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I. Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

5. **1)** Does your law or case law recognise parody or freedom of expression as a defence to trade mark infringement. YES or NO. Please comment, addressing, in particular, if such defence is:

- a) Yes
- b) No
- c) Statutory
- d) Judicially developed.
- e) Based on general principles such as honest practices or constitutional rights?

6. 1) (continued) Please comment

In the Netherlands, parody is recognised as a valid defence against trade mark infringement. The Dutch court must take into account the fundamental rights that are enshrined in the European Convention on Human Rights ('ECHR') and the Charter of Fundamental Rights of the European Union ('Charter'). These fundamental rights include the right to freedom of expression, which also covers parodies.¹ The foregoing applies to all matters of Union law, including trade mark law.

The court must strike a fair balance between the exclusive trade mark rights of the rights holder on the one hand,² and the right to the parodist's freedom of expression on the other. Since the Benelux Convention on Intellectual Property ('BCIP') and the Trade Mark Directive do not contain provisions that expressly deal with 'parody' (or other forms of expression), the balancing of interests takes place within the open norms of Benelux and European trade mark law.³ Two exceptions are particularly relevant in this context, namely

Due cause: Pursuant to article 2.20 par. 2 (c) and (d) BCIP, the use of a sign without due cause which takes unfair advantage of or which is detrimental to the distinctive character or the repute of a trade mark, can be prohibited by the trade mark holder.

Honest practices: Article 2.23 BCIP allows for various forms of trade mark use, provided that such use is "made in accordance with honest practices in industrial or commercial matters".

A parodist can argue that there is due cause for the use of a trade marked sign and that the use in question is in line with honest practices. Whether such defence holds up in court, very much depends on the circumstances of the case.

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1 See ECHR 25 January 2007, nr. 68354/01, NJB 2007/767 (Vereinigung Bildender Künstler / Austria).

2 Intellectual property rights are also protected by the ECHR (see article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms) and article 17 paragraph 2 of the Charter.

3 Recital 27 of the Trade Mark Directive does say that the "Directive should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression."

7. 2) Does your law or case law define or characterise "parody" in the framework of trademark infringement?

Yes

No

8. 2) (continued) Please explain, indicating how "parody" is understood (e.g. must it be humorous, critical, or transformative?) and by whom (legislature, courts, or doctrine).

EU trade marks

At the EU level, neither the EU Trade Mark Regulation (EU) 2017/1001 ('EUTMR') nor the EU Trade Mark Directive (EU) 2015/2436 ('EUTMD') contains an explicit definition or characterisation of "parody" in the context of trade mark infringement. Article 9(2) EUTMR provides for three specific infringement grounds: sub (a) (identical sign for identical goods or services), sub (b) (likelihood of confusion), and sub (c) (use of a reputed trade mark). The sub (c) ground contains an open norm (due cause) that may be raised as a ground for non-infringement, but this also does not contain a definition of, or otherwise characterises 'parody' in the framework of trade mark infringement. As stated in the Opinion of Advocate General Szpunar in *IKEA/Vlaams Belang*, the concept of due cause is at the heart of parody cases where courts seek to reconcile the right to property and freedom of expression.

Benelux trade marks

Benelux trade mark law (under the BCIP) also does not contain a statutory definition of "parody" within the framework of trade mark infringement. As touched upon above for EU trade marks and in Q1, parodic uses of trade marks are assessed through the open norm of due cause. This norm is relevant for two infringement grounds under Article 2.20(2) BCIP. The first is sub (c), which concerns use of a sign identical with or similar to a trade mark with a reputation, where such use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. The second is sub (d), which concerns use of a sign otherwise than to distinguish goods or services, where such use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

Within that framework, the operative question is not whether the use qualifies as a "parody" in the technical sense, but whether the use is supported by a due cause that justifies it. It is through this route (rather than through an explicit parody exception) that Dutch courts have engaged with parodic trade mark use. By way of illustration, in *Nijntje/Bruna/Punt.nl*, the Court of Appeal of Amsterdam assessed a potentially parodic use under Article 2.20(2)(d) BCIP by reference to considerations such as humorous intention, the absence of competitive motives, sufficient distancing from the original mark, and the absence of a likelihood of confusion.⁴ Similarly, in *Moët Hennessy/Cedric Art*, the Benelux Court of Justice confirmed that artistic freedom may constitute due cause under Article 2.20(2)(d) BCIP.⁵

9. **3)** Do any of the following aspects impact whether a parody of a trade mark may or may not be considered a trade mark infringement

