Free Movement of Goods and Parallel Imports in the Internal Market of the EU

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'Let us consider the reason of the case.
For nothing is law that is not reason.'
Sir John Powell

A. Introduction

In the reality of market economy only few will feel motivated to provide their resources and efforts towards development and quality without proper intellectual property (IP) protection. IP protection should guarantee adequate rewards for these efforts. Europeans of the 21st century are more informed of the existence of intellectual property rights (IPR) than ever before. We are ever more accepting the fact that IP does exist, its protection is necessary and that violating IPR is just as severe as interfering with any other property right.

The World Trade Organization is doing its best to develop stronger IP protection; the European Community (EC) has taken steps to harmonize laws of the Member States, creating for example a Community trademark. Estonia has declared some IP infringements punishable by criminal sanctions – not only limited to a fine, but also enabling prison sentences for up to three years.

The European Union (EU) has another goal stipulated in Article 14 of the European Community Treaty (EC Treaty),[1] namely the creation of an Internal Market – 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' (the so-called 'four freedoms'). The practice of the European Court of Justice (ECJ) in interpreting these four freedoms is pro-integration, finding all sorts of national rules and practices contrary to the relevant articles of the Treaty. In the *Dassonville* decision the ECJ stated that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative

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1 Hereinafter all references to articles are to those of the European Community Treaty if not stated otherwise.

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restrictions' and thus contrary to Article 28 (ex Article 30).[2] This rather generous interpretation was later limited in the *Keck* judgment, where the ECJ excluded certain selling arrangements from the scope of Article 28.[3]

In order to guarantee proper compensation for the efforts in creating something new, IP protection rules provide means for preventing others from making use or selling the products unless certain conditions are fulfilled. The Internal Market on the other hand, aims at challenging limitations to the free movement of goods. Both goals are legitimate, yet conflicting and thus it is hard to find a balance between the two. This article seeks to examine the possibilities of balancing IPR protection with an effectively functioning Internal Market.

The foundation of such balance lies in Article 30, which provides an exception to Article 28. Article 30 allows under certain limited conditions prohibitions or restrictions on imports, exports or goods in transit to be justified on grounds of protection of industrial and commercial property. These limitations should however not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Could one conclude from the exception in Article 30 that all limitations arising from IPRs are to be considered outside the grasp of Article 28? Such an interpretation would have meant the 'death' of the Internal Market because today a vast majority of all goods are connected with IPRs. An absolute protection of IPRs could have provided the owners of IPRs with excellent tools for partitioning the European market according to their own best interest and contrary to the general goals of the European Community. Based on the above one can see that applying the prohibition of quantitative restrictions and measures which have equivalent effect and the exceptions contained in the EC Treaty in cases concerning IPR can be complicated.

B. Splitting the IPRs into Two

From the very beginning the ECJ has justified its interference with IPR with the need to guarantee the effective functioning of the Internal Market and to prevent the Community from being split into separate national markets. According to the ECJ:

> If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.
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> That purpose could not be attained if, under the various legal systems of the Member States, nationals of those states were able to partition the market and bring

[2] Case 8/74, Dassonville, [1974] ECR 837, para. 5; wording of Article 28: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

[3] Joined Cases C-267 and 268/91, Bernard Keck and Daniel Mithouard, [1993] ECR I-6097.

> about arbitrary discrimination or disguised restrictions on trade between Member States.[4]

The ECJ saw a risk that an owner of IPRs could use its exclusive rights in an abusive manner by trying to prevent the movement of goods from one Member State to another. Thus a solution had to be found that would enable the owner of IP to receive adequate remuneration for her efforts and at the same time enable the goods to move freely within the European Community. In order to achieve this, the ECJ developed an approach, which is often described as splitting the IPRs into two: a) the existence of an intellectual property right (protection of ownership as such) and b) the use of an intellectual property right (limitations on the use of an IP right).[5]

It has been argued that the differentiation of the existence of a right and its exercise is not possible as the former logically includes the latter.[6] Such argumentation is somewhat misleading. Although intellectual property should, in theory, be treated as any other property that consists of a variety of rights of the owner, there are certain specific factors that are different. With the disposing of ordinary property the rights of the previous owner terminate. In the case of IP certain rights may however be inalienable (e.g. moral rights) and thus remain valid even after the disposal of the product itself. Thus, in case of IP there may be a situation where the product subject to intellectual property rights physically belongs to another person while the owner of the IPRs remains in possession of certain rights *vis-à-vis* the same product. The question is how to properly balance the rights of the two.

It is the view of this author that the case law of the ECJ seems to deal more with limiting the exercise of various property rights, not with the existence of property and the possibility to view the existence of the property and the exercise of certain rights separately.[7] Thus it is argued here that the case law of the ECJ can be better understood drawing a parallel to the classical division of the author's rights into moral rights and economic rights. Where the moral rights of the author remain valid throughout the whole term of protection, an economic right, such as the right to distribute the protected product, generally expires with putting the goods on the market.[8] Thus there are indeed several persons that have rights relating to the same product, of which only one may be the owner of the product itself.

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4 *See* Case C-78/70, Deutsche Grammophon Gesellschaft mbH *v.* Metro-SB-Großmärkte GmbH & Co. KG, [1971] ECR 487, para. 12.

5 *Id.,* para. 11.

6 *See e.g.* P. Craig & C. de Burca, EU Law: Text, Cases and Materials 1088-1089 (2003).

7 *See also* S. Kaur Verma, *Exhaustion of IP Rights: Recent Developments*, World Intellectual Property Organization, 1999 International Association for the Advancement of Teaching and Research in Intellectual Property ATRIP Annual Meeting, at 2 (1999).

