

# Allegro without Vivaldi: Trademark Protection, Freedom of Speech, and Constitutional Balancing

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*Allegro* – Trademark protection – Freedom of speech vs. intellectual property – Polish Constitution – European Convention on Human Rights – Balancing of competing values – Constitutionally permissible limits on freedom of expression – Comparison with case-law of United States Supreme Court – ‘Categorical’ approach vs. ‘balancing’ approach

‘... trademark rights have expanded beyond the scope that is justified by their rationales. Since this extension has taken such forms that it may ... interfere with core areas of social, cultural, and political discourse, ... it may be necessary to limit trademark rights where they disproportionately impair the freedom of expression of the third parties’.<sup>1</sup>

‘The Constitution cannot oblige the dour to laugh. It can, however, prevent the cheerless from snuffing out the laughter of the blithe spirits among us. ... And I can see no reason in principle why a joke against the government can be tolerated, but one at the expense of what used to be called Big Business, cannot’.<sup>2</sup>

## INTRODUCTION

In a cold early spring 2010, passers-by coming in and out of a busy subway station in Warsaw, Poland, could see a group of young people handing out leaflets: at first sight, nothing unusual in the city of newly discovered capitalism. However, the leaflets were unusual: they contained a big logo of the most popular Polish auction

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<sup>1</sup>W. Sakulin, *Trademark Protection and Freedom of Expression* (Kluwer Law International 2011) p. 91.

<sup>2</sup>*Laugh It Off Promotions. South African Breweries International*, Judgment of 27 May 2005, Case CCT 42/04, para. 109 (Sachs, J., concurring).

*European Constitutional Law Review*, 8: 456–492, 2012

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doi:10.1017/S1574019612000296

website, called Allegro, the Polish answer to e-Bay;<sup>3</sup> yet, the logo was noticeably deformed: the two 'L' letters in the logo were replaced by letters 'SS' in a font identical to the clearly recognizable symbol of the murderous Nazi paramilitary formation. So it was 'A-SS-egro': an Allegro with a Nazi touch.

The accompanying text explained that it was a protest against Allegro allowing users to buy and sell Nazi gadgets and memorabilia. The leaflets were part of a broader action under the slogan 'No More Nazism on Allegro!' and was carried on by a loose coalition of NGOs led by a group called the 'Foundation Green Light' (henceforth, the Foundation). This campaign had been run already for some time, and the Foundation complained that Allegro proved to be recalcitrant in the face of various letters and other communications addressed to QXL Poland (Allegro's owner; for the sake of brevity, it will henceforth be referred to as Allegro) urging it to block and remove from its websites any offers of sale of 'Nazi' objects and paraphernalia. These included cards with the swastika and Hitler's image, CDs with songs described by the Foundation as 'neo-Nazi', etc. Allegro would respond in a rather meek way, basically saying that, legally speaking, it could do nothing to remove these items from its website. The leaflet hand-out was a reaction by the Foundation to this recalcitrance.

In October 2010 Allegro sued the Foundation: the basis of its suit was the infringement of its protected trademark in a way which, according to Allegro, breached the good name of the company. By absorbing the Nazi symbol SS into the name of the company, the distorted trademark was alleged to breach Allegro's intellectual property (IP) rights, both copyright- and trademark-related, and generally caused a possible loss of confidence of customers. Allegro requested a temporary injunction until the judgment on merits, by enjoining the Foundation to remove and destroy all copies containing the distorted trademark, and to issue a statement of apology. In January 2011 the court of first instance dismissed the claim, on technicalities, but on 5 May 2011, the Court of Appeal reversed this judgment and issued a temporary injunction, as requested by Allegro.<sup>4</sup>

The matter raises a fascinating set of issues related to the balancing of competing values: those which are behind trademark protection and those which support freedom of speech. It is the first case of this kind in Poland, and one of few around the world. In this article, I will discuss this case as an instance of constitutional balancing, and will suggest the approach that a balancing judge (or a commentator who would like to echo the judge's reasoning) should take. In this, I will try

<sup>3</sup> Allegro boasts today 12.5 million members of the 'Allegro community' in Poland, *see* <[http://allegro.pl/country\\_pages/1/0/marketing/about.php](http://allegro.pl/country_pages/1/0/marketing/about.php)> (visited 1 Aug. 2012). It also claims that it has over 1000 staff, 12.5 million users, and that since its commencement of activities in 1999 until the end of 2010, approximately 162 million items have been sold and purchased on Allegro.

<sup>4</sup> The judgment on merits has not been yet handed down at the time of writing the final draft of this article (Sept. 2012).

to avoid legal technicalities related to specific details of Polish law, both constitutional and intellectual property law, because I would like to suggest an approach which may be of a universal validity, at least in the countries with constitutionalized freedom of speech provisions.

The balancing at stake is (at first blush) between two types of legal (including constitutional) claims: each party pleads a constitutional right or value against the other. The Foundation's claim is based on the right to freedom of speech, as expressly provided by both the Polish Constitution (Article 54.1) and the European Convention of Human Rights (Article 10). Allegro's claims are based also on constitutional rights to protection of property, recognized not only in the Polish Constitution (Article 64) but also in the ECHR (Article 1 of the 1<sup>st</sup> Protocol) and in the EU Charter of Fundamental Rights (Article 17(2)). Insofar as the Foundation's actions infringed Allegro's rights – this would come under the Polish Constitution's grounds for the restriction of freedom of speech (Article 31.3) and also under the European Convention's law insofar as it permits (in Article 10.2) the restriction of exercising of freedom of speech based on the rights of others. Hence, a full analysis of the balancing at stake in this case must include (1) an analysis of the rights claimed by the speaker, (2) an analysis of the trademark owner's rights, and (3) the comparison, weighing and balancing of these two rights, insofar as we find them *prima facie* valid. This is how this article will be structured.

Two preliminary caveats. First, in this article I do not take a stand on the question of the appropriateness of the availability of Nazi objects for sale, on auction sites or anywhere else. Different legal systems deal with this problem differently, and the question received some notoriety in legal circles recently in the context of a 2006 case before the Ninth Circuit Court of Appeals in the United States, in connection with the availability of such objects on a US-based auction site which also operated in France, where the sale of such artefacts is criminally prohibited.<sup>5</sup> The substance of the question – whether such objects should be legally available – is irrelevant to the question of the strength of protection of freedom to urge non-availability of such objects in public circulation.