- a) The parody constitutes an expression of humour or mockery;
- b) The parody has a critical intent;
- c) The parody is noticeably different from the original trademark;
- d) The parody is not directed at the original mark (i.e. targeting at society or other aspects unrelated to the original work);
- e) The parody is non-commercial and purely artistic;
- f) The parody is non-commercial and used to draw attention to political or social message;
- g) The parody is directed at the original mark, and is used to criticize, disparage or discredit the original trade mark, or otherwise affect its reputation;
- h) The parody is used "in the course of trade" and is used to sell competing, similar and/or related goods or services;
- i) The parody is used "in the course of trade" and is used to sell non-competing and unrelated goods or services;
- j) whether the parody involves monetisation (e.g. sales or advertising revenue);
- k) Whether the trademark being parodied is considered to be well-known or famous;
- l) Other

10. **3) (continued)** Please explain

Ad a) Dutch case law recognises that the humorous intent of a parody is a relevant factor when assessing if that parody infringes a trade mark.⁶ Relevant factors are whether the parody's purpose is to provoke laughter, and whether the tone of the original trade mark is changed in a humorous or ironic way.

Ad b) Dutch case law shows that critical or commentary intent is a relevant factor in assessing whether a parody constitutes trade mark infringement. For instance, a parody that formed part of a political campaign aimed at drawing attention to environmental issues and expressing criticism of government policy was found acceptable,⁷ as well as a parody on a slogan of a supermarket chain by a trade union.⁸

Ad c) Dutch case law shows that where a parody is directed at the original trade mark itself and is used to criticise, disparage or discredit the original trade mark in such a way that this damages the reputation of the original trade mark, such a circumstance may weigh in favour of trade mark infringement.⁹

Ad d) Dutch case law shows that a parody may avoid trade mark infringement where, while preserving the recognisability necessary for parody, sufficient distance is maintained from the original trade mark.¹⁰

Ad e) No, there is no indication in Dutch case law that this is a relevant factor in assessing trade mark infringement. We do point out that this factor has been deemed relevant as a consideration for not accepting due cause by AG Szpunar in the pending *IKEA/Vlaams Belang* case (C-298/236, para. 127).

Ad f) Yes, as reflected in Recital 27 of EU Trade Mark Directive 2015/2436, the non-commercial and artistic nature of a parody may be relevant when assessing trade mark infringement.¹¹ Artistic freedom is protected as an aspect of freedom of expression under Article 10(1) ECHR. As such, it could be considered 'due cause' if it falls within the limitations of Article 10(2) ECHR, which, in the trade mark context means that the parody may not be aimed at harming the trade mark or trade mark proprietor. In the weighing of interests between the trade mark proprietor and the artists, courts should take all relevant circumstances into consideration.

Ad g) Yes, as illustrated by aforementioned examples of case law, the non-commercial nature of a parody is a relevant factor in assessing trade mark infringement,¹² as is the fact that a parody seeks to draw attention to a political or social message.¹³ However, all of these cases do show that these aspects have to be weighed against the interests of the trade mark proprietor, such as whether the parody is aimed at causing damage to the trade mark or its proprietor.

Ad h) the absence of competitive motives is a relevant factor when assessing trade mark infringement in favour of the user of the parody.¹⁴ Inversely, if a competitive motive is present, such a factor may weigh in favour of the trade mark proprietor.

Ad i) Yes, using a (well-known) trade mark as a 'commercial parody' may be a relevant factor in favour of the trade mark proprietor as the goal of the parody is purely commercial rather than stirring up a public debate.¹⁵

Ad j) Yes, as mentioned, if the primary purpose is commercial gain, this is a factor that weighs in favour of trade mark infringement.¹⁶ Although not within the context of trade marks, the Court of The Hague did decide in a design right case that the pursuit of profit alone does not necessarily mean that less extensive freedom of expression should be afforded.¹⁷ That would require compelling additional circumstances.

Ad k) No, there is no indication in Dutch case law that this is a relevant factor in assessing trade mark infringement, as the concept of a parody is framed within the 'due cause' exception, which is an exception that is embedded within Article 2.20(2)(c) and 2.20(2)(d) BCIP. Unlike Article 2.20(2)(c) BCIP, Article 2.20(2)(d) BCIP does not require the prior trade mark to be reputed.

11. **3) (continued)** Please use the additional space below if needed

No answer provided.

12. **4)** Does the function in which the trade mark is used have an impact on liability — in particular, does liability depend on whether such use constitutes use in the function of indicating the origin of goods or services?

