

**Revisiting European Trade Mark Law
and the Approach of the CJEU: Should
Highly Distinctive Marks Receive
Broader Protection Against Confusion?**

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Introduction

Since the Court of Justice of the European Union (CJEU) has generally argued that “the more distinctive the earlier mark, the greater the likelihood of confusion”¹ when establishing the relative ground for refusal of registration, the contours of European trade mark principles have changed, becoming increasingly distanced from the context of an actual marketplace. This paper sets out to examine the desirability of this under-explored criterion in the light of contemporary marketing studies and new jurisprudence. My argument is twofold. Drawing on scholarly debates, I contend that the extent to which the CJEU preserves legal fictions and provides room for making normative corrections has recognisable benefits. Secondly, I argue that whilst deservedly protecting the source-identifying function of distinctive marks, this approach appears imbalanced and generates troublesome implications associated with market competition. The paper concludes that solutions from emerging jurisprudence only reinforce the need to recalibrate previous normativity so that more thought will be given to the effective balancing of interests when determining the degree of distinctiveness.

Principles of the Confusion Analysis

It is crucial to emphasise that Article 5(1)(b) of the Trade Marks Directive prescribes a three-limb test whereby the proprietor of an already registered trade mark may prevent the registration of a

¹ Case C-251/95 Sabel BV v Puma AG and Rudolf Dassler Sport [1998] ECR I-6191 [24]

later sign or initiate infringement proceedings² if: a) the earlier registered mark and the later sign are identical or similar; b) the goods and services covered by them are identical or similar; and c) there exists a likelihood of confusion on the part of the public. Interestingly, given the formulaic nature of these provisions, the CJEU embarked on a Sisyphean task of providing greater clarity through developing the so-called ‘global appreciation approach’ for assessing the likelihood of confusion, with a number of guiding principles that stress the need to take into account all factors relevant to the circumstances of each case³. For the purposes of this paper, note that ‘confusion’ refers to situations in which the public directly mistakes one mark for the other, or makes a broader economic connection between both marks, wrongly assuming that the respective goods originate from linked undertakings⁴. Generally, the matter must be judged through the eyes of average consumers who are ‘reasonably well-informed, observant and circumspect’⁵ but have imperfect recollection of the marks as a whole. One of the most controversial principles developed by the CJEU in the case of *Sabel v Puma* revolves around the notion of distinctiveness and stipulates that “the more distinctive the earlier mark, the greater the likelihood of confusion”⁶. When determining the degree of distinctiveness, the court makes an assessment of the ability of the mark to distinguish the commercial origin of goods for which it has been registered⁷. Marks with a highly distinctive

² Directive (EU) 2015/2436 of the European Parliament and of the Council to Approximate the Laws of the Member States Relating to Trade Marks (Recast), Article 5(1)(b)

³ Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191 [22]

⁴ Lionel Bently, Brad Sherman, Dev Gangjee, and Phillip Johnson “Intellectual Property Law” (5th edn, OUP, 2018), 1046

⁵ T. Aplin and J. Davis “Intellectual Property Law: Text, Cases and Materials” (3rd edn, OUP, 2017), 412

⁶ Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191 [24]; Case C-425/98 *Marca Mode v Adidas AG* [2000] ECR I-4861 [38]

⁷ Case C-342/97 *Lloyd Schuhfabrik Meyer v Klijsen Handel BV* [1999] ECLI:EU:C:1999:323 [22]

character, either from inherent characteristics or because of the reputation they possess on the market (acquired distinctiveness), enjoy broader protection against confusion than marks with a less distinctive character⁸. It then follows that there can be a likelihood of confusion, notwithstanding a lesser degree of similarity between the marks, if the goods covered by them are similar and the earlier mark is highly distinctive.

Towards Imbalanced Policy Implications?

Many scholars claim that highly distinctive marks should not receive broader protection against confusion under this guiding approach of the CJEU from *Sabel v Puma* because it suffers from alleged arbitrariness and remains heavily detached from reality⁹. According to empirical perspectives, consumers are less likely to be confused when encountered with some sign that resembles a well-known trade mark¹⁰. The likelihood of confusion *decreases* in proportion to the distinctiveness of the mark. For example, consumers are hitherto more prone to purchase the wrong goods when it comes to "less distinctive signs such as Eudermis and Eucerin for body care products"¹¹ rather than those of the biggest market players where nobody will think that Starbucks has suddenly rebranded itself as Charbucks. Borrowing insights developed from recent marketing studies, such behavioural tendency stems from the mere exposure effect, whereby humans easily recognise and develop positive attitudinal relationships