Second, and more generally, this article has a normative rather than positive-legal aspiration. I am not concerned about whether, under the best interpretation of the relevant legal rules of any given legal system, the scenario described here (the Allegro-Foundation affair) is or is not protected by constitutional or other legal rules of freedom of expression against the rules of trademark protection. This

<sup>5</sup> *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*. 433 F.3d 1199, 1201 (9<sup>th</sup> Cir. 2006). For a good recent discussion, see A.J. Ziaja, 'Free Speech in the Balance: An Examination of *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* for its Bearing on Conflict of Laws, Global Free Speech, and the International Regulation of the Internet', <[www.bepress.com/gj/vol11/iss2/art5](http://www.bepress.com/gj/vol11/iss2/art5)>, visited 27 Dec. 2011.

is not an article on the currently valid intellectual property law in Poland, or anywhere else for that matter. What I am interested in is whether, under our most plausible interpretation of the legitimate interests behind the freedom of expression on the one hand and trademark protection on the other, such and similar actions as those related to *Allegro* should be constitutionally protected. When I use various legal provisions and legal decisions – and I use them quite eclectically throughout the article – I treat them not so much as the basis for ascertaining the content of the currently authoritative doctrine and valid law in a certain legal system, but rather as an illustration of a convincing normative position about the proper balancing of competing values. (In any event, making any descriptive generalizations would be extremely risky because trademark protection regimes are not uniform internationally).

Naturally, a distinction between a positive (doctrinal) and normative (moral) approach is not easy to draw, especially in constitutional law, which ‘fuses legal and moral issues, by making the validity of a law depend on the answer to complex moral problems’.<sup>6</sup> The interpretation of vague and intrinsically value-laden legal provisions, even if aimed at establishing a proper doctrinal answer to a question about the valid law, is inevitably normative. And it is not only a constitution which requires ‘a moral reading’<sup>7</sup> but also lower-level law, including intellectual property law (specifically the law of trademark protection), because the scope of the protected rights, whether constitutional or statutory, depends on the moral strength of the rationales for protecting these rights – as will be argued in this article. But the point of my second caveat is about an aspiration: my aspiration in this article is normative and not doctrinal, and while it does not necessarily make it immune to any charges of plain legal errors, it explains why no single legal system is described here in depth, either on the freedom of expression or trademark protection side, but illustrations are taken from various jurisdictions which have something interesting and revealing to tell us about the balance of interests discussed in this article.

#### *ALLEGRO MOLTO E VIVACE: A FREEDOM TO ALTER TRADEMARKED SIGNS?*

The Foundation’s action was a typical, one might say paradigmatic, communicative action – an exercise of its freedom of speech – by expressing publicly its negative opinion about the availability, on *Allegro*, of certain objects which are alleged by the Foundation to be related to Nazism. Whether the criticism is justified or not is not determinative of the strength of its constitutional protection: the (putative)

<sup>6</sup>R. Dworkin, *Taking Rights Seriously* (Duckworth 1977) p. 185.

<sup>7</sup>See R. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press 1996).

falsity is not one of the legitimate grounds for restriction of freedom of speech. (Unless its falsity would constitute a criterion of assessing its defamatory character, which it evidently does not have and was not alleged by Allegro.) Constitutional protection is not a function of truth or falsity of a publicly made allegation. What *is* relevant for the strength of constitutional protection is whether an allegation concerns matters of public interest.

The case-law of the European Court of Human Rights (ECtHR) leaves no doubt that speech concerning public and political issues is entitled to particularly strong protection – especially when it concerns an opinion about public officials.<sup>8</sup> This is not directly relevant to the *Allegro* case. Nevertheless, a subject matter of the Foundation's opinions belongs to the category of most controversial and publicly significant issues. There is no ground to draw a distinction, in terms of the strength of protection, between 'political' matters (understood, as is the case in the ECtHR's vocabulary, assessments of public officials) and other matters of public interest. As it said in *Thorgeirson v. Iceland*,<sup>9</sup> 'there is no warrant in [the Court's] case-law, for distinguishing, in the manner suggested by the [Iceland's] Government, between political discussion and discussion of other matters of public concern'.<sup>10</sup> It seems incontestable that the question about public and legal availability of Nazi objects in public circulation is of utmost social importance: it belongs to a vast set of issues about how to deal with the unwholesome past, and is part of the category of issues to which also belong matters such as whether the use of Nazi symbols (such as swastika) should be tolerated, whether books such as *Mein Kampf* should be banned, and whether Holocaust denial should be criminally punished. These matters are of the highest public importance and there are few other matters which engage public excitement to a similar degree in many countries; this is certainly the case in Poland.

Following the lead of US First Amendment jurisprudence, political speech is understood broadly as speech which is 'both intended and received as a contribution to public deliberation'<sup>11</sup> and is considered to belong to the upper echelon of

<sup>8</sup> See e.g., *Lingens v. Austria*, A.103 (1986) 8 EHRR 107, paras. 41-43; *Bowman v. UK* (1998) 26 EHRR 1 paras. 42-43. See also, more recently, *Steel & Morris v. the United Kingdom*, Appl. No. 68416/01, judgment of 15 Feb. 2005, para. 88: 'The Court has long held that "political expression", including expression on matters of public interest and concern, requires a high level of protection under Article 10 ...'.

<sup>9</sup> *Thorgeirson v. Iceland* A.239 (1992) 14 EHRR 843.

<sup>10</sup> *Thorgeirson v. Iceland*, para. 64. The Government of Iceland sought (unsuccessfully) to draw a distinction between political expression and the discussion of other matters of public interest claiming that the Article 10 did not accord the latter category of expression the same breadth of protection as the former.

