

ISSUES OF TRADEMARKS LAW:
LEGAL THEORY

By Dr. Christos Chrissanthis

I. Introduction

Trademarks law has been subject to extensive review both from a legislative perspective (e.g. EU Directive 89/104/EC, Regulation 40/94, TRIPS Agreement, Greek Law 2290/1995, Madrid Protocol, Greek Law 2873/2000) and from a case law perspective, mainly due to ECJ case law. Under these circumstances, it is inevitable to review once more its fundamental principles in the light of modern trade requirements and needs.

II. Reasons for trademark protection: economic analysis or commercial ethics

Early foreign legislations of the end of the 19th century and the beginning of the 20th century on trademark protection were dominated by the perception that infringement of a trademark amounted to fraud against consumers and should be disapproved¹. The need to protect consumers against the risk of misrepresentation by producers of non-genuine low-quality goods and to do away with such unethical marketing strategy constituted strong arguments in favor of granting legal protection to trademarks. As a result, in some foreign jurisdictions the crucial criterion for granting legal protection to trademarks was the existence of trademark falsification or imitation, whereas in other jurisdictions it was the existence of a risk of confusion about the origin of the goods from a particular enterprise.

¹ Frank Schechter, *The historical foundations of the law related to trademarks*, New York-Columbia University Press 1925, reprint by the Lawbook Exchange 1999, 6-18 – Ed. Rogers, *Goodwill, trademarks and unfair trading*, 1914, 281. Similar views are adopted by K.G Pampoukis, *Law on Trademarks & Distinctive Marks*, 1965, 3.

Infringement of a trademark was regarded as incompatible with contemporary commercial ethics.

Modern legal literature does not adhere to the above view. According to the prevailing view (introduced by Landers & Posner² in the USA during the 80s), the reason for granting legal protection to trademarks is that the use of trademarks by producers (trademark proprietors) strengthens knowledge of consumers about the products available in the market and cuts down the cost of making such information accessible to prospective consumers. This view attempts to interpret trademarks law in accordance with factors & criteria based on an economic analysis of law. It further elaborates that to recognize absolute (i.e. *erga omnes*) rights on distinctive features that distinguish products and to grant legal protection from both a civil & an administrative law perspective on such distinctive features constitute the most effective and cost-cutting tool in order to increase consumer awareness on products available in the market. It also relieves consumers from the need to undertake time-consuming, expensive, tiring and/ or frustrating market research efforts in order to identify goods reflecting their needs. In addition, legal recognition of trademarks provides a strong motive to producers to invest into research in order to maintain high quality on their products. In other words, a trademark grants consumers the opportunity to recognize and reward high quality products. This function of trademarks not only benefits consumers, but also strengthens market competition between producers and enhances the effective operation of the market. As a result, the objective of trademarks law is not only to protect consumers from fraudulent producers who infringe trademarks rights of trademark proprietors, but also to protect such

² William M. Landes & Richard A. Posner, *The economics of trademark law*, 78 *Trademark Reporter* (1988) 267, *The economic structure of intellectual property law*, 2003, 166-8. Similar views are adopted by Glynn S. Lunney Jr., *Trademark Monopolies*, 48 *Emory Law Journal* (1999), 367, 417, 432 and Stacey L. Dogan & Mark A. Lemley, *The merchandising right: fragile theory or fait accompli?* 54 *Emory Law Journal* (2005), 461, 467, 479. See also B.G Antonopoulos, *Industrial Property*, 2nd Ed., 2005, 366.

trademark proprietors³. Such view is also adopted by ECJ case law, according to which absolute (*erga omnes*) rights constitute essential elements of an economic system based on effective competition, for they allow consumers to distinguish products according to their quality⁴. This position (that incorporates the trademark functions into competition): 1) detaches protection of trademarks from the criterion of trademark falsification or imitation or of the risk of confusion (which is associated with the origin of goods from a particular enterprise), 2) highlights the guarantee functions of trademarks and allows adoption of interpretation rules that extend the scope of the risk of confusion. However, it does not adequately substantiate why trademarks law protection for infringement of trademarks is applicable even in the absence of a risk of confusion. In addition, another disadvantage associated with the above view is that it threatens to establish the “market economic analysis” as a condition of applying trademarks legal protection, similar to the one used in cases of infringement of free competition principles. This “market economic analysis” criterion is alien to current trademarks law, since the latter is based exclusively on the risk of confusion and the exercise of improper influence upon consumers and is also rather vague and unsuitable for applying.