8 The fact that some of IP owners rights continue to exist while others expire can also be seen in Article 6bis of the 1971 Berne Convention for the Protection of Literary and Artistic Works, which provides in part that:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object

The fact that property rights are not absolute and are subject to certain limitations is nothing new. Already Roman law provided for limitations of ownership (*dominium*).[9] Considering the need to balance the property rights of an individual with Community interests and with the need of taking into account the specific nature of IP, the ECJ developed the doctrine of exhaustion. The origins of exhaustion, or the 'first sale' doctrine, can be found in the USA, and it was first introduced in Europe by the decisions of the German *Reichsgericht* in 1902.[10] 'It represents the demarcation line between the intellectual property rights of the manufacturer in the product and the proprietary rights of the purchaser in the product.'[11] The doctrine follows an easy concept – the owner's rights in using the property are not of unlimited duration – as a rule they are exhausted from the moment the goods are lawfully put on the market with the consent of the owner of IP. 'Exhaustion applies to individual goods, rather than to types of goods or to product lines.'[12] According to Prof. Torremans:

> Exhaustion is a limitation of trade mark rights that aims to prevent the fact that trade mark rights can be used twice in relation to the same goods. The argument behind this is that the justifiable purpose of the exclusive right has been fulfilled once the holder of the right has been allowed to be the only party that is able to release the goods, labelled with the trademark, on a market. Any further use of the trade mark to restrict the circulation of the genuine goods on the market would give rise to a non-justifiable use (or abuse) of the right.[13]

Although the above abstract addresses the question of exhaustion relating to trademarks, the same reasoning applies *mutatis mutandis* in relation to the other IPRs. It is not in the interests of the Internal Market to permit the IPR holder to have economic rights towards goods that have already been put on the market with his consent. When speaking about exhaustion, the ECJ has for years followed a similar pattern. The ECJ recognizes the existence of an intellectual property right, however limits the effects of the particular right by stating *de facto* that the economic right of putting the product on the market expires *vis-à-vis* a specific product, when the owner of IP has released that product in any Member State of the EC.[14]

> to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

9 For example, rights-of-way.

10 *See* A. A. Yusuf & A. Moncayo von Hase, *Intellectual Property Protection and International Trade-Exhaustion of Rights Revisited*, 16 World Competition 115–131, at 117 (1992); P. Torremans, *International Exhaustion in the European Union in the Light of Zino Davidoff: Contract v Trade Mark Law?*, *in* World Intellectual Property Organization, 1999 International Association for the Advancement of Teaching and Research in Intellectual Property ATRIP Annual Meeting, at 11 (1999).

11 *Id*.

12 *Id*., at 4.

13 *Id*., at 4-5.

14 Exhaustion occurs only where the products have been put on the market in the EC (in the EEA since the EEA Agreement entered into force). *See e.g.* Case C-355/96, Silhouette International Schmied GmbH & Co. KG *v.* Hartlauer Handelsgesellschaft mbH, [1998] ECR I-4799, para. 18.

Indeed the concept of exhaustion of a right is interesting in the sense that the term ‘exhaustion‘ does not fit into the classical description of the ‘life‘ of a right. According to the classical approach, rights a) are created, b) change and c) terminate.[15] In fact, if one studies the case law of the ECJ, it seems impossible to differentiate between ‘exhaustion’ of the IP owner’s rights of putting the goods on the market for the first time and ‘termination’ of the same rights. In the view of this author the using of the term ‘exhaustion‘ by the ECJ should be seen as a grammatical difference and treated as a synonym to the term ‘termination of a right’.

It is commonly accepted that exhaustion concerns a specific market and does not permit moving the goods from one market to another without the permission of the owner of IP.[16] The territorial application of the doctrine leads to the question of whether genuine goods lawfully marketed in one country can be imported to another country.[17] The ECJ has firmly established in its case law so that for the purposes of European Law, the ‘market’ in question is the European Economic Area.

C. Cases Concerning Patent Rights

In the case *Centrafarm v. Sterling Home*, Centrafarm imported from England and Germany to the Netherlands medicinal preparations that were manufactured using a patent method belonging to Sterling Drug Inc.[18] In doing so, Centrafarm benefited from a significant price difference. Even though Sterling Drug had agreed to the goods being marketed in England and Germany it was not happy about the importation of the same products to the Netherlands at significantly cheaper prices than those that Sterling Drug was charging on the Netherlands market. When Sterling Drug brought a lawsuit before Dutch courts trying to get an injunction against the imports that it claimed violated its patent rights, a request for a preliminary ruling was made. The ECJ was faced with a question whether using a patent right to prevent imports of goods lawfully marketed in other Member States, would fall within the exception laid down in Article 30 (ex Article 36), or would the employment of IPRs in such a way be contrary to the principle of free movement of goods laid down in Article 28 (ex Article 30). According to the decision:

> Inasmuch as it provides an exception to one of the fundamental principles of the common market, Article [30] in fact only admits derogations from the free movement of goods where such derogations are justified *for the purpose of safeguarding rights which constitute the specific subject matter of this property*.

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[15] *See* H. Pisuke, *Autoriõigus ja autoriõigusega kaasnevad õigused: saavutused ja perspektiivid* [Copyright and Related Rights: Achievements and Perspectives], 3 Õigusinstituudi Toimetised 3–13, at 10 (2000).

[16] Some states have adopted global exhaustion as a standard, however this falls outside the scope of this article.

[17] *See* Yusuf & von Hase, *supra* note 10, at 116.

[18] Case 15/74, Centrafarm BV and Adriaan De Peijper *v.* Sterling Drug Inc, [1974] ECR 1147.

> In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, *to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time*, either directly or by the grant of licences to third parties, as well as the right to oppose infringements.[19] [Emphases added]

In the two paragraphs above the ECJ clarified that Article 30 cannot be considered as an absolute absolution for using the IPR to prevent the free movement of goods. The ECJ limited the exception of Article 30 in such a way as to provide protection for manufacturing and putting the goods in circulation *for the first time*. In guaranteeing these two rights the creative effort of the inventor is sufficiently rewarded and thereafter the more general goals of the Internal Market prevail. Thus in paragraph 11 of the decision the ECJ made it clear that for the purposes of EC law putting the goods in circulation in another Member State is sufficient for exhaustion.