<sup>11</sup> C.R. Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993), p. 130, italics removed. The 'debate on public issues' test has been established by the Supreme Court of the US with particular clarity in *New York Times v. Sullivan*, 376 US 255, 270 (1964).

speech as far as the degree of constitutional protection is concerned. In Europe as well, under the rules of the European Convention on Human Rights (ECHR), there has been a growing acceptance of the idea that the level of constitutional protection is a function of the subject matter of speech, with speech on public and political matters belonging to the top of the hierarchy of protection.<sup>12</sup> This has been explained by the ECtHR as related to the goals of protection of freedom of expression linked to ‘the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.<sup>13</sup> By analogy, if the criticism of public authorities triggers the highest degree of protection, so must the criticism of private powers. As an author of a recent book on freedom of speech and trademark protection put it,

The freedom to control and criticise power must also imply a freedom to criticise the symbols of power as they are the representatives of that power. Next to state symbols or religious symbols, power in a democracy may also be represented by private actors (in particular by their trademarks). A logical consequence is that the freedom to control and criticise private power implies a freedom to criticise the symbols of private power, i.e. trademarks.<sup>14</sup>

Of course, not all speech, including speech on political and public matters, enjoys absolute constitutional protection. In contrast to the US First Amendment, with regards to which it has been the role of the Supreme Court to identify the categories of speech which can be legitimately restrained, in the European system of free expression there are some explicitly enumerated – both in the ECHR and in the most national constitutional documents – grounds for constitutionally permissible limits on freedom of expression. Based on the ECHR, freedom of expression may be subject to restrictions on several grounds, including ‘the protection of the reputation or rights of others’, which is the only *prima facie* applicable ground of restriction in the case considered in this article.<sup>15</sup> This is conditional upon such restriction being ‘prescribed by law’ and ‘necessary in a democratic society’. Also

<sup>12</sup>This has also been established by a number of national constitutional courts in Europe which are too numerous to cite here: a court which consolidated this doctrine in a representative way is the German Federal Constitutional Court (*see, e.g., Lüth case*, BVerfG 15 Jan. 1958).

<sup>13</sup>*Handyside v. United Kingdom* A.24 (1976) 1 EHHR 737 para. 49.

<sup>14</sup>Sakulin, *supra* n. 1, p. 114.

<sup>15</sup>Art. 10(2) ECHR. The other grounds are national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals, preventing the disclosure of information received in confidence, and maintain the authority and impartiality of the judiciary. As this list suggests, none of these grounds may apply in this case. Perhaps someone may consider ‘protection of morals’ as a candidate for such a ground but this is not so: it has been interpreted (in Poland and elsewhere) restrictively, as a rule against indecency. A broader interpretation would render this proviso capable of restricting any speech to which someone might object, on moral grounds.

the national constitution applicable to the *Allegro* case (i.e., Constitution of Poland) allows, echoing the ECHR, the restriction of the exercise of speech for the sake of the ‘liberties and rights of others’ (Article 31.3) – this being conditional upon meeting the requirement of a statutory form of restriction, of ‘necessity in a democratic state’, and of non-infringement of the ‘essence’ of a given right (i.e., the right of freedom of speech).

So the crucial point is: has the action of the Foundation infringed the rights of Allegro? To consider this, we must inquire into the nature of these rights, and even if we come to the conclusion that some legitimate rights of the trademark owner indeed have been infringed (something that will be the subject-matter of the argument in Part ‘*Scherzo*’), they will need to be compared and weighed against the alleged rights of the speaker (the Foundation). In particular, it needs to be ascertained whether such restriction of a right of the speaker, for the sake of the right of trademark owner, does not affect the ‘essence’ of the constitutional right at stake.

Before we consider this point, however, it may be asked, as one of the preliminary issues, whether the *form* and *manner* of speech, chosen by the Foundation, benefit from constitutional protection, alongside its *substance*. The substance can be captured, after all, by a statement such as:

We are strongly opposed to the availability of Nazi paraphernalia and objects online and we urge the online shop Allegro to make it impossible to buy and sell such objects in its service. If the law allows it, we advocate a change of the law, and if the law makes it impossible for Allegro to intervene in private transaction, we would like to see *that* law changed as well.

Without a doubt, no one’s constitutional rights would be even presumptively violated by such a public statement. It would be an example of a rational contribution to public debate; it would no doubt be deemed controversial, but perfectly legitimate in a civilized and democratic society. There is no need to deface the Allegro trademark and use the Nazi characters in order to make these points, the argument *may* run.

But this is a non-starter. A distinction between the form and the substance of the expression, for the purpose of the intensity of protection, is indefensible, in common sense and in law.<sup>16</sup> A quick common-sense reflection suggests that the content is inseparable from the form: an angry yell or a biting cartoon carry different meanings than a calm, analytically precise statement. In particular, an emotional, exaggerated or derisive *form* of expression conveys *content* about the attitude of the speaker; this is information which would be lost in an analytically

<sup>16</sup>As much of the argument which will follow will touch upon intellectual property law, note that the distinction between a substance and manner (form) of expression is different from that between the idea and its expression, which is a central distinction in copyright law.

precise and dispassionately worded expression. In law, the idea of protection for the form (including, the emotional or distasteful) as well as the substance has been well accepted not only in the US, where a *locus classicus* of this principle is in *Cohen v. California*,<sup>17</sup> but also in the European case-law on freedom of speech. The ECtHR emphasized that Article 10, protection of freedom of expression, is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that ‘offend, shock or disturb the State or any sector of the population’.<sup>18</sup> In another decision, made with regard to freedom of the press but applicable, *mutatis mutandis*, to our issue as well, the ECtHR observed that ‘journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation’.<sup>19</sup> This inseparability of form and content has also been recognized at a national constitutional level, including Poland. As the Polish Constitutional Tribunal once said:

Public debate is often coloured by intense emotions, and it is connected with the use of concepts and descriptions which are deliberately exaggerated. ... There can be no free, open, democratic debate in a situation in which the level of emotions and the ‘roughness’ of the language used were to be measured against some government-sanctioned standard to be determined in a formalized and bureaucratic way by public authorities.<sup>20</sup>

One other function of exaggerated or shocking expressions (in addition to carrying a unique content which cannot be expressed otherwise) is that they are attention-grabbers. This is a content-neutral function, but I would say, a function which is built into a general freedom of speech which should, as I had argued at some length elsewhere, also include a limited right to be heard, and thus an opportunity to access the target audience.<sup>21</sup> This also includes commercial speech and would protect shocking and offensive advertisements such as (in-)famous Benetton advertisements, e.g., the one showing the naked behind of a person with the stamp ‘HIV positive’.<sup>22</sup> If shocking expressions may be justified under this function in the realm of *commercial* speech, *a fortiori* they should be protected in the area of speech on social and political matters.

