

INTERNATIONAL AND COMPRATIVE TRADE MARK LAW -- LAWW4072

Student ID: 20590084

Question 3: "The additional protection for trade marks with a reputation against unfair advantage being taken of that reputation does not belong in trade mark law and is merely a protection against unfair competition. It should be scrapped. Discuss."

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Introduction

The protection of trademarks with a reputation against unfair advantage has long been a contentious issue in intellectual property law. Some argue that this provision, which aims to prevent the unauthorized use of well-known trademarks to gain an unfair advantage, does not belong in trademark law and is more appropriately categorized as a protection against unfair competition. This viewpoint suggests that such provisions should be eliminated, as they blur the lines between trademark law and unfair competition law. However, others contend that these protections are necessary to safeguard the reputation and distinctiveness of well-known trademarks, ensuring fair competition in the marketplace. This essay will explore both sides of the argument, examining the implications of retaining or scrapping these protections in trademark law.

I. Protection for trade marks with a reputation

The starting point in discussing the additional protection of trade marks with a reputation is to address the relevant legislation that affords them that protection of the Trade Marks Act (TMA) 1994 provides that:

1. Protection for Trademarks with a Reputation:

Trademarks with a reputation enjoy additional protection under trademark law due to their well-established presence and recognition among consumers. This protection is aimed at preventing third parties from exploiting the reputation of these marks for their own gain. Section 10 of the Trade Marks Act 1994 relates to the refusal of registration of trademarks that are identical or similar to an earlier trademark. It states that a trademark shall not be registered if it is identical to an earlier trademark and is to be registered for goods or services identical to those for which the earlier trademark is protected. Such exploitation can take various forms, including free-riding on the mark's reputation or diluting its distinctiveness by using a similar mark for unrelated goods or services.

Opponents of this protection argue that it extends beyond the core function of trademark law, which is to protect consumers from confusion regarding the origin of goods or services. They argue that the protection of trademarks with a reputation against unfair advantage is more appropriately addressed under unfair competition law. This is because the focus shifts from protecting the trademark itself to protecting the reputation or goodwill associated with the mark, which is a broader concept not directly linked to the mark's distinctiveness or origin-indicating function.

However, proponents of this protection point out that trademarks with a reputation play a crucial role in the marketplace by indicating quality, reputation, and other desirable attributes associated with the goods or services bearing the mark. Protecting these marks against unfair advantage ensures that consumers are not misled or deceived by third parties seeking to capitalize on the mark's reputation. Moreover, they argue that the distinctiveness and reputation of a mark are integral to its function as a source identifier, and therefore, protecting these aspects falls within the purview of trademark law.

In conclusion, while some may argue that the protection of trademarks with a reputation against unfair advantage belongs more appropriately in the realm of unfair competition law, it is undeniable that these marks serve a unique function in the marketplace and warrant additional protection under trademark law. Scrapping this protection could undermine the integrity of well-established marks and weaken the overall effectiveness of trademark law in protecting consumer interests.

Section 10 of the Trade Marks Act (TMA) 1994 outlines the provisions regarding the registration of trademarks that contain common or generic signs or indications. Here's a breakdown of the key points covered in this section:

- 1. Prohibition of Registration:** The section prohibits the registration of trademarks that consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the

time of production of goods or of rendering of services, or other characteristics of goods or services.

2. Exception for Distinctiveness: However, this prohibition does not apply if the applicant can establish that the mark has acquired a distinctive character as a result of the use made of it.

3. Distinctiveness Through Use: This means that even if a trademark is initially descriptive or generic, if it has been used extensively and consumers now associate it exclusively with a particular product or service, it may be eligible for registration.

4. Evidence Required: To establish acquired distinctiveness, the applicant may need to provide evidence of the mark's use in the marketplace and how it has become associated with their goods or services.

5. Scope of Protection: If a trademark is registered under this provision, its scope of protection is limited to the goods or services for which it has acquired distinctiveness.

6. Criteria for Determination: The determination of whether a trademark has acquired a distinctive character is based on the perception of the relevant public, including the perception of the mark as a whole and not its individual components.

In *Claeryn/Klarein*,¹ the trade mark of a toiler cleaner sounded similar (in Dutch) to a well-established trade mark of an alcoholic drink and, on that basis, the Belenux Court held that the trade mark with the reputation suffered detriment as it could be associated with toilet cleaners. Of course, it was irrelevant that the products in question were completely different. The broad scope of this protection was further explained in *Davidoff & Cie SA and Zino Davidoff SA v Gofkid Ltd*.² In that case, a company used the sign 'Durffee' for products similar to the ones Davidoff was selling. First, the EUCJ

¹ *Claeryn/Klarein* Belenux Court of Justice, 1 March 1975, [1975] NJ 272.