Due to the above reasons, foreign legal literature has recently introduced “commercial ethics” as a more convincing ground for justifying recognition and protection of trademarks⁵. The latter view attempts to detach legal protection (afforded where a risk of confusion applies) from the uncertainty and vagueness of the “market economic analysis” and to introduce a wider protection of trademarks, especially

³ See B.G Antonopoulos, *Industrial Property* *ibid*, 366- K.G Pampoukis *ibid*, 184 – Paul Lange, *Marken und Kennzeichenrecht*, 2006, par. 320, 340, 1816, 2267.

⁴ See L. Kotsiris, *EU Commercial Law*, 2003, 792 and 809. From ECJ case law see cases C-228/03, *Gillette* of 17.3.2005 at [25], C-517/99 *Merz & Krell* (2001 collection, page I-6959 at [21]) and C-206/01 *Arsenal Football Club* (2002 collection, page I-10273 at [47]). Similarly M.-Th. Marinos *Likelihood of confusion in trademarks law*, *Private Law Chronicles* 2004, 965 I and Karl-Heinz Fezer, *markenrecht*, Beck. 1999 Introduction, page 70.

⁵ Chad J. Doellinger, *A new theory on trademarks*, (2007) 111 *Penn St. Law Review* 823, 828.

in cases where there are concerns about whether protection of absolute (*erga omnes*) rights result in restrictions of freedom of competition⁶. One should also consider that the central objection for granting a wider and more effective legal protection on trademarks was that there were concerns that this would make producers (trademark proprietors) spend more on advertising in order to strengthen the “influence” of these trademarks towards consumers; however, these (increased) advertising costs would result in increased prices of goods and would be detrimental to competition, since few producers could afford paying for effective advertising.

III. The interests protected: protection of consumers or protection of brand-owners?

As mentioned above, early foreign legislations associated legal protection of trademarks with the objective to protect consumers from being defrauded about the quality and origin of goods that bear non-genuine trademarks. The gradual development of the legally protected functions of trademarks (origin of the goods, guarantee of quality and advertising function) and prevalence of voices campaigning in favor of the economic and communication function of trademarks directed trademarks law towards protection of producers who qualify as trademark proprietors instead of protection of consumers. Traditional trademarks law handbooks point out that the central objective of trademarks law is to protect the private interests of trademark proprietors; only indirectly may consumers benefit from such protection⁷.

⁶ B.G Antonopoulos *ibid* page 471, C. Chrissanthis Freedom of competition, origin function and likelihood of confusion in trademarks law, *Commercial Law Survey* 2007, 33. From foreign legal literature see B.W Pattischal, *Trademarks and the monopoly phobia*, (1952) 50 *Mich. L. Review* 967 – Ed. Chambelain, *The theory of monopolistic competition*, (1933), Gl. S. Lunney, *Trademark monopolies*, (1999) 48 *Emory LJ*. 367, 417.

⁷ B.G Antonopoulos *ibid* page 366, N.K Rokas *Trademarks Law*, 1978, 11, M.-Th. Marinos, *Reasons for denying trademark protection*, *Private Law Chronicles* 2005, 674

However, modern foreign jurisdictions seem to revert to protection of consumers as a central idea in the objectives of trademarks law⁸. According to this view, trademarks law protection equally incorporates the objective to protect a trademark as a private right and the objective to protect consumers when they buy goods. However, a correct interpretation of the law would dictate that both these objectives should be followed, whereas it would be incorrect to say that these objectives are antagonistic to each other. The reason for that is that protection of consumers includes protection against the risk of dilution. No other concepts of consumer protection are included in the objective of trademarks law. For the State to adhere to the view that protection of consumers is equally included in the protective scope of trademarks law means that the State may impose administrative & criminal law sanctions for trademark infringement (introduction of non-genuine products). We have already expressed the view that some trademarks law provisions that refer to public interest are destined to grant protection to consumers, while the centre of trademarks law is aimed at protecting the private law right to a trademark⁹. Further, we have already pointed out that the legal provisions on trademark protection are based on the element of risk of confusion, which takes account of the attitude of the average consumer; this means that protection of trademark proprietors depends upon the equal protection of consumers¹⁰.

