

Court of Justice EU, 6 February 2014, Bulldog v Redbull



TRADEMARK LAW

‘Due cause’ may also relate to the subjective interest of a third party using a sign which is identical or similar to the mark with a reputation

- It follows that the concept of ‘due cause’ may not only include objectively overriding reasons but may also relate to the subjective interests of a third party using a sign which is identical or similar to the mark with a reputation.

‘Due cause’ is intended to strike a balance between the interest in question, not to resolve a conflict between a mark with reputation and a similar sign

- Thus, the concept of ‘due cause’ is intended, not to resolve a conflict between a mark with a reputation and a similar sign which was being used before that trade mark was filed or to restrict the rights which the proprietor of that mark is recognised as having, but to strike a balance between the interests in question by taking account, in the specific context of Article 5(2) of Directive 89/104 and in the light of the enhanced protection enjoyed by that mark, of the interests of the third party using that sign. In so doing, the claim by a third party that there is due cause for using a sign which is similar to a mark with a reputation cannot lead to the recognition, for the benefit of that third party, of the rights connected with a registered mark, but rather obliges the proprietor of the mark with a reputation to tolerate the use of the similar sign.

Earlier use of a sign similar to a mark in relation to a product which is identical to that for which that mark was registered can be considered as due cause, if it is used in good faith

- the proprietor of a trade mark with a reputation may be obliged, pursuant to the concept of ‘due cause’ within the meaning of that provision, to tolerate the use by a third party of a sign similar to that mark in relation to a product which is identical to that for which that mark was registered, if it is demonstrated that that sign was being used before that mark was filed and that the use of that sign in relation to the identical product is in good faith. In order to determine whether that is so, the national court must take account, in particular, of:

- how that sign has been accepted by, and what its reputation is with, the relevant public;
- the degree of proximity between the goods and services for which that sign was originally used and the product for which the mark with a reputation was registered; and
- the economic and commercial significance of the use for that product of the sign which is similar to that mark.

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Court of Justice EU, 31 March 2010

(A. Tizzano, K. Lenaerts, A. Borg Barthet, E. Levits and M. Berger)

JUDGMENT OF THE COURT (First Chamber)

6 February 2014 (*)

(Request for a preliminary ruling – Trade marks – Directive 89/104/EEC – Rights conferred by a trade mark – Trade mark with a reputation – Protection extended to non-similar goods or services – Use by a third party, without due cause, of a sign identical with or similar to the trade mark with a reputation – Definition of ‘due cause’)

In Case C-65/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 3 February 2012, received at the Court on 8 February 2012, in the proceedings

Leidseplein Beheer BV,
Hendrikus de Vries

v

Red Bull GmbH,

Red Bull Nederland BV,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the First Chamber, A. Borg Barthet, E. Levits (Rapporteur) and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 February 2013,

after considering the observations submitted on behalf of:

– Leidseplein Beheer BV and Mr de Vries, by T. Cohen Jehoram and L. Bakers, advocaten,

– Red Bull GmbH and Red Bull Nederland BV, by S. Klos, advocaat,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the European Commission, by F. Wilman and F. Bulst, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5(2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the

laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

2 The request has been made in proceedings between Leidseplein Beheer BV and Mr de Vries (collectively, 'Mr de Vries'), on the one hand, and Red Bull GmbH and Red Bull Nederland BV (collectively, 'Red Bull'), on the other, concerning the production and marketing by Mr de Vries of energy drinks with packaging that displays the 'Bull Dog' sign or another sign containing the word element 'Bull' or other signs which are confusingly similar to the trade mark registrations of Red Bull.

Legal context

European Union law

3 Article 5 of Directive 89/104, subsequently reproduced, in essence, in Article 5 of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25), provides, under the heading 'Rights conferred by a trade mark':

'1. The registered trade mark 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 trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

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

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 trade mark in relation to goods or services which are not similar to those for which the trade mark 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 trade mark.

...

Netherlands law

4 Trade mark law in the Netherlands is based on the Benelux Convention on Intellectual Property (Trade Marks and Designs) signed on 25 February 2005 in The Hague ('the Benelux Convention').

5 Article 2.20(1)(c) of the Benelux Convention, which replaced the former Article 13(A)(1)(c) of the Uniform Benelux Law on Trade Marks, is worded as follows:

'1. A registered trade mark shall provide its owner with an exclusive right. Without prejudice to the possible application of ordinary law in matters of civil liability, the exclusive right to a trade mark shall permit the owner to prevent any third party, without its consent, from:

...

(c) using in business a sign which is identical or similar to the trade mark for goods or services which are not similar to those for which the trade mark is registered, where the trade mark enjoys a reputation in the Benelux territory and where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trade mark;

...

The dispute in the main proceedings and the question referred for a preliminary ruling

6 Red Bull is the proprietor in the Benelux countries of, inter alia, the word and figurative mark 'Red Bull Krating-Daeng' ('the mark "Red Bull Krating-Daeng"'), registered on 11 July 1983 for goods in, inter alia, Class 32 (non-alcoholic drinks).

7 Mr de Vries is the proprietor in the Benelux countries of the following marks for goods in Class 32:

– the word and figurative mark 'The Bulldog', registered on 14 July 1983;

– the word mark 'The Bulldog', registered on 23 December 1999; and

– the word and figurative mark 'The Bulldog Energy Drink', registered on 15 June 2000.

8 It appears from the order for reference to be common ground that, before Red Bull filed its mark in 1983, Mr de Vries was using the sign 'The Bulldog' as a trade name for hotel, restaurant and café services ('hotel, restaurant and café services') involving the sale of drinks. It is also common ground that the mark 'Red Bull Krating-Daeng' enjoys a certain reputation in the Benelux countries.