Yes

No

13. **4) (continued)** Please explain

EU trade marks

Article 9(2) EUTMR provides for three specific infringement grounds, being sub (a) (identical sign for identical goods or services), sub (b) (likelihood of confusion) and sub (c) (use of a reputed trade mark). Liability under all three infringement grounds requires that the trade mark is used:

(i) in the course of trade, meaning that the use takes place in the context of a commercial activity with a view to economic advantage and not as a private matter (see e.g. CJEU C- 206/01, Arsenal/Reed); additionally, it is required that a third party uses the sign in its own commercial communication (see e.g. CJEU C-148/21 and C-184/21, Amazon/Louboutin); and

(ii) in relation to goods and services, meaning that the use is made for the purpose of distinguishing goods or services as to their commercial origin, in the sense that the third party uses the sign in such a way that a link is established between that sign and the goods marketed or the services provided by that third party (see e.g. CJEU C-17/06, Céline).

As a result of these basic requirements, use that is purely parodic in nature outside of a commercial context does not in principle constitute infringement under any of these grounds.

Benelux trade marks

Article 2.20(2) BCIP, implementing Article 10(2) of the EU Trade Mark Directive (EU) 2015/2436 ("EUTMD"), provides for identical infringement grounds under sub (a)–(c) and thus imposes the same basic requirements to establish liability as under the EUTMR. However, the BCIP creates a broader regime of protection against parodic use by providing for an additional infringement ground sub (d), implementing the optional provision of Article 10(6) EUTMD. Infringement under (d) concerns the use of a sign other than for the purpose of distinguishing goods or services, where such use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. As a result, under the Benelux trade mark regime, parodic use of a reputed Benelux trade mark may be actionable even where the sign is not used in the course of trade or in relation to goods or services. In such cases however, it is additionally required (as is included in the article) that the use is without due cause and takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. Depending on the circumstances of the case a counterargument could be that parodic use qualifies as a due cause and that an action of the trade mark owner is at odds with the freedom of expression.

14. **5)** Is the parodic nature of the use, including the specific type of parody (e.g. commercial, artistic, political or satirical), taken into account as a relevant factor in the assessment of the likelihood of confusion?

Yes

No

15. **5) (continued)** Please explain

YES, but no more than any other relevant factor.

Legal framework

Under Article 2.20(2)(b) BCIP, the holder of a registered trade mark may prohibit any third party not having its consent from using, in the course of trade, a sign that is identical with or similar to its mark in relation to goods or services that are identical or similar to those for which the mark is registered, where such use gives rise to a likelihood of confusion on the part of the public, including a likelihood of association with the earlier mark.

In modern practice, however, trade mark proprietors confronted with parodic uses of their marks tend not to rely on the likelihood-of-confusion ground of Article 2.20(2)(b) BCIP. Instead, they more commonly invoke Article 2.20(2)(c) BCIP (protection of marks with a reputation) or Article 2.20(2)(d) BCIP (use other than for the purposes of distinguishing goods or services), as those provisions do not require proof of a likelihood of confusion.

Application in EU case law

The framework on likelihood of confusion was outlined in 1997 in the CJEU case Puma/Sabel (CJEU 11 November 1997, IEF 22500; ECLI:EU:C:1997:528 (Puma/Sabel):

Para. 22: "As pointed out in paragraph 18 of this judgment, Article 4(1)(b) of the Directive does not apply where there is no likelihood of confusion on the part of the public. In that respect, it is clear from the tenth recital in the preamble to the Directive that the appreciation of the likelihood of confusion 'depends on numerous elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign and between the goods or services identified'. The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case."

Application in the Netherlands

In the Netherlands, too, this ruling constitutes the prevailing doctrine on the assessment of likelihood of confusion. In subsequent Dutch case law, the courts have not yet addressed the question of whether the parodic nature of the use constitutes a specific relevant factor in the assessment of likelihood of confusion. Accordingly, the parodic nature of a use may be considered as one of the relevant circumstances in the global assessment of likelihood of confusion under the Puma/Sabel doctrine, but Dutch courts have not (yet) attributed any specific or additional weight to it.

16. **6)** Does your law address conflicts between parody and the protection of well-known, reputed or famous trade marks?

Yes

No

17. **6) (continued)** Please explain in particular, does your jurisdiction recognize a statutory fair-use exemption, apply a “due cause” balancing test, or afford stricter protection to reputation?

