

# A Brave New World: EU Trade Mark Reform Package

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Simmons & Simmons

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## History

- 1988 TM Directive 89/104/EEC
- 1995 CTM Regulation (EC) 40/94
- 2008 Codified TM Directive 2008/95/EC
- 2009 Codified CTM Regulation (EC) 207/2009
- Nov 2009 Max Planck Institute Study Begins
- Mar 2011 Max Planck Institute Study Published
- May 2011 Commission Hearing with User Groups
- Mar 2013 Commission adopts revision proposals
- Apr 2015 'Trilogue' agrees proposal
- **23 Mar 2016 Reform package came into force (in part)**



## The Headlines

### ■ Regulation

- EU Trade Mark Regulation, Regulation 2015/2424
- Came into force on 23 March 2016
- Replaces CTM Regulation, and governs all “CTMs” (as were) which were then registered
- Implementing Regulation redone
- Fee Regulation repealed

### ■ Directive

- Trade Mark Directive, Directive 2015/2436
- Must be made effective in the Member States within 3 years (or 7 years for one provision)
- Replaces the old Trade Mark Directive

## Name Changes

OHIM → EUIPO

CTM → EUTM

President → Executive Director

- No change to RCDs, which will continue until amended
- Can no longer file EUTMs at IPOs in Member States

## Changes to Fees

	Old Fee	New Fee
Registration of TM for 1 Class	€900	€850
Registration of TM for 2 Classes	€900	€900
Registration of TM for 3 Classes	€900	€1,050
Renewal of TM for 1 Class	€1,350	€850
Renewal of TM for 2 Classes	€1,350	€900
Renewal of TM for 3 Classes	€1,350	€1,050
Opposition Fee	€350	€320

## Some Key Dates

- 23 March 2016 – Many provisions commenced. Article 28 declaration period opened
- 23 September 2016 – Article 28 declaration period closes
- 01 October 2017 – Commencement of provisions requiring preparatory acts, like graphic representation requirement, certification marks, etc.
- 23 March 2019 – Directive must be implemented (except in relation to administrative cancellation actions)
- 23 March 2023 – Administrative cancellation actions mandatory in all Member States

## Some Key Proposals that Didn't Make It

- Bad faith is still not a ground for opposing EUTMs (but is a ground for cancellation)
- National searches remain in existence (thankfully still optional)
- Member States may continue to examine on relative grounds
- Administrative cancellation procedures at the Member State level will only become mandatory on 23 March 2023.

## What can be registered?

- Elimination of Graphic Representation Requirement (effective 1 October 2017; see Reg. 2015/2424, art. 4)
- Expanded Functionality Provision (effective 23 March 2016)

## Graphic Representation – The Legislation

- **Original Legislation:** “A trade mark may consist of any signs **capable of being represented graphically**, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.” (Directive, art. 2; regulation, art. 4)
- **New Legislation:** “A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are **capable of:**
  - (a) distinguishing the goods or services of one undertaking from those of other undertakings; and
  - (b) **being represented on the [Register], in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.**’ (Regulation, art 4; Directive, art 3).

## Graphic Representation – Case Law under Old Provision

- *Sieckmann* (balsamically fruity smell with a hint of cinnamon, for various services)
  - Graphic representation does not require that a sign be “visually perceptible” (para 45) but “must enable the sign to be represented visually” (para 46)
  - CJEU set out seven criteria, effectively excluding smell marks: must be “clear, precise, self-contained, easily accessible, intelligible, durable, objective” (para 55)
  - Rejecting chemical formula, written description, or deposit or combination of the same (para 73)
- *Libertel*: (orange for phone services)
  - sample not durable
  - representation accessible and intelligible if did not require excessive efforts for the public to understand it
  - Pantone codes OK because precise and stable
- *Shield Mark* (first nine notes of “Für Elise” and crowing of a cock for various products/services)
  - acceptable: “a stave divided into measures and showing, in particular, a clef, musical notes and rests whose form indicates the relative value and, where necessary, accidentals”
  - not acceptable: written description, onomatopoeia, or mere sequence of notes
  - not answered (hypothetical): sonograms, sound recordings or digital recordings
- Public interest at issue: certainty for office and notice for competitors