In order to have proper regard to the justified interests of the owner of IP the ECJ continued in the following paragraph as follows:

> [D]erogation from the principle of the free movement of goods is not, however, justified where the product has been put onto the market in a legal manner, by the patentee himself or with his consent, in the member state from which it has been imported, in particular in the case of a proprietor of parallel patents.
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> In fact, if a patentee could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive rights flowing from the parallel patents.[20]

The above excerpts of the decision show once again that the main concern of the ECJ is the possibility of abuse of IP rights with the goal of partitioning the Internal Market. Such abuse of IP rights could ultimately result in a failure of the creation of the Internal Market. Considering the above, a reasonable compromise was made between the conflicting interests. It is difficult to dispute the argument that sufficient reward has been given to the inventor by reserving the right of manufacturing the goods and putting them on the market for the first time. It would be difficult to show a legitimate and common interest in extending this protection to each and individual Member State. It can indeed be argued that if an IP owner decides to market its product in one Member State it makes an informed decision and must know that his right of putting the goods on the market has been exhausted as to the whole Internal Market.

The situation becomes more complicated if public regulations limit the freedom of the owner of IP to determine the quantity or price of the product. Can one still claim that the system provides for an adequate and effective reward for the creative effort of the owner of IP? This question arose in *Merck II*.[21] According to the ECJ:

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[19] *Id*., paras 8-9.

[20] *Id*., para. 12.

[21] Case C-267, 268/95, Merck / Primecrown and Beecham / Europharm, [1996] ECR I-6285.

> [A]lthough the imposition of price controls is indeed a factor, which may, in certain conditions, distort competition between Member States, that circumstance cannot justify a derogation of the principle of free movement of goods. It is well settled that distortions caused by different price legislation in a Member State must be remedied by measures taken by the Community authorities and not by the adoption by another Member State of measures incompatible with the rules on free movement of goods. [References to case law omitted]

It is more difficult to agree with the ECJ on this point. The owner of IP is faced with a very tough choice – either to market the goods in a Member State where the price of the goods is fixed by local rules and risk with the same goods moving to other Member States where prices are higher, or to refrain from marketing and risk not only with negative publicity but also moral conflicts as well as in certain cases also mandatory licences being issued to competitors. It has been argued that there is indeed a third possibility – limit supplies to a particular Member State so that they would correspond to the needs of that Member State.[22]

Concerning the issue of mandatory licences the *Pharmon* case has to be mentioned.[23] In the *Pharmon* case the imported product was manufactured in the exporting member state by the holder of a compulsory licence. The question arose, whether marketing a product in one Member State under a mandatory licence could be considered to exhaust the rights of the original owner of IP. This time the ECJ emphasized the importance of patentee's consent to put the product into circulation. Where a third party uses a compulsory licence to produce and sell a product, 'the patentee cannot be deemed to have consented to those operations and he may therefore oppose importation of products made by the holder of the compulsory licence'.[24]

The above practice of the ECJ seems to aim in the same direction – if one chooses to market a product in a given Member State despite the conditions there, one knowingly accepts whatever conditions are laid down in that Member State and cannot attempt to block parallel imports from the same state. In cases of mandatory licences the decision to inform is not made by the IPR owner and therefore the right to rely on IP protection remains.

22 *See* the opinion of Advocate General Jacobs *in* Case C-53/03, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) *v*. Glaxosmithkline AEVE, [2004] ECR I-4609 and Case C53/03, Syfiat and others [2005] ECR I-4609.

23 Case 19/84, Pharmon *v*. Hoechst, [1985] ECR 2281.

24 *Id*., para. 25.

D. Cases Concerning Trademarks

The laws on trademark are harmonized by the First Council Directive 89/104/EEC of 21 December 1988.[25] Articles 5 to 7 of the Directive seek a complete harmonisation of the rules relating to the rights conferred by a trademark and accordingly to define the rights of proprietors of trademarks in the Community.[26]

Article 5 of the said directive enables the trademark proprietor to prevent a third party from affixing the sign to the goods or to the packaging thereof, offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder, importing or exporting the goods under the sign and using the sign on business papers and in advertising.

Just as in the case of patents, these rights concern the entire Internal Market. The exhaustion of the rights is covered by Article 7(1) of the directive, according to which 'the trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent'. Thus, Article 7(1) incorporates the approach taken by the ECJ of Justice and ties the exhaustion with the moment the IP proprietor markets the goods in any given Member State.

However, one cannot ignore the second half or Article 7, which lays down a limitation on the general rule of exhaustion of trademark rights. According to its paragraph 2: 'Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market'. Notice that when mentioning 'condition of the goods' the article has it as merely one example (the term 'especially' is used). Still the case law of the ECJ largely revolves around this one main condition.

First of all let us come back to the *Centrafarm* case.[27] Some of the products exported by *Centrafarm* to the Netherlands bore the trademark 'Negram', which belonged to different companies in different Member States. In the UK the trademark proprietor was Sterling-Winthrop Group Ltd and in the Netherlands the trademark was owned by its subsidiary *Winthrop BV*. At the same time with the dispute regarding patent rights Sterling Drug NY attempted to block parallel imports through its subsidiary and using trademark rules. The question was resolved by the ECJ in the same manner as the question about patent rights – the trademark cannot be used to block imports from Member States, where the

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[25] OJ 1989 L 40, 11 February 1989 (amended by the Council Decision 92/10/EEC of 19 December 1991, OJ 1992 L 6, 11 January 1992). In addition a Community trademark has been created by the Council Regulation (EC) No. 40/94 of 20 December 1993, OJ 1994 L 11, 14 January 1994.

[26] Case C-16/03, Peak Holding AB *v.* Axolin-Elinor AB, [2003] not yet published, para. 30; Silhouette International Schmied GmbH & Co. KG *v.* Hartlauer Handelsgesellschaft mbH, *supra* note 14, paras. 25 and 29; Joined Cases C-414/99, C-415/99, C-416/99 Zino Davidoff SA *v.* A & G Imports Ltd and Levi Strauss & Co. and Others *v.* Tesco Stores Ltd and Others, [2001] ECR I-8691, para. 39.

