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## Parfums Christian Dior Sa & (and) Anor v. Evora BV

### Keywords

Practice and Procedure, Defenses, Comparative Law, Trademarks

**PARFUMS CHRISTIAN DIOR SA & ANOR V. EVORA  
BV**

DOUGLAS R. HEGG\*

I. INTRODUCTION

Unrestricted trade is an essential step in the equalization and integration of the European Community.<sup>1</sup> This case note proposes that the European Court of Justice (ECJ) is correct in encouraging parallel imports as a means of promoting unrestricted intra-Community trade. Similarly, assuming parallel imports provide an important benefit to the community, manufacturers should not be able to side-step such benefits by imposing artificial limits on parallel importers' ability to advertise the products legally imported and offered for sale. *Parfums Christian Dior SA v. Evora BV* provides a basis upon which future courts may balance the rights conferred by a trademark and the Community's interest in the free movement of goods.

Price discrepancies among Member States of the European Union (EU) have resulted in a practice known as "parallel imports," whereby individuals purchase products on the market in low-price countries, export them to high-price countries for resale at a profit, and still undercut the manufacturer's official selling price.<sup>2</sup> General principles of economics suggest that such actions will continue as long as the costs of transportation are less than the profit derived on resale. Thus, from a consumer's standpoint, parallel imports are beneficial, providing the same product at lower costs and in turn leading to price equalization throughout the EU.

Unsurprisingly, manufacturers have a different viewpoint. A trademark confers a right to proprietors to prevent, in the course of trade, unauthorized use of the trademark that takes unfair advantage

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\* Douglas R. Hegg is a third year law student at the University of Denver College of Law. The author wishes to thank his family and friends for their support and encouragement throughout his scholastic career. He wishes to extend special thanks to Sheila for helping him through the rigors of law school.

1. See generally Andreas Reindl, *Intellectual Property and Intra-Community Trade*, 20 *FORDHAM INT'L L.J.* 819 (1997) (analyzing trademark functions, costs and benefits).

2. See Joined Cases C 427, 429 & 436/93 *Bristol-Myers Squibb v. Paranova* [1996] *ECR I-3457*, ¶3 [hereinafter *Bristol-Meyers-Squibb*].

of, or is detrimental to, the distinctive character or the repute of the trademark.<sup>3</sup> Since consumers regard a trademark as an indication of the quality and identity of the manufacturer of a given product, proprietors of a trademark have a legitimate interest in protecting the integrity of the trademark.<sup>4</sup>

Manufacturers initially attempted to restrain parallel imports through claims of trademark infringement resulting from the repackaging of the product.<sup>5</sup> In *Hoffmann-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse GmbH*, the ECJ held that Article 36, in principle, grants a right to restrict the import of repackaged goods upon which the trademark had been reattached.<sup>6</sup> Article 36 of the EC Treaty permits quantitative restrictions on imports, exports, or goods in transit that fall within specific categories of public concern.<sup>7</sup>

Nevertheless, the EC Treaty also provides that any such prohibitions or restrictions may not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."<sup>8</sup> The ECJ concluded that restrictions were an impermissible "disguised restriction" on trade where: (1) use of the trademark right contributes to the artificial partitioning of the markets between Member States; (2) repackaging cannot adversely affect the original condition of the product; (3) the proprietor of the mark receives prior notice of the marketing of the repackaged product; and (4) it is stated on the new packaging by whom the product has been repackaged.<sup>9</sup> Thus, though the limits are ambiguous, Article 36 provides a measure of restraint from undue interference with free trade. The adoption of the First Council Directive (Directive) raised additional questions as to the scope of Article 36.<sup>10</sup> Arti-

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3. See First Council Directive to Approximate the Laws of the Member States Relating to Trademarks, No. 89/104/EEC [1988], art. 5(2) 1989 O.J. (L 40)1 [hereinafter First Council Directive].

4. See generally Reindl, *supra* note 1, at 854-57; See, e.g., N. Wilkof, *Same Old Tricks or Something New? A View of Trademark Licensing and Quality Control*, 18 EUR. INTELL. PROP. REV. 261, 268 (1996).