## Graphic Representation – Effect of Reform

- MPI sought to make an administrative matter by removing from the definition (p. 68), but formally still within the statutory definition
- Regulation, recital 9 and Directive, recital 13 require that the “sign is capable of being represented in a manner which is clear, precise, self-contained, easily accessible, intelligible, durable and objective” (i.e. *Sieckmann* criteria)
- Goal is “flexibility” without jeopardising “certainty”: can be “represented in any appropriate form using generally available technology, and thus not necessarily by graphic means, as long as the representation offers satisfactory guarantees to that effect” (Regulation, recital 9)
- Liberalisation?
  - Perhaps with musical marks not consisting of piece of music (i.e., discrete sounds)
  - And perhaps greater certainty: representation by other than graphical means (e.g. by digital recordings) may be preferable to mere graphical representation, if it allows for a more precise identification of the mark (MPI Study, at p. 67); same with moving image marks
  - Other definitional requirements pick up some of the same policy concerns; these remain unaffected in any event
    - *Dyson, Nestle v. Cadbury (Purple), Spear v Zynga* [2013] EWCA Civ 1175 (Scrabble Tile mark neither a “sign” nor satisfies *Sieckmann* certainty concerns)

## Expanded Functionality – Old CTMR, art. 7(1)(e)

*A sign shall not be registered as a trade mark if it consists exclusively of-*

- (i) the shape which results from the nature of the goods themselves;*
- (ii) the shape of goods which is necessary to obtain a technical result;*
- (iii) the shape which gives substantial value to the goods.*

## Expanded Functionality – EUTMR, art. 7(1)(e)

*A sign shall not be registered as a trade mark if it consists exclusively of-*

- (i) *the shape, **or another characteristic**, which results from the nature of the goods themselves;*
- (ii) *the shape, **or another characteristic**, of goods which is necessary to obtain a technical result;*
- (iii) *the shape, **or another characteristic**, which gives substantial value to the goods;*


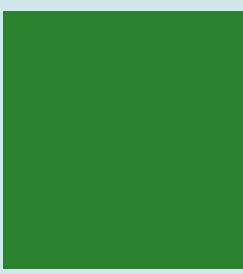

## Expanded Functionality – Purpose of Art 7(1)(e)

- Two (related) purposes:
  - Avoiding *de facto* patents/extension of time-limited IP rights (“channelling concern”)
    - especially as regards second and third exclusions
  - Avoiding competitive costs of monopoly on function (“competition concern”)

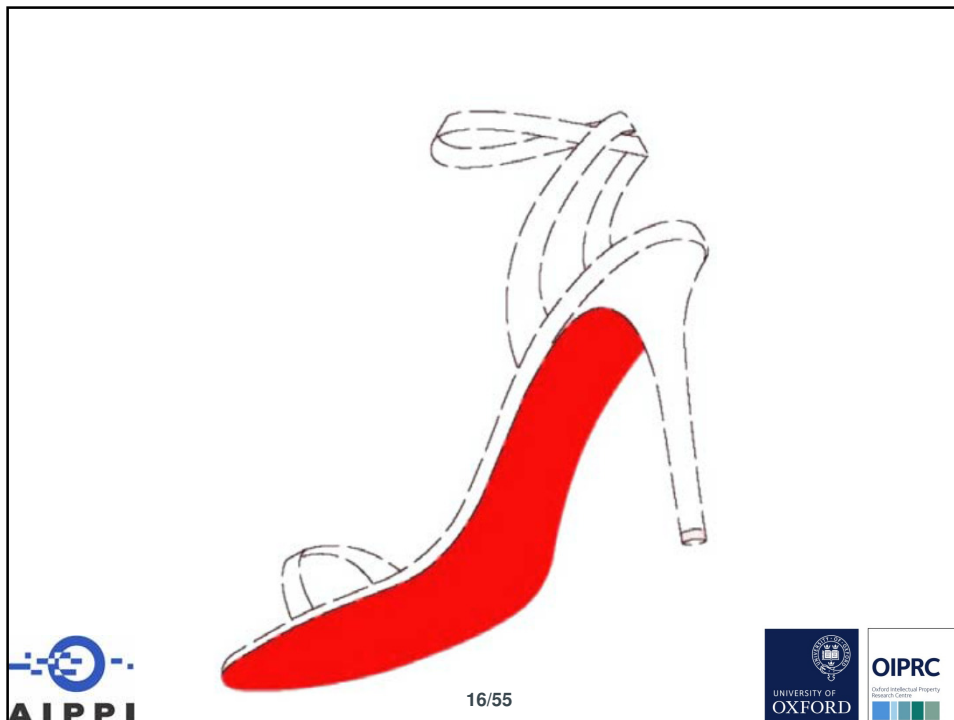
## Expanded Functionality – Impetus for Change