[27] Case 16/74, Centrafarm BV and Adriaan De Peijper *v.* Winthrop BV, [1974] ECR 1183.

product has been marketed lawfully with the consent of the trademark proprietor there. According to the ECJ:

> In fact, if a trade mark owner could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive right flowing from the trade mark.[28]

Thus – rights of the proprietor were sufficiently protected – no one else but a trademark owner could affix the mark on a product. At the same time the rights to use the trademark were limited – once the product is lawfully on the market, it will move freely throughout the entire Community.[29]

In *Silhouette* the question of exhaustion of rights surfaced in another perspective.[30] Here *Hartauer* attempted to conduct parallel imports of Silhouette spectacles into the European Community from Bulgaria. The ECJ confirmed that according to the directive exhaustion occurs only where the products have been put on the market in the Community (in the EEA since the EEA Agreement entered into force).[31] The ECJ did not accept arguments of *Hartauer* and the *Government of Sweden* that the directive does not exclude the possibility of national rules establishing that that exhaustion of rights could take place also *vis-à-vis* goods that have been put on the market in non-member countries.[32] According to the ECJ: 'Articles 5 to 7 of the Directive must be construed as embodying a complete harmonisation of the rules relating to the rights conferred by a trade mark'.[33] It is up to the Member States to implement provisions on the basis of which the proprietor of a trademark can obtain an order restraining third parties from violating its trademark rights.[34]

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28 *Id*., para. 11.

29 There is one limitation – the trademark owners in different Member State must have an economic link to the assignor. *See* Case C-9/93, IHT Internationale Heiztechnik GmbH and Uwe Danzinger *v.* Ideal-Standard GmbH and Wabco Standard GmbH, [1994] ECR I-02789.

> On the other hand, where a trade mark has been assigned, for one or several Member States in which it was registered only, to an undertaking which has no economic link with the assignor, Articles 30 and 36 do not preclude application of national legislation which allows the assignor to oppose the marketing by the assignee of goods bearing the trade mark in the State in which the assignor has retained it.

Regarding exhaustion of rights read the opinion of Advocate General Jacobs *in* Case C-379/97, Pharmacia & Upjohn SA *v*. Paranova A/S [1999] ECR I-6927.

30 Silhouette International Schmied GmbH & Co. KG *v.* Hartlauer Handelsgesellschaft mbH, *supra* note 14.

31 *Id*., para. 18.

32 *Id.*, paras 20–31. For a discussion regarding the possibility of permitting international exhaustion in the laws of a single Member State *see* G. Karnell, *On Exhaustion of Copyright-Swedish Law in its European Setting*, *in* World Intellectual Property Organization, 1999 International Association for the Advancement of Teaching and Research in Intellectual Property ATRIP Annual Meeting (1999).

33 *Id.*, para. 25.

34 *Id*., para. 35.

The complicated nature of the doctrine of exhaustion of rights is very well illustrated by the fact that in *Levi Strauss & Davidoff* in 2001 the parties still argued about what act of the seller constitutes grounds for exhaustion and who bears the burden of proving that the goods have been lawfully marketed with the trademark owners consent.[35] A trademark holder *Davidoff* gave its consent to a distributor to market its goods in Singapore. A&G went ahead and bought the jeans in Singapore and started marketing them in England.[36] In similar circumstances Tesco and Costco obtained Levi's 501 jeans, genuine goods originally sold by Levi's or on its behalf, from traders who imported them from countries outside the EEA. The contracts pursuant to which they acquired those products contained no restrictive covenants to the effect that the goods were, or were not, to be sold in a particular territory. The jeans bought by Tesco had been manufactured by, or on behalf of, Levis in the United States of America, Mexico or Canada. Those bought by Costco had been manufactured on the same terms in the United States or Mexico.[37]

The main issues that arose in this case were: a) whether a trademark proprietor must express to its resellers outside Europe that they are not allowed to market the goods in Europe and b) whether the fact that the trademark proprietor is aware of the imports at the time and does not act immediately to prevent such imports can be considered as silent consent to the imports and c) whether it is the trademark proprietor that has to prove the fact that the goods come from a source outside Europe which has no permission to market them in the EU.

In conformity with its prior case law, the ECJ stuck with the position that has been described by some as 'fortress Europe'. According to the ECJ, the consent of a trademark proprietor to marketing within the EEA cannot be presumed. It must be express or implied and it is for the trader who relies on that consent to prove it. Even if the trademark proprietor has given consent to market the goods outside the EU, it does not result in an automatic right to import these goods into the Community. The fact that an agreement with a third party for sales outside Europe does not mention that there is no right to market in the EC, cannot be interpreted against the trademark proprietor.

It is common knowledge that it is difficult, if not impossible, to prove the absence of a fact. Thus it is well founded to adopt an approach that it is up to the parallel trader relying on the argument to prove that such a fact (consent of the IP proprietor) exists. The drawback of this approach is that it enables the IPR holder to find out the origin of the goods subject to parallel imports by claiming that they have been put on the market without the IP proprietors' consent.[38] Considering the delicate nature of the relationship of the IP proprietor and the authorized resellers it is clear, why those engaged in parallel trade do not wish the IP proprietor to

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35 Zino Davidoff SA *v.* A & G Imports Ltd and Levi Strauss & Co. and Others *v.* Tesco Stores Ltd and Others, *supra* note 26.

36 *Id*., paras 9–11.

37 *Id*., para. 22.

38 *See* Commission Staff Working Paper, *Possible Abuses of Trademark Rights within the EU in the Context of Community Exhaustion* (2003) at 7, available at europa.eu.int/comm/internal_market/en/indprop/tm/docs/sec-2003-575/sec-2003-575_en.pdf (6 March 2005).

be informed of the precise source of the goods subject to parallel trade within the Community. Often the conditions laid down in order for someone to qualify as a distributor in a selective distribution system are drafted so vaguely that the manufacturer no longer willing to cooperate with a certain distributor can cause severe headache to those distributors it does not wish to cooperate with.[39] High sales targets are another way of putting pressure on distributors.[40] Despite this criticism it is difficult to see a better alternative to the distribution of the burden of proof than that laid down by the ECJ.