EU trade marks

At the EU level, the protection of trade marks with a reputation is governed by Article 9(2)(c) EUTMR. Under that provision, the proprietor of a reputed trade mark may oppose the use of an identical or similar sign where such use, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the mark. The EUTMR does not provide for a parody exception as such, nor does it contain an explicit definition or characterisation of “parody” for trade mark purposes (see Q2). The concept of due cause within Article 9(2)(c) EUTMR is not defined in the Regulation, but the CJEU has held that its purpose is to strike a balance between the interests of the trade mark proprietor and those of the third party using the sign.¹⁸ Depending on the circumstances, freedom of expression, possibly also including parodic expression, may constitute such a competing interest. In this regard, Recital EUTMD confirms that the application of trade mark law must take full account of fundamental rights and freedoms, and in particular freedom of expression.

In this regard, Advocate General Szpunar recently confirmed, in his Opinion in *IKEA/Vlaams Belang*, that the concept of due cause within the meaning of Article 9(2)(c) EUTMR and Article 10(2)(c) EUTMD may serve as the mechanism through which freedom of expression, as guaranteed by Article 11 of the EU Charter of Fundamental Rights, is accommodated within trade mark law.¹⁹ However, the AG equally made clear that the proprietor of a reputed trade mark cannot be compelled to tolerate, on the basis of due cause alone, the use of an identical or similar sign where the potential contribution of that use to a debate of public interest does not outweigh the fact that the use must be understood as an attempt to ride in the wake of a trade mark with a reputation in order to disseminate and promote a political programme. That is, according to Szpunar, the case where the programme does not raise issues relating to that mark, its proprietor or the proprietor’s goods or services.

Benelux trade marks

Benelux law also does not provide for a codified parody exception or a statutory fair-use exemption in the context of well-known or reputed trade marks (see question 2). Rather, where the use of a sign invokes or evokes a well-known or reputed mark, such use is assessed through the open norm of due cause. In this regard, Article 2.20(2)(c) BCIP is of particular relevance, as it specifically concerns the protection of marks with a reputation and provides that the proprietor of such a mark may oppose use of a sign where such use, without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trade mark. It is within this framework that parodic uses of well-known marks could be assessed, not through a self-standing parody defence, but through the due cause analysis embedded in Article 2.20(2)(c) BCIP. Article 2.20(2)(d) BCIP, which concerns use otherwise than to distinguish goods or services, may additionally be relevant where the parodic use of the famous trade mark does not serve a trade mark function.

A central question in this context is whether the concept of due cause as set out under Article 2.20(2)(d) BCIP is to be interpreted in the same manner as the concept of due cause under Article 2.20(2)(c) BCIP. In this regard, the Advocate General (AG) in the *Moët Hennessy/Cedric Art* proceedings noted that the Court of Justice of the European Union, in a judgment concerning Article 2.20(2)(c) BCIP, which also contains the concept of due cause, had ruled that the purpose of due cause is to “strike a balance between the interests in question”, namely between the rights of the proprietor of a registered trade mark and the interests of the third party using the sign. ** See full text in the report sent by e-mail.

18. **7)** Does your law or case law allow a trade mark parody to be registered as a trade mark?

Yes

No

19. **7) (continued)** Please explain, also addressing how local practice deals with such applications.

In the Netherlands, trade mark protection can be obtained through two registration systems:

- Benelux trade marks, governed by the BCIP; and
- EU trade marks, governed by the EUTMR.

Neither regime applies a separate test for a parody trade mark, and such signs are assessed under the same requirements as regular trade marks. Trade marks may be formed by any signs, provided that the sign is capable of distinguishing the goods and services of an undertaking from those of another (Article 2.1 BCIP; Article 4 EUTMR). A sign consisting of a parody may thus be applied for and registered if it complies with (i) the registration requirements and (ii) no successful opposition action is brought:

i. The trade mark applied for must comply with the absolute grounds for registration, namely that a parody trade mark must constitute a trade mark, is required to have distinctive character, cannot serve exclusively as an indication to designate kind, quality, quantity, intended purpose value, place of origin or time of production of the goods or of rendering of the service, or other characteristics of the goods or services, cannot consist exclusively of customary indications, cannot consist of a characteristic that gives substantial value to the goods, and cannot be contrary to public order or mislead the public.

ii. Moreover, once applied for, a trade mark may be opposed by the proprietor of an earlier trade mark (e.g., the trade mark to which the parody pertains). There are no known administrative decisions from the Benelux Office for Intellectual Property which provides guidance on the factors to be considered in such a situation.

II) Policy considerations and proposals for improvements of your Group's current law

Current Law

20. **8)** Could your Group's current law or practice relating to parody defences to trade mark infringement be improved?