² Case C-292/00 *Davidoff & Cie SA and Zino Davidoff SA v Gofkid Ltd* EU:C:2003:9.

acknowledged how strong the protection of trade marks with a reputation is, by explicitly stating: "This stronger protection is given when the use of the sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the mark."³ Then the Court went on to explain that:

Articles 4(4)(a) and 5(2) of the Directive are to be interpreted as entitling the Member States to provide specific protection for registered trade marks with a reputation in cases where a later mark or sign, which is identical with or similar to the registered mark, is intended to be used or is used for goods or services identical with or similar to those covered by the registered mark.⁴

It follows from this judgement, that trade marks with a reputation are afforded protection not only in cases where the products or services in question are not similar, but also in cases where the products or services in question are similar. That is now reflected in s. 10(3A) TMA and was later reaffirmed in *Adidas v Fitnessworld*.⁵ In that case, the EUCJ explained the fundamental difference between the protection afforded to trade marks with a reputation compared to the protection of other trade marks and, by doing so, widened the scope of protection of trade marks with a reputation even further. The Court held that:

unlike Article 5(1)(b) of the Directive, which is designed to apply only if there exists a likelihood of confusion on the part of the public, Article 5(2) of the Directive establishes, for the benefit of trade marks with a reputation, a form of protection whose implementation does not require the existence of such a likelihood.⁶

Although the Court explained in *Adidas* how broad the scope of protection of trade marks with a reputation is, what was still needed was clarification as to how exactly this 'link' with a reputed trade mark could lead to infringement. The opportunity for the Court

³ Ibid para 21.

⁴ Ibid para 30.

⁵ Case C-408/01 *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd* EU:C:2003:582.

⁶ Ibid para 27.

to clarify this requirement arose in *Intel*.⁷ That case involved a company using the term 'INTELMARK' for marketing and telemarketing services, to which the famous microprocessor manufacturer, Intel objected. The Court explained that "the fact that the earlier mark has a huge reputation for certain specific types of goods or services, does not necessarily imply that there is a link, within the meaning of *Adidas*."⁸ The Court also stated that "existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case."⁹ According to the Court, such factors include:

- a) the degree of similarity between the conflicting marks; b) the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public; c) the strength of the earlier mark's reputation; d) the degree of the earlier mark's distinctive character; and e) the existence of the likelihood of confusion on the part of the public.¹⁰

Finally, the Court clarified that the existence of such a link "requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future."¹¹ This decision is very important, because it created certain safeguards as to how exactly the protection of trade marks with a reputation operates in practice and confirmed that simply because a trade mark enjoys certain reputation, that does not automatically trigger the very wide protection under s. 10(3) TMA.

In *L'Oréal*¹² a company produced imitation perfumes, the characteristics of which (including their smell, name and packaging) strongly resembled the perfumes produced

⁷ Case C-252/07 *Intel Corporation Inc. v CPM United Kingdom Ltd* EU:C:2008:655.

⁸ *Ibid* para 64.

⁹ *Ibid* para 41.

¹⁰ *Ibid* para 42.

¹¹ *Ibid* para 77.

¹² Case C-487/07 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd* EU:C:2009:378.

by L'Oréal and also made comparison lists that included both the original and imitation perfumes which were then distributed to retailers. The Court explained that Article 5(2) of Directive 89/104 "does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark."¹³ Moreover, the Court explained what exactly is meant by 'taking unfair advantage of the reputation of a trade mark': "also referred to as 'parasitism' or 'free-riding'. That concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign"¹⁴. It refers to situations where "by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation."¹⁵

The EUCJ also held that a third party takes unfair advantage of a trade mark with reputation, when it seeks to "ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image."¹⁶

In *Interflora*,¹⁷ the issue at stake was whether the use of AdWords by a competitor amounted to 'taking unfair advantage of the reputation of a trade mark'. The Court held that:

the proprietor of a trade mark with a reputation is entitled to prevent a competitor from advertising on the basis of a keyword corresponding to that trade mark, which the competitor has, without the proprietor's consent, selected in an internet referencing service, where the competitor thereby takes unfair advantage of the distinctive character or repute of the trade

¹³ Ibid para 50.