In *Van Doren + Q. GmbH* the question of burden of proving the existence of consent of the trademark proprietor to placing the goods on the market in the EEA arose once again.[41] Here the trademark proprietor claimed that the imported goods were marketed in the USA. The parallel importer on the other hand argued that clothing had been acquired in the EEA from an intermediary who, the parallel importer assumed, had purchased it from an authorised distributor. In addition, the parallel importer refused to disclose the identity of the suppliers until such time as *Van Doren* proved the imperviousness of its distribution system.[42] The parallel importer justified its unwillingness to reveal distributors it had bought the goods from because it feared that the trademark proprietor could take measures against the distributor and prevent it from obtaining supplies from a member of the exclusive distribution network in the future. The ECJ struck a balance between the two extremes and laid down the rule as follows:

> Accordingly, where a third party against whom proceedings have been brought succeeds in establishing that there is a real risk of partitioning of national markets if he himself bears the burden of proving that the goods were placed on the market in the EEA by the proprietor of the trade mark or with his consent, it is for the proprietor of the trade mark to establish that the products were initially placed on the market outside the EEA by him or with his consent. If such evidence is adduced, it is for the third party to prove the consent of the trademark proprietor to subsequent marketing of the products in the EEA.[43]

Thus it is still the parallel importer that bears the burden of proving the legal origin of the goods subject to parallel trade. It is only in cases where the parallel importer proves a real risk of sanctions against the distributors, that the trademark proprietor can be required to present evidence that the specific goods have been marketed outside the EEA.

A further question regarding exhaustion of trademark rights arose in the *Peak Holding case*.[44] *Peak Holding* is the proprietor of trademark 'Peak Performance' used for clothing. The right to use that trademark was granted to Peak Performance Production AB – a company associated with that group. That company produces and sells clothing and accessories under that trademark in

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39 *Id*., at 8.
40 *Id.*
41 Case C-244/00, Van Doren + Q. GmbH *v*. Lifestyle sports + sportswear Handelsgesellschaft mbH and Michael Orth, [2003] ECR I-3051.
42 *Id*., paras 11–13.
43 *Id*., para. 41.
44 Peak Holding AB *v.* Axolin-Elinor AB, *supra* note 26.

Sweden and other countries. In 2000 a Swedish company *Factory Outlet* marketed garments under the 'Peak Performance' trademark, from 1996–1998 collections that had been manufactured outside the EEA on behalf of Peak Performance and had been imported into the EEA in order to be sold there. According to Factory Outlet, the garments from 1996 to 1998 had been offered in shops belonging to independent resellers, while, according to Peak Holding, they had been offered in Peak Performance Production's shops. As the consignment consisted of goods that remained unsold after the sales, Peak Performance Production sold that consignment to COPAD International (COPAD), an undertaking established in France. According to Peak Holding the contract provided that the consignment was not to be resold in European countries other than Russia and Slovenia.[45] Factory Outlet contested such a restriction, and submitted that, in any event, it had no knowledge of the restriction when it purchased the consignment. Factory Outlet asserted that it had acquired the consignment from Truefit Sweden AB, a company governed by Swedish law.[46]

A very interesting question arose in the above case – does the condition 'lawfully put on the market with the consent of the proprietor of the trademark' imply that the goods are actually sold in the European Community or is it sufficient that the relevant goods have been offered for sale in the Community. It is important to remember that the goods never left the EEA before they were sold to *Factory Outlet*.[47] The parties to the proceedings offered different solutions to answer the question on when the goods are to be considered as 'lawfully marketed'. For example the Government of Sweden was on the position that exhaustion occurs at the latest when the goods are offered for sale to consumers.[48] The ECJ did not accept this position and tied the question of exhaustion very closely with awarding proper remuneration to the proprietor of the trademark. According to the ECJ:

> *A sale which allows the proprietor to realise the economic value of his trade mark* exhausts the exclusive rights conferred by the Directive, more particularly the right to prohibit the acquiring third party from reselling the goods. [Emphases added]
>
> On the other hand, where the proprietor imports his goods with a view to selling them in the EEA or offers them for sale in the EEA, he does not put them on the market within the meaning of Article 7(1) of the Directive.
>
> Such acts do not transfer to third parties the right to dispose of the goods bearing the trademark. They do not allow the proprietor to realise the economic value of the trademark. Even after such acts, the proprietor retains his interest in maintaining complete control over the goods bearing his trademark, in order in particular to ensure their quality.[49]

Thus the question of exhaustion should be answered on the basis of the test, whether the proprietor of the trademark has had an opportunity to realise the economic value of his trademark *vis-à-vis* the Internal Market. Goods bearing

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45 With the exception of 5% of the total quantity, which could be sold in France.
46 *Peak Holding AB v. Axolin-Elinor AB*, *supra* note 26, paras 6–13 (facts of the case).
47 *Id.*, para. 14.
48 *Id.*, para. 27.
49 *Id.*, para. 40.

a trademark cannot be regarded as having been put on the market in the EEA just because they have been imported with a view to selling them there or have been offered for sale to consumers in the EEA without actually selling them. The reason being that without the actual sale, the proprietor of the trademark has not received remuneration for its trademark right.[50]

However in the *Peak Holding* case there was a further factor to be considered – as mentioned above, the relevant goods were sold to a company in the European Community, namely to COPAD International, an undertaking established in France. According to Peak Holding the sale was made under the condition that the goods were not to be marketed in the European Community (with minor exceptions). Could the fulfilment of the condition 'put on the market' be avoided by a contractual clause?

Here the ECJ applied grammatical interpretation of Article 7(1) of the Directive, which makes Community exhaustion subject either to putting the trade mark on the market in the EEA by the proprietor of the trade mark himself or to putting the trade mark on the market in the EEA by a third party but with the proprietor's consent. The article does not mention as an additional condition the requirement that the trademark proprietor must agree that the goods can be further marketed in the EEA. Thus, once the sale is made in the EEA the prohibition of resale in the EEA does not reverse the fact that the goods have already been put on the market.[51] The fact that the other party violated the sales agreement is a matter of contract law. It is interesting to note the difference between the values given to contract terms in the *Peak Holding* case compared to the *Davidoff* case. In both instances it was claimed that the sales contract only allowed sales outside the Community. However, the wording of Article 7(1) of the Directive provides justification for such differentiation because in the *Davidoff* case the goods had never been sold inside the European Community by the proprietor.