5. See also, Reindl, *supra* note 1, at 854-55. See generally *Bristol-Meyers Squibb*, *supra* note 2.

6. Case 102/77 *Hoffmann-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse GmbH*, 1978 E.C.R. 1039, [1978] 3 C.M.L.R. 217 (1978).

7. TREATY ESTABLISHING THE EUROPEAN COMMUNITY (Treaty of Rome), Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) art. 86 [hereinafter EC TREATY] (grounds of public morality, public policy, or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property).

8. *Id.*

9. *Id.* ¶ 44.

10. See generally First Council Directive, *supra* note 3.

cle 5 of the Directive codifies the rights conferred by a trademark.<sup>11</sup> It purports to grant broad rights against unauthorized third party use which takes "unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark."<sup>12</sup> Such unauthorized use includes: a) affixing the sign to the goods or to the package thereof; b) offering the goods, or putting them on the market under that sign; c) importing or exporting the goods under the sign; and d) using the sign on business papers and in advertising.<sup>13</sup>

Nevertheless, the sweeping grant of rights to trademark proprietors in Article 5 is limited by the doctrine of Exhaustion of Rights provided in Article 7.<sup>14</sup> Pursuant to Article 7, a proprietor may not restrict the use of his trademark in goods marketed within the Community by the proprietor without his consent, unless a legitimate reason exists to oppose further commercialization.<sup>15</sup> A "legitimate reason" includes alteration or impairment to the goods after entering the Community market.<sup>16</sup>

In *Parfums Christian Dior SA & Anor v Evora BV (Dior)*, Christian Dior took an alternate approach to limiting parallel imports.<sup>17</sup> Dior sought to prohibit resellers from advertising its products acquired through parallel imports, thereby limiting the product's marketability by parallel importers.<sup>18</sup>

The ECJ held that unauthorized advertising of parallel products may only be opposed where such advertising results in significant damage to the reputation of the trademark and its owner.<sup>19</sup> The ECJ concluded that what constitutes "significant damage" is a question of fact for the national court. However, it did provide some guidance. As a general rule, proprietors of a trademark should not be entitled to object to "respectable advertising by respectable traders", even if there is some damage to the product's luxurious image, resulting in advertising inferior to that of selected distributors.<sup>20</sup> The ECJ stated, however, that it *might* be justifiable for a trademark proprietor of luxury perfumes to oppose an advertisement which "depicted his perfumes heaped in a sale-bin at cut-price prices along with rolls of toilet paper and tooth-

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11. *See id.* art. 5.

12. *See id.* art. 5(2).

13. *See id.* art. 5(3).

14. *See id.* art. 7.

15. *See id.* art. 7(1).

16. *Id.*

17. Case C-337/95, *Parfums Christian Dior SA v. Evora BV* 1997 CELEX LEXIS [1997] [hereinafter *Dior*].

18. *See id.* ¶ 6.

19. *See id.* ¶ 61.

20. *See id.* ¶ 51.

brushes.”<sup>21</sup> Without explaining its reasoning, the ECJ concluded that “resellers cannot be required to comply with the same conditions as selected distributors.”<sup>22</sup>

With this holding, the ECJ promoted the equalization of pricing by extending the principle of the Exhaustion of Rights to the advertising and marketing of trademarked goods. In doing so, it eliminated a potential “disguised restriction on trade between Member States,” and effectively promoted the use of parallel imports as a means of price equalization.<sup>23</sup> The holding makes clear that the rights of a trademark proprietor cannot outweigh the interests of the European Community.

## II. THE CASE IN CHIEF

### A. Facts

In *Dior*, the Hoge Raad der Nederlanden (the Supreme Court of the Netherlands), referred six questions for preliminary ruling to the ECJ.<sup>24</sup> The essential question was whether a trademark conveys upon the proprietor authority to prevent unauthorized advertising, even when conducted in a manner customary to the trade.<sup>25</sup>

Parfums Christian Dior SA (Dior France) is the manufacturer of “luxury” perfumes and other cosmetic products, which it sells at premium prices. It utilizes a selective distribution system, whereby selected retailers only supply ultimate customers or other selected retailers.<sup>26</sup> Parfums Christian Dior (Dior Netherlands) is Dior France’s sole representative in the Netherlands. In addition, Dior France has exclusive trademark rights in Benelux, including illustrations of the packaging of the perfumes.<sup>27</sup>

The defendant, Evora, operates a chain of approximately 300 “health and beauty” retail stores under the subsidiary name Kruidvat.<sup>28</sup> Consumers in the Netherlands regard the stores as the “undisputed number one” for the sale of luxury perfumes.<sup>29</sup> Kruidvat obtained Christian Dior products by means of parallel imports, whereby products

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21. *Id.* (nonetheless, the court further noted that the advertiser could not be prevented from simply cutting prices).