9 As it took the view that Mr de Vries' use of the distinctive sign 'The Bulldog' adversely affects the mark 'Red Bull Krating-Daeng', in that it contains the word element 'Bull', Red Bull brought an action before the Rechtbank Amsterdam (Amsterdam District Court) on 27 June 2005 requesting that Mr de Vries be ordered to cease production and marketing of energy drinks in packaging that displays the 'Bull Dog' sign or any other sign containing the word element 'Bull' or any other signs which are confusingly similar to the trade mark registrations of Red Bull.

10 By his counterclaim, Mr de Vries applied for the revocation, in respect of the Benelux countries, of Red Bull's rights in respect of the mark 'Red Bull Krating-Daeng'.

11 By decision of 17 January 2007, the Rechtbank Amsterdam dismissed all of those claims.

12 By judgment of 2 February 2010, the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) largely upheld the appeal brought by Red Bull against the decision of the Rechtbank Amsterdam. The Gerechtshof te Amsterdam held, first, that the mark 'Red Bull Krating-Daeng' had a reputation within the Benelux countries and, secondly, that, because of the similarity, consisting in the common word element 'Bull', between that mark and the sign 'The Bulldog' used by Mr de Vries for energy drinks, the relevant public would make a connection between the trade

mark and the sign, even if the two were not mistaken for each other.

13 The Gerechtshof te Amsterdam found that the sign 'The Bulldog' was similar to the mark 'Red Bull Krating-Daeng' and that Mr de Vries, by riding on the coat-tails of that mark with a reputation, had sought to take advantage of the reputation of that mark with a view to having his share of the energy drinks market held by Red Bull and corresponding to a multimillion euro turnover.

14 The fact, relied on by Mr de Vries, that use of the mark 'The Bulldog' was a continuation of the use, commencing prior to 1983, of the sign 'The Bulldog' for merchandising and designating hotel, restaurant and café services, including the sale of drinks, was not considered by the Gerechtshof te Amsterdam to constitute due cause for allowing the use of that sign.

15 The Gerechtshof te Amsterdam found that Mr de Vries had not substantiated such a need to use that sign that he could not reasonably be expected to desist from such use.

16 Mr de Vries lodged an appeal in cassation before the Hoge Raad der Nederlanden (Supreme Court) against the judgment of the Gerechtshof te Amsterdam, claiming, inter alia, that the Gerechtshof te Amsterdam had given a restrictive interpretation to the concept of 'due cause', within the meaning of Article 5(2) of Directive 89/104 ('the concept of due cause'). He claims, in the present case, that the use, in good faith, of the sign 'The Bulldog' as a trade name before the mark 'Red Bull Krating-Daeng' was filed constitutes such due cause.

17 The referring court states that the Gerechtshof te Amsterdam had applied, in the case before it, the criterion of need to use a sign, set out in the judgment of the Benelux Court of Justice of 1 March 1975 in *Colgate Palmolive v Bols (Claeryn/Klarein)*, in order to assess whether there was due cause to justify that use.

18 The referring court expresses doubts as to the Gerechtshof te Amsterdam's interpretation of the concept of 'due cause'. First, that concept, as provided for in Article 2.20(1)(c) of the Benelux Convention, must be interpreted in accordance with Article 5(2) of Directive 89/104. Secondly, in the judgment of **22 September 2011 in Case C-323/09 *Interflora and Interflora British Unit*** [2011] ECR I-8625, the Court of Justice of the European Union interpreted the concept of due cause more widely than did the Benelux Court of Justice in *Colgate Palmolive v Bols (Claeryn/Klarein)*.

19 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 5(2) of Directive [89/104] to be interpreted as meaning that there can be due cause within the meaning of that provision also where the sign that is identical or similar to the trade mark with a reputation was already being used in good faith by the third party/parties concerned before that trade mark was filed?'

The question referred for a preliminary ruling

20 By its question, the referring court asks, in essence, whether Article 5(2) of Directive 89/104 must be interpreted as meaning that the use by a third party of a sign that is similar to a trade mark with a reputation in relation to goods identical to those for which that mark is registered may be considered to be with 'due cause', within the meaning of that provision, if it is demonstrated that that sign was being used before that mark was filed.

21 In the light of the circumstances of the case in the main proceedings, and in so far as the question referred calls for the interpretation of Article 5(2) of Directive 89/104, it should be borne in mind that, even though that provision makes express reference only to the situation in which use is made of a sign which is identical with, or similar to, a trade mark with a reputation in relation to goods or services which are not similar to those for which that trade mark is registered, the protection provided for applies, *a fortiori*, also in relation to use of a sign which is identical with, or similar to, a trade mark with a reputation in relation to goods or services which are identical with, or similar to, those for which the mark is registered (***Interflora and Interflora British Unit***, paragraph 68 and the case-law cited).

22 Moreover, since it is common ground that the mark 'Red Bull Krating-Daeng' has a reputation and that the proprietor of that mark seeks cessation by Mr de Vries of the production and marketing of goods, which are identical to those for which the mark in question is registered, in packaging which features a sign similar to that mark, Article 5(2) of Directive 89/104 may be applied to the case in the main proceedings.

23 The parties in the main proceedings disagree, however, on the scope of the concept of 'due cause'. While Mr de Vries submits that the use, in good faith, of a sign that is similar to a mark with a reputation, in the case where that sign was being used before that mark was filed, can be covered by that concept, Red Bull claims that that concept covers only objectively overriding reasons.

24 In the first place, Red Bull claims that the broad interpretation of the concept of 'due cause' which is to be derived from Mr de Vries' arguments would lead indirectly to the recognition of unregistered marks, whereas the Benelux Convention has set out, in accordance with Directive 89/104, a system for the protection of marks which is based exclusively on their registration.

25 In the second place, Red Bull argues that that interpretation would wrongly result in the scope of the rights for the protection of a mark which Article 5(2) of Directive 89/104 confers on the proprietor of a registered mark being narrower than the scope of the rights which that proprietor derives from Article 5(1).

