

# Concise

## European Trade Mark and Design Law

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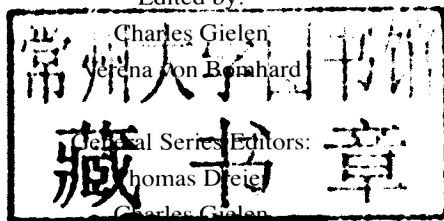


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# Concise European Trade Mark and Design Law

Edited by:



Richard Hacon



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# **Concise European Trade Mark and Design Law**

## PREFACE

'Concise IP' is the short name given to a series of five volumes of commentary on European intellectual property legislation. The five volumes cover: Patents and related matters, Trade marks and designs, Copyrights and neighbouring rights, IT and a general volume including jurisdictional issues. The series is based on a successful formula used for a Dutch publication, a series called *Tekst & Commentaar* (Text & Commentary) and on the equivalent German publication, *Kurz Kommentar* (Short Commentary). Since their first publication, these have won a prominent place among Dutch and German legal publications with each volume becoming an authority in the field.

Concise IP aims to offer the reader a rapid understanding of all the provisions of intellectual property law in force in Europe enacted by European and other international institutions. The volumes take the form of an article-by-article commentary on the relevant regulations and other legal instruments. It is intended to provide the reader with a short and straightforward explanation of the principles of law to be drawn from each article, rule or other provision. Where appropriate, this is done by reference to the construction of that provision by senior courts. Usually only judgments of the European Court of Justice, higher national courts or other senior tribunals such as the Board of Appeal of the European Patent Office are cited, though there are exceptions where an important point has only so far be considered by a lower tribunal. The citations do not include an analysis of the facts of the case, only the relevant point of law. In order to keep the commentaries clear, they are in a form that is as brief as the subject-matter allows. For in-depth analysis and discussion the reader will need to move on to specialist text books. Concise IP also differs from other publications in the form of commentaries, such as those in looseleaf format, by reason of its shorter, more direct style. The idea is that the reader will find it easy to gain a rapid appreciation of the meaning and effect of the provision of interest and thereafter be in a position to look in the right direction should further information be needed. The editors and authors are all prominent specialists (academics and/or practitioners) in their fields.

It is the intention of the editors and publisher to publish new editions every two to three years.

April 2011

Karlsruhe,  
Thomas Dreier

Amsterdam,  
Charles Gielen

London,  
Richard Hacon

## ABOUT THE EDITORS

**Charles Gielen** is a partner in the Amsterdam office of NautaDutilh, where he concentrates on patent and trade mark litigation. He is a part-time professor in IP law at Groningen University and has authored various IP handbooks. Charles is a member of the Executive Committee of the International Association for the Protection of Industrial Property (AIPPI) and acts as Chairman of the Special Committee on Biotechnology. He is the past President of the Dutch group of AIPPI; recently he has been appointed Member of honour of this association. Furthermore he is a member of the standing advisory committee to the Dutch Government on trade mark and design law.

In 2006, Professor Charles Gielen received the INTA President Award, one of the highest honours given to intellectual property practitioners.

Charles graduated from Tilburg University in 1971 and obtained his doctorate degree at Utrecht University in 1991.

**Verena von Bomhard** is a partner in the Alicante office of Hogan Lovells, which she founded in 1996. She focuses on the law and practice of Community trade marks and Community designs and also manages trade mark and design portfolios extending beyond the EU. Verena is an active member of the International Trademark Association, where she currently chairs the Programs Committee, and of GRUR. She has authored and co-authored a number of books and articles dealing with European trade mark law and teaches European trade mark law at the Munich Intellectual Property Law Center and the Magister Lucentinus at Alicante University.

Verena received her law and doctorate degrees from the Ludwig Maximilians University of Munich, Germany.

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## INTRODUCTION

**General.** This book is about European trade mark and design law. The two most important developments both in trade mark and design law were, first, the harmonisation of national laws, which aimed at abolishing obstacles to the free movement of goods and services and ensuring undistorted competition in the European Union, and second, the creation of pan-European, unitary trade mark and design rights valid for the whole of the European Union. This was inspired by the desire to create one European market without borders and to give undertakings the possibility to acquire protection of trade marks and designs for the whole of the European Union. However, the creation of these unitary European titles did not mean the abolition of the national protection systems. As the Community Trade Mark Regulation says: “national trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level.” As the other volumes in this series, this book provides for an article by article commentary of the provisions of the European instruments concerning trade marks – Community Trade Mark Regulation (CTMR) and Trade Mark Harmonisation Directive (TMD) – and those concerning designs – Community Design Regulation (CDR) and Design Harmonisation Directive (DD). These instruments are being interpreted by the Court of Justice of the European Union. Such interpretation is achieved through two channels. One are the prejudicial questions referred to the Court of Justice by national courts in the Member States who are confronted with questions regarding the interpretation of European law, in accordance with art. 267 TFEU. The other, which obtains increasing importance, is through appeals from decisions rendered by the Office for the Harmonisation of the Internal Market (OHIM), who is responsible for the registration of CTMs and CDs. *Case law.* No case law later than March 1, has been referred to.