E. Partitioning the Market via Other Means

The owners of intellectual property have also sought to use other, perhaps less obvious ways of partitioning the market, in order to resist the effects on prices of parallel imports (considering that price differences exist in different Member States). One way would be to create different consumer habits by using different packaging and different brands for the same products in different Member States. For example in the case of over the counter medicines – if one is used to taking a medicine that has been sold under one brand, it is very difficult to convince the consumer that a medicine stemming from another Member State that wears a totally different brand and comes with a completely different package, is in fact the same product. Consumer loyalty to one medicine is not likely to switch without serious measures being taken to inform the consumer of the fact that the medicines sold under different names are indeed the same product. Even if the

50 *Id*., para. 44.
51 *Id*., paras 50–56.

parallel importer would in the end be successful in informing consumers, the effort and investment that has to be put into this, would significantly decrease the benefit to be gained from such parallel imports.

Notice that Article 5(3)(a) of the Directive expressly confirms the trademark proprietors' right to prohibit third parties from affixing the sign to the goods or to the packaging thereof. Thus, at least on the face of it, no one except the trademark proprietor could make a new package for the goods nor could they affix a trademark to such a package. Once again the ECJ had to interfere in defence of the free movement of goods.

In *Pfizer Inc. v. Eurim-Pharm* the drug *Vibramycin* was sold in Germany in packages of 8, 16 and 40 capsules and for clinics in packages of 100 capsules.[52] In England the same drugs were sold in packages of 10 and 15 (in strips of 5). Eurim-Pharm bought the drugs in the UK, repackaged them and sold them in Germany. The original trademark was visible through a window on the external package and the back of the external package contained information about the repackaging. In *Hoffmann-La Roche v. Centrafarm* the product *Valium* was marketed in Germany in packages of 20 or 50 tablets and for hospitals in batches of five packages containing 100 or 250 tablets. In England the same product was marketed in packages of 100 or 500 tablets at considerably lower prices.[53] Centrafarm bought the medicine in the UK, placed it into packages of 1000 pills, placed a *Hoffmann-La Roche* trademark on the package and noted on the package that the medicine was marketed by Centrafarm. Centrafarm also gave notice that it intended to pack the medicine into smaller packages in order to sell it to individuals.

The question of the legality of such repackaging arose. Could one rely on Article 30 (ex article 36) and demand that the trademark be left untouched? First of all the ECJ undertook determining the substance of a trademark right. According to the ECJ:

> In relation to trade-marks, the specific subject-matter is in particular to guarantee to the proprietor of the trade-mark that he has the exclusive right to use that trade-mark for the purpose of putting a product into circulation for the first time and therefore to protect him against competitors wishing to take advantage of the status and reputation of the trade-mark by selling products illegally bearing that trade-mark.[54]

The ECJ found that where the quantities in packages are intentionally different from one Member State to the other, this might be considered as a disguised restriction to the free movement of goods. The key factor in these cases was the question why the trademark proprietor has an exclusive right to place the trademark on the packaging?

> Regard must be had to the essential function of the trademark, which is to guarantee the identity of the origin of the trademarked product to the consumer or ultimate

[52] Case 1/81, Pfizer Inc. *v.* Eurim-Pharm GmbH, [1981] ECR 2913.

[53] Case 102/77, Hoffmann-La Roche & Co. AG *v.* Centrafarm, [1978] ECR 1139, para. 2.

[54] *Id.,* para. 7; Pfizer Inc. *v.* Eurim-Pharm GmbH, *supra* note 52, para. 7; Case C-10/89, CNL-SUCAL *v.* HAG GF ('HAG II'), [1990] ECR I-3711, para. 14; Joined Cases C-427/93, C-429/93 and C-436/93, Bristol-Myers Squibb and Others, [1996] ECR I-3457, para. 44.

> user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin. This guarantee of origin means that the consumer or ultimate user can be certain that a trade-marked product which is sold to him has not been subject at a previous stage of marketing to interference by a third person, without the authorization of the proprietor of the trademark, such as to affect the original condition of the product. The right attributed to the proprietor of preventing any use of the trademark, which is likely to impair the guarantee of origin is therefore part of the specific subject matter of the trademark right.[55]

Thus according to the ECJ, the purpose of the trademark right from the point of view of the consumer is to guarantee to the consumer that the product stems from the trademark proprietor or from another person with the trademark proprietors' consent. The trademark must constitute a guarantee that all products that carry it have been manufactured under the control of a single undertaking to which responsibility for their quality may be attributed.[56] Thus in principle a trademark right could be a ground to block importation of the repackaged product on the basis of Article 30 (ex Article 36).[57] However one cannot forget that the condition that 'such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States' limits the exception in Article 30 (ex Article 36). According to the ECJ: 'Trade mark rights are not intended to allow their owners to partition national markets and thus assist the maintenance of price differences which may exist between Member States'.[58]

Is the right of the consumer to rely on the trademark as a guarantee of origin always endangered by repackaging? The answer is clear, where one cannot avoid affecting the product; however in other cases it is not so obvious. For example with medicine it is common to have a double packaging – and in case the repackaging concerns only the external package, leaving the internal package intact, the substance of the product is unaffected and the consumer can still be safe to assume that the product is of a specific origin that the trademark refers to.

To guarantee that the free movement of goods is not prevented by disguised restrictions the ECJ noted that in certain instances one must accept repackaging of goods, where the repackaging is necessary for selling the product at a target market and there are sufficient guarantees that the product itself remains unaltered.[59] It is normally up to the national courts to decide, whether using different packaging or trademarks constitutes an attempt to establish disguised restrictions to the free movement of goods.

In the cases of *Valium* and *Vibramycin* the essential function of the trademark was not harmed – it still provided the consumer a guarantee of origin of the product enabling the consumer to differentiate the product from all others. In addition to

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55 Hoffmann-La Roche & Co. AG *v.* Centrafarm, *supra* note 53, para. 7; Pfizer Inc. *v.* Eurim-Pharm GmbH, *supra* note 52, paras 8–9; Bristol-Myers Squibb and Others, *supra* note 54, para. 24.

56 CNL-SUCAL *v.* HAG GF ('HAG II'), *supra* note 54, para. 13; Bristol-Myers Squibb and Others, *supra* note 54, para. 43.