Yes

No

21. **8) (continued)** Please explain

It is our view that the open norm of due cause in Benelux trade mark law (under Articles 2.20(2)(c) and 2.20(2)(d) BCIP) and EU trade mark law (Article 9(2)(c) EUTMR and Articles 10(2)(c)) provides a framework through which parodic trade mark use can be assessed, without the need for a self-standing statutory parody exception. A deliberate legislative choice was made not to adopt the European Parliament's proposal to include parody, artistic expression, criticism or comment among the limitations of the effects of a trade mark under Directive 2015/2436 and Regulation 2017/1001, even though copyright law provides for such an exception in Article 5(3)(k) of Directive 2001/29/EC.

At the same time, it is our group's view that the interpretation of due cause under Benelux trade mark law by the Benelux Court of Justice in the case *Moët Hennessy Champagne Service v Cedric Art* is in need of improvement. In that case, the Court held, in summary, that due cause exists where there is an artistic expression that is the original result of a creative design process and the artistic expression is not aimed at causing harm to the trade mark or its proprietor. In our view, this approach renders the existence of due cause entirely dependent on a subjective test and unduly restricts trade mark protection.

In our view, the interpretation of due cause proposed by AG Szpunar for European trade mark law, in Case C-298/23 – *Inter IKEA Systems BV v Vlaams Belang*, offers a preferable approach:

- Recourse to the concept of "due cause" must serve as a mechanism for satisfying the requirements of protection of the fundamental rights at stake, while noting that the exercise of freedom of expression does not in itself amount to "due cause". Rather, the same reasons that lead to giving precedence to that freedom when balancing it against the rights of others may validly be regarded as constituting such cause.
- Where the proprietor of a mark with a reputation has demonstrated the existence of one of the forms of injury referred to in those provisions, the onus is on the third party to establish that he or she has due cause for using such a sign. The use of a sign with the intention of riding in the wake of a trade mark with a reputation cannot, without other valid justification, amount to due cause. That justification may exist, in particular, where the use of a sign is necessary because of objectively overriding considerations or the subjective interests of a third party. The requirement is not one of absolute necessity, but of a ground that, when weighed against the proprietor's interest and taking into account the standards of conduct generally accepted in the sector in which the third party operates, justifies compelling the proprietor to tolerate the use of a sign identical or similar to its trade mark.
- It is for a third party seeking to rely on "due cause" to establish that the expression based on the use of a sign in the field of political speech and debate targets the trade mark, the proprietor or its goods or services, or that the proprietor itself has, by its previous conduct, engaged in the debate of general interest at issue

22. **9)** In your Group's view, what policy objective (such as free speech, or another objective) would a defence of parody promote and help accomplish? Does the policy objective drive the types of expression that should be allowed under a parody defence? YES / NO. Please explain.

Yes

No

23. **9) (continued)** Please explain

At the European level, recital 27 of Directive 2015/2436 expressly states that use of a trade mark by third parties for artistic expression should be considered fair where that use complies with honest practices in industry and commerce. It also states that the Directive should be applied in a way that ensures full respect for fundamental rights and freedoms, in particular freedom of expression. A parody defence in trade mark law (incl. for the sake of completeness, in the form of 'due cause') would mainly serve to give effect to this objective. Assuming the CJEU follows AG Szpunar's Opinion in Case C-298/23 (*Inter IKEA Systems BV v Vlaams Belang*), freedom of expression would already be a relevant ground under the existing due cause framework for justifying a third party's use of a sign corresponding to a reputed trade mark (see Q8).

At the Benelux level, the Benelux Court of Justice held in *Moët Hennessy/Cedric Art* that artistic freedom, as an aspect of the right to freedom of expression protected by Article 10(1) ECHR, can amount to due cause. It interpreted Article 2.20(2)(d) BCIP as meaning that artistic freedom amounts to due cause under that provision for the use of a sign identical with or similar to a trade mark, except to distinguish goods or services, where the artistic expression is the original result of a creative process that is not aimed at causing harm to the trade mark or its proprietor.

24. **10)** Are there any policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

Yes

No

25. **10. (continued)** Please explain

No, no such policy considerations exist

III) Proposals for harmonisation

26. **11)** Do you believe that there should be harmonisation in relation to exceptions and defences to trade mark infringement based on parody? *If YES, please respond to the following questions without regard to your Group's current law or practice. Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.*

Yes

No

27. **11) (continued)** Please explain

There should be harmonisation in relation to exceptions and defences to trade mark infringement based on parody. Harmonisation could ensure a common definition of 'parody' within trade mark law, and ensure common guiding principles to balance trade mark rights and freedom of expression. In our view, open norms and concepts such as 'due cause' suffice in this respect, as they can serve as a flexible mechanism for accommodating principles such as freedom of expression within trade mark law.