⁸ Case C-39/97 Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc. [1998] ECR I-5507 [18]

⁹ Kimberlee Weatherall "The Consumer as the Empirical Measure of Trade Mark Law" (2017) 80 Modern Law Review 57, 59

¹⁰ Annette Kur and Martin Senftleben "European Trade Mark Law: A Commentary" (1st edn, OUP, 2017), 326

¹¹ Lotte Anemaet "The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?" (2020) 51 IIC 187, 193-194

towards objects that have become familiar through repeated perceptual stimulus¹². Hence, distinctive marks are much better stored in memory than weaker marks because their companies maximise the sending of non-obtrusive signals, which increases the exposure of the mark and fosters credibility as well as consumer preference for their products¹³. Although some cases may justify offering additional protections, there has been a consensus within critical scholarship that the ruling of the CJEU remains symptomatic of a deeper disjunction between law and scientific research into consumer habits and therefore perpetuates "legal fiction that replaces empirical proof to protect highly distinctive trademarks"¹⁴. But what is missing from such epistemological critique is a broader understanding of *why* there has been selective resistance to empiricism within European jurisprudence. Having identified a high dose of presumptive scepticism which was injected into the model of an average consumer, this paper suggests that the guiding approach of the CJEU effectively prevents the emergence of a self-serving mechanism for the branded goods industry¹⁵. Since valuable proprietary entitlements are allocated during the course of the 'confusion' analysis, the overreliance on empirical findings would encourage all companies to dedicate disproportionate costs to consumer surveys demonstrating the likelihood of confusion¹⁶. This has the potential to disincentivise all stakeholders. Instead of making investments into genuine marketing campaigns that strengthen the distinctiveness of their marks, resources may be diverted towards 'quick and dirty evidence'. Using such tactics

¹² Kristin A. Scott and Margaret A. White "Mere Exposure as a Signal: Company Objectives and Research Propositions" (2016) 24 *Journal of Marketing Theory & Practice* 411, 417

¹³ Kimberlee Weatherall "The Consumer as the Empirical Measure of Trade Mark Law" (2017) 80 *Modern Law Review* 57, 59

¹⁴ Lotte Anemaet "The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?" (2020) 51 *IIC* 187, 197

¹⁵ *Ibid.* 188

¹⁶ Lotte Anemaet "The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion" (2020) 69 *GRUR International* 1008, 1011

carries a potential risk of the manipulation of percentages or tainting the evidence by leading questions, with the aim of shaping the desired scope of protection in the company's favour¹⁷. This risk illustrates that arguments made by critical scholars like Weatherall are not entirely convincing. Weatherall overlooked an important question posed by the decontextualized approach from *Sabel v Puma* - whether an average consumer *ought* to be confused. Hence, the CJEU deliberately preserves legal fictions to accommodate normative inflections when evaluating the responses of hypothetical consumers¹⁸. Without the room for normative corrections within this global assessment, performing the role of a gatekeeper and balancing *broader* advantages flowing from establishing the likelihood of confusion would be a much harder task for the law. By juxtaposing those two streams of literature, I agree with the extent to which CJEU's jurisprudence adopts a normative approach, which could be perceived as an evolutionary shift that enables the incorporation of policy considerations under its wings.

Nonetheless, there are some remaining difficulties associated with market competition. The categorization of trade marks needs to be considered in order to fully understand these difficulties. Whilst granting broader protection against confusion from fanciful words and inherently distinctive logos, this broader protection does not necessarily translate into competitive advantages over third parties. On the other hand, *non-traditional and figurative marks* continue to be problematic in that the law is overly restrictive when it comes to marks from this category¹⁹. Those non-traditional marks with *acquired distinctiveness*, such as the three-stripe motif of Adidas or certain colour combinations,

¹⁷ Kimberlee Weatherall "The Consumer as the Empirical Measure of Trade Mark Law" (2017) 80 *Modern Law Review* 57, 65-66

¹⁸ Lotte Anemaet "The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?" (2020) 51 *IIC* 187, 210

¹⁹ Lotte Anemaet "The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion" (2020) 69 *GRUR International* 1008, 1020

are not available in unlimited numbers²⁰ and tend to optimise the appearance of certain goods like sports clothing²¹. Granting them broader protection on the basis of high distinctiveness and enabling trade mark owners to assert exclusive rights may affect the availability of aesthetically functional elements on the market and therefore generate entry barriers for small and medium enterprises (SMEs) or newly established businesses²². Despite the aforementioned restrictive issue, in the case of *Adidas AG v Marca Mode*, the judges ruled that normative corrections should not be made in favour of interests of third parties, being reluctant to attach importance to the policy argument that competitors may also need freedom to use similar signs to decorate their products²³. By assuming that both categories of distinctiveness should be treated the same for the purposes of the ‘confusion’ analysis, the CJEU failed to appreciate that they may not share analogous implications.