**Trade mark law. (a) Harmonisation.** Harmonisation of trade mark law is achieved through Directive 2008/95 (EC) of 22 October 2008 to approximate the Laws of the Member States relating to Trade Marks (“TMD”). This Directive is a codified version of the First Directive 89/104/EC of 21 December 1988 as amended. The Directive did not aim at full harmonisation. Only the most relevant issues of trade mark law were harmonised such as the definition of a mark, grounds for refusal of registration, scope of protection, limitations, invalidation and cancellation. Other aspects such as procedural issues are left to the Member States. The TMD only relates to registered trade marks. Unregistered rights, which are recognised in the laws of many member states, are not touched by the TMD and continue to be governed by national law. **(b) Community Trade Mark.** The CTM is governed by Council Regulation (EC) 207/2009 of 26 February 2009 on the Community

## Introduction

trade mark, a codified version of Council Regulation (EC) 40/94 as amended. Prior to the codification, the most important changes to the CTM system came about in the so-called “CTM Reform” embodied in Council Regulation (EC) 422/2004 of 19 February 2004. **(c) Possible revision.** In 2009, the Commission undertook to have a study made of the overall functioning of the European trade mark system. This task was given to the Max Planck Institute in Munich and resulted in the so-called Study on the Overall Functioning of the European Trade Mark System, published in March 2011. This document will be a source for the European Commission to propose amendments to both the TMD and the CTMR. We have to wait and see when such proposals will be made.

**Design law. (a) Harmonisation.** Harmonisation of design law was achieved through Directive 98/71/EC of 13 October 1998 (“DD”). The scope of the DD concerns only registered designs and provides for the substantive provisions of design protection. In particular procedural provisions are left to the Member States. The DD does not touch upon other systems of protection of industrial designs, such as copyright, utility design protection or unfair competition. Many member states do have particular provisions in their laws or developed in case law on the basis of which protection of the outward appearance of designs is given. For example, German and Dutch law protect designs against confusing slavish imitation. In The Netherlands and the UK, designs are also protectable under copyright law. This is entirely left to the national law. **(b) Community Design.** The CD was introduced by Council Regulation (EC) 6/2002 of 12 December 2001. It is interesting to note that the CDR did not only introduce a registered CD but also, albeit for a much shorter duration, an unregistered design right. The latter was introduced to serve the needs of sectors of industry that develop large numbers of designs for products with a short market life.

## PRACTICAL NOTES FROM THE EDITORS

All relevant legal texts referred to in this commentary are abbreviated as defined in the list of abbreviations at the end of this book. Within a legal instrument, the one that is being commented on is not indicated jointly with the article number. For example, in the context of the CTMR, article numbers are indicated without adding “CTMR”. Conversely, where in the context of the CTMR, provisions of the CDR or the TMD etc. are commented on, that is indicated. Similarly, where it is obvious that references to implementing provisions refer to the CTMIR or the CDIR, that is not expressly indicated; in any event those two instruments are easy to distinguish in that the CTMIR has “rules” and the CDIR “articles”.

Throughout the commentary, reference is made to the provisions and corresponding article numbers as they currently stand. Similarly, the General Court is always referred to as “GC” independently of whether a decision might have been issued while it was still called “Court of First Instance” or “CFI”. And the Court of Justice of the European Union is referred to as “CJ” throughout.

All case law is indicated using short references. In the case of GC decisions, the short references generally refer to the trade marks or design(s) at issue, followed by “(GC)”. CJ judgments are normally referred to using the name of the party or parties, as is most common for the decision in question, followed by “(CJ)”. Decisions of the Boards of Appeal of OHIM are indicated much like GC decisions, followed by “(BoA)”. National decisions are quoted using a common short reference and indicating the country where the deciding court is situated in parentheses. This was done to avoid case law references becoming unwieldy and hindering the flow of the lecture. At the end of the book there is a full list of short references and corresponding full references.