57 Hoffmann-La Roche & Co. AG *v.* Centrafarm, *supra* note 53, para. 8.

58 Bristol-Myers Squibb and Others, *supra* note 54, para. 46.

59 Hoffmann-La Roche & Co. AG *v.* Centrafarm, *supra* note 53, para. 10.

the requirement of guaranteeing the preservation of the integrity of the product, the ECJ laid down the additional conditions that the trademark proprietor must be given prior notice about the repackaging and the new packaging must contain information that the product has been repackaged.[60] Thus the ECJ took a step in support of the parallel importers and in fact gave them a right to affix a trademark on the packaging of the products, where the existence of such a right was highly disputable.

The matter became even more complicated where the ECJ started dealing with cases, where the same product was marketed in different Member States under different trademarks. In *Upjohn* different trademarks were used: 'Dalacin' in Denmark, Germany and Spain, 'Dalacine' in France and 'Dalacin C' in other Member States.[61] Paranova purchased the products in France and Greece, repackaged and changed the trademarks on the packages against the trademark used in the target Member State (Denmark). According to Paranova this was necessary in order to effectively market the drug in the target state. The ECJ accepted that using different trademarks in marketing a product can indeed constitute a disguised restriction to the free movement of goods.

> In the first place, the practice of using different packaging and that of using different trade marks for the same product, in contributing similarly to the partitioning of the single market, adversely affect intra Community trade in the same way; secondly, the reaffixing of the original trade mark on the repackaged product and its replacement by another trade mark both represent a use by the parallel importer of a trade mark which does not belong to him.[62]

Thus, as in the cases of *Vibramycin* and *Valium*, the ECJ accepted that repackaging might be permitted as long as legitimate interests of the trademark proprietor are protected.[63] The ECJ did not see a reason to differentiate the rule for situations where the packaging is changed and the same trademark is affixed from the situation where the trademark used in the target Member State is affixed instead of reaffixing the one used in the source Member State.[64] The main condition remained, whether the replacement of the trademark was objectively necessary in order for the parallel importer to sell the goods in the target state depending on the situation in that state.[65]

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60 *Id.*, para. 12.

61 Pharmacia & Upjohn SA *v.* Paranova A/S, *supra* note 29.

62 *Id.,* para. 38.

63 *See* Hoffmann-La Roche & Co. AG *v.* Centrafarm, *supra* note 53, para. 10; Bristol-Myers Squibb and Others, *supra* note 54, para. 49; Case C-349/95 Loendersloot *v.* Ballantine, [1997] ECR I-6227, para. 29.

64 Pharmacia & Upjohn SA *v.* Paranova A/S, *supra* note 29, para. 37.

65 Regarding repackaging of pharmaceuticals *see also* Case C-143/00, Boehringer Ingelheim and Others, [2002] ECR I-3759; also note that with effect from 1 January 1995, Council Regulation (EEC) 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, OJ 1993 L 214, 24 August 1993 established a procedure for obtaining central marketing authorisations for medicinal products. *See* to that effect Case C-433/00, Aventis Pharma Deutschland GmbH *v.* Aventis Pharma Deutschland GmbH, MTK Pharma Vertriebs-GmbH, [2002] ECR I-7761, e.g. para. 27:

In the *Ballantines* case clients of transport and warehousing firm *F. Loendersloot Internationale Expeditie* were engaged in parallel imports of *Ballantines and others* products.[66] The parallel importers bought the products from Member States where products were sold at a lower price, removed the labels bearing Ballantines and others trade marks and reapplied them by reaffixing the original labels or replacing them with copies, removed the identification numbers on or underneath the original labels and on the packaging of the bottles, removed the English word 'pure' and the name of the importer approved by Ballantine and others from the original labels, and in certain cases replaced that name by the name of another person and exported the products thus treated to traders in France, Spain, England, the United States and Japan.[67] In principle such interference with the labelling and packaging is not permitted, however *Loendersloot* argued that such actions were necessary to allow parallel trade in the products in question on certain markets. In some Member States the legislation prohibits the use of terms such as 'pure', which would make the parallel import of the product from another Member State, where such a limitation does not exist, impossible.

The ID number of the product however would enable the trademark proprietor to trace the product subject to parallel imports to the distributors and the possibility of sanctions could reduce the willingness of the distributors to sell the product to parallel importers. In order to avoid such disguised restrictions to the free movement of goods the above changes may, in certain situations, be permissible.

In *Ballantines and others* the ECJ confirmed its prior case law and stated that in principle the actions described above could be permissible if necessary preconditions are met. The ECJ did not in principle resist the idea of removing the identification numbers in fear of sanctions against the distributors. It did however note that if such numbers are necessary to comply with a legal obligation,[68] or serve other objectives that are legitimate from the point of view of Community law,[69] Article 30 (ex article 36) can be used to block the removal of such ID numbers, and any illegal sanctions placed upon the distributors participating in parallel trade should be combated under the rules of competition law.[70] The question of whether the labels were indeed used to partition the Internal Market along national lines, whether interference with the labels was necessary to penetrate the target markets etc. can, according to the position of the ECJ, be assessed by the national courts.

> In the light of the foregoing, the answer to the first question must be that Council Regulation (EEC) No. 2309/93 precludes a medicinal product which is the subject of two separate central marketing authorisations, one for packs of five items and the other for packs of 10 items, from being marketed in a package consisting of two packs of five items which have been joined together and relabelled.

66 Loendersloot *v.* Ballantine, *supra* note 63.
67 *Id.,* para. 6.
68 Council Directive 89/396/EEC of 14 June 1989 on Indications or Marks Identifying the lot to Which a Foodstuff Belongs, OJ 1989 L 186, 30 June 1989.
69 Such as the recall of faulty products and measures to combat counterfeiting.
70 Loendersloot *v*. Ballantine, *supra* note 63, paras 41-43.