22. *Id.*

23. EC TREATY, *supra* note 7, art. 36.

24. *See Dior*, 1997 CELEX LEXIS, at ¶1.

25. *Id.* ¶ 1.

26. *See id.* ¶ 2.

27. *See id.* ¶ 3.

28. *See Case T-87/92, BVBA Kruidvat v. EC Commission*, 1996, 4 C.M.L.R. 1046 (Ct. First Instance 1997).

29. *Id.*

are purchased in low priced markets, exported to higher priced markets for resale at a profit, and yet still undercut the manufacturer's official selling price.<sup>30</sup> As part of a 1993 Christmas promotion, Kruidvat advertised several Dior perfumes.<sup>31</sup> The advertisements depicted the packaging and bottles of some Christian Dior products in a manner customary to retail traders in the relevant sector.<sup>32</sup> Nevertheless, Dior France had not consented to the advertising and commenced proceedings to prohibit Evora from making any use of its picture trademarks.<sup>33</sup>

Dior claimed that its trademark had been used "either in breach of its exclusive right to use the mark in respect of the same or similar goods," or "in circumstances liable to cause it damage, by, *inter alia*, impairing the prestige and image of the marks."<sup>34</sup> Dior sought an order to prevent Evora from making any publication or reproduction of Dior's trademarks in unauthorized catalogues, brochures, advertisements, or otherwise.<sup>35</sup>

### B. Procedural History

The Arrondissementsrechtbank Haarlem (district court) ordered Evora to desist from using Dior's trademark "in a manner not conforming to Dior's customary manner of advertising."<sup>36</sup> Evora appealed to the Gerechtshof (regional court of appeals). Dior argued before the Gerechtshof that a change in the "condition of the products" required under Article 7(2) of the First Council Directive (89/104)<sup>37</sup> and in paragraph 3 of Article 13A of the Benelux Law,<sup>38</sup> included "mental condition,"<sup>39</sup> described as a product's "allure, prestigious image, and aura of luxury surrounding the goods."<sup>40</sup> The Gerechtshof reversed the district court ruling and Dior appealed to the Hoge Raad.

As the highest national court, the Hoge Raad is obliged under Article 10 of the Benelux Law to refer certain questions that interpret

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30. See *Dior*, 1997 CELEX LEXIS, at ¶ 4. See also *Bristol-Myers Squibb*, *supra* note 2, ¶ 3.

31. E.g. Eau Sauvage, Poison, Fahrenheit, Dune, and Svelte. See *Dior*, 1997 CELEX LEXIS, ¶ 5.

32. *Id.*

33. *Id.* ¶ 6.

34. *Id.*

35. *Id.* ¶ 7.

36. *Id.*

37. First Council Directive *supra* note 3, art. 7(2) (to approximate the laws of the Member States relating to trademarks).

38. Uniform Benelux Law on Trademarks concluded between Belgium, Luxembourg, and Netherlands on March 19, 1962.

39. See *Dior*, 1997 CELEX LEXIS, ¶¶ 9-12.

40. *Id.* ¶ 12.

