perception of the target public but must, as appropriate, take into account other normative aspects, such as the interests of competitors and the public to keep the sign available;
  - a fundamental distinction must be drawn between situations in which a trade mark is used to indicate the commercial origin of goods or services that do not originate from the trade mark proprietor and situations in which a mark is used to identify goods or services as those of the trade mark proprietor or to designate goods or services that are legitimately commercialized in the EU. In the latter situations, use of the mark should only be held to infringe the mark where it is manifestly unfair;
  - the burden of proving the existence, or absence, of conditions relevant to the establishment of trade mark infringement must be distributed appropriately between claimant and defendant, taking into account the equal importance of trade mark protection on the one hand and freedom of expression and freedom of competition on the other.
- *Believing* that these measures are of a mandatory nature, deriving from overarching fundamental principles embodied in the Lisbon Treaty, the Charter of Fundamental Rights and the European Convention on Human Rights;
- *Recognizing* that the existing law already contains certain flexibilities to balance trade mark protection against freedom of expression and freedom of competition and that these flexibilities have, to some extent, been used by courts and that room for such flexibilities must continue to exist;

- *Recommending* nevertheless that, for the purposes of clarification, legal certainty and uniform implementation of these flexibilities in all Member States, certain free uses should be expressly secured in the envisaged new EU trade mark legislation, in particular:
  - political and artistic use, including use for the purposes of criticism, comment and parody;
  - use for the purpose of reporting current events;
  - use resulting from the exhaustion of trade mark rights, including use relating to the offering of goods or services in respect of trade-marked products on downstream markets;
  - use in advertising that allows consumers to compare goods or services, informs consumers about alternative offers in the marketplace, or that brings the resale of trade-marked goods to the attention of consumers;
  - use of a sign or indication that is descriptive in the language of any Member State even if the sign or indication also enjoys protection as part of, or in connection with, a national trade mark;
  - use of all kinds of signs which should remain free to prevent trade mark protection from granting its proprietor a monopoly on functional product characteristics of a technical or aesthetic nature which consumers are likely to seek in the products of competitors, such as use of signs resulting from the nature of goods or services, being necessary to obtain a technical result, or giving substantial value to goods or services.
  
- *Recommending* that, in order to keep pace with technological developments and to allow the adaptation of the law to changing circumstances, an open-ended clause should be added to the provision on limitations which allows courts to develop appropriate new defences on a case-by-case basis in circumstances where the purposes, objectives and fundamental principles underlying the existing legislation warrant permitting third party use notwithstanding the lack of an express limitation. The application of this open-ended clause should not be pre-empted by the existence of more specific limitations. Its scope must not be confined to non-commercial use;
  
- *Recommending* that any legislative requirement for flexibility tools, such as limitations, to be exercised in accordance with “honest practices”, should not be applied in a way that erodes their effectiveness. In particular, the honest practices requirement must leave room for courts to enter into a balancing of all rights and interests at stake. It must not consist of a repetition of infringement criteria that brings protection interests into focus.

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