<sup>17</sup> *Cohen v. California* 403 US 15 (1971).

<sup>18</sup> *Handyside*, *supra* n. 13, para. 49.

<sup>19</sup> *De Haas & Gijssels v. Belgium*, Appl. No. 19983/92, judgment of 24 Feb. 1997, para. 46. Elsewhere, in the context of satire in art, the ECHR said: ‘satire is a form of artistic expression and social commentary and by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate’, *Vereinigung Bildener Künstler v. Austria*, ECtHR 25 Jan. 2007, para. 33.

<sup>20</sup> Decision P 3/06 of 11 June 2006, part 8.

<sup>21</sup> W. Sadurski, *Freedom of Speech and Its Limits* (Kluwer 1999), p. 85-98.

<sup>22</sup> See Sakulin, *supra* n. 1, p. 130.

Such was indeed the character of a deformed ‘Allegro’ sign: the speech by the Foundation was a harsh, mordant and hyperbolic expression of an opinion about the dangers of allowing the public circulation of Nazi and neo-Nazi objects. Whether the Foundation could have chosen a different way of conveying the same message is immaterial; the form they chose was the best way for it to mix rational debate with expression of its emotions, which are incapable of being captured by a cold, detached argument.<sup>23</sup> The Foundation was *angry*, and it had a communicative right to convey this anger at Allegro publicly.<sup>24</sup>

At the same time, it is unlikely that any reasonable person would read the leaflets as accusing the online shop of harbouring Nazi sentiments: the obvious critical message – though a very forceful and tactless one – was a critique of Allegro making financial profits from a trade with objects which are despicable to the critic. (It should be recalled that the deformed Allegro logo was accompanied by a text explaining the nature of the objections against the online trader, and anyone picking up the leaflet with the deformed logo, if initially harbouring any doubts about the message, would quickly and easily find out what the nature of the Foundation’s criticism was). Whether the speaker is right – whether indeed the online auction site owner has or should have a duty to ban the trade in such objects, or whether, conversely, tolerating the trade in such objects is the right price to be paid for commercial freedom or freedom of speech, etc., – is irrelevant in evaluating the constitutional protection for a critique.<sup>25</sup> What matters is that

<sup>23</sup> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. ... We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated’, *Cohen v. California*, 403 US 15, 26 (1971).

<sup>24</sup> At this point I should make a note about the use of the term ‘parody’ later in the article, to characterize the uses of trademarks in a deformed way, such as in Allegro. I will be following the standard use of the word ‘trademark parody’ in the case-law and IP literature, especially in the US, but I should note that, under ordinary language standards, it is arguably a mis-characterization to call the Foundation’s action against Allegro ‘parody’, because the word ordinarily suggests a degree of light-hearted humour (that is, poking fun at symbols, making jokes, etc.) The Foundation’s actions were nothing of the sort; in fact, they expressed anger and a depth of moral emotion in response to what it saw as a matter of great concern. So, to characterize their actions as ‘parody’ may be seen as trivializing its message. I will be using the word ‘parody’ in a technical-legal sense, broader than satire, humour and comic effect of the disjunction between the parody and the parodied object, *see* M. Spence, ‘Intellectual Property and the Problem of Parody’, 114 *LQR* (1998) p. 594 at p. 594-595.

<sup>25</sup> In US First Amendment jurisprudence it has been long established that “The constitutional protection does not turn upon “the truth, popularity, or social utility of the ideas and beliefs which are offered”, *New York Times v. Sullivan*, 376 US at 270, quoting *NAACP v. Button*, 371 US 415, 445 (1963). *See also* the Hungarian Constitutional Court’s statement: ‘The right to free expression protects opinion irrespective of the value or veracity of its content. Only this approach meets the

the critique belongs to a *category* of speech which deserves the highest degree of constitutional protection because it concerns the matters of great public importance and is in the very centre of a legitimate controversy on public issues. In addition, the view that the *form* of the speech is rude, impolite, tactless or exaggerated (all these opinions which may be admitted *arguendo*) does nothing to remove this category from the highest tier of constitutional protection in a country which regards freedom of expression as a principle of special, high value, and where interference with speech requires a stronger justification than restrictions on other forms of conduct with similar consequences.<sup>26</sup>

SCHERZO: A RIGHT TO HAVE ONE'S TRADEMARK UNTARNISHED?

But this is only one side of the picture. What are the legitimate claims of an owner of a trademark, so that we can weigh and balance them against the rights of a speaker? There is no doubt that intellectual property rights – including trademark protection – belong to a broader genus of property rights: this much explicitly emerges not only from the relevant international instruments<sup>27</sup> level, but also from the case-law of the European Court of Justice<sup>28</sup> and the European Court of Human Rights.<sup>29</sup> But we must identify carefully the boundaries of these rights, and in particular, we need to precisely identify the rights of an owner (including of a trademark owner) which can be subsumed under the 'reputation or rights of others' which may, consistently with the ECHR or the Polish constitution, constitute a legitimate constitutional ground for a restriction of freedom of speech. Some potential 'rights' can be disqualified at the outset. First, no one – including any trademark owner – has a *general* right not to be criticized, even harshly and

[constitutional] requirement of ideological neutrality...', Decision 30/1992 of 26 May 1992 Part V.3 of the reasoning, reprinted in L. Sólyom and G. Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (The University of Michigan Press 2000) p. 236.

<sup>26</sup> For an elucidation of this understanding of a Free Speech Principle, see F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982) p. 5-10.

<sup>27</sup> See the EU Charter of Fundamental Rights (Art. 17(2)): 'Intellectual property shall be protected'.

<sup>28</sup> The European Court of Justice has recognized in a number of cases that the protection of the fundamental right to property includes rights linked to intellectual property: see Case C-275/06 *Promusicae* [2008] ECR I-271 paras. 62-68; Case C-70/10 (*Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*) [2012] ECDR 4 at para. 44. *SABAM* includes discussion that balances IP rights against freedom of information (para. 52). See also *R. (on the application of British American Tobacco (Investments) Ltd) v. Secretary of State for Health* (C-491/01) [2002] ECR I-11453; [2003] 1 CMLR 14 Case C-490/01 at para. 149.