Benelux Law to the Benelux Court for a preliminary ruling. Similarly, under Article 177 of the EC Treaty, a "court or tribunal of a Member State" must refer certain questions of EC Treaty interpretation to the ECJ.<sup>41</sup> In the interest of "procedural economy" the Hoge Raad referred similar questions to both courts.<sup>42</sup> It also asked the ECJ whether for proceedings related to Benelux law, the highest national court or the Benelux court is the court "against whose decisions there is no judicial remedy under national law for purposes of Article 177."<sup>43</sup>

With respect to the jurisdictional issue, the ECJ initially determined that the Benelux court is a "court or tribunal of a member state" within the meaning of Article 177.<sup>44</sup> In addition, the court concluded that the requirements of Article 177 are satisfied *provided that* the ECJ has given a ruling at "some stage in the proceedings before the national court takes a final decision."<sup>45</sup> Thus, it makes little difference which court (highest national court or the Benelux court) requests the ruling.<sup>46</sup> Nevertheless, the Court indicated that the purpose of Article 177, as well as the interest of procedural economy, will often be best served, if the ECJ is given the opportunity to rule in advance of the Benelux court.<sup>47</sup>

### C. Court's Holding and Analysis

The ECJ held that the principle of exhaustion of rights extends to the advertising of trademarked goods.<sup>48</sup> Article 7 permits the resale of goods placed on the market in the Community by, or with the permission of, the proprietor of the trademark.<sup>49</sup> Therefore, the ECJ concluded that "in principle" a reseller must be entitled to advertise the goods which he is entitled to sell.<sup>50</sup>

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41. See EC TREATY, *supra* note 7, art. 177(c).

42. *Dior*, 1997 CELEX LEXIS, at ¶ 13-14.

43. *Id.* ¶ 14.

44. *Id.* ¶ 27-28.

45. *Id.* ¶ 28.

46. *Id.*

47. *Id.*

48. See *Id.* ¶ 30-33.

49. See First Council Directive, *supra* note 3, art. 7. Article 7- Exhaustion of the rights conferred by a trademark states:

1. The trademark 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 trademark by the proprietor or with his consent.

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. EC TREATY, *supra* note 7, art.7.

50. See *Dior*, 1997 CELEX LEXIS ¶ 31.



In support of this principle, the Court looked to the wording of Articles 5 and 7.<sup>51</sup> Article 5(3)(d) specifies that the rights conferred by the trademark extend to preventing others from “using the sign on business papers and in advertising.”<sup>52</sup> Article 7(1), in espousing the exhaustion principle, also refers to the “use” of the trademark. Thus, the Court

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51. Article 5 of the EC TREATY, Rights Conferred by a Trademark states:

1. The registered trademark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is Identical with the trademark in relation to goods or services which are Identical with those for which the trademark is registered;

(b) any sign where, because of its Identity with, or similarity to, the trademark and the Identity or similarity of the goods or services covered by the trademark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trademark.

2. Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is Identical with, or similar to, the trademark in relation to goods or services which are not similar to those for which the trademark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark.

3. The following, inter alia, may be prohibited under paragraphs 1 and 2:

(a) affixing the sign to the goods or to the packaging thereof;

(b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under the sign;

(d) using the sign on business papers and in advertising.

4. Where, under the law of the Member State, the use of a sign under the conditions referred to in 1 (b) or 2 could not be prohibited before the date on which the provisions necessary to comply with this Directive entered into force in the Member State concerned, the rights conferred by the trademark may not be relied on to prevent the continued use of the sign.

5. Paragraphs 1 to 4 shall not affect provisions in any Member State relating to the protection against the use of a sign other than for the purposes of distinguishing goods or services, where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark.

EC TREATY, *supra* note 7, art.5. Article 7 of the EC Treaty, Exhaustion of the Rights Conferred by a Trademark, states:

1. The trademark 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 trademark by the proprietor or with his consent.

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.

EC TREATY, *supra* note 7, art.7.

52. *Dior*, 1997 CELEX LEXIS, ¶ 32.

concluded that "use" extends to advertising and therefore, application of the exhaustion principle permits resellers not only to resell such goods, but also to advertise.<sup>53</sup>

The ECJ then considered whether any exceptions existed to the general rule of exhaustion as applied to advertising.<sup>54</sup> In *Bristol-Myers Squibb v. Paranova (Bristol-Meyers Squibb)*, the ECJ held that damage to a trademark owner's reputation can be a legitimate reason within the meaning of Article 7(2) for a trademark owner to oppose the further marketing of goods placed on the market in the Community by the proprietor or with his consent.<sup>55</sup> In light of that holding, the ECJ concluded that the repackaging must not be "defective, of poor quality, or untidy."<sup>56</sup>