Unsurprisingly, the judges opted for an investment-based justification as they emphasised that market reputation acquired by the three-stripe motif was the fruit of intense investments²⁴ into branding campaigns, which incentives investment in such campaigns. This inclination resonates with the guidance from *Lloyd Schuhfabrik v Klijsen* where the CJEU held that, when assessing the degree of distinctiveness, factors like “the market share and the amount invested by the undertaking in promoting

²⁰ Joined Cases T-101/15 and T-102/15 *Red Bull v EUIPO* [2017] ECLI:EU:T:2017:852 [21]

²¹ Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217

²² Max Planck Institute for Intellectual Property and Competition Law, “Study on the Overall Functioning of the European Trade Mark System” (2011), 52

²³ Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217 [50]

²⁴ *Ibid* [17]; Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187, 198

the mark' should be taken into account²⁵. The focus has been on protecting the primary function of trade marks as a badge of origin indicating the commercial identity of marked goods and lowering search costs for consumers²⁶. From this perspective, stronger protection should be afforded to marks that are more distinctive after rounds of investment since those marks are more likely to be regarded as source-identifying in the marketplace²⁷. Nevertheless, this justification of the CJEU does not exhibit sufficient consequentialist reasoning because protecting *non-traditional marks* has additional negative implications. Firstly, enforcing normative corrections only in favour of trade mark owners encourages standardisation of aesthetic features of goods to acquire the necessary level of market recognition (distinctiveness), and therefore receive broader protection against confusion²⁸. Such monolithic effect undoubtedly hinders creativity and innovation. Secondly, apart from adversely affecting design innovation for new products for both trade mark owners and their competitors, protecting *non-traditional marks* may contribute towards smaller investment into product quality for existing goods²⁹. This means that capitalising on the attractive power of their marks presents businesses with a more effective short-term strategy to attract consumers towards their products and guarantee profitability, rather than devoting

²⁵ Case C-342/97 *Lloyd Schuhfabrik Meyer v Klijsen Handel BV* [1999] ECLI:EU:C:1999:323 [23]

²⁶ T. Aplin and J. Davis "Intellectual Property Law: Text, Cases and Materials" (3rd edn, OUP, 2017), 412

²⁷ Case C-361/04 *P Ruiz-Picasso and Others v OHIM* [2006] ECLI:EU:C:2006:25 [30]; Lotte Anemaet "The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?" (2020) 51 *IIC* 187, 199

²⁸ Irene Calboli "Hands Off "My" Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation" in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 288

²⁹ *Ibid.* 288-289

huge amounts to long-term product quality³⁰. Hence, the approach of the CJEU that grants broader protection against confusion when a mark is highly distinctive appears imbalanced and may generate dysfunctional twofold implications, both from the perspective³¹ of market competitors and trade mark owners. Although the CJEU leaves room for investment-based normative corrections in favour of trade mark owners, without giving equal weight to the policy consideration of keeping certain signs free³² (corrections in favour of competitors), their approach may unfortunately impede achieving undistorted competition, and the proper functioning of markets.

One may question whether this imbalance has not been dictated more by happenstance than well-thought-out judicial reasoning. In recent decades, the original notion of distinctive character seems to have become somewhat looser³³. Even though trade marks were previously required to be unequivocally distinctive from existing products, distinctiveness has come to mean little more than simply having a *potential* to be distinctive – something that is original, interesting, or appealing to human senses³⁴. In other words, previously mentioned non-traditional and aesthetically functional marks are not genuinely distinctive of goods, they are integral parts of the goods, if not the entire goods themselves. Additionally, given that the Trade Marks Regulation has recognised the changed realities of the digital age and liberalised the requirement for graphic representation, the number of new registered multimedia signs is highly likely to

³⁰ Max Planck Institute for Intellectual Property and Competition Law, “Study on the Overall Functioning of the European Trade Mark System” (2011), 100