IV. The legal nature of the right

The preamble of Directive 89/104/EC at [10] includes a reference to cases where protection of trademarks is absolute [erga omnes] and where it is not, i.e. where it depends upon the existence of a likelihood

⁸ Doellinger, *ibid* 823, 856. This view is long prevailing in Greece- El. Alexandridou, Protection of trademarks even in cases of non-similarity of goods, *Timitikos Tomos K.N Rokas*, 423.

⁹ C. Chrissanthis, comment on No13360/2003 decision of Administrative Trademarks Commission, *Commercial Law Review* 2004, 168, 170

¹⁰ C. Chrissanthis, *ibid*, *Commercial Law Survey* 2003, 347.

of confusion. A right to a trademark is absolute (*erga omnes*) where both the respective distinctive features and the products, which are distinguished by such distinctive features, are identical, whereas it is not absolute (i.e. it depends upon the existence of a likelihood of confusion) where either both trademarks, or both the respective goods, or both trademarks and goods involved are similar (but not identical). The law also adopts this distinction between absolute and relevant protection (article 4 par. 1a-b of Law 2239/1994, article 4 par. 1a-b, article 5 par. 1a-b of EU Directive 89/104). This distinction has also been adopted by ECJ case law¹¹. After all, both article 4 of Directive 89/104/EC and article 4 par. 1a-b of Greek Trademarks Law 2239/1994 are based on the above distinction introduced by Recital No10 of Directive 89/104. However, this does not mean that trademark rights are sometimes absolute (*erga omnes*) and sometimes not, as this would constitute a legal paradox. A legal right may be either absolute or not. Non-absolute are the rights that derive from contracts and can be breached only by the contractual counter-party. On the contrary, absolute are the rights introduced directly by law, such as the right of personality or the right of ownership (the latter being the cornerstone of absolute rights); breach of the latter amounts to both breach of contractual duties and tortuous behavior *per se*. More precisely, infringement of a trademark constitutes a tortuous act of commercial law directly regulated by Greek Trademarks Law 2239/1994; if the latter provision did not exist, such infringement would amount to an act of unfair competition. The above 10th Recital of Directive 89/104 does not refer to the legal nature of the right to a trademark as absolute or not, but to the conditions that should be met in order to grant protection¹². Hence, a right to a trademark is always an absolute right, like all rights deriving directly from law (and

¹¹ ECJ cases C-251/1995 Sabel-Puma at [19], C-39/1997 Canon/Metro-Goldwyn-Mayer at [27], C-206/2001 Arsenal/Matthew Reed at [50], C-228/2003 Gillette at [4].

¹² This was applicable even before introduction of Directive 89/104/EC: see N.K Rokas Trademarks Law, 1978, 13, 15 and K.G Pampoukis, Industrial Property Law-Trademarks, 40. See also A. Liakopoulos, Industrial Property Law, 5th Edition, 2000, 311.

not from a contract)¹³. The true meaning of Recital No10 of Directive 89/104/EC is that where the distinctive features involved and the goods distinguished are identical, then there is a legal presumption that a likelihood of confusion exists¹⁴. Consequently, article 4 par. 1 of Directive 89/104 and of Greek Trademarks Law 2239/1994 do not refer to the legal nature of the right to a trademark, but to the conditions required for applying protection and establish a legal presumption that a likelihood of confusion exists.