¹⁴ Ibid para 41.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Case C-323/09 *Interflora v Marks & Spencer plc Ltd* EU:C:2011:604

mark (free-riding) or where the advertising is detrimental to that distinctive character (dilution) or to that repute (tarnishment).¹⁸

However, the Court stated that, when AdWords is used, but the competitor does not offer imitation products or services and does not cause dilution or tarnishment to the trade mark with a reputation, no infringement occurs.¹⁹

In addition, it should be noted that the particular facts of every case should be taken into consideration in deciding whether unfair advantage has been taken of the reputation of a trade mark. For instance, when Kenwood started manufacturing kitchen appliances that were similar to the ones produced by KitchenAid, which were protected by a shape trade mark, it was held that no unfair advantage had been taken under s. 10(3) TMA, as Kenwood had already an established reputation in that specific market.²⁰ Similarly, in *Argos*, the Court held that an element of unfairness is required to trigger the wide protection afforded by s.10(3) TMA and not just a mere advantage of the reputation of a trade mark.²¹

II. Why trade marks with a reputation are different & does their protection belong in trade mark law?

(A).Arguments suggesting that this additional protection does not belong in trade mark law

Trademarks with a reputation are considered different due to their distinctive status in the marketplace. These marks have acquired a significant level of goodwill and recognition among consumers, often transcending their original goods or services. The protection of such marks is essential to prevent dilution and unfair advantage by others seeking to capitalise on their reputation. This additional protection is crucial in maintaining the integrity of the trademark system and ensuring fair competition.

¹⁸ Ibid para 93.

¹⁹ Ibid para 95.

²⁰ *Whirlpool Corporation v Kenwood Ltd* [2009] EWCA Civ 753.

²¹ *Argos Ltd v Argos Systems Inc* [2018] EWCA Civ 2211, paras 108-109.

However, some argue that the protection of trademarks with a reputation does not belong in trademark law for several reasons. One argument is that extending protection to these marks could create monopolies and hinder competition. Critics suggest that such protection may lead to the suppression of innovation and limit consumer choice by restricting the use of similar marks, even in unrelated fields.

Another argument is that the protection of trademarks with a reputation blurs the line between trademark law and other areas of intellectual property law, such as unfair competition law. Critics contend that issues related to reputation and goodwill should be addressed through broader legal frameworks rather than within the confines of trademark law.

Furthermore, some argue that the protection of trademarks with a reputation may impose an undue burden on smaller businesses and startups. The cost and complexity of enforcing these rights could disproportionately affect smaller entities, potentially stifling entrepreneurship and economic growth.

In conclusion, while the protection of trademarks with a reputation is essential for maintaining the integrity of the trademark system, there are valid arguments suggesting that this additional protection may not fully belong in trademark law. Balancing the need to protect these marks with the goal of promoting competition and innovation remains a challenge for policymakers and legal practitioners.

Moreover, McKenna has observed that the difference between trade mark law and unfair competition law is that, *traditionally*, trade mark law primarily focuses on the validity of the trade mark, whereas unfair competition is more concerned with the conduct of

competitors.²² However, both the TMA and the TMD prohibit “unfair advantage” being taken of the reputation of a reputed trade mark and it is this element of unfairness and the prohibition of free-riding that inevitably signify a connection with the conduct of trade mark proprietors.

(B).Unfair competition in the UK

The importance of protection against unfair competition is enshrined in Article 10bis of the Paris Convention²³ and also repeated in Article 2 of the TRIPS Agreement.²⁴ Article 10bis(2) of the Paris Convention states that “any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.” However, in the UK, although *obiter* was stated in *Arsenal* that passing off can be referred to as tort of unfair competition,²⁵ the English Courts have expressly refused to recognise a tort of unfair competition. The High Court in *L’Oréal*, stated that “never has the tort (i.e. of passing off) shown even a slight tendency to stray beyond cases of deception”²⁶ and in the Court of Appeal, Jacob LJ stated that “if the courts (or indeed Parliament) were to create such a tort [of unfair competition] it would be of wholly uncertain scope – one would truly have let the genie out of the bottle.”²⁷ D. Meale and J. Smith argue that *maybe* the genie is now out.²⁸ The additional protection for trade marks with a reputation against unfair advantage being taken of that reputation gives proprietors of trade marks with a reputation the right, even in the absence of any confusion or proof of actual harm, to effectively prevent competitors from free-riding on the trade marks’ reputation regardless of whether the goods or services in question are similar or dissimilar. Hence, Meale and

²² Mark P. McKenna, 'Property and Equity in Trademark Law' (2019) 23 Marq Intell Prop L Rev 117,126.

²³ Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference (20 March 1883) 828 UNTS 305.

²⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

²⁵ *Arsenal Football Club Plc v Reed* (No.2) [2003] EWCA Civ 696, [2003] 3 All E.R. 865 para 70.

²⁶ *L’Oréal v Bellure* [2006] EWHC 2355 (Ch), [2007] E.T.M.R. 1 para 166, citing *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* (No.1) [1994] 1 W.L.R. 1564.

²⁷ *L’Oréal v Bellure* [2007] EWCA Civ 968, [2008] E.T.M.R. 1, para 161.

²⁸ Darren Meale and Joel Smith, 'Enforcing a trade mark when nobody's confused: where the law stands after *L’Oréal* and *Intel*' (2010) 5(2) Journal of Intellectual Property Law & Practice 96, 104.

Smith claim that “this may be as close to an unfair competition law as we have in the UK.”²⁹

(C). Unfair competition in the EU

At the EU level, there is lack of complete harmonisation on unfair competition law and as a result, according to Senftleben, some EU Member states have enacted their own Acts covering matters of unfair competition, whilst other states rely on their general tort law to handle cases involving unfair competition.³⁰ Precisely because every EU Member State has its own approach when it comes to unfair competition, similar cases might be decided differently across the EU.³¹ The relevant legal instruments covering unfair competition as regards trade marks, are the Unfair Commercial Practices Directive³² (UCPD) and the Directive concerning Misleading and Comparative Advertising³³ (MCAD). However, Lepik argues that, in practice, both of these Directives are of little help to trade mark proprietors for two reasons: first, the thresholds for protection are much higher compared to the provisions of the TMD, for instance under Article 6(1) UCPD, a consumer must be deceived to enter a transaction “he would not have taken otherwise”; and second, because neither of these Directives adequately protect the interests of trade mark proprietors, since they “do not require (Member States) to confer a private right of action on persons having a legitimate interest in ensuring compliance with their provisions, including competitors.”³⁴ Finally, Lepik acknowledges that, as a result of the additional protection for trade marks with a reputation against unfair advantage being taken of that reputation, “the EU trade mark law is increasingly becoming the EU law of unfair competition with regard to practices

²⁹ Ibid 103.

³⁰ Martin Senftleben, ‘Protection against unfair competition in the European Union: from divergent national approaches to harmonized rules on search result rankings, influencers and greenwashing’ (2024) 19(2) *Journal of Intellectual Property Law & Practice* 149, 150.

³¹ Gea Lepik, ‘Protecting Trade Mark Proprietors Against Unfair Competition in EU Trade Mark Law’ (2021) 30 *JURIDICA INTERNATIONAL* 152, 161.

³² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

³³ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising OJ L 376, 27.12.2006, p. 21–27.

³⁴ Gea Lepik (n 46) 162.

involving the use of trademarks.”³⁵ Nevertheless, Lepik sees that as a positive development, because, now EU trade mark law has a twofold purpose: first, it helps trade mark proprietors by providing them with an effective mechanism to enforce their rights; and second, it provides a necessary element of harmonization at the EU level when it comes unfair practices in relation to trade marks.³⁶

(D). Arguments suggesting that this additional protection does belong in trade mark - Trademark law is based on the fundamental purpose of trademarks. Trademarks serve as indicators of the source of goods or services, helping consumers make informed decisions and avoiding confusion. Trademarks with a reputation play a crucial role in this regard, as they have become synonymous with a certain level of quality, reliability, and trustworthiness in the eyes of consumers. Protecting these marks in trademark law helps maintain the integrity of the trademark system by ensuring that consumers can continue to rely on trademarks as reliable indicators of source. Furthermore, the protection of trademarks with a reputation in trademark law helps prevent dilution and unfair advantage by others seeking to capitalise on the reputation of these marks. Dilution occurs when a mark is used in a way that diminishes its distinctiveness or harms its reputation. By providing protection for trademarks with a reputation, trademark law helps preserve the distinctiveness and value of these marks, ensuring that they continue to serve as strong indicators of source. Additionally, protecting trademarks with a reputation in trademark law helps promote fair competition. By preventing competitors from unfairly benefiting from the reputation of another’s mark, trademark law encourages businesses to compete based on the quality and merits of their own goods or services, rather than by misleading consumers or trading on the goodwill of others. In conclusion, the protection of trademarks with a reputation in trademark law is essential to maintaining the integrity of the trademark system, protecting consumers, and promoting fair competition. While there are valid arguments suggesting that this additional protection may not fully belong in trademark law, the benefits of protecting

³⁵ Ibid 163.

