# Editorial

## Another Attack on Trade Marks

Any sort of monopoly can be expected to attract criticism. There have been plenty of occasions in the past when the scope of intellectual property rights has been called into question, and the pressure particularly on trade marks is even reaching new levels.

The realisation that designer goods sell for less in other markets – particularly the US – than here has prompted the latest attack on trade marks. Price differentials in a variety of areas – not just cars, where they have been remarked on for years – have attracted considerable interest, including the attention of parallel traders.

The result is that the courts – in particular, the European Court of Justice – are churning out regular statements of how trade mark law should be interpreted in the light of these developments. In the landmark *Silhouette* judgment last year, the Court made it abundantly clear that the exhaustion of trade mark rights under Directive 89/104/EEC meant, and could only mean, exhaustion within the European Economic Area (EEA): the trade mark owner's rights were not exhausted when the goods later re-imported into the EEA were sold in Bulgaria.

Now, in Case C-173/98 *Sebago*, Advocate General Jacobs has presented an opinion that closes the latest loophole detected by a parallel trader. Arguing that the function of a trade mark is simply to indicate the origin of products and to give a guarantee of quality, the defendants contended that marketing batches of identical goods in the EEA amounted to marketing the entire product line, so that it could be said that the grey imports had effectively been marketed with the consent of the trade mark owner.

The argument, though ingenious, could not be allowed, and sure enough the Advocate General has rejected it. It flew in the face of the wording of the Directive and of the jurisprudence of exhaustion of intellectual property rights. It seeks to counter one fairly artificial proposition with one that is even more artificial. No trade mark owner would recognise in the defendants' argument the function of the brand it had spent time and money in developing.

There is nevertheless a very serious point to be made here. The Directive is an instrument of single market integration, and clearly that goal does not require that parallel imports from Bulgaria or the USA are given free access to the common market. But European consumers have learnt to think globally, and to ask why sunglasses should be sold cheap in Bulgaria (and somehow to ignore the obvious answer, that you can't sell them at full price in Bulgaria). The US, too, is a very different market.

Trade marks do more than identify origin and guarantee quality, though those are important functions. They represent value to their owners, and they convey a certain cachet to consumers (and bystanders). Consumers want to be seen in Sebago shoes, or Levi's jeans, or (following the brand's meteoric rise from obscurity courtesy of the ECJ) Silhouette sunglasses. But when every second person is equipped with these designer goods, freely available from your local supermarket, the cachet and with it the brand value will have evaporated.

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