³¹ Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187, 210

³² *Ibid.* 192

³³ Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 294-295

³⁴ *Ibid.*

increase³⁵. Such gradual expansion of non-traditional trade marks across Europe has correspondingly produced uncertainty over (the ironically) low threshold of *high distinctiveness* when establishing the likelihood of confusion³⁶. These changes strengthen the foregoing realisation that market difficulties generated by the presumption of broader protection against confusion if the mark is highly distinctive are more relevant today than ever before. On this basis, confining the reasoning towards investment-based justifications in *Sabel*³⁷ and *Adidas*³⁸ appears dubious and shows more concern with mindless box-ticking that rewards the notoriety of dominant brands at all costs. Nonetheless, in the seminal case of *Chocoladefabriken Lindt & Sprüngli v OHIM* concerning the registration of the shape of a chocolate bunny wrapped in golden foil, the reasoning of the CJEU explicitly emphasised the fact that those marks are “common phenomena on the market which correspond to the customs of the industry”³⁹ that safeguard freedom of competition. Neither the shape of a bunny nor aesthetically functional elements were able to enjoy trade mark protection, even if wrapped into the cloak of a combination mark⁴⁰. Hence, this exemplifies that providing more room for competition-friendly arguments within European jurisprudence is certainly

³⁵ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 4

³⁶ Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 294-295

³⁷ Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191

³⁸ Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217

³⁹ Case C-98/11 P *Chocoladefabriken Lindt & Sprüngli AG v OHIM* [2012] EU:C:2012:307 [48]

⁴⁰ Dev S. Gangjee “Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 84

plausible and would not result in stretching the boundaries of law to their breaking point, both when assessing absolute and relative grounds for refusal⁴¹. Whilst the CJEU adopted desirable corrections, at the same time, it has conveniently *sidestepped* and *resisted* engaging with more difficult and substantive questions. Its approach remains therefore largely unhelpful when delivering a transparent⁴² and supported process of reasoning. Without analogous attempts to counterbalance the automatism of granting more protection against confusion for distinctive marks, alleviating troublesome policy implications may be indeed perceived as a construed fallacy that cannot be achieved in practice.

New Jurisprudence, Yet Unresolved Problems

On the other side of the debate is the view that risks associated with reducing choices available to competitors when granting broader protection for highly distinctive marks could be overstated. What about the increasingly *procedure-centred approach* towards acquired distinctiveness? Drawing on Article 1(2) of the Trade Marks Regulation, the CJEU in *Nestlé* tailored a strict geographical requirement for registering non-traditional marks which are unlikely to be inherently distinctive and must therefore evidence an equal effect of their market reputation throughout the European Union⁴³. Instead of evaluating whether the overall

⁴¹ Case C-98/11 P *Chocoladefabriken Lindt & Sprüngli AG v OHIM* [2012] EU:C:2012:307 [48]; Case C-206/01 *Arsenal Football Club Plc v Matthew Reed* [2002] EU:C:2002:373 [47]

⁴² Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 294-295

⁴³ *Joined Cases C-84/17 P, C-85/17 P and C-95/17 P Société des Produits Nestlé SA and Others v Mondelez UK Holdings & Services Ltd* [2018] ECLI:EU:C:2018:596 [14]

population, reflecting a substantial part of Europe, would perceive the mark as performing the source-identifying function, that analysis shifted towards markets of individual member states⁴⁴. Any burdened party must produce evidence of acquired distinctiveness for every part of the European Union, and some further evidentiary basis for extrapolating that evidence⁴⁵ if several member states are grouped for marketing purposes. Following the recent judgement from *Adidas AG v EUIPO*, there were some additional revisions of the European Union Intellectual Property Office (EUIPO) guidelines⁴⁶ that could make acquired distinctiveness even more difficult to establish. Given that the dictum elaborated that “the simpler the mark, the less likely it is to have a distinctive character and the more likely it is for an alteration to that mark to affect one of its essential characteristics”⁴⁷, it is clear that evidence which demonstrates distinctiveness based upon use of an insignificant variation of the applied mark cannot be admissible⁴⁸. On that basis, the court dismissed numerous pieces of persuasive evidence produced by Adidas because they covered products which bore signs other than the applied mark⁴⁹. Drawing on rigorous formalism from new jurisprudence, saying that non-traditional marks are set up to fail is not an understatement. This viewpoint is echoed by

⁴⁴ Joined Cases C-84/17 P, C-85/17 P and C-95/17 P *Société des Produits Nestlé SA and Others v Mondelez UK Holdings & Services Ltd* [2018] ECLI:EU:C:2018:596 [78]; Joseph Jones “Can’t Get a Break, Can’t Have a Kit Kat: Court of Appeal Rejects Acquired Distinctiveness for Kit Kat Shape” (2017) 39 *European Intellectual Property Review* 783, 787