- Max Planck Study: “the corresponding exclusion . . . in US trade mark law does not contain any such restrictions [to shapes], but can be applied to all kinds of signs, like colours, smells, or sounds.” (p. 72, para 2.31)
- Same (or similar) policy concerns might be implicated by other types of mark
  - the sound of a motorbike produced by the technical properties of the engine (p. 72, para 2.31)
  - limited supply of colours (like shapes) giving rise to competition concerns

## Expanded Functionality: Intended Effects

Black for marine outboard engines	Green for Farm Equipment	Peach and white for Prescription Medicines
		

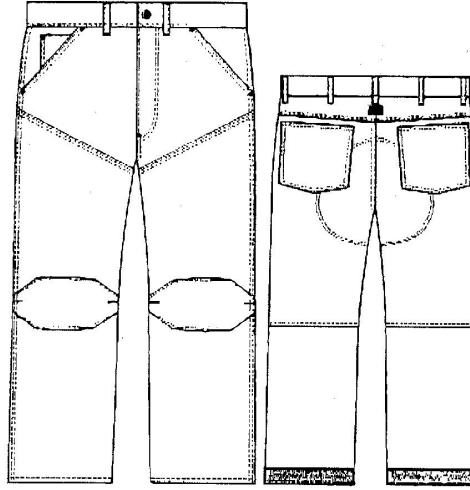
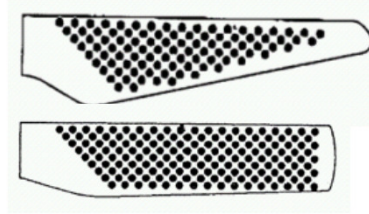




## How Necessary? How Big a Change?

- (Inherent and acquired) distinctiveness standards for nonconventional marks:
  - In practice, much harder to show inherent distinctiveness
  - Other exclusions: competitors' needs can be considered under Article 7(1)(c) (and, for colours also under Article 7(1)(b))
  - And if *Nestle (FOUR FINGER KIT KAT)* (EWHC) is correct and followed on acquired distinctiveness test
- Article 7(3): proof for entire EU
  - Max Planck proposal (p. 147) to liberalise rejected (though courts might get there; see also OHIM Guidelines Part B, para 2.6.6.4 on extrapolation)
- Article 7(1)(e) exclusions cannot be overcome

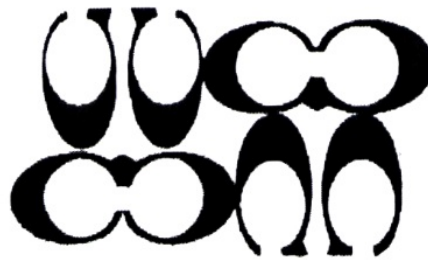
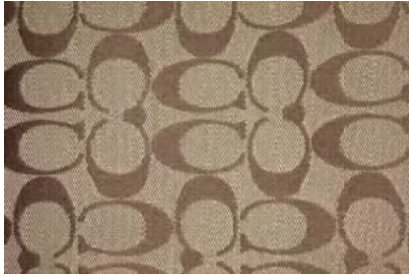
## “Shape”



## Effect of Change: Unintended Effects

- (i) “the shape, **or another characteristic**”
  - colour
  - sound (motorbike)
  - others?