F. Cases Concerning Copyright

In order to address issues regarding exhaustion of rights, just as in the case of trademarks and patents, the specific subject matter of copyright must be determined. This is in some sense made more difficult by the fact that there are so many different ways of exercising the economic rights related to copyrighted works. For example photocopying, reproducing a printed page by handwriting, typing or scanning into a computer, taping live or recorded music, issuing copies of the work to the public, renting or lending copies of the work, performing, showing or playing the work, broadcasting the work or other communication to the public by electronic transmission, making an adaptation of the work etc. The fundamental approach is the same as in patents and trademarks – a proprietor of an industrial property right cannot prevent imports, when a product has been put into circulation in another Member State with the IP proprietors consent.[71] In *Terrapin* the ECJ noted:

> [A]rticle 36 (now Article 30) in fact admits exceptions to the free movement of goods only to the extent to which such exceptions are justified for the purpose of safeguarding rights which constitute the specific subject-matter of that property. [Article amendment added]

Having said the above, the ECJ adopted the same theory of exhaustion as in the case of patents and trademarks, and stressed that it is up to the IP proprietor to choose in which Member State it markets the copyrighted works. In making these choices the IP proprietor makes a conscious decision and must accept the results, including the free movement of the protected material within the Internal Market.

As an example of how free movement of copyrighted works affects our everyday life, one can take the *GEMA* case, where the German copyright management society wanted to charge authors fees on works imported from other Member States.[72] Even though the society merely wished to charge the difference between the lower fees of the exporting Member State, the ECJ found that such an action would be contrary to the free movement of goods.

The ECJ has made a few exceptions based on the same logic as with the other IPR – awarding proper compensation for the creative efforts of the author. For example in *EMI Electrola* a question arose, whether one can consider that the goods have been placed on the market with the IP proprietors' consent where the goods stem from a Member State where the term of protection has expired.[73] Has the author in such a situation received its proper reward so that exhaustion of his rights could be justified? The ECJ adopted the position that in such a case

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71 Case 119/75, Terrapin Ltd *v.* Terranova Industrie C.A. Kapferer and Co, [1976] ECR 1039; Joined Cases 55/80 and 57/80, Musik-Vertrieb Membran GmbH and K-tel International *v.* Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte (GEMA), [1981] ECR 147.

72 *Id*.

73 Case 341/87, EMI Electorola GmbH *v.* Patricia Im- und Export, [1989] ECR 79.

the copyright cannot be considered as exhausted and the copyright proprietor is indeed permitted to block parallel imports of such works.[74]

Another interesting issue arose in *Coditel* regarding movies. It is common knowledge that movies do not reach the theatres in all Member States simultaneously.[75] Belgian cable company Coditel transmitted the movie Le Boucher that was played on TV in Germany, while *Ciné Vog Films* held the rights for playing the movie in theatres in Belgium. For obvious reasons *Ciné Vog Films* was unhappy with the fact and sued the copyright proprietor and *Coditel*. In this case the ECJ accepted the argumentation of *Ciné Vog Films* and differentiated between the exclusive rights for displaying the movie at theatres and TV transmission rights.

A similar situation arose in *Warner Bros*, where the ECJ dealt with video cassettes of the movie *Never Say Never Again*.[76] In this case the rules regarding selling and hiring out videocassettes were different in Denmark and the UK. In the UK, once the author sold the videocassette, it had no influence over hiring it out, whereas in Denmark a separate consent from the copyright proprietor was necessary for hiring out. Once again the ECJ followed the theory of proper reward for the creative effort and found that the requirement for copyright owners consent for hiring out the material in Denmark would be rendered useless video cassettes imported from UK could be hired out in Denmark without such consent.

G. Conclusions

It is clear that a balance has to be struck between the rules regarding the free movement of goods and the rights of the owners of intellectual property in the Internal Market. A right will be recognised and protected as long as it is not abused to artificially partition the Internal Market. In order to achieve a proper balance the ECJ has adopted the doctrine of exhaustion of rights, which provides for the first step in guaranteeing that the intellectual property rights are not abused. It is presumed that the owner of an IPR makes an informed decision on where and under which condition it wants to market its product, and knowingly accepts the results that follow.

This approach is balanced with the test of proper economic reward to the owner of intellectual property, allowing for exceptions in cases, where the products were marketed without the direct consent of the owner of IP, such as mandatory licences etc. The ECJ has made it more than clear that there is no international or global exhaustion.[77]

74 *See also* Merck / Primecrown and Beecham / Europharm, *supra* note 21.

75 Case 62/79, Compangnie Générale pour la Diffusion de la Télévision, Coditel *v.* SA Ciné Vog Films, [1980] ECR 881.

76 Case 158/86, Warner Brothers and Metronome Video ApS *v.* Christiansen, [1988] ECR 2605.

77 Commission Staff Working Paper, *Possible Abuses of Trademark Rights within the EU in the Context of Community Exhaustion*, *supra* note 38, at 5; Silhouette International Schmied GmbH & Co. KG *v.* Hartlauer Handelsgesellschaft mbH, *supra* note 14; Zino Davidoff SA *v.* A & G Imports Ltd and Levi Strauss & Co. and Others *v.* Tesco Stores Ltd and Others, *supra* note 26.

In case of trademarks even repackaging and altering the trademarks affixed to the product by the parallel importers is accepted under certain conditions. This is done in order to prevent the use of the trademark rights in such a way as to contribute to artificial partitioning of the markets between Member States. At the same time legitimate interests of the owners of IP are sufficiently protected by the requirements that the repackaging cannot affect the original condition of the product and that the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner.[78] In addition the person who repackages the products is under an obligation to inform the trademark owner of the repackaging, to supply him, on demand, with a specimen of the repackaged product, and to state on the repackaged product the person responsible for the repackaging.[79] If the above conditions are not met, Article 30 (ex article 36) could be used in order to block parallel importation of repackaged or relabelled products.

The questions regarding burden of proving consent and the fact that the goods have been placed on the market in the Community still remain to be disputed. The general rule seems to be that the parallel importer has to prove consent, however under certain conditions also the owner of IP can be required to present evidence to the contrary. The situation remains unclear in what concerns the using and removing of identification numbers. Here the fear of sanctions to distributors that engage in parallel trade has to be considered, on the other hand there may be legitimate reasons for using such numbers and prohibiting their removal.

For years the possibility of international exhaustion of rights has been discussed. It is highly questionable, whether such a possibility will become realistic as this would place the owner of IP in a very difficult position, having to police the protection of their rights globally. Until that time far in the future the Europeans can enjoy the doctrine of exhaustion established by the ECJ for the EC.

78 Loendersloot *v.* Ballantine, *supra* note 63, para. 29.
79 *Id*., para. 30.