The ECJ reasoned from *Bristol-Meyers Squibb* that a proprietor of a trademark is similarly entitled to oppose shoddy advertising that damages his reputation.<sup>57</sup> Nonetheless, "condition of the goods" is distinguishable from "mental condition of the goods."<sup>58</sup> The phrase "condition of the goods" in Article 7(2) merely refers to the condition of the goods *inside the packaging*.<sup>59</sup> Thus, change or impairment of the condition of the goods is one example of a "legitimate reason" within the meaning of Article 7(2) and damage to reputation is another.<sup>60</sup>

In establishing damage to reputation, the proprietor need only show risk of significant damage to his reputation, and need not show that the public believed the retailer to be connected to, or authorized by him.<sup>61</sup> Whether or not there is a risk of significant damage is a question of fact for the national court.<sup>62</sup>

The ECJ did note, however, several factors that may indicate whether or not there is a risk of significant damage including: 1) evidence that authorized distributors have carried out similar advertising without complaint from the trademark owner; 2) evidence that the selective distribution system is objectionable under the provisions of the treaty as unnecessary for the type of product in question; or 3) evidence that the trademark owner had not taken the trouble to set up a "water-tight" distribution system.<sup>63</sup>

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53. *Id.* ¶ 33.

54. *Id.* ¶ 34-55.

55. See generally *Bristol-Meyers Squibb*, *supra* note 2.

56. See *Dior*, 1997 CELEX LEXIS, at ¶ 35.

57. *Id.* ¶ 36.

58. *Id.* ¶ 38.

59. *Id.* ¶ 58.

60. *Id.* ¶ 38.

61. *Id.* ¶ 39.

62. *Id.* ¶ 50.

63. *Id.*

The appropriateness of the advertising is also essentially a question of fact for the national court.<sup>64</sup> But the ECJ did propose that where the advertising is similar to authorized distributors, there is no risk of significant damage to the reputation of the trademark.<sup>65</sup> Additionally, even where such advertising is inferior to that of selected distributors, the court proposed that such evidence itself is insufficient. "Resellers cannot be required to comply with the same conditions as selected distributors."<sup>66</sup> Nonetheless, there may be "exceptional" circumstances to which the proprietor of the trademark may object.<sup>67</sup>

The sales in question were from chemist shops, and Dior conceded that Kruidvat's advertising complied with customary retail standards in the relevant sector.<sup>68</sup> Thus, the ECJ concluded that although a trademark owner may object to advertising, and such damage may include damage to a product's luxurious image, the proprietor must properly substantiate claims of significant damage to the reputation of the trademark.<sup>69</sup>

### III. RELEVANT LAW

Dior's claims relied upon the rights conferred by Articles 5 and 7 of the First Council Directive.<sup>70</sup> The ECJ balanced these rights against the mandate of free movement of goods provided in Articles 30 and 36 of the EC Treaty.<sup>71</sup>

Article 5 establishes the rights conferred by a trademark and provides the basis of Dior's claims. Specifically, Article 5(2) protects the proprietor of a trademark from unauthorized use of its trademark where such use takes "unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark."<sup>72</sup> In addition, Article 5(3) includes using the trademark in advertising as a possible prohibited use.<sup>73</sup>

The rights conferred by Article 5 are constrained by the exhaustion principle of Article 7. Article 7(1) establishes the principle of exhaus-

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64. *Id.* ¶ 51.

65. *Id.*

66. *Id.*

67. *See id.* ¶¶ 51-52 (sale of luxury perfumes in "bargain bin" with toilet paper, or sales by "Seedy" red-light district shops).

68. *Id.* ¶ 41.

69. *Id.* ¶ 61.

70. *See* First Council Directive, *supra* note 3, arts. 5, 7.

71. *See* EC TREATY, *supra* note 7, arts. 30, 36.

72. First Council Directive, *supra* note 3, art. 5(2).

73. *See* First Council Directive, *supra* note 3, art. 5(3)(b).

tion of trademark rights, whereby a trademark owner cannot rely on his trademark to oppose the importation or marketing of a product marketed by him or with his consent in another Member State.<sup>74</sup> Article 7(2) excludes from that principle commercialization of goods where the condition of the goods is changed or impaired after they have been put on the market.<sup>75</sup>

In *Dior*, the products in issue were not altered physically after being placed on the market. Therefore, Dior claimed that the advertising used to promote Kruidvat's sale of the product was detrimental to the product's "mental condition."<sup>76</sup> Thus, Dior sought to assert the rights conferred by Article 5 and avoid the exhaustion principle of Article 7 by claiming that the advertising was detrimental to the "luxurious image" of Dior.