## “Another characteristic”

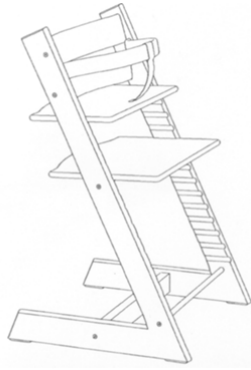


## “Another characteristic”



- *Philips v Remington* (Jacob J) ( “[W]hat is meant is an exclusion of shapes which exclusively add some sort of value . . . to the goods disregarding any value attributable to a trade mark (i.e. source identification) function. . . . For instance the Rolls-Royce grille adds value to a Rolls-Royce. But it does so primarily because it signifies Rolls-Royce and not because of its inherent shape.”
- *Julius Samaan Ltd v Tetrosyl* (‘Magic Tree’) (Kitchin J)
- U.S. Supreme Court in *Qualitex*: would protection put competitors at a substantial non-reputation related disadvantage?

## Hauck v Stokke (CJEU 2014)



## Conventional (pre-2014) account: art. 7(1)(e)

### (i) shape results from nature of goods

- Almost never engaged (“shape of banana for banana”)
- Alternatives avoid exclusion



### (ii) shape necessary to obtain a technical result

- Limited case law, but had some bite:
  - not sufficient to show alternatives (*Philips*)
  - little scope for clever claiming to take advantage of “exclusively” (*Lego*: look at the “essential functional features”)
  - prior patents given great weight (*Philips* and *Lego*)



### (iii) shape that gives substantial value to goods

- Very little case law
- Broad dicta in *G Star* (CJEU) and *Bang & Olufsen* (GC) suggested potentially broad application to design-conscious products

## Hauck v Stokke (CJEU 2014)

- **First indent:** “may apply to a sign which consists exclusively of the shape of a product with one or more essential characteristics which are inherent to the generic function or functions of that product and which consumers may be looking for in the products of competitors” (para 27)
  - “natural” as “expected”
- **Third Indent:** the concept of a ‘shape which gives substantial value to the goods’ cannot be limited purely to the shape of products having only artistic or ornamental value, as there is otherwise a risk that products which have essential functional characteristics as well as a significant aesthetic element will not be covered.” (para 32)
  - Max Planck Study proposed deleting the substantial value exclusion, and relying on Article 7(1)(b) and 7(1)(c) to protect concerns of competition
  - *Hauck* gave substantial value new life: how much?
    - Is it simply that the shape can have aesthetic plus other value (eg comfort, safety) or has the Court said any substantial non-trade mark value emanating from the shape makes that shape non-registerable?

## IP Translator

- The use of Nice Class headings has changed, following the Court of Justice’s guidance in *IP Translator*: class headings mean what they say.
- Article 28 of the New Trade Mark Regulation has enacted the requirements of *IP Translator* for EUTMs.
- Article 39 of the new Directive appears to extend the requirements of *IP Translator* to national trade marks as well, but no transitional fix.
- Owners of EUTMs are now able (until 23 September) to amend their marks’ specifications at the EUIPO.
- EUTMs which were registered for the whole of a Nice Class will be able to file a declaration saying that the mark was intended to be registered for everything listed in the alphabetical Nice Classification list for that Class as at the date of registration: they do this by specifying the “orphans” they wish to add.

## IP Translator

e.g. Class 15:

- Class Heading: Musical Instruments

- Alphabetical list:

accordions, bagpipes, balalaikas [stringed musical instruments], bamboo flutes, bandonions, banjos, barrel organs, basses [musical instruments], bellows for musical instruments, bow nuts for musical instruments, bows for musical instruments, bridges for musical instruments, buccins [trumpets], carillons [musical instruments], cases for musical instruments, castanets, catgut for musical instruments, chin rests for violins, clarionets, clarions, concertinas, conductors' batons, cornets [musical instruments], cymbals, double basses, drumheads / skins for drums, drums [musical instruments], drumsticks, electronic musical instruments, flutes, gongs, handbells [musical instruments], harmoniums, harp strings, harps, hats with bells [musical instruments], horns [musical instruments], horsehair for bows for musical instruments, huqin [Chinese violins], intensity regulators for mechanical pianos, [musical instruments], kettledrum frames, kettledrums, keyboards for musical instruments, keys for musical instruments, lyres, mandolins, mouthpieces for musical instruments, music rolls [piano], music stands, music synthesizers, musical instruments, musical boxes, mutes for musical instruments / dampers for musical instruments, oboes, ocarinas, organs, pedals for musical instruments, pegs for musical instruments, perforated music rolls, piano keyboards, piano strings, piano keys, pianos, pipa [Chinese guitars], plectrums / picks for stringed instruments, reeds, saxophones, sheng [Chinese musical wind instruments], stands for musical instruments, sticks for bows for musical instruments, stringed musical instruments, strings for musical instruments, suona [Chinese trumpets], tambourines, tom-toms, triangles [musical instruments], trombones, trumpets, tuning hammers, tuning forks, turning apparatus for sheet music, valves for musical instruments, violas, violins, wind pipes for organs, xylophones, zithers