<sup>29</sup> See *Anheuser Busch Inc. v. Portugal*, Case 73049/01, judgment of 11 Jan. 2007 (trade marks); *British-American Tobacco Company v. Netherlands*, judgment of 20 Nov. 1995, A Series No. 331 (patent); *Melnitchouk v. Ukraine* Case 28743/03, judgment of 5 July 2005, CEDH 2005-IX.

tactlessly, unless the critique can be viewed as defamatory (under strict legal criteria of defamation valid in a given jurisdiction) or is prohibited by some other specific laws.<sup>30</sup> Whether a misuse of a trademark *may* be seen as defamation is a matter of specific legal criteria in a given legal system of defamation, typically, whether the statement is false and injurious of the trademark owner – in which case the fact of trademark deformation ceases being an independent ground of the challenge.

A second candidate for a right which can be dismissed straightaway relates to a copyright. It would be wrong (though Allegro has done so in its suit against the Foundation) for a trademark owner to claim a violation of a copyright when the trademark is altered or deformed for the purpose of a criticism – however well- or ill-founded – of the trademark owner. A logo, a signage, a name, etc. is typically not a proper subject matter in copyright law: it is not an ‘original literary, dramatic, musical or artistic work’, as the leading and typical national copyright act (UK’s Copyright Designs and Patents Act of 1988) defines the proper subject matters of copyright.<sup>31</sup> Even in the case of words specially created for the purpose of identifying a firm or a product – such as Exxon – the courts refused to recognize a copyright to the word.<sup>32</sup> All the more so, it must be the case with the words which already have an previously settled meaning (as ‘allegro’) even if that meaning is changed for the purpose of a commercial trademark.

### *Central justification for trademark protection: consumer confusion*

So, we need to identify what the ‘rights of others’ are that are specific to *trademark* protection. The nature of the rights of a trademark owner over its trademark must be at the centre of our attention. And because the use – or misuse – of the trademark Allegro by the Foundation was non-typical for trademark use (indeed, it was precisely the fact that the use of a deformed trademark was *so* non-typical that made it or at least promised it to be an effective speech), we must inquire into the

<sup>30</sup>I should emphasize the *general* character of the principle that no one is protected against a criticism by others. Some forms of criticism may be a violation of specific rules; in addition to defamation, one may mention, closer to the topic of this article, the unfair or abusive use of comparative advertising (in which trademarks may or may not be used). However, the rationale of this specific ban is not that it is a criticism but rather that it is an unfair competitive practice in commercial relations (an injurious falsehood), see W. Cornish et al., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 10<sup>th</sup> edn. (Sweet & Maxwell 2010) p. 704-706.

<sup>31</sup>See Cornish, *supra* n. 30, at p. 441. Only in special and rare occasions a logo may be protected by a copyright, if found to carry a substantial artistic value.

<sup>32</sup>See *Exxon Corp. v. Exxon Insurance Consultants* [1982] ch. 119; [1981] 3 All ER 241. As a leading IP textbook states, trademarks or names, just like the titles of books, are insufficiently substantial to attract copyright: ‘copyright is not a means of preventing a well-known mark from being applied to an entirely different product or service’, Cornish, *supra* n. 30, p. 446.

rationales for trademark protection in general, and then see to what degree those rationales are applicable to the trademark deformation in cases such as that of *Allegro*. The rights, after all, are not entitlements in themselves but acquire their value and strength from the values they serve; rights are not detachable from their rationales but, to the contrary, their contents, contours, worth and stringency are dependent upon the rationales which can be provided for them in the first place.<sup>33</sup>

In our subject matter, the rationales for trademark-related rights may be seen as a way of elucidating the standard of the ‘use *as* a trademark’ or the use ‘in the course of trade’. Typically, internationally recognized principles of trademark protection refer to this standard,<sup>34</sup> which would imply that when a conduct *uses* a trademark but not *as* a trademark, or not in the course of trade, it should be immune to the charge of being an infringement. But what use *of* a trademark constitutes use *as* a trademark is of course not self-explanatory, and the only feasible way of giving it substance is by referring to the rationales for trademark protection in the first place.

As a point of departure for further consideration we may accept as uncontroversial that the main rationale (the ‘essential function’, to use the language of the European Court of Justice)<sup>35</sup> for trademark protection inheres in the legitimate commercial interests of the producer of a commodity or a supplier of the service: the main justification for copyright is the certification of the source of a product; it is the badge of its origin.<sup>36</sup> While – as I will go on to suggest – there are also some other rationales for trademarks, it is important to characterize those other rationales as secondary or ancillary, and the badge-of-origin rationale as the main or fundamental one; these are not mere emphatic words, but an important resource

<sup>33</sup> More on this understanding of rights, see W. Sadurski, ‘Rights and Moral Reasoning: An Unstated Assumption’, 7 *I.CON* (2009) p. 25 at p. 27-28.

<sup>34</sup> See Art. 5(l)(a) of the European Trademark Directive (Dir. 2008/95/EC of the European Parliament and of the Council of 22 Oct. 2008 to approximate the laws of the member states relating to trade marks Art. 5(1) (The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade ...)).

<sup>35</sup> See I. Simon, ‘How Does “Essential Function” Doctrine Drive European Trade Mark Law?’, 36 *International Review of Intellectual Property and Competition Law* (2005) p. 401; see also text between n. 115 and n. 116 *infra*.

<sup>36</sup> Indeed, this rationale is so dominant that it became part of the very *definition* of trademark in US law, where a trademark is defined by the Lanham Act (a trademark regulation statute currently in force, enacted in 1946) as ‘a word, name, symbol, device, or any combination of these designations that is used to identify and distinguish a person’s goods from the goods of others and to indicate the source of the goods’, Lanham Act codified as amended at 15 USC para. 1127 (2004). This rationale is also evident in the common law tort of ‘passing off’ in the UK which involves the deceptive invasion of a property right in the goodwill of a business, and the likelihood of injury as a result of the misrepresentation of the defendant passing off its goods as those of the plaintiff, see *Spalding & Brothers v. AW Gamage Limited* [1915] 32 RPC 273. On the doctrine of passing off and its role in trademark protection, see Cornish, *supra* n. 30, p. 663-700.

when it comes to the balancing exercise which follows. In fact, for many trademark experts, the badge of origin function is so important that it is presented as the only rationale for trademark protection in the first place.<sup>37</sup>