28. **12)** Should different standards apply when assessing whether a parody infringes a trade mark, depending on the nature of the parody (e.g. commercial use, artistic expression, brand criticism, or political parody)?

Yes

No

29. **12) (continued)** Please explain

According to the Dutch Group, the applicable standard when assessing whether a parody infringes a trade mark should be the same, but the nature of the parody is of course a relevant factor in the assessment of whether the parody defence succeeds in a given case. As the question of whether a parody defence succeeds is ultimately a balancing of interests, all factors mentioned in Q14 – including factors relating to the nature of the parody – are relevant. Thus, the standard should be uniform, but the outcome of its application naturally differs depending on the type of expression at issue. This approach ensures the ability of courts to conduct a fact-based proportionality assessment within a harmonised framework.

30. **13)** Should there exist exceptions or limitations to trade mark protection for the purpose of parody or freedom of expression?

Yes

No

31. **13) (continued)** Please explain

Exceptions or limitations to trade mark protection for the purpose of parody or freedom of expression should exist as the protection afforded to the trade mark proprietor should not be absolute. However, we do not believe that there is a need to introduce a separate, self-standing "parody exception" comparable to the parody exception found in many copyright laws. As argued before, open norms such as "due cause" already provide adequate mechanisms to accommodate parody as a form of protected expression that enable courts to strike a fair balance between the exclusive rights of the trade mark proprietor and the right to freedom of expression, including parodic expression. Introducing a separate and formally defined parody exception risks creating rigidity and potentially narrowing the scope of protected expression. A framework based on an open norm, by contrast, allows for a proportionate, case-by-case balancing of interests that can adapt to the wide variety of forms that parodic expression may take in practice.

32. **14)** Should any of the following aspects impact whether a parody defence for trademark infringement should be available

- a) The parody constitutes an expression of humour or mockery;
- b) The parody has a critical intent;
- c) The parody is noticeably different from the original trademark;
- d) The parody is not directed at the original mark (i.e. targeting at society or other aspects unrelated to the original mark);
- e) The parody is non-commercial and purely artistic;
- f) The parody is non-commercial and used to draw attention to political or social message;
- g) The parody is directed at the original mark, and is used to criticize, disparage or discredit the original trade mark, or otherwise affect its reputation;
- h) The parody is used "in the course of trade" and is used to sell competing, similar and/or related goods or services;
- i) The parody is used "in the course of trade" and is used to sell non-competing and unrelated goods or services;
- j) The parody involves monetisation (e.g., sales or advertising revenue);
- k) The trade mark being parodied is considered to be well-known or famous;
- l) Other. Please explain.

33. **14) (continued)** Please explain

Ad a) This factor should impact the availability of the parody defence. Humour or mockery is the defining characteristic of a parody. Consequently, without a genuinely comic or mocking element, the use cannot properly qualify as a parody at all. It is therefore a necessary condition – rather than an aspect in the assessment – that the statement/image/otherwise constitutes an expression of humor or mockery and thus qualifies as a parody.

Ad b) Critical intent is an important element in the balancing of fundamental rights. Where a parody carries a political message, contributes to a debate of public interest, or is otherwise critical in nature, greater weight should be afforded to the parodist's right to freedom of expression in the assessment of whether the defence is available.

Ad c) This factor should impact the availability of the parody defence, as a parody must both evoke and deviate from the original mark in order to function as such. A sufficient degree of difference supports the legitimacy of the parody.

Ad d) We consider that this factor should impact the availability of the parody defence, in the sense that a parody which is not directed at the original mark itself is more likely to be found impermissible. Where the trade mark is merely used as a vehicle to comment on unrelated societal or other matters, the justification for invoking that specific mark is weaker. However, it is noted that Dutch Group is of the opinion that intentions, which are inherently subjective, should not be a factor in determining whether a parody defence is available.

Ad e) We consider commercial intent a relevant factor, but not decisive on its own. Trade mark parody is assessed through a balance between trade mark protection and freedom of expression. A commercial purpose generally reduces the scope for a valid parody because it increases the likelihood of confusion, unfair advantage and/or reputational harm. However, it does not automatically exclude the parody defence; it remains one element within the broader overall assessment.

Ad f) Here the conclusion goes in the opposite direction (compared to e)). If there is no commercial intent, that will weigh in favour of the user, and the fact that the parody draws attention to political or social messages should also positively influence the balancing of interests.

Ad g) Purposeful targeted criticism should weigh in favour of freedom of expression (unlike for example a parody with a clear confusing purpose), but if the parody unfairly tarnishes the mark or exploits its reputation beyond what is necessary for the commentary (and thus not in accordance with honest practices), that should weigh against permissibility.