- Orphans:

Bellows for musical instruments; bow nuts for musical instruments; bows for musical instruments; bridges for musical instruments; cases for musical instruments; catgut for musical instruments; chin rests for violins; conductors' batons; drumheads; drumsticks; harp strings; horsehair for bows for musical instruments; intensity regulators for mechanical pianos; kettledrum frames; keyboards for musical instruments; keys for musical instruments; mutes for musical instruments; music rolls [piano]; music stands; mutes for musical instruments; pedals for musical instruments; pegs for musical instruments; perforated music rolls; piano keys; piano strings; plectrums; reeds; stands for musical instruments; sticks for bows for musical instruments; strings for musical instruments; tuning hammers; tuning forks; turning apparatus for sheet music; valves for musical instruments; wind pipes for organs.



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## IP Translator: Practical Reality

- EU traders in “orphan” goods and services will likely leave specified.
- Many of the orphans will be vulnerable to revocation for non-use.
- But, no attorney wants to advise their client not to claim extra rights that are on offer.
- The difficulty in reviewing hundreds of specifications against six editions of the Nice Classification, and not losing the will to live.
- Declarations must be filed by 23 September 2016.



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## EU Certification Marks

- These were permitted under the Directive, but not the Regulation
- Absurd situation because the national and EUTM systems overlap and should not be substantively different. E.g. a national certification marks could, in principle be invoked to prevent CTMs, if OHIM could get their head around what a certification mark was.



- Detailed provisions in Art 74A and following
- NB: EXCLUDES geographical origin – which is different from UK marks
- Contrast s 50 of UK Trade Marks Act 1994:  
*“A certification mark is a mark indicating that the goods or services in connection with which it is used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics.”*

■ Explanatory Memo:

*While various national systems offer protection for certification marks, the European trade mark system currently provides only for the registration of individual and collective marks. Some public and private bodies that do not meet the conditions to be eligible to obtain collective trade mark protection also need a system for protection of certification marks at EU level. Such a system would also remedy the current imbalance between national systems and the European trade mark system. It is proposed to add to the Regulation a specific set of rules covering the registration of European certification marks.*

## Infringement – Comparative Advertising

**9(3)(f) – “using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC of the European Parliament and of the Council”**

A new infringing act, or same old same old?



The poster is framed by a decorative border of orange flowers. At the top, it asks "Who loves flying you to the place you actually booked?". Below this, there are two boxes. On the left, a blue box for Ryanair lists: "Barcelona" = Girona, "Paris" = Beauvais, "Milan" = Bergamo, and "Venice" = Treviso. On the right, an orange heart-shaped box for easyJet lists: Barcelona = Barcelona, Paris = Paris, Milan = Milan, and Venice = Venice. An arrow points from the easyJet heart to the Ryanair box. At the bottom, it says "Get on board the love plane now!".



## Infringement – Comparative Advertising

- Case C-533/06 *O2 Holdings* paragraphs 35, 36, 42
- Case C-487/07 *L'Oréal* paragraphs 52 and 53
- Case C-236/08 *Google France* – paragraph 70
- Use of a mark in a comparative advertisement by an advertiser for the purposes of identifying the goods and services offered by the latter and to compare its own goods or services therewith, ALREADY is use in relation to goods or services.
- So this is just codifying that, right?

