**The exhaustion of trademark rights, Rotterdam 15-16th of September 2023.**

On the 15th and 16th of September 2023, the eleventh edition of TLI was held in Rotterdam on the topic of ‘exhaustion’ in trade mark law. The participants – all having some affiliations to academia – came from various countries including Italy, Germany, Poland, the UK and the Netherlands. The symposium commenced on Friday with a session, chaired by Prof. Dirk Visser, on exhaustion and parallel trade, addressing the tension between the rights and interests of the trademark holder and the principle of the free circulation of goods.

Luigi Mansani elaborated on the specific challenges associated with the exhaustion of luxury goods. For instance, when the trademark holder has a legitimate reason to oppose the resale of perfumes and cosmetics. This issue is particularly relevant due to the growing number of e-commerce platforms selling such luxury goods. In spite of this, Mansani explained that there are few CJEU decisions on these matters, and even the definition of a luxury good remains unclear. This uncertainty regarding the exhaustion of luxury goods is problematic because trademark holders could attempt to control the distribution of their products even after the initial sale, thereby jeopardizing the principle of the free circulation of goods.

Continuing on the topic of exhaustion, Prof. Tobias Cohen Jehoram presented Marjolein Bronneman's article on her proposed new infringement ground in European trademark law. Recent CJEU jurisprudence suggests the creation of a new right for trademark holders: the right to control the first marketing of a trademarked product in the EEA. Cases such as *Sebago* and *Makro v. Diesel* all seem to support this.During the ensuing discussion, comparisons were made with the distribution right in copyright, and critical questions were raised about the added value of this new function.

The second part of the day revolved around exhaustion and sustainability, with Prof. Charlotte Vrendenbarg being chair. This topic is of contemporary relevance because trademarked products are often used in recycled or upcycled goods. Allowing the original trademark holder to prevent such use based on trademark rights could have a chilling effect and discourage entrepreneurs from reusing and upcycling branded goods, Vrendenbarg noted.

As Dirk Visser pointed out in his following speech, upcycling is most problematic in situations where the public could still recognize the original trademarked product. For example, a Volkswagen would still be recognizable without its logo. In such cases, recycling or upcycling could potentially result in reputational damage for the trademark holder, even without the trademark itself. Additionally, the (dis)similarity of categories between the original and recycled goods is relevant. A small toy car made from Coca-Cola cans, for example, would never confuse a consumer nor harm Coca-Cola's reputation. Thus, the question whether a trademark holder could oppose resale after the first sale based on exhaustion becomes very case-specific.

Subsequently, Martin Senftleben provided an interesting example of upcycling involving luxury goods. The artist Duran Lantink created a new jacket, that consisted for a substantial part of a former Louis Vuitton bag, prominently displaying the famous logo on the fabric. According to Senftleben art like this can convey a message and serve as a mirror to society, especially when a significant portion of the original product is visibly reused in the new object. This could inspire more sustainable and circular reuse of trademarked goods. However, he also emphasized that trademark infringement was conceivable in such cases due to potential confusion. Consumers might wonder if there is a connection between the artist and the visible trademarks. An interesting discussion among the attendees followed. Whilst no one opposed the importance of recycling and a more circular economy, the question was brought up if the artist did not profit (unfairly) from the goodwill of the trade mark proprietor, as consumers would not be likely to pay the same without the LV-logos on it. Should criteria like the commercial intent and the scale of production therefore be taken into account in cases like this?

After these interesting discussions it was time to conclude the first day of the symposium. In the evening a quintessential Rotterdam ‘watertaxi’ ferried the participants to the local Zalmhuis for an enjoyable diner. The next day the symposium continued with Gert-Jan van Hout as the chair.

Willem Leppink addressed the topic of the refurbishment industry, particularly the challenges that may arise when the refurbisher is not the original manufacturer but a third party directly supplying consumers. In these situations the trademark proprietor could, despite the general exhaustion rule, have legitimate reasons to oppose further commercialization of the product. An example would be a tampered perfume package. Leppink also presented another interesting case, the Audi v. CQ dispute, in which a third party manufactured and sold grilles specifically designed to fit certain Audi cars, even carving out the Audi logo in the grille, allowing buyers to fit in the logo themselves.

The following discussion mainly concerned the practical and legal consequences of third-party refurbished products. What if a smartphone explodes or a charger catches fire due to a third party refurbishing an iPhone with a non-original and unsound battery? This could lead to a situation in which the original trademark holder is liable, at least initially, despite the damages actually resulting from the refurbisher. After all the trademark of the mark proprietor is still displayed on the product.

One of the final presentations focused on the exhaustion of trade mark rights in the metaverse and was delivered by Cesar Ramirez-Montes. An example of infringement cases in the metaverse is the Nike v. StockX dispute in 2022. StockX is a secondary digital platform that authenticates and resells trademarked products through vault NFTs, which give the buyer the right to "redeem" and thus acquire the physical product. In this case, StockX sold Vault NFTs displaying Nike shoes. While StockX argued that their NFTs were simply a new and more efficient way of selling Nike products, Nike claimed that StockX created new products with the Nike logo on them, effectively riding on Nike's reputation. Virtual cases like this present new challenges and questions, such as whether digital platforms can successfully use the defense of trademark exhaustion or if it interferes with the interests and rights of the trademark holder.