When we see a trademark on a product, we normally use it as one of the motivations for purchasing: we buy the products or services rendered by (what we consider to be) reputable firms, and in this sense, a trademark has a very clear and quantifiable commercial value to the maker: it attracts consumers to his product.<sup>38</sup> When some other producer uses his trademark, the trademark owner may lose a potential sale and in this case the infringer reaps the benefits which are not his due; in addition, the customer may refrain from purchasing the trademark owner's product in the future if the infringing product is not to her liking, thus exacerbating the losses to the trademark's owner.<sup>39</sup> At the same time, a trademark can be seen as a means of consumer protection (which is another side of the same coin): a trademark has an important informational value to the buyer and reduces the costs in making purchasing decisions; in this sense, it plays a role similar to the label or advertisement, and a trademark infringement may be compared to a false or misleading label. So the trademark law may be seen as, fundamentally, addressed against two illegitimate harms: first, the deprivation of the producer of the rightful value of its trademark, and second, the disinformation of the consumer as to who really produced it. These harms are engaged by what may be characterized as 'ordinary' trademark infringements.

Of course, as always in law, these two harms are subject to judgments of degree and to uncertainty of occurrence, especially when the putative infringer uses a similar but not an identical mark, and the IP law in different jurisdictions has

<sup>37</sup> 'Trademark law advances an obvious societal interest by preventing consumer confusion regarding the source, sponsorship or affiliation of that owner's goods or services', M.K. Cantwell, 'Confusion, Dilution and Speech: First Amendment Limitations on the Trademark Estate: An Update', 94 *The Trademark Reporter* (2004) p. 547 at p. 547.

<sup>38</sup> The literature on trademarks normally lists three functions of trademarks: source identification, consistency guarantee, and advertising medium, see, e.g., K.L. Baxter, 'Trademark Parody: How to Balance the Lanham Act with the First Amendment', 44 *Santa Clara Law Review* (2003-4) p. 1179 at p. 1181 (see also Cornish, who characterizes these three functions as, respectively, 'origin function', 'quality or guarantee function' and 'investment or advertising function', Cornish, *supra* n. 30, p. 655). I would suggest that the second and the third are parasitic on the former: a guarantee of consistency is credible only if it properly identifies a maker, and the advertising device reinforces the source identification but cannot occur without it. Be that as it may, the second and the third functions do not engage with the trademark deformation for the purpose of social or political commentary, so everything said subsequently in this article about source identification as not undermined by trademark parody applies, *mutatis mutandis*, to the two other commercial functions of trademarks.

<sup>39</sup> On this last effect, see O.H. Dean, 'The Irresistible Force of Freedom of Speech Meets the Immovable Object: Trade Mark Law in South Africa', 1 *Journal of Intellectual Property Law & Practice* (2006) p. 614 at p. 620.

worked out quite sophisticated standards and tests to ascertain when these harms are likely and can be blamed on the infringer. As a representative example, consider the test in one of the US landmark cases on trademark protection, *Quality Inns International v. McDonald's*,<sup>40</sup> where the court established that, in determining whether the mark was an infringement, it must consider several factors, including (1) the evidence of confusion between the marks in question, (2) the similarity of the contexts of the marks' uses, (3) the proximity of the markets for the products, and (4) the intent behind the putative infringer's adoption of the mark.<sup>41</sup> As one can see, all these elements of the overall test for infringement only make sense in a commercial context, when the putative infringer is an actual or potential competitor of the trademark's owner, or (as was the case in the *Quality Inns* case) wants to reap the benefits of the reputation of the mark for its own economic interests, and with a possible economic detriment to the owner, such as the weakening of the link between the mark and its unique owner.

On its face, a trademark alteration by a social or political critic of the trademark owner is not a use (or misuse) of a trademark which follows the logic of this fundamental *commercial* rationale for trademark laws. The Foundation did not appropriate the Allegro trademark in a way which is targeted by the main justification of a trademark protection, i.e., it was not creating any risk of confusion about who is the real producer of a commodity or a service, and for this reason, it neither reaped the benefits of the mark by illegitimately capturing some of the Allegro's potential customers, nor misinformed the customers about the origins (and, consequently, characteristics, quality, etc.) of the product. In fact, the Foundation and the other critics of trademark owners in the other similar cases described below are not producers or service-providers at all: they do not compete with trademark owners.

If reaping the benefits of a mark by an infringer can be likened to unjust enrichment, then it has to be observed that social or political critics who use the trademark do not, literally speaking, enrich themselves at all. So the standard, classical, commercial justification for trademark protection does not apply here, and cannot be used to defend the right of trademark owner against any abuse of the trademark (or the correlated right of a consumer to know who is the real maker of the product). To paraphrase Mark Lemley and Eugene Volokh, in such cases as discussed here, 'the trademark itself [is not] used to propose a commercial transaction: rather, it is used as the subject of speech'.<sup>42</sup> We may say that a trademark, which

<sup>40</sup> 695 F. Supp. 198 (D. Md. 1988). The Quality Inn hotel chain was enjoined from using the mark 'McSleep Inn', on the basis of a likelihood of confusion with the McDonald's mark.

<sup>41</sup> Id. at 217.

<sup>42</sup> M.A. Lemley and E. Volokh, 'Freedom of Speech and Injunctions in Intellectual Property Cases', 48 *Duke Law Journal* (1998) p. 147 at p. 220.

in its normal commercial uses is a call or invitation to perform an action ('Drink me!', 'Wear me!', 'Buy me!'),<sup>43</sup> in the context of a social commentary or a critique becomes a statement of fact or an expression of an opinion. It becomes a different category of speech act, and the rationales for protecting it in its normal uses cease to apply to its non-typical uses, as in the social commentary or parody.<sup>44</sup>

*Extended rationales for trademark protection: dilution*

However, the standard commercial justification is not restricted to the 'badge of origin' rationale, and there may be harms done to the trademark which go beyond the 'ordinary' trademark infringement. Even when the speaker is not using the trademark in order to confuse the potential buyer about the origin of a product or service, trademark owners have some trademark-related rights which go beyond this rationale; in particular, the rights against so-called 'trademark dilution' which may lead to the decline of the economic value of a well-known trademark. The dilution is seen as harm to the 'preservation of the uniqueness of a trademark',<sup>45</sup> and the damage is seen in the 'gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name'.<sup>46</sup> When the distinctiveness of the product is blurred, the link between the product and the producer is weakened, to the detriment of the producer.<sup>47</sup> In such cases, the effect of 'con-

<sup>43</sup> As the US Supreme Court observed, one who uses a trade name 'does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters', *Friedman v. Rogers*, 440 US 1, 11 (1979), quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748, 761 (1976), rather, trademark 'is used as part of a proposal of a commercial transaction', 440 US 11.