26 It is therefore necessary, first of all, to determine the scope of the concept of 'due cause' before then going on to assess whether, in the light of the finding made in that regard, the use made of a sign similar to a mark with a reputation, before that mark was filed, is liable

to come within the scope of that concept in the case where that sign is used in relation to goods or services which are identical to those for which that mark has been registered.

Scope of the concept of ‘due cause’

27 It must be stated at the outset that the concept of ‘due cause’ is not defined in Directive 89/104. Moreover, the wording of Article 5(2) of that directive is not such as to support Red Bull’s strict interpretation of that concept.

28 That concept must therefore be interpreted in the light of the overall scheme and objectives of the system of which it forms part (see, to that effect, [Case C-292/00 Davidoff](#) [2003] ECR I-389, paragraph 24), and, in particular, must take into account the context of the provision which contains it (see, to that effect, [Case C-320/12 Malaysia Dairy Industries](#) [2013] ECR, paragraph 25).

29 As a preliminary point, it should be borne in mind that, while Article 5 of Directive 89/104 provides that the registered trade mark confers on its proprietor an exclusive right, restrictions on the exercise of that right also arise from that provision.

30 It is thus settled case-law that the exclusive right under that provision was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor of that mark, that is, to ensure that the trade mark can fulfil its functions. Therefore, the exercise of that right must be reserved to cases in which another party’s use of the sign adversely affects or is liable adversely to affect one of the functions of the trade mark. Those functions include not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services in question, but also its other functions, such as that of guaranteeing the quality of those goods or services or those of communication, investment or advertising ([Case C-661/11 Martin Y Paz Diffusion](#) [2013] ECR, paragraph 58 and the case-law cited).

31 In that regard, it follows from the wording of Article 5(1) of Directive 89/104 and from the tenth recital in the preamble thereto that the laws of the Member States have been harmonised inasmuch as the exclusive right conferred by a trade mark affords the proprietor of the mark ‘absolute’ protection against the use by third parties of signs which are identical with that mark in relation to identical goods or services ([Interflora and Interflora British Unit](#), paragraph 36).

32 Although the legislature described as ‘absolute’ the protection against the unauthorised use of signs identical with a trade mark in relation to goods or services identical with those for which the mark is registered, the Court has put that description into perspective by stating that, as extensive as it may be, the protection conferred by Article 5(1)(a) of Directive 89/104 is intended solely to enable the trade mark proprietor to protect its specific interests as proprietor of the mark, that is to say, to ensure that the trade mark can fulfil its functions. From this the Court has concluded that the exercise of the exclusive right

conferred by the trade mark must be reserved to cases in which a third party’s use of the sign adversely affects, or is liable adversely to affect, the functions of the trade mark ([Interflora and Interflora British Unit](#), paragraph 37).

33 Article 5(2) of Directive 89/104, however, establishes, for the benefit of trade marks with a reputation, a wider form of protection than that laid down in Article 5(1). The specific condition of that protection consists of a use without due cause of a sign identical with or similar to a registered mark which takes, or would take, unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark ([Case C-487/07 L’Oréal and Others](#) [2009] ECR I-5185, paragraph 34 and the case-law cited).

34 When a Member State transposes Article 5(2) of Directive 89/104, it must therefore grant protection which is at least as extensive for identical or similar goods or services as it is for non-similar goods or services. The Member State’s option thus relates to the principle itself of granting greater protection to marks with a reputation, but not to the situations covered by that protection when the Member State grants it (see [Case C-408/01 Adidas-Salomon and Adidas Benelux](#) [2003] ECR I-12537, paragraph 20).

35 Such a finding, however, cannot mean that the concept of ‘due cause’ should be interpreted by having regard to the scope of Article 5(1) of Directive 89/104.

36 As the Advocate General has essentially noted in point 29 of her Opinion, the purpose of Article 5(1) and (2) of Directive 89/104 is not the same and, accordingly, the rules for the protection of simple marks may apply in cases which are not governed by the provisions relating to the protection of marks with a reputation. Conversely, the rules for the protection of marks with a reputation may apply in cases which are not governed by the rules for the protection of simple marks.

37 Consequently, Red Bull and the Italian Government are wrong in their submission that the system for the protection of marks based on their registration, which was taken up by the Benelux Convention, precludes the scope of the rights conferred on the proprietor of a registered mark from being liable to circumscription.

38 The Court notes that it is only in certain circumstances that Article 5(2) of Directive 89/104 entitles proprietors of trade marks with a reputation to prohibit third parties from using signs identical or similar to their trade marks in relation to goods or services which are not similar to those in respect of which those marks are registered.

39 The protection of trade marks with a reputation is more extensive than that for simple marks, in that the prohibition of the use of a sign by a third party is not dependent on either the identity of the sign and mark in question, as referred to in Article 5(1)(a) of Directive 89/104, or the likelihood of confusion referred to in Article 5(1)(b) of that directive.

40 In particular, the proprietor of a mark with a reputation is not required, in order to claim the

protection provided for in Article 5(2) of Directive 89/104, to prove detriment to the distinctive character or repute of that mark, where a third party, by using a sign identical or similar to that mark, takes unfair advantage of its reputation.

41 Nevertheless, the purpose of Directive 89/104 is generally to strike a balance between the interest which the proprietor of a trade mark has in safeguarding its essential function, on the one hand, and the interests of other economic operators in having signs capable of denoting their products and services, on the other (Case C-145/05 *Levi Strauss* [2006] ECR I-3703, paragraph 29).

42 It follows that the protection of rights which the proprietor of a trade mark derives from that directive is not unconditional, since in order to maintain the balance between those interests that protection is limited, in particular, to those cases in which that proprietor shows himself to be sufficiently vigilant by opposing the use, by other operators, of signs likely to infringe his mark (*Levi Strauss*, paragraph 30).