## Infringement – Comparative Advertising

- But what of the part of Art 9(3)(f) that says “....in a manner that is contrary to Directive 2006/114/EC of the European Parliament and of the Council.”
- That is the second stage of the enquiry, NOT the definition of the infringing act.
- Explanatory Memorandum (23/3/13): Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising[15] regulates the conditions under which advertising, which explicitly or by implication identifies a competitor or goods or services offered by a competitor, is permissible. The relationship of this instrument to the legislation on trade marks has given rise to doubts. It is therefore appropriate to clarify that the trade mark owner may prevent the use of his trade mark in comparative advertising where such comparative advertising does not satisfy the requirements of Article 4 of Directive 2006/114/EC.

## Infringement – Comparative Advertising

- One view:
  - Merely an “avoidance of doubt” provision
  - Ignore the words “in a manner that is contrary...etc”
  - Because it is listed in Article 9 along with the other infringing acts, it does not create liability (damage to functions etc) it merely reflects a type of use

## Infringement – Preparatory Acts

- Art 9(a) – Right to prevent preparatory acts
- Where the **risk** exists that the packaging, labels ... or any other means to which the mark is affixed **could** be used in relation to goods or services and such use **would** constitute an infringement... the proprietor shall have the right to prohibit
  - (a) affixing a sign identical with, or similar to, the EU trade mark on packaging, labels (etc) or;
  - (b) offering or placing on the market, or stocking for those purposes, or importing or exporting, packaging, labels, (etc) to which the mark is affixed.

## Infringement – Preparatory Acts

- Easy cases.....



## Infringement – Preparatory Acts

- Hard cases.....



## Infringement – Preparatory Acts

### ■ Explanatory Memorandum:

*Neither the Regulation nor the Directive contains any provisions allowing proceedings against the distribution and sale of labels and packaging or similar items which may subsequently be combined with **illicit** products. Some national laws have explicit rules covering this activity. Including a rule on this in the Regulation and the Directive is appropriate to provide another practical, relevant and efficient contribution to the **combat against counterfeiting**.*

## Infringement – Preparatory Acts

### ■ Case C-119/10 Frisdranken Industrie Winters



## Goods in Transit

- There has been a change to the procedures for infringing goods in transit (Article 9a).
- Goods bearing a registered mark (or a mark similar to the registered mark) are now prevented from entering any Member State where the mark is valid:
  - It is no longer required to show that the goods were going to be released onto the EU Market.
  - This also affects Internet purchases.
  - It is a defence for the importer to show that it was entitled to put the goods in question on the market in the country of final destination.
- Whilst generally covered by implication in the old law, there is now a new explicit provision prohibiting the creation of infringing labels and packaging (Article 9b).
- Whilst there will remain difficulties for rights holders to enforce their rights, the balance appears to be shifting yet further towards their interests in this area.

## Defences – Own Name

- Own name – natural persons only

*Art 12(1) An EU trade mark shall not entitle the proprietor to prohibit a third party from using in the course of trade: (a) the name or address of the third party, **where that third party is a natural person***

## Defences – Own Name

- Directly contrary to no less than two Grand Chamber judgments of the CJEU
- C-245/02 *Anheuser-Busch* (Grand Chamber) paragraphs 78-81  
*“Certainly, the Council .. and the Commission ... issued a joint declaration, which was recorded in the minutes of the Council when Directive 89/104 was adopted, that that provision covers only natural persons’ names.”*
- BUT:  
*“The Council and the Commission themselves explicitly recognised that [the statements] are not part of the legal text ...”*
- *“No reference is made in the wording of [the Directive] to the considerable restriction of the meaning of ‘name’ resulting from the declaration ... That declaration therefore has no legal significance.*
- See also the Grand Chamber in Case C-17/06 *Celine* at 31.