Article 30 of the EC Treaty prohibits quantitative restrictions on imports between Member States.<sup>77</sup> However, Article 36 provides exceptions to import restrictions on the following grounds: (1) public morality, policy, or security; (2) protection of health or life of humans, animals or plants; (3) protection of national artistic, historic, or archaeological treasures; or (4) protection of industrial or commercial property.<sup>78</sup> Yet such restrictions are permitted only if they do not constitute a means of "arbitrary discrimination or a disguised restriction on trade between Member States."<sup>79</sup>

#### IV. ANALYSIS

The free movement of goods, as established in Article 1 of the EC Treaty, is one of the most important principles of European law.<sup>80</sup> Article 30 is another fundamental provision of the EC Treaty, clearly reflecting the drafters' intent to ensure a single European market.<sup>81</sup> Parallel imports are a reaction to intra-Community price discrepancies that provides a means of price equalization. Parallel importers, therefore, play an important role in market integration and equalization.

Critics of parallel imports argue that unrestricted parallel trade

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74. See *Dior*, 1997 CELEX LEXIS, ¶ 30.

75. First Council Directive, *supra* note 3, art. 7(2).

76. See *Dior*, 1997 CELEX LEXIS ¶ 12.

77. EC TREATY, *supra* note 7, art. 30 ("Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States").

78. See EC TREATY, *supra* note 7, art. 36.

79. *Id.*

80. *Id.* art. 1.

81. See Case 249/81, In Re "Buy Irish" Campaign, 1982 E.C.R. 4005, 4021-23, [1982] 2 C.M.L.R. 104, 123-24 (1983).

may result in higher uniform prices at which low demand countries may be unable or unwilling to purchase such goods.<sup>82</sup> The result would be lower demand, reduced output, and higher prices. Additionally, the critics argue, removing price discrepancies may serve as a disincentive to research, development, and production output levels.<sup>83</sup>

Both notions disregard the basic assumption that the issue of parallel imports will only arise where the importer may make a profit. The importer must determine what products have sufficient discrepancies in prices to outweigh the costs of transportation and importation. The parallel importer, in effect, provides marketing information to the manufacturer as to appropriate pricing. Thus, the parallel importer, provides the proprietor notice of the inadequate pricing, distribution, or marketing in both the home market and in the nation of export.

Furthermore, parallel imports will not eliminate price discrepancies, they will only limit the spread. Where the costs of importation and transportation for the parallel importer outweigh the profit, the importation will cease. Economies of scale favor the proprietor in transportation and distribution. In addition, since the proprietor sets the initial price, there is necessarily a delay before the parallel importer realizes the discrepancy exists and determines that it is sufficient to act. The proprietor thus benefits from the initial imperfect market information. He can also capitalize on the parallel importer's imperfect marketing information to head off unauthorized sales of his products. Furthermore, since the proprietor always maintains the option of altering its pricing scheme, he may decrease the price discrepancy by simply lowering his prices, thereby making it not worth the parallel importer's while.

Another concern about parallel imports arises from one interpretation of the function of a trademark. The ECJ traditionally has emphasized the role of trademarks as an indication of the origin of products.<sup>84</sup> Other functions of a trademark include communication, investment, or advertising.<sup>85</sup> These additional functions arguably go to the goodwill of the product in question.<sup>86</sup> As such, a primary purpose of the trademark

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82. See generally W. Bishop, *Price Discrimination Under Article 86: Political Economy in the European Court*, 44 MOD L. REV. 282 (1981); Malueg & Schwartz, *Parallel Imports, Demand Dispersion, and International Price Discrimination*, *Economic Analysis Group Discussion Paper 6-12 (1993)*; Reindl, *supra* note 1, at 830-31.