43 In a system for the protection of marks such as that adopted, on the basis of Directive 89/104, by the Benelux Convention, however, the interests of a third party in using, in the course of trade, a sign similar to a mark with a reputation must be considered, in the context of Article 5(2) of that directive, in the light of the possibility for the user of that sign to claim 'due cause'.

44 Where the proprietor of the mark with a reputation has demonstrated the existence of one of the forms of injury referred to in Article 5(2) of Directive 89/104 and, in particular, has shown that unfair advantage has been taken of the distinctive character or the repute of that mark, the onus is on the third party using a sign similar to the mark with a reputation to establish that he has due cause for using such a sign (see, by analogy, Case C-252/07 *Intel Corporation* [2008] ECR I-8823, paragraph 39).

45 It follows that the concept of 'due cause' may not only include objectively overriding reasons but may also relate to the subjective interests of a third party using a sign which is identical or similar to the mark with a reputation.

46 Thus, the concept of 'due cause' is intended, not to resolve a conflict between a mark with a reputation and a similar sign which was being used before that trade mark was filed or to restrict the rights which the proprietor of that mark is recognised as having, but to strike a balance between the interests in question by taking account, in the specific context of Article 5(2) of Directive 89/104 and in the light of the enhanced protection enjoyed by that mark, of the interests of the third party using that sign. In so doing, the claim by a third party that there is due cause for using a sign which is similar to a mark with a reputation cannot lead to the recognition, for the benefit of that third party, of the rights connected with a registered mark, but rather obliges the proprietor of the mark with a reputation to tolerate the use of the similar sign.

47 The Court thus held in paragraph 91 of the judgment in *Interflora and Interflora British Unit* (a case concerning the use of keywords for internet referencing) that where the advertisement displayed on the internet on the basis of a keyword corresponding to a trade mark with a reputation puts forward – without offering a mere imitation of the goods or services of the proprietor of that trade mark, without being detrimental to the repute or the distinctive character of that mark and without, moreover, adversely affecting the functions of the trade mark concerned – an alternative to the goods or services of the proprietor of the trade mark with a reputation, it must be concluded that such a use falls, as a rule, within the ambit of fair competition in the sector for the goods or services concerned and is thus not without 'due cause'.

48 Consequently, the concept of 'due cause' cannot be interpreted as being restricted to objectively overriding reasons.

49 It is thus necessary to examine under what conditions the use by a third party of a sign which is similar to a trade mark with a reputation in relation to goods which are identical to those for which that mark is registered, where that sign was already being used before that mark was filed, may be covered by that concept.

The conditions under which the prior use of a sign which is similar to a trade mark with a reputation may be covered by the concept of 'due cause'

50 Mr de Vries claims in his observations that he has been using the sign 'The Bulldog' for hotel, restaurant and café services since 1975. It is apparent from the order for reference that that use has been established from a date prior to that on which the mark 'Red Bull Krating-Daeng' was registered. In addition, Mr de Vries is the proprietor of the word and figurative mark 'The Bulldog' for, inter alia, non-alcoholic drinks, registered on 14 July 1983. The date from which Mr de Vries has been producing and marketing energy drinks with packaging displaying the 'Bull Dog' sign is not specified.

51 It is common ground that Mr de Vries used the sign 'The Bulldog' in relation to services and goods other than those for which the mark 'Red Bull' was registered and before that mark had acquired its reputation.

52 The Court has held that, where a third party attempts, through the use of a sign similar to a mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of that mark in order to create and maintain the image of that mark, the advantage resulting from such use must be considered to be an advantage that has been unfairly taken of the distinctive character or repute of that mark (see *L'Oréal and Others*, paragraph 49).

53 In order to determine whether the use by a third party, before a trade mark with a reputation was filed,

of a sign similar to that mark may constitute 'due cause', within the meaning of Article 5(2) of Directive 89/104, and justify the fact that that third party takes advantage of the repute of that mark, the referring court must carry out an assessment, taking into account, in particular, two factors.

54 In the first place, such an assessment requires a determination as to how that sign has been accepted by, and what its reputation is with, the relevant public. In the present case, it is not disputed that the sign 'The Bulldog' has been used for a range of hotel, restaurant and café services since 1983 or before. The date from which Mr de Vries has offered energy drinks for sale is, however, not specified in the order for reference.

55 In the second place, it is necessary to examine the intention of the person using that sign.

56 In this regard, in order to determine whether the use of the sign similar to the mark with a reputation was in good faith, it is necessary to take account of the degree of proximity between the goods and services for which that sign has been used and the product for which that mark was registered, as well as to have regard for when that sign was first used for a product identical to that for which that mark was registered, and when that mark acquired its reputation.

57 First, where a sign has been used prior to the registration of a mark with a reputation in relation to services and goods which may be linked to the product for which that mark has been registered, the use of that sign in relation to that latter product may appear to be a natural extension of the range of services and goods for which that sign already enjoys a certain reputation with the relevant public.

58 In the present case, it is not disputed that Mr de Vries uses the sign 'The Bulldog' in relation to hotel, restaurant and café goods and services which include the sale of drinks. Consequently, in the light of the recognition enjoyed by that sign among the relevant public, and in the light of the nature of the goods and services for which it has been used, the sale of energy drinks contained in packaging which displays that sign may therefore be perceived, not as an attempt to take advantage of the repute of the mark 'Red Bull', but rather as a genuine extension of the range of goods and services offered by Mr de Vries. That impression would be strengthened even further if the sign 'The Bulldog' was used for energy drinks before the mark 'Red Bull Krating-Daeng' acquired its reputation.