<sup>44</sup> I am putting to one side the unusual case of trademarks which themselves, and in accordance with the owner's intentions, attempt to make a political or social statement, either sincerely or disingenuously, in order to help sell the product. Consider an admittedly bizarre case of the Old Glory Condom Corporation, which sold condoms in boxes with the statement called the Old Glory Pledge: 'We believe it is patriotic to protect and save lives. We offer only the highest quality condoms', and registered as its trademark a condom with an American flag, see J.V. Tait, 'Trademark Regulation and the Commercial Speech Doctrine: Focusing on the Regulatory Objective to Classify Speech for First Amendment Analysis', 67 *Fordham Law Review* (1998) p. 897 at p. 932. Whether such 'mixed' expressions, which are partly invitation to buy, partly a political or social statement, deserve the protection based on the commercial rationale or freedom of speech rationale, may be a matter of some disagreement (see Tait, who calls for extending a strong First Amendment protection to trademarks on the basis that they perform many roles other than simply invitations to transaction, see Tait, at p. 930-938), but does not affect the argument of this article.

<sup>45</sup> F.I. Schechter, 'The Rational Basis of Trademark Protection', 40 *Harvard Law Review* (1927) p. 813 at p. 831, Schechter's article is generally credited with creating the idea of trademark dilution.

<sup>46</sup> Schechter, *supra* n. 45, p. 825.

<sup>47</sup> Perhaps yet another rationale for trademarks can be mentioned at this point: Michael Spence has argued that trademark owners have a right grounded in freedom of speech ('expressive

sumer confusion', so crucial in the main rationale for trademark protection, is neither here nor there: the wrong of the dilution is *not* in the fact that the consumer is misled as to the origin of the product but rather in the harm to the trademark itself.<sup>48</sup> This immediately shows that the dilution strand of trademark infringement is intrinsically more dangerous for free speech than the provisions addressed against ordinary trademark infringement, if only because of the absence of its connection with consumer confusion: while the standard strand of copyright infringement has a built-in guarantee for freedom of speech, in the form of a requirement that the trademark infringement plaintiff proves likelihood of confusion (which may prove a good rescue strategy for the defendant and a reasonable safeguard for freedom of speech), no such requirement makes sense in the dilution charges.<sup>49</sup>

So how far can the extension of protection against trademark infringement upon trademark dilution go?<sup>50</sup> It cannot be based solely on the rationale that trademark dilution affects adversely economic interests of the trademark owner: there are many actions which may affect adversely economic interests of the company and yet which are perfectly legitimate and against which a company has no legal claims. Any successful competitive action sets back the interests of a firm, but this is just part of the rules of the free market. This is what Ronald Dworkin calls 'bare competition harm', and observes: 'No one could even begin to lead a life if bare competition harm were forbidden'.<sup>51</sup> The economic interests of a firm

autonomy'), and more specifically in the right to resist compelled speech, insofar as the infringement of their trademark may falsely communicate to a third party, a message which claims to be from the trademark owner: 'a trademark owner should be able to insist on maintaining the distinctive character of her mark because that is entailed in respect for her expressive autonomy', M. Spence, 'The Mark as Expression/The Mark as Property', 58 *Current Legal Problems* (2005) p. 491. The attraction of this conceptualization (dubbed by commentators as 'a radical rethinking of trade mark principles', L. Bently and B. Sherman, *Intellectual Property Law*, 3<sup>rd</sup> edn. (Oxford University Press 2009) p. 721) would lie in rendering the conflicting rights commensurable because on both sides (trademark owner and infringer) they would be based in freedom of speech. But it is inapplicable to trademark parody discussed in this article because (even though Spence develops this argument in the context of anti-dilution provisions) such a clash is dependent upon there being a genuine confusion as to *who* is the speaker; such a confusion is as unlikely in our cases as the consumer confusion as to *who* is the maker of a 'product'.

<sup>48</sup> For a more detailed discussion on trademark dilution in various legal systems, and the absence of the link between trademark dilution and consumer confusion, see Spence, *supra* n. 24, p. 599-600.

<sup>49</sup> See Cantwell, *supra* n. 37, p. 548.

<sup>50</sup> For a recent energetic attack on the dilution doctrine, see S.L. Rierson, 'The Myth and Reality of Dilution', *Duke Law & Technology Review* (forthcoming 2012), Thomas Jefferson School of Law Research Paper No. 1952671, Nov. 2011, available at SSRN: <<http://ssrn.com/abstract=1952671>> (visited 22 Dec. 2011).

<sup>51</sup> R. Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) p. 287.

may be also adversely affected by a communicative action such as criticism on public interest grounds – but no firm has a legitimate claim based on its economic interests against such criticism. When the trademark of a firm is used, not by a commercial competitor of the trademark owner but by its critic who is not competing for the customers, the very point of the use (or abuse) of the trademark is to make a critical comment, and then to protect the trademark owner against *such* a use of its trademark would be tantamount to protecting it against critique. No one has legitimate rights to a protection against critique *per se*.

Trademark dilution must therefore be given a reasonably precise interpretation to figure among the rationales for trademark protection, in order to avoid reducing the argument to one of protection against any criticism of the trademark owner. A common-sense reflection indicates that the dilution is commercially detrimental to the trademark owner because, with time, the specific link between the trademark and its owner becomes weakened, watered-down, severed, *and* it is the effect of its use by third parties without the permission by the trademark owner.<sup>52</sup> Both these criteria of trademark dilution are important. First, there must be such a generalized use of a trademark that it becomes associated, in the eyes of typical consumers, with a generic class of the product rather than a product of this particular company (such as ‘Xerox’, which in some languages became synonymous with a photocopier, regardless of its maker). Second, it must be done without a permission of the trademark-owner – because it may well be that in some cases an acquisition of a generic meaning by a trademarked product in the eyes of the consumers may be seen as commercially advantageous to the maker because it creates a sense of exclusivity: when one thinks ‘photocopier’, one immediately thinks ‘Xerox’, etc.<sup>53</sup> So it should be up to the trademark owner to decide whether such ‘dilution’ is advantageous or not.

