

## **Seminar 5: Free Movement of Goods Rules and Article 30 Derogations (NB Intellectual Property Rights)**

### **Reading**

- Barnard, Ch 5 & 9
- Alexander, “Exhaustion of Trade Mark Rights in the EEA” (1999) 24 ELRev 56

### **I Article 36 Derogation (ex-Art 30) Barnard Ch 5**

#### **Article 36 (ex-Art 30)**

“The provisions of Articles 34 and 35 (ex Arts 28 & 29) shall not preclude prohibitions or restrictions in imports, exports or goods in transit justified on 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

**Article 36** (ex-Art 30) can be relied on in the absence of Community legislation in the relevant field.

- **Public morality**  
**Henn and Darby**, Case 34/79, [1979] ECR 3795  
**Conegate**, Case 121/85, [1986] ECR 1007
- **Public policy or public security**  
**Campus Oil**, Cases 72/83, [1984] ECR 2727
- **Public health**  
**Commission v UK** (French Turkeys), Case 40/82, [1982] ECR 2793  
**Eyssen**, Case 53/80, [1981] ECR 409
- Artistic, historic or archaeological value
- Industrial and commercial property
- Cultural goods – Council Regulation 3911/92. Council Directive 1992 on return of cultural goods

**NB:** Construed narrowly: measure must be *necessary* and no more than is necessary to achieve objective ie must satisfy the principle of *proportionality*. The burden of proof is on the national authorities.

**II**     **Article 36 Derogation re Industrial and Commercial Property** (ex-Art 30)  
Barnard, Ch 9 & **Article 345** (ex-Art 295)

- What are intellectual property rights?
- Why does a conflict with the free movement of goods rule arise?
- The distinction between the existence and exercise of IP rights

**Parker Davis v Probel**, Case 24/67, [1968] ECR 55

**Deutsche Grammophon v Metro**, Case 78/70, [1970] ECR 487

- The exhaustion of rights doctrine – **Silhouette**, Case C-355/96 [1998] ECR I-4799; **Davidoff & Levi Strauss** Joined Cases C-414/99 to C-416/99 [2001] ECR I-8691

i        Patents

**Centrafarm v Sterling**, Case 15/74, [1974] ECR 1147

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

**Merck v Sephar**, Case 187/80, [1981] ECR 2062 (**Merk I**)

**Merk II** Joined Cases, C-267 & C-268/95 [1996] ECR I-6285

ii       Trade Marks

(a)     Specific Subject Matter

**Consten v Grundig**, Joined Cases 56 & 58/64, [1966] ECR 299

**Centrafarm v Winthrop**, Case 16/74, [1974] ECR 1183

**Terrapin v Terranova** Case 119/75 [1976] ECR 1039 (risk of confusion)

**Hoffman-La-Roche v Centrafarm**, Case 102/77, [1978] ECR 1139 (repackaging)

**Bristol-Myers Squibb** Joined Cases C-427, 429 & 436/93 [1996] ECR I-3457

**Centrafarm v American Home Products**, Case 3/78, [1978] ECR 1823 (repackaging and change of trade mark)

(b)     Common Origin Principle

**Van Zuylen v Hag** (Café Hag I), Case 192/73, [1974] ECR 731

**CNL-Sucal v Hag** (Café Hag II), Case C-10/89, [1990] ECR I-3711 (See Cornish (1991) CLJ 223)

**Ideal Standard Case**, Case C-9/93, [1994] ECR I-2789

iii      Copyright

**Deutsche Grammophon v Metro**

**Musik-Vertrieb Membran v GEMA**, Joined Cases 55 & 57/80, [1981] ECR 147

**Coditel v Cine Vog Film**, Case 62/79, [1980] ECR 881

- Harmonisation

Convention on Community Patent (1975)

Directive 89/104 on Trade Marks -OJ 1989 L40/1

Regulation 40/94 on the Community Trade Mark – 1994 OJ L11/1

Directive 91/250 on Protection of Computer Programmes

Databases

Directive 92/100 on Lending Rights

Directive 98/71 on the Legal Protection of Designs 1998 OJ L289/28

Regulation 6/2002, 2002 OJ L3/1

### **Further Reading**

O’Keeffe & Keans, annotation on *Davidoff & Levi Strauss* (2002) 39 CMLRev 591

Dyrberg & Petursson, “What is consent? A note on *Davidoff & Levi Strauss*” (2002) 27 ELRev 464

Gippini-Fournier, annotation Case C-355/96 *Silhouette* (1999) 36 CMLRev 807