Ad h) The Dutch Group is of the opinion that this is of relevance (but lack of use in the course of trade should not exclude the parody from a legal trade mark assessment). Use in the course of trade directly triggers the core functions of the mark, in particular the origin function and the protection of the mark's distinctiveness and reputation. It thus raises the risk of confusion or association and it increases the likelihood of finding unjustified advantage or tarnishment.

Ad i) The Dutch Group is of the opinion that this is still relevant (although less strongly compared to when a parody is used to sell competing goods). Non-competing goods make confusion less likely which usually favours the parodist. Absence of likelihood of confusion is one of the main reasons why many parodies remain permissible. But even if the goods are unrelated, the use still has a commercial purpose which generally weighs against the parody compared to a purely artistic/non-commercial parody but weighs less heavily than when a parody is used for competing goods.

Ad j); k) and l) ** See full text in the report sent by e-mail.

34. **15)** Should the function in which the trade mark is used have an impact on liability — in particular, should liability depend on whether such use constitutes use in the function of indicating the origin of goods or services?

- Yes
- No

35. **15) (continued)** Please explain

While the function in which the mark is used should play a role in the overall assessment, the Dutch Group does not believe that liability should depend on whether the use is made in connection with the trade mark's origin function (which could potentially exclude other types of use).

Origin-indicating use tends to increase the risk of confusion and strengthens the rightsholder's claim of harm to essential trade mark functions (consequently reducing the scope of freedom-of-expression protection in that case). But trade mark law also protects non-origin functions, such as the reputation function, so infringement (and a need to assess parody as a defense) can still occur even if origin indication is not involved.

It is therefore not necessary to connect this requirement to the existence of liability as such since liability can be established in both cases (and article 2.20 (2) (c) and (d) jointly cover all trade mark functions). It should however be a relevant factor in the assessment.

36. **16)** Should the availability of a parody defence be subject to the demonstration of the following

- a) Absence of likelihood of confusion or association as to source, affiliation, sponsorship?
- b) That the parody does not take unfair advantage of, or cause undue detriment to, the reputation or distinctiveness of the mark?
- c) That use of the parody is consistent with honest commercial practices?

37. **16) (continued)** Please explain

a) No, because we conclude that in most cases there will be absence of likelihood of confusion/association to the source, affiliation, sponsorship. Thus – if the validity of the defence were to depend on the existence of this factor/criterion, many parodies that we consider permissible would fall outside the scope of protection. We consider that undesirable.

b) and c) – Yes, but these two criteria are connected. After all, if the parody is consistent with honest commercial practices, there will be no unjustified exploitation of, or disproportionate detriment to, the reputation or distinctive character of the trade mark (and vice versa).

38. **17)** Should well-known, reputed or famous trade marks benefit from additional protection against trade mark parody?

Yes

No

39. **17) (continued)** Please explain

While we believe that well-known, reputed and famous trade marks should benefit from additional protection against trade mark parody, the existing (Benelux) legal framework already provides such additional protection through open norms. For example, Article 2.20(2)(c) BCIP grants the owner/holder of a well-known trade mark the right to oppose the use of an identical or similar sign, even in the absence of a likelihood of confusion, where that use takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the mark, unless such use is justified by “due cause”. In the context of this article, “unfair advantage”, “detriment to distinctive character or reputation”, and, crucially, “due cause” are open norms that invite a contextual assessment of the specific use at issue, including its expressive or parodic nature.

The notion of (use without) due cause is especially important in this context. It allows courts to take into account legitimate reasons for using a trade mark, including parody, satire, and other forms of expression. In our opinion, this framework already ensures that, on a case-by-case basis, all relevant circumstances are weighed, making it unnecessary to grant well-known trade marks any additional or heightened level of protection.

Moreover, well-known trade marks are precisely the ones that lend themselves most readily to parody. Parody depends on recognition, and it is the cultural visibility of famous marks that makes them effective vehicles for humor, criticism, or social commentary. These marks often function as reference points in public discourse, and their use in parody can contribute to broader societal debates, for example, criticism of corporate or political behavior or consumer culture. Introducing additional protection would risk unduly restricting such forms of expression.

Furthermore, in our opinion, there is no convincing justification for raising the threshold specifically for reputed marks. As such marks already enjoy broader protection under Dutch trade mark law, extending beyond confusion to include dilution and free riding, this enhanced protection should in our opinion not translate into a greater ability to suppress parody. On the contrary, one could argue that the more prominent and powerful a brand is, the more it should be expected to tolerate a certain degree of critical or humorous use.