59 Secondly, the greater the repute of the sign used, prior to the registration of a similar mark with a reputation, for a certain range of goods and services, the more its use will be necessary for the marketing of a product identical to that for which the mark was registered, *a fortiori* as that product is close, by its nature, to the range of goods and services for which that sign was previously used.

60 Consequently, it follows from all of the foregoing considerations that the answer to the question referred is that Article 5(2) of Directive 89/104 must be interpreted as meaning that the proprietor of a trade mark with a reputation may be obliged, pursuant to the

concept of 'due cause' within the meaning of that provision, to tolerate the use by a third party of a sign similar to that mark in relation to a product which is identical to that for which that mark was registered, if it is demonstrated that that sign was being used before that mark was filed and that the use of that sign in relation to the identical product is in good faith. In order to determine whether that is so, the national court must take account, in particular, of:

- how that sign has been accepted by, and what its reputation is with, the relevant public;
- the degree of proximity between the goods and services for which that sign was originally used and the product for which the mark with a reputation was registered; and
- the economic and commercial significance of the use for that product of the sign which is similar to that mark.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 5(2) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that the proprietor of a trade mark with a reputation may be obliged, pursuant to the concept of 'due cause' within the meaning of that provision, to tolerate the use by a third party of a sign similar to that mark in relation to a product which is identical to that for which that mark was registered, if it is demonstrated that that sign was being used before that mark was filed and that the use of that sign in relation to the identical product is in good faith. In order to determine whether that is so, the national court must take account, in particular, of:

- how that sign has been accepted by, and what its reputation is with, the relevant public;
- the degree of proximity between the goods and services for which that sign was originally used and the product for which the mark with a reputation was registered; and
- the economic and commercial significance of the use for that product of the sign which is similar to that mark.

[Signatures]

*Language of the case: Dutch

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 21 March 2013 (1)

Case C-65/12

Leidseplein Beheer BV

H.J.M. de Vries

(Request for a preliminary ruling from the Hoge Raad der Nederlanden)

(Directive 2008/95/EC – Trade mark law – Right of the proprietor of a registered trade mark – Trade mark with a reputation – Use made by a third party, without due cause and unfairly, of a sign identical with, or similar to, the trade mark with a reputation – Notion of ‘due cause’)

I – Introduction

1. Any Member State may grant proprietors of trade marks with a reputation the right to prevent third parties from using a similar sign in cases where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark with a reputation.

2. Following the Court of Justice’s earlier discussion of certain aspects of potential due cause in the context of internet advertising using keywords, (2) it is now necessary to address the extent to which the *bona fide* use of a sign prior to the date of application for registration of a similar trade mark which later gains a reputation can justify the continued use of that sign. Mr de Vries and his undertaking, Leidseplein Beheer BV, were already using the image of a bulldog with the words ‘The Bulldog’ long before the date on which Red Bull’s trade marks were first registered. At issue now is whether Red Bull can prohibit the use of this sign for an energy drink.

II – Legal framework

A – European Union law

3. Article 5(1) of the Trade Marks Directive (3) governs the rights enjoyed by all proprietors of trade marks:

‘The registered trade mark 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 trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark 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 trade mark.’

4. Article 5(2) of the Trade Marks Directive governs the additional rights enjoyed by the proprietors of trade marks with a reputation:

‘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 ... similar to ... the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State concerned 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 trade mark.’

B – Law of the Netherlands

5. Trade mark law in the Netherlands is laid down in the Benelux Convention on Intellectual Property, signed on 25 February 2005 in The Hague. Article 2.20(1)(c) of the Convention corresponds to Article 5(2) of the Trade Marks Directive.

III – Facts of the case and request for a preliminary ruling

6. Red Bull is the proprietor of the word/figurative mark ‘Red Bull Krating-Daeng’, which was registered on 11 July 1983 for Class 32 (non-alcoholic drinks). This undertaking’s best known product is the energy drink of the same name.

7. Mr de Vries is the proprietor of the word/figurative mark ‘The Bulldog’, which was registered on 14 July 1983, also for Class 32 (non-alcoholic drinks), as well as similar, more recent trade marks. (Long) before Red Bull filed its trade mark in 1983, Mr de Vries was using this sign for ‘hotel, restaurant and café services involving the sale of drinks’ and for various merchandising activities, namely, according to information provided by him, since 1975 inter alia for so-called ‘Coffeeshops’, but also for cafés, a hotel, a bicycle-hire business and, since 1997, for an energy drink. Leidseplein Beheer BV appears to be the company which Mr de Vries uses to carry out these activities.

8. Red Bull seeks particularly to prevent Mr de Vries from producing and distributing energy drinks in packaging bearing the sign ‘Bull Dog’, any other sign in which the word element ‘Bull’ appears, or other signs which are confusingly similar to Red Bull’s registered trade marks.

9. Mr de Vries was successful at first instance before the Rechtbank Amsterdam (Amsterdam District Court); by contrast, on appeal before the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal), Red Bull was successful. Mr de Vries’ appeal in cassation is currently pending before the Hoge Raad (Netherlands Supreme Court).

10. According to the request for a preliminary ruling, the similarity between the two signs has not yet thus far been adequately assessed. A likelihood of confusion cannot therefore be taken as established for the purposes of the present proceedings. In addition, the request for a preliminary ruling leaves open the question whether Mr de Vries has sought to obtain a share in Red Bull’s multi-million turnover for energy drinks, as well as whether, riding on the coat-tails of Red Bull’s trade mark with a reputation, he has taken unfair advantage of that reputation. (4)

11. Rather, the Hoge Raad has doubts as to the extent to which the prior use of the sign can constitute due cause. It has therefore referred the following question to the Court of Justice:

Is Article 5(2) of [the Trade Marks Directive] to be interpreted as meaning that there can be due cause within the meaning of that provision also where the sign that is identical or similar to the trade mark with a reputation was already being used in good faith by the third party/parties concerned before that trade mark was filed?