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**COUNCIL REGULATION (EC) No 207/2009**

***(Community Trade Mark Regulation)***

**of 26 February 2009 on the Community trade mark (codified version)  
(Text with EEA relevance)**

**The Council of the European Union,**

**Having regard to the Treaty establishing the European Community,  
and in particular Article 308 thereof,**

**Having regard to the proposal from the Commission,**

**Having regard to the opinion of the European Parliament,<sup>1</sup>**

**Whereas:**

**(1) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark<sup>2</sup> has been substantially amended several times.<sup>3</sup> In the interests of clarity and rationality the said Regulation should be codified.**

**(2) It is desirable to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion by completing an internal market which functions properly and offers conditions which are similar to those obtaining in a national market. In order to create a market of this kind and make it increasingly a single market, not only must barriers to free movement of goods and services be removed and arrangements be instituted which ensure that competition is not distorted, but, in addition, legal conditions must be created which enable undertakings to adapt their activities to the scale of the Community, whether in manufacturing and distributing goods or in providing services. For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Community, regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.**

**(3) For the purpose of pursuing the Community's said objectives it would appear necessary to provide for Community arrangements for trade marks whereby undertakings can by means of one procedural system obtain Community trade marks to which uniform protection is**

1. OJ C 146 E, 12.6.2008, p. 79.

2. OJ L 11, 14.1.1994, p. 1.

3. See Annex I.

given and which produce their effects throughout the entire area of the Community. The principle of the unitary character of the Community trade mark thus stated should apply unless otherwise provided for in this Regulation.

(4) The barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform Community law directly applicable in all Member States.

(5) Since the Treaty has not provided the specific powers to establish such a legal instrument, Article 308 of the Treaty should be applied.

(6) The Community law relating to trade marks nevertheless does not replace the laws of the Member States on trade marks. It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as Community trade marks. National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level.

(7) The rights in a Community trade mark should not be obtained otherwise than by registration, and registration should be refused in particular if the trade mark is not distinctive, if it is unlawful or if it conflicts with earlier rights.

(8) The protection afforded by a Community trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin, should be absolute in the case of identity between the mark and the sign and the goods or services. The protection should apply also in cases of similarity between the mark and the sign and the goods or services. An interpretation should be given of the concept of similarity in relation to the likelihood of confusion. The likelihood of confusion, the appreciation of which depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified, should constitute the specific condition for such protection.

(9) It follows from the principle of free movement of goods that the proprietor of a Community trade mark must not be entitled to prohibit its use by a third party in relation to goods which have been put into circulation in the Community, under the trade mark, by him or with his consent, save where there exist legitimate reasons for the proprietor to oppose further commercialisation of the goods.

(10) There is no justification for protecting Community trade marks or, as against them, any trade mark which has been registered before them, except where the trade marks are actually used.

(11) A Community trade mark is to be regarded as an object of property which exists separately from the undertakings whose goods

or services are designated by it. Accordingly, it should be capable of being transferred, subject to the overriding need to prevent the public being misled as a result of the transfer. It should also be capable of being charged as security in favour of a third party and of being the subject matter of licences.

(12) Administrative measures are necessary at Community level for implementing in relation to every trade mark the trade mark law created by this Regulation. It is therefore essential, while retaining the Community's existing institutional structure and balance of powers, to provide for an Office for Harmonisation in the Internal Market (trade marks and designs) which is independent in relation to technical matters and has legal, administrative and financial autonomy. To this end it is necessary and appropriate that that Office should be a body of the Community having legal personality and exercising the implementing powers which are conferred on it by this Regulation, and that it should operate within the framework of Community law without detracting from the competencies exercised by the Community institutions.

(13) It is necessary to ensure that parties who are affected by decisions made by the Office are protected by the law in a manner which is suited to the special character of trade mark law. To that end provision is made for an appeal to lie from decisions of the examiners and of the various divisions of the Office. If the department whose decision is contested does not rectify its decision it is to remit the appeal to a Board of Appeal of the Office, which is to decide on it. Decisions of the Boards of Appeal are, in turn, amenable to actions before the Court of Justice of the European Communities, which has jurisdiction to annul or to alter the contested decision.

(14) Under the first subparagraph of Article 225(1) of the EC Treaty the Court of First Instance of the European Communities has jurisdiction to hear and determine at first instance the actions referred to in particular in Article 230 of the EC Treaty with the exception of those assigned to a judicial panel and those reserved in the Statute to the Court of Justice. The jurisdiction which this Regulation confers on the Court of Justice to cancel and alter decisions of the Boards of Appeal should accordingly be exercised at first instance by the Court.

(15) In order to strengthen the protection of Community trade marks the Member States should designate, having regard to their own national system, as limited a number as possible of national courts of first and second instance having jurisdiction in matters of infringement and validity of Community trade marks.