Finally, the current framework already allows courts to intervene where necessary. If a purported parody is in reality a purely commercial exploitation that takes unfair advantage of the mark without any genuine expressive element, or if it causes disproportionate and unjustified harm to the mark’s reputation, the existing doctrines provide sufficient grounds to prohibit such use. A case-by-case assessment is therefore both adequate and preferable to any categorical extension of protection.

In sum, the open norms of Dutch (and EU) trade mark law, and in particular the concept of (use without) due cause, already enable a balanced approach to parody. Granting additional protection to well-known trade marks would be unnecessary and would risk upsetting the careful balance between trade mark rights and freedom of expression.

40. **18)** What approach best balances parody and freedom of expression with the protection of well-known, reputed or famous trade marks, should the law provide for:

a) a statutory fair-use exemption, under which parody would not constitute trade mark infringement if specific legal conditions are met;

b) a “due cause” balancing test, under which parody could justify the use of a trade mark on a case-by-case basis, following a judicial assessment; or

c) stricter protection of trade mark reputation in cases involving parody?

41. **18) (continued)** Please explain

To determine which approach best balances parody and freedom of expression with the protection of well-known trade marks, we believe that it is necessary to consider how Dutch trade mark law already accommodates competing interests. Under the Benelux framework, in particular Articles 2.20(2)(c) and 2.20(2)(d) BCIP, the protection of (reputed) trade marks is formulated as an open norm: the use of a sign may be prohibited where it takes unfair advantage of, or is detrimental to, the distinctive character or repute of the trade mark, unless such use is justified by "due cause."

Within this framework, parody, satire, and other expressive uses of trade marks can constitute a legitimate justification. The "due cause" test therefore, offers the most appropriate approach. It allows for a case-by-case assessment in which all relevant factors can be weighed, including the nature of the parody, the commercial context, and the potential impact on the trade mark. Furthermore, the assessment explicitly allows courts to consider fundamental rights, in particular freedom of expression. As a result, the "due cause test" already provides the necessary flexibility to distinguish between legitimate expressive uses on the one hand, and purely commercial attempts to exploit the reputation of a well-known mark on the other hand. Against this background, we believe that a statutory fair-use exemption specifically for parody and/or enhanced protection for well-known, reputed or famous trade marks is not required.

42. **19)** Should a sign which parodies a third-party's trade mark be allowed to be registered as a trade mark?

Yes

No

43. **19) (continued)** Please explain, also addressing how TM Offices should deal with the situation.

In our opinion, a sign which constitutes a parody of a third party's trade mark should not be allowed to be registered as a trade mark.

Under Dutch and Benelux trade mark law, parody may, in appropriate circumstances, constitute a legitimate justification for the use of a trade mark, in particular in light of the concept of "due cause" and the need to safeguard freedom of expression. However, granting a right of trade mark to a parody sign would go beyond merely tolerating its use and would instead enable the applicant to appropriate, to a certain extent, the distinctive features of the earlier mark for its own commercial purposes. This is difficult to reconcile with the function of trade mark law and the interests of the original trade mark proprietor.

In practice, parody signs will in many cases already encounter obstacles under the relative grounds for refusal laid down in Article 2.2ter BCIP, as they are typically identical or similar to earlier marks and applied for identical or similar goods or services, giving rise to a likelihood of confusion or, in the case of reputed marks, unfair advantage or detriment. These grounds provide an appropriate filter to prevent the registration of signs that unduly encroach on earlier rights.

Trade mark offices should therefore assess parody signs in the same way as any other application. They should not treat parody as a factor favouring registrability. Instead, where an earlier right is invoked, the application should be refused if the conditions of Article 2.2ter BCIP are met. The assessment of parody and freedom of expression should be left primarily to the context of use, where a case-by-case balancing can properly take place.

44. **20)** Please comment on any additional issues concerning exceptions and limitations to trade mark protection related to parody you consider relevant to this Study Question.

The group is of the opinion that the current open norm of "due cause" provides a framework through which parodic trade mark use can be assessed, without the need for a self-standing statutory parody exception (see also under 8).

However, we believe it would benefit legal certainty as to how to apply this open norm, if the ECJ would provide further guidance on how to categorize trade mark use in the context of parody. More specifically, guidance is needed on when a sign is used "in the course of trade" and "in relation to goods and services". This is because the use of a sign outside the commercial sphere is likely to benefit from more extensive protection for freedom of expression than the use of a sign within the commercial sphere (i.e. the use "in the course of trade" and "in relation to goods and services")

45. **21)** Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.

The questionnaire and its answers have been shared and discussed within the Dutch Group, which includes representatives from large and small/medium-sized companies.