12. The parties to the main proceedings, Leidseplein Beheer B.V., together with H.J.M. de Vries, and Red Bull GmbH, as well as the Italian Republic and the European Commission, have submitted written observations. With the exception of Italy, they also took part in the hearing held on 27 February 2013.

IV – Legal analysis

A – Background to the question referred

13. With regard, first, to the applicability of the rules set out in Article 5(2) of the Trade Marks Directive, it is settled case-law that, even though those provisions make express reference only to the situation in which use is made of a sign which is identical with, or similar to, a trade mark with a reputation in relation to goods or services which are not similar to those for which the trade mark is registered, the protection there provided for applies, *a fortiori*, also in relation to use of such a sign in relation to goods or services which are identical with, or similar to, those for which the mark is registered. (5) They are therefore also applicable to the case at issue, which concerns identical goods, namely energy drinks.

14. With regard to the extent of the protection conferred on trade marks with a reputation, it is thus clear from the wording of Article 5(2) of the Trade Marks Directive that the proprietor of such a mark is entitled to prevent the use by third parties, in the course of trade, without his consent and without due cause, of a sign identical with, or similar to, that trade mark where that use takes unfair advantage of the distinctive character or the repute of the trade mark or is detrimental to that distinctive character or repute. The exercise of that right by the proprietor of the trade mark with a reputation is not conditional upon the existence of a likelihood of confusion on the part of the relevant section of the public. (6)

15. The types of injury against which Article 5(2) of the Trade Marks Directive provides protection are, firstly, detriment to the distinctive character of the trade mark ('dilution'), secondly, detriment to the repute of the mark ('tarnishment') and, thirdly, the taking of unfair advantage of the distinctive character or the repute of the trade mark ('free-riding'), just one of those types of injury sufficing for application of the rule set out in that provision. (7)

16. In the national proceedings, the appeal court – the Gerechtshof – considered the *'taking of unfair advantage of the distinctive character or the repute of the trade mark'*, also referred to as 'free-riding', to be established. This infringement of the trade mark proprietor's rights relates, not to the detriment caused to the mark, but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation. (8)

17. The Hoge Raad postponed its decision on the relevant ground of Mr de Vries' appeal in order first to

ask the Court of Justice whether there can also be due cause, within the meaning of Article 5(2) of the Trade Marks Directive, in the case where the sign that is identical or similar to the trade mark with a reputation was already being used in good faith by the third party or parties before that trade mark was filed.

B – Red Bull's contention

18. Red Bull's position on this issue is that there will be due cause only in the case where the user of a sign has a need to use that specific sign, and, irrespective of the harm caused by that use to the trade mark proprietor, he could not reasonably be expected to refrain from such use. In other words: there must be a compelling ground under which he cannot refrain from the use at issue. In support of this position, Red Bull refers to a judgment of the General Court, (9) to a decision of one of the Boards of Appeal of OHIM, (10) and to the earlier case-law of the Benelux Court of Justice. (11)

C – The wording

19. The Dutch-language version of Article 5(2) of the Trade Marks Directive is potentially somewhat closer to the restrictive position taken by Red Bull than are other language versions. The Dutch version does not use the concept of 'due cause' ('rechtvaardige reden'), but rather the concept of a 'proper ground' or a 'valid ground' ('geldige reden'). This version could almost be understood as requiring the existence of a specific right to use the sign, for example, a right to a name, or an earlier trade mark.

20. By contrast, the German concept of 'rechtfertigender Grund', but also the corresponding concepts in the French-language version – 'juste motif' – and the English – 'due cause' – can also be understood to mean that the ground for the use of the sign need not be compelling in nature. On this basis, the existence of a legitimate interest which prevails over the interests of the proprietor of the trade mark with a reputation might also suffice.

21. Prima facie, it is not evident why the prior use of a sign should not be capable of forming the basis of a potentially prevailing legitimate interest.

22. However, the different language versions of a provision of European Union law must be uniformly interpreted. Hence, in the case of divergence between those versions, in principle the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (12)

D – The scheme of the Trade Marks Directive

23. Red Bull does in fact rely, in support of its contention, on the scheme of the Trade Marks Directive and its implementation in the Benelux Convention. This is based on the rules on the protection of so-called *de facto* trade marks, that is to say, trade marks which are not registered but are instead protected only by reason of their use.

24. Article 4(4)(b) of the Trade Marks Directive permits Member States to refuse registration of a trade mark in the case where rights to a non-registered trade mark already exist and that non-registered trade mark confers on its proprietor the right to prohibit use of the subsequent trade mark. Furthermore, Article 6(2)

permits Member States to recognise earlier rights which apply only in a particular locality. As recital 5 in the preamble makes explicit, Member States may therefore recognise and protect non-registered trade marks but are not obliged to do so.

25. The Benelux Convention does not make use of these options. Under its provisions, a trade mark can be acquired only by registration and not by mere use. Red Bull's position is that, in a pure registration system, the sole corrective measure is the sanctioning of trade mark applications made in bad faith under Article 3(2)(d) of the Trade Marks Directive. Italy also submits that, in such a system, the prior use of a sign in good faith cannot constitute due cause under Article 5(2).

26. The thinking behind this line of argument is that recognition of the prior use of a sign in good faith as potentially constituting due cause within the meaning of Article 5(2) of the Trade Marks Directive would have the indirect effect of protecting non-registered trade marks.

27. That view is, however, unconvincing. Recognition as potential due cause means neither that the party which has used the sign without registering it is able to take advantage of the protective rights conferred by a trade mark, nor does it follow from such recognition that it would be accepted as due cause in every case.

28. Moreover, the use of a sign which is potentially justified under Article 5(2) of the Trade Marks Directive can still be prohibited pursuant to Article 5(1) in the case where there is a likelihood of confusion, since in this case there would be a risk that consumers might be misled.