83. See Reindl, *supra* note 1, at 831.

84. See *Dior*, 1997 CELEX LEXIS ¶39.

85. *Id.* See generally DAVID C.L. PERKINS & MARLEEN VAN KERCKHOVE, *LICENSING INTELLECTUAL PROPERTY RIGHTS IN THE EU: THE COMMUNITY EXHAUSTION DOCTRINE*, PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES (1997); Reindl, *supra* note 1, at 855.

86. See generally Reindl, *supra* note 1, at 855.

is to provide assurance of the quality as well as the origin of the product.

The ECJ defined the essential function of the trademark as "to enable the consumer, without any possibility of confusion, to distinguish the marked product from products of different origins."<sup>87</sup> Such guarantee of origin includes the assurance that the marked product has not been subject to interference by a third party, without authorization of the proprietor of the trademark.<sup>88</sup>

Legitimate concerns arise when the parallel importer repackages a product prior to importation. Such occasions are due to diversified packaging requirements for various Member States.<sup>89</sup> However, the ECJ concluded that restrictions on parallel imports were an impermissible disguised restriction on intra-Community trade unless four requirements were met: (1) use of the trademark right contributed to the artificial partitioning of the markets between Member States; (2) repackaging adversely affected the original condition of the product; (3) the proprietor of the mark did not receive prior notice of the marketing of the repackaged product; and (4) the new packaging did not contain information concerning by whom the product had been repackaged.<sup>90</sup> Thus, so long as the integrity of the product remains intact, the proprietor of the trademark may not oppose repackaging and marketing of its product.

The general proposition remains that the primary purpose of a trademark is to signify the origin of the product to the purchaser. This signal includes the perceived quality, manufacturer, and any goodwill associated with the product. So long as the integrity of the product remains intact, the proprietor is assured that the product they marketed in one Member State is equivalent to the parallel imported product into another Member State. The only adverse consequence to the manufacturer, therefore, is that any price discrepancy results in profits for the parallel importer, and not the proprietor. Thus, parallel imports encourage price equalization, at least to the point where the importer's transportation and importation costs outweigh the profit resulting from the price discrepancy.

The present case provides an example of a manufacturer's attempt to prohibit parallel imports in order to maintain their exclusive market. The product was unaltered in content and packaging. In addition, the advertising complied with the general practice in the relevant industry.

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87. See Case 107/76, *Hoffmann-La Roche v. Centrafarm Vertiebsgesellschaft Pharmazeutischer Erzeugnisse mbH* ECR 957 (1977).

88. *Id.*

89. See *Bristol-Meyers Squibb*, *supra* note 2.

90. *Id.*

Dior asserted that by not selling its product in an approved distributorship, the parallel import damaged the luxurious image of its product. This argument was merely smoke and mirrors.

In reality, Dior's trademark was secure. The product sold was the identical product sold in approved distributorships. The marketing was appropriate for the product in the market in which it was being sold. Furthermore, there was no question as to whether Kruidvat was an authorized Dior retailer. Thus, the only damage to Dior was the loss of its exclusive market.

The ECJ was careful to assert that the risk of serious damage to a trademark's reputation was a question of fact for the national court. This provides trademark proprietors with protection from actions seriously detrimental to its trademark, such as where a luxurious perfume is sold in a "seedy" red-light district shop, or advertised in a "sale-bin at cut-price prices along with rolls of toilet paper and toothbrushes."<sup>91</sup> It does not, however, provide the blanket trademark protection that Dior sought. Furthermore, the opinion indicates that only such extreme situations should result in protection.<sup>92</sup>

With the *Dior* decision, the ECJ promoted the goals of the EC Treaty, especially that of encouraging the free movement of goods. Parallel imports provide a means of encouraging the concomitant price equalization. So long as the manufacturer's product is secure in quality and appearance, the market should dictate its cost. Allowing trademark proprietors to assert rights prohibiting the free movement of goods discourages market equalization and perpetuates price discrepancies, contrary to those goals.

Finally, the principles of market equalization only apply to intra-Community trade.<sup>93</sup> Proprietors control the prices at which they sell their product within the Community. They may choose the markets to distribute their product with an understanding of potential parallel trade. They may then weigh the costs and benefits of price discrepancies. Additionally, the proprietor controls the quantity of the product introduced into a given market. Where parallel imports originate from a particular Member State, the trademark proprietor may increase its costs or limit the quantity of product marketed within that State, thereby economically achieving the same result.