V. Content of trademarks functions: protect trademark legal functions or protect consumers?

The traditional legal theory on trademarks law identifies the scope of protection of trademarks from its three main functions: origin function (this is the main function protected¹⁵), quality guarantee and advertising function. In addition, it has introduced a series of criteria, which correspond to the above functions and are used in order to identify whether a likelihood of confusion exists or not. Some of these criteria have been adopted by law directly, such as the level of similarity between the trademarks (indications/ marks) therein compared and the level of association/affiliation of/between the goods or services under comparison. Other criteria also applied by the Courts (though not directly adopted by the law) include, among else, identity or similarity of distribution networks, level of establishment or market influence of a senior trademark etc. The widespread usage of these additional criteria (that are not based on law, but may be included in the concept of likelihood of confusion) has led legal theory

¹³ N.K Rokas *ibid*, 13- M.-Th. Marinos Trademarks Law 2007, 7.

¹⁴ Similar views are adopted by A. Liakopoulos, *Industrial Property Law*, 5th Edition, 2000, 347- Ar. Sinanioti-Maroudi, *Services trademark*, 1995, 98- L. Kotsiris *ibid*, 798 (e contrario). In addition, Fezer (*ibid* under article 14, pages 568-9), par. 72-75 accepts that in this case there is no need to investigate whether a likelihood of confusion exists.

¹⁵ See B.G Antonopoulos *ibid*, 367- A. Liakopoulos, *Industrial Property Law* 5th Edition, 2000, 317- K.G Pampoukis, *Law on distinctive marks* 1965, 92. According to Lange (as above, par. 11-12) it is the origin function that is the mainly protected function and all other trademark functions are based on it. On the contrary, Fezer (as above, pages 68-70) argue that all trademark functions should be equally protected.

and case-law to suggest that the existence of likelihood of confusion is identified by means of a test comprising multiple factors & criteria (multi-factor test¹⁶). It is also worth noting that the so-called “legal functions” of a trademark do not have a clear basis on law. Current law is rather vague and unclear about these three functions, since e.g. the quality guarantee function is not directly based on the law (however, article 17 par. 1 of Law 2239/94 allows deregistration of a trademark if its use has become delusive). Further, the origin function practically means that the producer and production facilities are rather unknown to consumers and that the respective goods or services have a particular quality. In addition, while article 4 par. 1c of Law 2239/94 purports to incorporate the legal basis of the advertising function, there are several problems when trying to interpret and apply it¹⁷ (e.g. no good reason is given in order to explain why a common trademark that lacks strong reputation cannot have such advertising function and is excluded from the scope of protection). One may conclude that the theoretical basis of the above trademark functions is of limited value for interpretation purposes and, hence, *contra legem* interpretation should be avoided, since it cannot be reasonably argued that the lawmakers intentionally elected to introduce such principles (trademark functions). The factors casting discredit to the above three trademark functions (which disfavor uniform interpretation and application of trademarks law provisions) include, among else, conclusions deriving from the science of psychology and from relevant scientific studies on the impact of advertising and of trademarks upon consumers and upon their decision to choose and buy a particular kind or class of goods (instead

¹⁶ L. Kotsiris, as above, 792. See ECJ cases C-251/1995 Sabel-Puma, Armenopoulos 1998, 382- C-342/1997 Lloyd's/Loit's and other cases as well. See also C. Chrissanthis Commercial Law Survey 2003, 352- B. Beebe, An empirical study of the multifactor tests for trademark infringement, (Dec. 2006) 94, Cal.L.Rev. 1581, An.Bertrand, Le droit des marques et des signes distinctifs, CSDAT 2000, 274, 318, 325.

¹⁷ N.K. Rokas, Functional amendments on a right to a trademark, Commercial Law Review 1997, 447- B.G Antonopoulos as above 368- El. Soufleros, Transfer of a part of a trademark, Law Review on Companies & Enterprises (DEE) 2004, 393- C. Chrissanthis, Commercial Law Survey 2003, 342 and Commercial Law Survey 2007, 40- M. Th. Marinos, Trademarks Law 2007, 17.