29. To counter this last consideration, Red Bull argues that the protection offered by Article 5(2) of the Trade Marks Directive is broader than that offered by Article 5(1); this argument, however, is also unconvincing. In fact, these two rights have different functions. The exclusive purpose of Article 5(2) is to protect the proprietor of the trade mark, while Article 5(1) serves also to protect the consumer from deception. Thus, the protection of simple trade marks may apply in cases in which the protection of trade marks with a reputation does not apply, and vice versa.

30. For the sake of completeness, it should also be noted that another aspect of the scheme of the Trade Marks Directive could be relevant, namely the relative grounds for refusal to register a trade mark with a reputation pursuant to paragraphs (3) and (4)(a) of Article 4. Indeed, the same terminology is used in these provisions as is used in Article 5(2). However, since the sign at issue in the present case had already been registered before 'Red Bull' became a trade mark with a reputation, there is no need to reach a decision on the potential consequences for the registration of trade marks of the interpretation of Article 5(2) suggested here.

31. As such, the scheme of the directive also does not require that the restrictive view taken by Red Bull be accepted.

E – The balancing exercise required

32. It is therefore not surprising that, in its recent *Interflora* judgment, upon which the Hoge Raad also relies in order to justify the need for its request for a preliminary ruling, the Court of Justice did not understand the concept of 'due cause' as requiring that the ground be compelling. That case concerned an advertisement displayed on the internet on the basis of a keyword corresponding to a trade mark with a reputation. The advertisement proposed an alternative to the goods or services of the proprietor of the trade mark with a reputation – without, however, offering a mere imitation of the goods or services of the proprietor of that trade mark, without causing dilution or tarnishment and without, moreover, adversely affecting the functions of the trade mark concerned. As a rule, such use comes within the ambit of fair, healthy competition in the sector for the goods or services concerned and is thus not without 'due cause' for the purposes of Article 5(2) of the Trade Marks Directive. (13)

33. For the purposes of healthy and fair competition with the proprietor of a trade mark with a reputation, it may indeed be helpful to use that trade mark as a keyword when advertising on the internet. Such advertising is, however, not a precondition which is strictly necessary for that competition.

34. Consequently, in the *Interflora* judgment the Court did not rely on the absence of any alternative to the use of trade marks with a reputation as keywords. Rather, its decision was based on the result of a balancing exercise which weighed up the detriment to the trade mark against other legal rights, in particular freedom of competition.

35. Moreover, a balancing exercise is also more consistent with the Court's case-law to the effect that the purpose of the directive is generally to strike a balance between the interest of the proprietor of a trade mark in safeguarding its essential function, on the one hand, and the interests of other economic operators in having signs capable of denoting their products and services, on the other. (14)

36. Article 5(2) of the Trade Marks Directive also calls for a balancing exercise. The proprietor of a mark with a reputation cannot prevent all uses of the mark or a similar sign, but only use which, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. In this context, the detriment or taking of unfair advantage is closely linked to the absence of due cause. This is because, where the use of the sign is justified, there is generally no room for a negative assessment deeming the use to be unfair. (15)

37. It is therefore opportune to link the examination of due cause to the examination of whether the use of a sign takes unfair advantage of the trade mark's distinctive character or repute. This calls for a comprehensive assessment of all factors relevant to the circumstances of the specific case. (16)

38. In this context, the Court has focussed in particular on the strength of the mark's reputation and the degree of distinctive character of the mark, the degree of

similarity between the marks at issue, as well as the nature and degree of proximity of the goods or services concerned. As regards the strength of the reputation and the degree of distinctive character of the earlier mark, the stronger that mark's distinctive character and reputation are, the easier it will be to accept that detriment has been caused to it. The more immediately and strongly the trade mark is brought to mind by the sign, the greater will be the likelihood that the current or future use of the sign is taking, or will take, unfair advantage of the distinctive character or repute of the trade mark or is, or will be, detrimental to them. (17)

39. In carrying out this examination, the national courts will have to take into account the fact that identical goods are involved and, as such, an association with the trade mark – which is very well known in relation to those goods – is particularly likely to arise. The signs are not, however, identical, but rather have only the word 'Bull' in common, which in Mr de Vries' sign is merely a component of the word Bulldog and is associated with an entirely different image.

40. The essential characteristic of taking *unfair* advantage is, however, that a third party attempts, through the use of a sign similar to a trade mark with a reputation, to ride on the coat-tails of that mark in order to benefit from its power of attraction, its reputation and its prestige, and to exploit, without paying any financial compensation and without being required to make efforts of his own in that regard, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. (18)

41. In this assessment, great importance can be attached to the fact that the sign 'The Bulldog' has already been registered as a trade mark for non-alcoholic drinks since 1983. While the trade mark 'Red Bull' predates it by a few days, it is nevertheless doubtful that the former already had a reputation at that time. In principle, therefore, with regard to this trade mark Mr de Vries can rely on the principle of respect for acquired rights, which is recognised by European Union law, (19) to justify its use for a non-alcoholic energy drink. The exercise of an existing right cannot, in principle, be unfair and without due cause simply because another trade mark subsequently achieves a high degree of recognition, with the result that its scope of protection conflicts with the scope of protection of existing marks.

42. On the other hand, it must be recognised that not even Mr de Vries is claiming to have used the trade mark for energy drinks prior to 1997. Nor does it appear that the Hoge Raad addressed the effects of this trade mark in its request for a preliminary ruling. Rather, it focussed on the use of the trade mark for *other* economic activities in the catering sphere.