³⁶ Ibid.

these marks outweigh the potential drawbacks, making their protection a crucial aspect of trademark law. However, in order to reach this level of recognition, success and reputation in the marketplace, often substantial resources and time (in the case of the brands mentioned above, entire decades) have been spent. In practice, this additional protection for trade marks with a reputation against unfair advantage being taken of that reputation "reflect(s) the commercial value of [these] brands."³⁷ If such a protection for trade marks with a reputation did not exist, anyone would be able to launch and market products similar to the original ones, but without having spent any effort, time and capital to build such reputation or such high quality products in the first place and "the free-rider (would) be able to sell his products at lower prices since he is not paying the full costs of production, whilst the competitor (would) have to incur extra costs."³⁸

Therefore, because brands with a certain reputation are different in nature, the protection of their respective trade marks should be equally different. One needs to ask, what would happen to a trade mark with a reputation if protection against free-riding were to be scrapped entirely from trade mark law? The answer is, it would have negative consequences for an entire class of products and services that rely heavily on the reputation of their trade marks to appeal to their prospective customers. Lepik rightly points out that in the case of trade marks with a reputation, the connection between the product and the trade mark is so strong, that its proprietor can actually raise the price of the product, simply on the basis of that reputed trade mark and that "makes the proprietor vulnerable to commercial practices of third parties that either attempt to damage the trade mark's attractive force or take advantage of its status and reputation without putting in the necessary effort and investment."³⁹ It is noteworthy that even the European Union Intellectual Property Office (EUIPO) has explicitly stated in its guidelines that "a very strong reputation is both easier to harm and more tempting to take advantage of, owing

³⁷ Hannes Rosler, 'The rationale for European trade mark protection' (2007) 29(3)E.I.P.R. 100, 106.

³⁸ Basma (n 36) 1243.

³⁹ Gea Lepik (n 46) 152, 153.

to its great value⁴⁰ and this is the exact reason why trade mark law affords this additional protection to trade marks with a reputation.

(E).What functions of the trade mark are being protected and why is that important?

The broader interpretation of the role of trade marks, was first discussed in *Arsenal*, where AG Ruiz-Jarabo Colomer stated: "It seems to me to be simplistic reductionism to limit the function of the trade mark to an indication of trade origin. (...) The trade mark acquires a life of its own, making a statement, as I have suggested, about quality, reputation and even, in certain cases, a way of seeing life."⁴¹ Then, in *L'Oréal*, the EUCJ went a step further when it recognised that the functions of a trade mark "include not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services, but also its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising."⁴²

The functions of a trademark that are being protected include:

1. Source identification: Trademarks serve as indicators of the source of goods or services, helping consumers identify and distinguish between products or services offered by different companies. This function is crucial in ensuring that consumers can make informed .

2. Quality assurance: Trademarks also serve as a guarantee of quality and consistency.

A strong trademark is associated with a certain level of quality, reliability, and trustworthiness. By protecting trademarks, intellectual property laws help maintain this

⁴⁰ European Union Intellectual Property Office (EUIPO), 'Guidelines for Examination of European Union Trade Marks – Part C: Opposition (1/02/2020) Sec. 5, p. 1106.

⁴¹ Case C-206/01, *Arsenal Football Club v Reed*, EU:C:2002:373, Opinion of AG Ruiz-Jarabo Colomer, para 46.

⁴² *L'Oréal* (n 18) para 58.

association, ensuring that consumers can continue to rely on trademarks as indicators of quality.

3. Marketing and advertising: Trademarks play a significant role in marketing and advertising efforts. They help companies build brand recognition and loyalty, which are essential for attracting and retaining customers. Protecting trademarks ensures that companies can continue to invest in building their brands without the risk of others unfairly benefiting.

4. Investment protection: Companies invest significant resources in developing and promoting their trademarks. Protecting trademarks ensures that companies can reap the benefits of their investments and prevent others from unfairly benefiting from their efforts.

Overall, protecting the functions of trademarks is important because it helps maintain the integrity of the trademark system, protects consumers from confusion and deception, promotes fair competition, and encourages innovation and investment in brand.

Concluding Remarks

This essay has sought to explain ,, the legal landscape surrounding the protection of trademarks with a reputation against unfair advantage is complex, blending elements of unfair competition law with trademark law. While the UK courts have not embraced a distinct tort of unfair competition, the EU, through its trade mark law, provides a harmonised framework that extends broader protection to marks with a reputation. This recognition underscores the unique nature of such marks, emphasizing their vulnerability and the need for enhanced safeguards. As businesses navigate these intricate legal principles, a clear understanding of both trademark and unfair competition laws is essential to ensure effective protection of intellectual property rights.

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