of other goods)¹⁸. Recent empirical studies indicate that formation of human will (the way human will is formed and decisions are made) depends on emotional and/ or empirical factors that are usually expressed through human sub-conscious and are not directly controlled by the person concerned. Rationalism mainly attempts to provide a later- de facto- justification of decisions that have already been formed/ taken based on emotional and empirical criteria/factors deriving from subconscious. This also applies with respect to the way we choose to buy some products instead of others. Voices criticizing traditional trademarks law theory argue that consumers do not react in a rational way towards genuine and/ or not-genuine products (nor according to trademarks legally protected functions). Moreover, consumers neither evaluate whether a product is genuine according to its similarity with a senior trademark that has been registered beforehand, nor associate the origin of a product from a particular enterprise with this trademark. On the contrary, consumers form their choice (choose) to buy particular goods originating from a particular producer (trademark proprietor) based on mainly subconscious, automatic and emotion-led procedures and less on rational and logical evaluations. It has been pointed out that each consumer has a particular predisposition towards a particular trademark and that such predisposition is automatically and uncontrollably expressed where he chooses to buy a product instead of other products. Such predisposition is also influenced by advertisements made by producers (trademark proprietors) and by previous experiences of these consumers stemming from previous purchases of the respective good (e.g. depending on the level and degree of satisfaction)¹⁹. Hence, trademarks operate as a means of continuous/constant and sui generis means of communication between producers and consumers, which is always important (not just at the time of purchase of the

¹⁸ J.N Sheff, The boundedly rational basis of trademark liability (Spring 2007) 15 Tex.Intell.Prop.L.J. 331, 357, 373.

¹⁹ Similar views are adopted by El.Aleksandridou, as above, 442- M.Th Marinos, Trademarks Law, 2007, 8.

respective product). Any third party involvement distorts the above communication and any resemblance to trademarks owned by third parties is detrimental to the interests of both consumers and producers and may be subject to judicial scrutiny for infringement of the trademark's protective function as a means of communication between consumers and producers (which is mainly expressed emotionally and subconsciously and only to a lesser extent rationally). Practically, the above conclusions justify expansion of the traditional concept of after-sales confusion and reverse risk of confusion²⁰. In addition, they allow easier identification of cases where a likelihood of confusion exists in cases of 3-dimension trademarks, colors and color combinations on packages of products (look-alike products) and other cases of falsification or imitation to trademarks owned by third parties, which were not adequately covered by the traditional concept of likelihood of confusion and the traditional theory on legal protection of trademark functions. The most important conclusion from the above is that the absolute (*erga-omnes*) character of the trademark right is strengthened and the importance of absolute (*erga-omnes*) rights in trade and transactions is highlighted²¹. In other words, the importance of the absolute and exclusive right of a trademark proprietor upon such trademark is further elaborated if we accept that trademarks are a means of communication between producers and consumers and that any involvement of a third party to this communication either prejudices the respective trademark's advertising function and is detrimental to the trademark proprietor, or unfairly benefits the third party by allowing him to take advantage of the foreign trademark's reputation, i.e. the communication function

²⁰ On a trademark's function as a means of communication see: C. Chrissanthis, as above, *Commercial Law Survey* 2003, 345-6. See on these new forms of trademark infringement: C. Chrissanthis, *New forms of likelihood of confusion in trademarks law*, *Commercial Law Survey*, 2007, 359- Chr. Xourafa, *Domain names and conditions required for allowing their registration as trademarks*, 2006, 351, 428- Al. Mikroulea, *commenting on Judgment of Athens Court of First Instance No10216/2001* *Commercial Law Review* 2002, 164.

²¹ See B.G Antonopoulos, as above 377.

already developed by the legal proprietor. This further empowers a trend towards a wider and more effective protection of trademarks.