(16) Decisions regarding the validity and infringement of Community trade marks must have effect and cover the entire area of the Community, as this is the only way of preventing inconsistent decisions on the part of the courts and the Office and of ensuring that the unitary character of Community trade marks is not undermined. The provisions of Council

**Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>4</sup> should apply to all actions at law relating to Community trade marks, save where this Regulation derogates from those rules.**

**(17) Contradictory judgments should be avoided in actions which involve the same acts and the same parties and which are brought on the basis of a Community trade mark and parallel national trade marks. For this purpose, when the actions are brought in the same Member State, the way in which this is to be achieved is a matter for national procedural rules, which are not prejudiced by this Regulation, whilst when the actions are brought in different Member States, provisions modelled on the rules on *lis pendens* and related actions of Regulation (EC) No 44/2001 appear appropriate.**

**(18) In order to guarantee the full autonomy and independence of the Office, it is considered necessary to grant it an autonomous budget whose revenue comes principally from fees paid by the users of the system. However, the Community budgetary procedure remains applicable as far as any subsidies chargeable to the general budget of the European Communities are concerned. Moreover, the auditing of accounts should be undertaken by the Court of Auditors.**

**(19) Measures necessary for the implementation of this Regulation should be adopted, particularly as regards fees regulations and an Implementing Regulation, in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission,<sup>5</sup>**

**Has adopted this Regulation:**

## **TITLE I. GENERAL PROVISIONS**

### **[Community trade mark]**

#### **Article 1**

**A trade mark for goods or services which is registered in accordance with the conditions contained in this Regulation and in the manner herein provided is hereinafter referred to as a ‘Community trade mark’.**

**A Community trade mark shall have a unitary character. It shall have equal effect throughout the Community: it shall not be registered, transferred or surrendered or be the subject of a decision revoking the rights of the proprietor or declaring it invalid, nor shall its use be**

4. OJ L 12, 16.1.2001, p. 1.

5. OJ L 184, 17.7.1999, p. 23.

**prohibited, save in respect of the whole Community. This principle shall apply unless otherwise provided in this Regulation.**

**1. Basic principles.** The Community trade mark (CTM) system established by the Community Trade Mark Regulation (CTMR) is a system limited to protection through registration (arts. 1(1) and 6). The system is governed by several basic principles, one of which – the unitary character of CTMs – is expressed in art. 1(2). The other principles are the principle of autonomy and the principle of coexistence. **(a) Autonomy.** Autonomy means that CTMs are governed by a separate and autonomous legal order – the CTMR and legislation based on it, such as the Community Trade Mark Implementing Regulation (CTMIR), as well as the rules and principles of Community law – independently of any national rules, regulations or principles. National law applies only to the extent that the CTMR expressly or implicitly refers to such national laws. This is the case throughout the CTMR, the most prominent examples being the relative grounds for refusal or invalidity provided for in art. 8 and art. 53, the reference to national law in dealing with CTMs as objects of property in art. 16, and the application of national law in cases of infringement as provided for in art. 14 and in Title X (art. 94 et seq.). The case law of the GC/CJ has established the principle that the autonomous character also means that OHIM and the Court itself are not required to take into account decisions of national courts involving the same or similar marks (e.g. *Electronica* (GC)). This corresponds to similar statements of the CJ regarding the extent to which the authorities in one Member State must take into account the decisions of competent authorities in other Member States. The CJ has held in *Perwoll Bottle* (CJ) that the fact that the same mark has been registered in another Member State may be taken into account, while decisions regarding similar marks ‘can have no bearing on the examination by the competent trade mark registration authority of another Member State of the distinctive character of a similar mark for goods or services similar to those in respect of which the first trade mark was registered’. The CJ hereby referred to its decision of the same date *Postkantoor* (CJ) para. 44. The CJ confirmed this approach in its decisions *VolksHandy & Schwabenpost* (CJ). None of these statements is convincing. Rather, in a harmonised European trade mark system the same mark should receive the same treatment, as a matter of principle, and similar cases should be dealt with in the same manner in all jurisdictions. **(b) Coexistence.** The principle of coexistence means that the CTM system and the national trade mark systems of the Member States coexist – the CTM system has neither replaced the national systems (as was the case with the unification of Benelux trade mark law in the 1960s) nor does the CTM system take precedence over the national systems – each is of the same value. The Community legislator chose, as is made expressly clear in the sixth recital of the CTMR, that the decision whether to apply for and register a CTM or a national mark is entirely a matter for the individual applicant. The enforcement of national trade mark rights and other rights is

not in any way impeded by the application or registration of a (later) CTM (art. 110), and national rights may be invoked in the proceedings provided by the CTMR against later CTMs (opposition as provided for in art. 8 and art. 41 and 42, and invalidity as provided for in art. 53 and art. 56 and 57). Just as national rights are relative grounds for refusal or invalidation, CTMs are relative grounds for refusal or invalidation in all of the Member States vis-à-vis later trade mark rights or other rights (art. 4 TMD). Coexistence also means that the same mark may be protected as a CTM and as a national mark. There is no prohibition of double protection. The coexistence principle is the most prominent example of the many interfaces which exist between the CTM system and the IP systems of the Member States.