As a result, there remains no reason to perpetuate price discrepancies. The benefits accrue only to the proprietor of the trademark, and

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91. See *Dior*, 1997 CELEX LEXIS, ¶¶ 51-52.

92. *Id.* ¶ 51-52.

93. See EC TREATY, *supra* note 7, art. 30 (restrictions prohibited between Member States); *id.* art. 36 (prohibiting arbitrary or disguised restrictions on trade between Member States).

such practice defeats the specific purpose of the EC Treaty. *Dior* and *Bristol Meyers Squibb* maintain the necessary protection to the trademarked product, while encouraging the free movement of goods.

## V. CONCLUSION

Through the guise of protecting the "luxurious image" of its products, Dior sought to perpetuate favorable price discrepancies among the Community nations.<sup>94</sup> The ECJ rejected Dior's argument that damage to the "condition of the goods" includes not only actual damage, but also "mental damage." It also concluded that the proper interpretation of Article 7, accounting for the Community goal of free movement of goods, prohibited the owners of trademarks from encouraging price discrepancies between countries.<sup>95</sup>

As discussed above, utilization of parallel imports encourages equalization. The ECJ, through its limited reading of Article 5 of the EC Treaty, further protected parallel importers. To hold otherwise would have provided the proprietors of a trademark with excessive control over their products' marketing, perpetuating price discrepancies. Through the threat of lawsuits, proprietors could also have made it all but impossible for parallel importers to advertise their products. This would give exclusive distributors and retailers a competitive edge, contradicting and frustrating the purpose of the "exhaustion of rights" in Article 7.

That is not to say that a reseller's rights are absolute in regards to advertising of trademarked goods. The ECJ acknowledged, in principle, that protection of a proprietor's trademark from damage to its reputation may be a legitimate interest under Article 7(2). Nevertheless, it placed the burden of establishing "serious damage" to a trademark upon the owner of the trademark. The ECJ further noted that where a reseller habitually markets articles of the same kind, although not of the same quality, the trademark owner must provide *specific* circumstances of *serious* damage to the reputation of the trademark.

The ECJ additionally limited trademark owner's rights to control reseller's advertising under Article 30 of the EC Treaty. Article 30 prohibits obstacles to the free movement of goods, unless justified under the exceptions set forth in Article 36. Citing *Bristol-Meyers Squibb*, the ECJ initially noted that Article 7 of the Directive and Article 36 of the

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94. See *Dior*, 1997 CELEX LEXIS, ¶ 48 (the *Gerechthshof* concluded that Dior wished to prohibit all advertising and thus hinder the sale of products so as to protect its selective distribution system against parallel importers).

95. See *Dior*, 1997 CELEX LEXIS, ¶¶ 32-38.



EC Treaty must be interpreted in the same way.<sup>96</sup> The ECJ thus concluded that the proper interpretation of Articles 30 and 36 prohibited the proprietor of a trademark from opposing marketing by resellers.<sup>97</sup>

The ECJ further expanded its holding to copyrighted materials. Citing *Musik-Vertrieb Membran GmbH v. Gesellschaft fuer Musikalische Auffuhrngs-und Mechanische Vervielfaeltigungsrechte*,<sup>98</sup> the ECJ concluded that the grounds of protection conferred by Article 36 to industrial and commercial property also included protection of copyrighted items. The ECJ further noted, however, that the protection afforded copyrighted material may not be broader than that conferred on a trademark owner.<sup>99</sup>

The ECJ's holding in *Dior* eliminated a potential barrier to parallel imports, promoted price equalization, and furthered the EC Treaty goal of free movement of goods. In the final analysis, therefore, the holding was good for the European economy.

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96. See *Dior*, 1997 CELEX LEXIS, ¶ 53 (citing *Bristol-Meyers Squibb supra* note 2.

97. *Id.* ¶ 54 .

98. Joined Cases 55/80 and 57/80, *Musik-Vertrieb Membran GmbH v. Gesellschaft fuer Musikalische Auffuhrngs-und Mechanische Vervielfaeltigungsrechte* [1981].

99. *Id.* ¶ 58 .