VI. Forms of trademark infringement: infringement based on likelihood of confusion or not?

According to traditional trademarks law theory, as this has been developed in Germany²², no trademark infringement exists unless there is a risk of likelihood of confusion²³. In addition, the risk of likelihood of confusion is distinguished into likelihood of confusion *stricto sensu* and likelihood of confusion in a broader sense. *Stricto sensu* likelihood of confusion may further include both direct and indirect risk. A direct risk exists in the case of non-genuine products, which is the most characteristic example of infringement of the trademark origin function (the latter being regarded as the most fundamental function of trademarks law protection framework). An indirect risk exists mainly in the case of imitation of a trademark owned by a third party, i.e. where the junior trademark is not identical to the senior (such case would qualify as imitation), but has so many similarities with the senior mark that may cause an impression to consumers that the respective goods have the same origin and come from the same undertaking. In other words, there is an infringement of the origin function in the latter case as well. Professor Nick Rokas refers to *Singer and Tiger*²⁴ trademarks law cases as examples of indirect risk of confusion. On the other hand, there is a likelihood of confusion in a broader sense when consumers are able to distinguish that the respective goods derive from different undertakings, but may conclude that these different undertakings somehow cooperate by

²² Under French Law before introduction of Directive 89/104/EC, the central concept of trademarks law was not the origin function, but *PARAPOIHSH* and *APOMIMHSH*. Hence, under French Law a trademark infringement existed when there was a *PARAPOIHSH* or *APOMIMHSH*. However, after introducing Directive 89/104/EC the likelihood of confusion has become the central concept of trademarks law in France, too.

²³ N.K Rokas, *Trademarks Law*, 1978, 93- A. Liakopoulos, as above, 347-8.

²⁴ N.K Rokas, *Trademarks Law*, as above, 93, footnote 16 that refers to the Decision of Trademarks Law Commission 851/1952, *Commercial Law Review* 1953, 273.

reason of the similarities found between their respective products²⁵. However, even traditional legal theory would argue in favor of protecting the advertising function of trademarks with a reputation even and beyond the limits of likelihood of confusion. Such view had also been adopted by Greek and foreign case law in the 1950s. However, the above distinctions of the concept of likelihood of confusion do not really assist in the practical application of trademarks law by Courts. In addition, they centre upon the concepts of likelihood of confusion and origin function of trademarks, but fail to adequately explain e.g. the grounds which substantiate the existence of a likelihood of confusion when a third party puts a producer's properly registered trademark upon goods that the latter (producer) has introduced/ put into the market and traded with/in them as anonymous goods (i.e. bearing no trademark at all), or where a third party detaches a producer's registered trademark from the respective goods and trades in them as "anonymous" goods, or in the case of parallel imports of goods from third (non-EEC) States²⁶. All the latter cases involve genuine goods and it would be difficult to allege that the origin function is infringed (i.e. it would be difficult to substantiate the existence of an infringement of the origin function). Moreover, by rendering likelihood of confusion into a fundamental and central concept of trademarks law and by accepting that existence of a likelihood of confusion amounts to the most characteristic case of infringement of a trademark, it becomes more difficult to understand the ratio of legal protection of trademarks with a reputation²⁷, which are protected even beyond the limits of a likelihood of confusion. As of the beginning of the 20th century, Frank Schechter, who introduced the view that a trademark may be infringed even beyond the limits of

²⁵ See also El. Alexandridou, as above, 423 about a case-by-case classification.

²⁶ With regard to parallel imports and relevant issues (right to introduce a product into EEC market and exhaustion of the relevant right) see A. Liakopoulos, *Industrial Property* 5th Edition 2000, 125- B.G Antonopoulos, *Industrial Property*, as above, 477, N.K Rokas, as above, 149- One should take into account that according to *Silhouette* ECJ case C-355/1996 (at [34-37]) parallel imports in principle qualify as a trademark infringement according to article 4 par. 1a and 5 par. 1a of Directive 89/104/EC.

²⁷ See M.-Th. Marinos, *Trademarks Law*, 2007, 18.