**2. Rights acquired through registration (para. 1).** The CTM system is a system of trade mark rights acquired through registration (art. 6). Unregistered rights are recognised only to the extent that they are recognised in the legal systems of the Member States. They are taken into account as earlier rights (relative grounds for refusal or invalidation).

**3. Unitary character (para. 2).** Art. 1(2) provides that CTMs have a unitary character, unless the CTMR provides otherwise. The most prominent expressions of the principle of the unitary character are found in art. 7(2) and in arts. 8 and 53. Under art. 7(2), a CTM application must be rejected even if one of the absolute grounds for refusal exists only in part of the Community. For example, a mark which is descriptive in one of the official languages of the Community must be refused (e.g. *Options* (GC)). Under arts. 8 and 53, a CTM application must be rejected or a registration must be declared invalid if a conflicting earlier right exists in a single Member State. Such rejected CTM applications or invalidated registrations may be converted, but conversion is only possible (rule 45(4) CTMIR) into national trade mark applications in those Member States where no obstacle exists (art. 112 et seq.). Where an earlier CTM is invoked as a basis for an opposition or invalidation, the existence of likelihood of confusion in a part of the Community is sufficient to defeat the later CTM. Art. 1(2) also expressly provides that a CTM may not be transferred or declared invalid or surrendered, or that its use may not be prohibited, except for the whole Community, unless otherwise provided. There are no exceptions as regards refusal, revocation, invalidation, surrender or transfer. However, as regards transfer, a similar effect may be obtained by granting territorially limited licences, which may also be exclusive (art. 22). As regards the prohibition of use, there is an obvious, expressly provided exception, found in arts. 110 and 111, which permits the prohibition of the use of a mark protected as a CTM in the territory where an earlier right is protected or where some other right to claim injunctive relief is available. Art. 165(5) refers to these provisions when safeguarding the rights of owners of prior rights in acceding 'new' Member States. In an infringement proceeding based on a CTM against the use of a later mark that is also protected as a CTM, the claimant may be forced to limit the right to relief to the country

where the litigation is taking place when the jurisdiction of the CTM court is based on the 'place of the wrong' (art. 98(2)). Also the claimant may limit his claim to a particular territory even if the court has jurisdiction for all of the territory of the Community. According to some opinions, a limitation of the effect of a CTM may also occur when a conflict with a later sign or mark can be found to exist only in a part of the Community, for example when likelihood of confusion exists only in a particular language, or when the reputation required for relief under art. 9(1)(c) exists only in a part of the Community. Under a strict reading of art. 1(2), such a limitation of the effect of a CTM is not justified.

## [Office]

### Article 2

**An Office for Harmonisation in the Internal Market (trade marks and designs), hereinafter referred to as 'the Office', is hereby established.**

**The Office.** Art. 2 establishes the office for administering the CTM system. The office, the European Union's trade marks and designs office, has the official name Office for Harmonisation in the Internal Market (Trade Marks and Designs), and is popularly known under its acronyms (OAMI, HABM, OHIM, OHMI, UAMI). The name was chosen at the special summit in October 1993 which decided the location of the office (Spain), and expresses that the office's tasks are not limited to trade marks but also include designs, and perhaps in future other tasks as well. The CDR entered into force in 2003. Provisions relating to the functioning of the Office are found in Title XII (art. 111 et seq. CTMR). In addition to OHIM, the CTM courts provided for in art. 91 are competent to declare registered CTMs invalid or revoked in proceedings regarding a counterclaim brought by a defendant in an infringement action.

## [Capacity to act]

### Article 3

**For the purpose of implementing this Regulation, companies or firms and other legal bodies shall be regarded as legal persons if, under the terms of the law governing them, they have the capacity in their own name to have rights and obligations of all kinds, to make contracts or accomplish other legal acts and to sue and be sued.**

**1. Entitlement to act before the Office.** Parties to proceedings before the office must be either natural persons or legal persons. Entities that are not legal persons lack the required personality to become party to proceedings before the Office. For example, art. 5 provides that all natural or legal persons