43. However, such use must also be taken into account in the balancing of interests, as this use is attributable to the third party's own effort, who at any rate can no longer be accused of jumping on coat-tails without effort on his own part. Rather, the prior use may itself have led to a power of attraction, reputation and prestige accruing to the sign, which will now have to be

taken into account as legitimate interests of the third party. This also applies to a lesser extent in the case where the sign was used subsequent to the filing of the trade mark, but before that mark gained a reputation. What weight ought to be accorded to the use of signs which took place after a trade mark had gained a reputation need not be determined in the present case.

44. Since a power of attraction, reputation and prestige can result from the prior use of a sign, its current use can, moreover, be capable of functioning as an indicator of origin and, in so doing, contribute to the provision of better information for consumers. In the present case, therefore, it is possible that consumers, at least in Amsterdam, will be better able to associate the sign 'The Bulldog' with a particular undertaking than the names 'De Vries' and 'Leidseplein Beheer' or a completely new identifier.

45. The possibility that Mr de Vries may have begun to market energy drinks only after Red Bull had enjoyed great success with this product also does not negate his legitimate interest in employing a previously used sign. The purpose of trade mark law is not to prevent particular undertakings from participating in competition on particular markets. Rather, such competition within the internal market is considered desirable, as the *Interflora* judgment shows. (20) Within the framework of this competition, undertakings should in principle also be entitled – subject to any likelihood of confusion – to use the sign under which they are known on the market.

46. Accordingly, the example provided by Red Bull, of an established bookshop with the name 'Green Apple' which starts to sell computers under this designation, cannot automatically be regarded as an infringement of the rights pertaining to the trade mark with a reputation 'Apple' either.

47. However, as the Commission correctly points out, it is still possible to pursue remedies against particular types of use of previously used signs in the case where, taking all relevant facts into consideration, they are in fact likely to cause detriment to or take unfair advantage, without due cause, of the distinctive character or the repute of a trade mark with a reputation. This could be the case, for example, where the presentation of the sign gives the consumer the impression that there is a particularly close link to the trade mark with a reputation.

48. All of these factors will have to be taken into account in detail by the competent national courts when they examine whether the use of a sign takes unfair advantage, without due cause, of the distinctive character or the repute of a trade mark with a reputation.

V – Conclusion

49. I accordingly propose that the Court answer the question on which a preliminary ruling is requested in the following terms:

In weighing up whether a third party has, within the meaning of Article 5(2) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States

relating to trade marks, taken, without due cause, unfair advantage of the distinctive character or the repute of a trade mark with a reputation by using a sign similar to that trade mark with a reputation, if that third party was already using the sign in good faith for other goods or services before the trade mark with a reputation was filed or gained a reputation, such a fact will be taken into account in that third party's favour.

1 – Original language: German.

2 – Case C-323/09 *Interflora and Interflora British Unit* [2011] ECR I-8625, paragraph 91.

3 – The request for a preliminary ruling makes reference to First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1). The applicable legislation, however, is Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25), although the content of the relevant provisions does not differ from that of the earlier directive.

4 – Point 3.10.2 of the request for a preliminary ruling.

5 – Case C-292/00 *Davidoff* [2003] ECR I-389, paragraph 30; Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-2417, paragraph 48; as well as *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 68.

6 – Case C-487/07 *L'Oréal and Others* [2009] ECR I-5185, paragraph 36, and *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 70 et seq.

7 – Case C-252/07 *Intel Corporation* [2008] ECR I-8823, paragraph 27 et seq.; *L'Oréal and Others* (cited in footnote 6), paragraphs 38 and 42; as well as *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 70 et seq.

8 – *L'Oréal and Others* (cited in footnote 6), paragraph 41, and *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 74.

9 – Judgment of 25 March 2009 in Case T-21/07 *L'Oréal v OHIM – Spa Monopole (SPALINE)*, paragraph 43.

10 – Decision of the Second Board of Appeal of OHIM of 10 November 2010 (OStCaR/OSCAR) (R 1797/2008-2), paragraph 63.

11 – Judgment of 1 March 1975, *Bols/Colgate Palmolive (Claryn/Klarein)*, GRUR International 1975, 399 (401).

12 – Case 19/67 *Van der Vecht* [1967] ECR 345, at 354; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraphs 13 and 14; Case C-56/06 *Euro Tex* [2007] ECR I-4859, paragraph 27; and Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 25.

13 – *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 91.

14 – Case C-145/05 *Levi Strauss* [2006] ECR I-3703, paragraph 29, and Case C-482/09 *Budějovický Budvar* [2011] ECR I-8701, paragraph 34.

15 – See Advocate General Mengozzi's Opinion in Case C-487/07 *L'Oréal and Others* (cited in footnote 6), point 105 et seq., Hacker, F., '§ 14 – Ausschließliches Recht – Sonderschutz der bekannten Marke', in Ströbele/Hacker, *Markengesetz-Kommentar* (published by Carl-Heymanns-Verlag), 9th ed., Cologne 2009, p. 925, n. 323, Fezer, K.-H., *Markenrecht*, 4th ed., Munich 2009, § 14, p. 1167, n. 814.

16 – *Intel Corporation* (cited in footnote 7), paragraph 68, and *L'Oréal and Others* (cited in footnote 6), paragraph 44.

17 – *Intel Corporation* (cited in footnote 7), paragraphs 67 to 69, and *L'Oréal and Others* (cited in footnote 6), paragraph 44.

18 – *L'Oréal and Others* (cited in footnote 6), paragraph 49; Joined Cases C-236/08 to C-238/08 *Google France and Google* (cited in footnote 5), paragraph 102; and *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 89.

19 – Case C-168/09 *Flos* [2011] ECR I-181, paragraph 50.

20 – *Interflora and Interflora British Unit* (cited in footnote 2), paragraph 91. See also Article 3(3) TEU on the establishment of an internal market and Protocol No 27 on the internal market and competition, as well as Case C-496/09 *Commission v Italy* [2011] ECR I-11483, paragraph 60.