likelihood of confusion²⁸, had expressed the view that there are two distinct (but equally important) classes of trademark infringement, each one of which depends on whether a number of distinct conditions have been fulfilled; as soon as these have been fulfilled, protection under trademarks law becomes imperative. The first class includes infringement cases based on the existence of a likelihood of confusion. It is highlighted that where the respective trademarks and goods involved are absolutely identical, then law introduces a rebuttable legal presumption that a likelihood of confusion exists (according to article 1 par.1a of Law 2239/94). The second class includes infringement cases incurring without the existence of a likelihood of confusion and involves either degradation or falsification or imitation of a trademark that has been registered beforehand, or taking advantage (directly or indirectly) of its reputation and recognition in the market by unfair approach falsification or imitation. Schrechter's thoughts²⁹ were based on the fact (conclusion/argument) that some undertakings have developed expertise in producing one single (kind/class of) product and their market reputation is based on the fact that consumers are aware of the undertaking's expertise reputation. In such case, a trademark's reputation is prejudiced even in the case where a third party producer decides to use the same trademark in a totally different (non-competing) product³⁰, because in the latter case, the expertise reputation of the undertaking (that qualifies as a trademark proprietor in the case at stake), i.e. the undertaking's reputation as an expert in producing goods of the kind or class at stake, is prejudiced. Current Greek trademarks law grants such protection only to "trademarks with a strong reputation", provided that conditions set by law (article 4 par. 1c of Law 2239/94)

²⁸ Frank Schechter, *The historical foundations of the law related to trademarks*, 1925, reprint 1999 and *The rational basis for trademark protection*, (1927) 40 *Harvard Law Review* 813.

²⁹ See also Paul Lange (as above, par. 2226) who argued that trademark infringement exists even without the existence of a likelihood of confusion. See also L. Kotsiris, as above, page 806.

³⁰ Paul Lange makes reference to examples from German case-law, such as usage of Dimple (alcoholic drinks) trademark for cleaning products (BGHZ 93, 96), usage of Mars (chocolate products') trademark for condoms (BGHZ 125, 91)

have been fulfilled. In addition, one should consider as a third class/category of trademark infringement the cases of infringement of a trademark's proprietor right to prohibit parallel imports from third (non-EEC) States. It is true that such right (to prohibit parallel imports) cannot be justified by reference to the origin function, since the respective goods are genuine, even though they are not necessarily of the same quality; indeed, quality may vary between different markets, even if the respective goods bear the same trademark. Further, it cannot be justified on the grounds of the advertising function of trademarks, nor by reference to the need to protect the market recognition of a "trademark with a reputation" regardless of the existence of likelihood of confusion. Prohibition of parallel imports of goods is adequately justified solely on financial grounds associated with a need to protect EU/EEC industry from competition of low-cost goods originating from third (non-EEC) States.

Adoption of the aforementioned distinction between a) trademark infringement cases associated with the existence of a likelihood of confusion and b) trademark infringement cases independent from such likelihood of confusion does not extinguish (do away with) the distinction between *stricto sensu* likelihood of confusion and broad sense of likelihood of confusion and between direct and indirect likelihood of confusion. Both distinctions reflect efforts to systematize and interpret current (applicable) law. However, it becomes more evident that the risk of confusion is neither the central concept of trademarks law nor the only requirement for granting legal protection. Furthermore, to extract a rebuttable legal presumption from article 4 par. 1a of Law 2239/94 justifies why there is a trademark infringement in cases where a third party detaches a trademark that distinguishes goods originating from a particular producer, or where a third party attaches a producer's (trademark proprietor's) trademark upon goods that such producer has introduced into a market as anonymous goods (i.e. bearing no trademark at all). To extract such

legal presumption could also justify –to some extent- prohibition of parallel imports of goods originating from third States, since such amounts to a non-licensed usage of a trademark.

VII. Conclusion

One could summarize the fundamental characteristics of modern trademarks law theory as follows:

- a) Gradual abandonment of financial analysis concerns and of concerns about potential restrictions on the freedom of competition; trend to empower legal certainty about applicable law;
- b) Equal protection of legitimate interests of both consumers and producers/trademark proprietors;
- c) Expansion of the concept of likelihood of confusion and recognition that trademark infringement exists even in case of absence of any likelihood of confusion;
- d) Less importance is given to the likelihood of confusion and to the origin function;
- e) Recognition that trademark functions, which are directly linked to trade & transactions, are important with respect to the way consumers react to advertising. All the above factors point towards a wider and more effective protection (from both a civil and administrative law perspective) of trademarks, which empowers the absolute (*erga omnes*) character of a right to a trademark.