⁴⁵ J. Strath and K. Cameron “Go figure! GC Strikes out Three-Stripes: *Adidas v EUIPO* (T-307/17)” (2019) 41 *European Intellectual Property Review* 719, 723

⁴⁶ EUIPO, “Guidelines for Examination of European Union Trade Marks” (February 2020)

⁴⁷ Case T-307/17 *Adidas AG v EUIPO* [2019] ECLI:EU:T:2019:427 [72]

⁴⁸ EUIPO, “Guidelines for Examination of European Union Trade Marks” (February 2020), §8.5 of Chapter 14

⁴⁹ Aida Conde “The General Court Says No to (One of) the Adidas Three-Stripe Mark(s)” (2019) 14 *Journal of Intellectual Property Law & Practice* 746, 747

Conde who poses an intriguing question: “will it become more frequent to question the use of other well-known trademarks with a low level of or non-existent distinctive character?”⁵⁰ Given that these threshold filters increase transactional costs of registration to the point of deterring stakeholders, they might contribute to the pre-emption of dysfunctional implications at the stage of the ‘confusion’ analysis. Hence, critical arguments regarding the approach of the CJEU from *Sabel* could be exaggerated because the new jurisprudence appears to have taken steps towards addressing former difficulties associated with competition.

Whilst the cumulative effect of those developments certainly reduces the number of non-traditional signs that may be registered at the European level, that *procedural strictness* does not make previous policy considerations entirely redundant. According to Gangjee, companies will simply adapt to overcome hurdles that risks producing a substantial spill-over of marks to national registration systems which require proving market reputation merely within respective national borders⁵¹. Proliferation of national registrations makes potential invalidity challenges increasingly difficult because third parties will be obliged to initiate proceedings in several countries which may naturally come to conflicting resolutions on matters of distinctiveness or functionality⁵². Building on the impact assessment study from the European Commission, this legal patchwork arguably leads to “discrimination and artificial barriers, since small companies find it increasingly difficult to

⁵⁰ Ibid. 748

⁵¹ Dev S. Gangjee “Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 59

⁵² L.H. Porangaba “Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market” (2019) 109 *Trademark Reporter* 619, 648

compete with big multinationals”⁵³ because they spend considerably larger sums when attempting to question the use of particular marks across multiple countries. While laudable efforts into the development of electronic databases increased access to national registers, challenging non-traditional marks within that fragmented system is more complex and requires advice from external counsel, the costs of which tend to reflect the number of jurisdictions involved⁵⁴. As a result, larger-sized enterprises, with significant resources at their disposal, are more likely to absorb transactional costs that this framework entails⁵⁵. Somewhat paradoxically, devising alternative barriers through evidential avenues translates into the same competitive advantages of trade mark monopoly that the new jurisprudence was trying to alleviate. In this way, the normative approach from *Sabel v Puma* continues to generate troubling twofold implications, both from the perspective of market competitors and trade mark owners. My analysis suggests that the issue of acquired distinctiveness cannot therefore be framed as a binary choice between keeping non-traditional marks freely available for others and complete removal from the EU market⁵⁶. Instead of perpetuating all-or-nothing rationale prevailing at the time of procedural registration, the jurisprudence of the CJEU should give more thought to the balancing of interests when determining the degree of distinctiveness in the enforcement context⁵⁷. This illustrates that distinctive marks should receive broader protection against confusion. Recalibrating this principle

⁵³ European Commission, “Impact Assessment Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council SWD (2013) 95 final, 32

⁵⁴ *Ibid.*

⁵⁵ L.H. Porangaba “Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market” (2019) 109 Trademark Reporter 619, 649

⁵⁶ L.H. Porangaba “Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market” (2019) 109 Trademark Reporter 619, 653

⁵⁷ Dev S. Gangjee “Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 59

and departing from the rather unfortunate *Adidas/Marva* ban on adopting normative corrections in favour of third parties' interests should be seriously reconsidered.

Conclusion

This paper has attempted to evaluate whether stronger protection should be afforded to marks that are highly distinctive. Whilst the approach of the CJEU facilitates desirable normative corrections in favour of trademark proprietors, confining their reasoning towards investment-based justifications remains both unsatisfactory and dubious. My argument suggests that more weight should be explicitly given to another consideration of keeping certain non-traditional signs free for competitors. Hence, if possible reforms of the approach are not revisited, achieving the trade mark policy of balanced functioning of markets alongside fair competition will remain the greatest unseized opportunity of all.

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