## Defences – Own Name

- Explanatory Memorandum  
*“The limitation in Article 12(1)(a) is restricted to cover the use of personal names only in accordance with the Joint Statement of the Council and the Commission”.*
- Recital 21  
*“In order to create equal conditions for trade names and EU trade marks in the event of conflicts, given that trade names are regularly granted unrestricted protection against later trade marks, such use should be only considered to include the use of the personal name of the third party”*
- Max Planck Study:  
*“The Study does not take a position on whether this is limited to family names or includes also forenames, and whether the right to use a name will continue when there is a succession in ownership and when there are transformations, such as from a partnership to a limited liability company”*

## Defences – Own Name

- Effects a very significant change to the law in this country
- *Premier Luggage & Bags Ltd v Premier Co (UK) Ltd* [2003] F.S.R. 5 – registration of the trade mark PREMIER for luggage not infringed by the D's swingtags because he use of the name 'The Premier Company (UK) Ltd' and the address 'Premier House' on the swing tags was within s.11(2)(a) of the 1994 Act. Did not cover abbreviations.
- *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2009] EWHC 3032 (Ch); [2009] R.P.C. 9 – Arnold J held that did not cover a mere trading name as opposed to full corporate name (excluding "limited" etc.)
- *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2010] EWCA Civ 110; [2010] Bus. L.R. 1465; [2010] R.P.C. 16 disagreed with this aspect of the judgment, holding that there was no hard and fast rule that mere trading names were excluded from the defence.

## Defences – Own Name

- *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159 [2004] R.P.C. 40 at para.116(iii) Jacob L.J. made much the same point in relation to the name of a newly formed company:  
“Any fear that dishonest people might form companies with misleading names so as to take advantage of the defence is easily removed by the use of the proviso - such a deliberate attempt to avail oneself of another's mark would not be an honest practice”
- *Stitching BDO v BDO Unibank* [2013] FSR 35 – trading name for the Philippines bank and the use was in accordance with honest practices.

## Defences – Non-Distinctive Signs

- “Non-distinctive signs”

*Article 12(1)(b) **signs or** indications **which are not distinctive or which** concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of the goods or of rendering of the service, or other characteristics of the goods or services*

## Defences – Non-Distinctive Signs

- The Explanatory Memo says:

*“For reasons of consistency, the limitation in Article 12(1)(b) is extended to cover the use of non-distinctive signs or indications”*

- Recital 21 not much more helpful

*“It should further permit the use of descriptive or non-distinctive signs or indications in general.”*

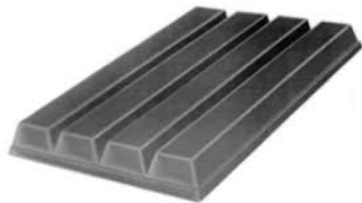


## Defences – Non-Distinctive Signs

- Max Planck – intended this to be a balance between allowing trade mark protection and not finding infringement. Reference in the study to *Adam Opel*
- Dangerous approach and potentially contrary to the “stringent & full examination” principle from C-104/01 *Libertel*
- Or Jacob J in *Colorcoat* [1990] RPC 511 – “the privilege of a monopoly should not be conferred where it might require honest men to look for a defence”

## Defences – Non-Distinctive Signs

- Possible application?



- Or Max Planck suggests Case C-48/05, *Opel/Autec*, para 42, 43

## Defences – Referential Use

- Referential use?

- Recital 21

*Furthermore, the proprietor should not be entitled to prevent the fair and honest use of the EU trade mark for the purpose of identifying or referring to the goods or services as those of the proprietor. Use of a trade mark by third parties to draw the consumer's attention to the resale of genuine goods that were originally sold by or with the consent of the proprietor of the EU trade mark in the Union should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. Use of a trade mark by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. Furthermore, this Regulation should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression*

## Defences – Referential Use

- Article 12(c) of the new Reg

*(c) the EU trade mark for the purpose of identifying or referring to goods or services as those of the proprietor of that trade mark*

- How does this sit with MCAD and O2?

- Under O2 you establish infringement (Stage 1) and then, to invoke a defence under MCAD you have to comply with all conditions (Stage 2)
- Now: you have in addition an argument about referential use PLUS honest practices to layer on to that
- invoked as a defence and subject to the proviso

## Defences – Referential Use

- So in a typical comparative advertising case:
  - 1. Establish double identity/similar marks/LOC + Damage to functions = Infringement
  - 2. Establish compliance with all MCAD conditions (not misleading etc.) = a defence to infringement
- Is this a trump card or is it a Stage 3?