**Trade Mark Rights and Free Movement of Goods: Can We Achieve An Ever Closer Union?**

Lionel Bently

It has long been recognised that national trade mark rights have the capacity to impede the free movement of goods within the European Union. The legislative strategy adopted in the late 1980s and early 1990s, of harmonizing national trade mark laws and creating a unitary Community (soon to be ‘European Union’) Trade Mark has gone a long way towards alleviating the problem, but it has not come close to removing many of the impediments to the free movement of goods. In fact, the legislative strategy adopted recognises that national rights will continue to exist [on a par with Community right], and ‘linguistic, cultural, historical, social and economic differences’ ensure that, whatever the benefits may be of legal harmonization effected by the Directive, different outcomes are realised from the application of the law in different countries. This is clear in relation to descriptiveness from the *Matratzen II* case, and the earlier *Matratzen I* litigation shows how similar differences can be relevant in determining confusing similarity. Even after harmonization, these differences in the national application of the harmonized law continue to impede the operation of the Single Market.

In this paper, I want consider some options for trying to limit the problems caused by different application of the same trade mark law. First I review the Commission’s 2013 proposal, rejected by the EP, to adopt Community standards when applying absolute grounds to national marks. Second, I consider one of the Commission’s ideas from the 1980s: strict interpretation of the TMD to limit cases of interference between divergent national regimes. While the Courts purport to use Article 34 to assist interpretation, in fact FMG is only ever seriously considered in the context of the defences (Art 6 and 7 of the TMD). Third, I consider whether the idea of mutual recognition/country of origin might be considered, and ask whether the *Gerolsteiner* case hints at this. I will suggest that there are problems with such a move, which might be regarded as a return to the broadest interpretation of *Hag I*. Finally, I will argue that a more attractive alternative might be to extend the ‘proportionality’ analysis applied to other purposes immunised from the Article 34 prohibition of ‘measures having equivalent effect’ (whether under the ‘mandatory requirements’ test or more generally). This would open the possibility for courts to deviate from the strict application of national law (albeit a harmonized law), and towards an individualised balancing of interests in cases where goods have been legitimately marketed elsewhere in the European Union.