<sup>52</sup>Whether the *only* harm of trademark dilution by blurring consists of severing the link between the trademark and the trademark owner in the eyes of the public is a matter open for discussion. Consider the commercial infringements of trademarks where such a risk is low and yet which can be said to result in the watering down of the distinctiveness of a trademark, such as when an owner of the trademark ‘The Greatest Show on Earth’ successfully sued for infringement the organizers of ‘The Greatest Used Car Show on Earth’ (*Ringling-Bros.-Barnum & Bailey Combined Shows, Inc. v. Celozzi-Ettelson Chevrolet, Inc.*, 855 F.2d 480 (7<sup>th</sup> Cir. 1988)). The court found that even though there was no likelihood of confusion about the origins of the product, the owners of the former trademark would nonetheless suffer irreparable harm because its trademark would lose its distinctiveness, *id.* at 485. In my view, such harm still boils down to the severing of the link between the trademark and its owner but even if it does not, it is irrelevant for the purposes of this article because the ‘harm’, if any, inflicted upon the owner by the social or political critic using the trademark parody does not result in the loss of ‘distinctiveness’ of the trademark but, if effective, of the reputation of the trademark owner, which is the whole point of the parody.

<sup>53</sup>On the other hand, if the mark becomes too generic, it may lead to a striking off the register, in which case the owner will not be able to sue third parties for the infringement.

But in the case of a social or political critique done through the (mis-)use of a trademark, no such 'dilution' is conceivable: it is implausible that 'Wal-mart' or 'Esso' (as in the cases considered below) or 'Allegro' will become 'diluted' and acquire a generic meaning in the eyes of consumers, thus causing economic losses to trademark owners. Just to the contrary: the whole point of such (mis-)use of a trademark by a critic is to link a product (or service) with *this* particular maker and lay the blame for the allegedly negative social consequences of the maker's conduct of *this* particular firm rather than 'dilute' it, and thus water down the message and reduce its urgency.<sup>54</sup> Dilution would be counter-productive to a critic. So there must be a different sense of 'dilution' of a trademark at work in order to bring it closer to the facts of an *Allegro* case, or any other case of (mis-)using trademarks in order to make a social criticism of the trademark owner. It must be not (to use the jargon of IP law) 'dilution by blurring' (i.e., to reduce the distinctiveness of the mark) but 'dilution by tarnishment' which consists of weakening of positive associations with a product of its maker.<sup>55</sup> While a protection against such 'tarnishment' may be legitimate in the context of a protection against a commercial competitor,<sup>56</sup> it becomes much more questionable when the 'tarnishment' occurs – or may occur – through conduct which has no commercial aim, or where commercial aims are clearly secondary to the communicative action focused on criticism or commentary. To provide such protection against 'tarnishment' by a non-commercial critic would amount to immunization of a commercial entity against criticism.<sup>57</sup>

<sup>54</sup> A similar point was occasionally made even in the context of commercial 'parody'. In the US, the Tenth Circuit once held, for instance, that the use of 'Lardache' on jeans marketed for large women as a parody of designer jeans 'Jordache' was more likely to increase than erode public identification of the 'Jordache' mark with the plaintiff, so it was not classified as dilution by blurring, *Jordache Enterprises, Inc. v. Hogg, Wyld, Ltd.* 828 F.2d 1482, 1490 (10<sup>th</sup> Cir. 1987).

<sup>55</sup> For this distinction, see, e.g., Baxter, *supra* n. 38, p. 1183-1184. A UK equivalent of 'dilution by tarnishment' is in one of three types of trademark infringement in the Trades Mark Act 1994, namely, where a trademark has a 'reputation' in the UK, it is an infringement to use an identical or similar sign, where the use of the sign, *inter alia*, is detrimental to the distinctive character or the repute of the mark, Trades Mark Act 1994 s.10(3), see Cornish, *supra* n. 30, p. 779. In the language of the European Court of Justice, this corresponds to the 'discrediting or denigration' of the trademark seen as incompatible with 'honest practices in industrial or commercial matters', see *The Gillette Company and Gillette Group Finland Oy v. LA-Laboratories Ltd Oy*, C-228/03, Judgment of the Court, March 17 2005.

<sup>56</sup> See, e.g., *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39 (2d Cir. 1984). In this case, a competitor lawn tractor company created an animated commercial in which its tractor (the MTD tractor) frightened the Deere & Co.'s trademark protected deer. The court held that the defendant diluted the plaintiff's trademark by making the deer look timid, thus weakening the positive association with Deere & Co.'s product. Among many silly trademark cases, this one probably reaches the extreme pole of silliness.

<sup>57</sup> In US trademarks law regarding 'dilution by tarnishment', it has been accepted that 'tarnishment caused merely by an editorial or artistic parody which satirizes [the complainant's] product or

Does it mean that a trademark owner has no legitimate rights against ‘dilution by tarnishment’ in non-commercial contexts?<sup>58</sup> There is a temptation to answer affirmatively, and in this way to disqualify at the outset any claims that trademark owners may have in cases such as that of *Allegro*.<sup>59</sup> This would make any further balancing unnecessary: there would be nothing to balance freedom of speech against because on the side of *Allegro* and similar trademark owners there would be no legitimate claims whatsoever. But such a temptation should be resisted.

First, there are some good reasons for thinking, at least intuitively, that there is a genuine and not just illusory conflict of interests and values at play, and if so, we must assume that both side have some legitimate interests to preserve, even if we ascertain (after the balancing analysis) that they are of unequal weight. So, the conflict is real, and as an IP scholar noted, ‘parody’ (understood in the broad sense of the word, which includes also non-humorous expressions) ‘provides good examples of the conflict that can arise between intellectual property and free speech’.<sup>60</sup> This is the point which will be developed at some length in the section below titled ‘*Scherzo. Allegro*’.

Second, because an honest moral reflection should convince us, I believe, that it would be unfair to dismiss any claims by *Allegro* and similar targets of trademark tarnishment (as will be mentioned below) as without any basis whatsoever. Consider: your trademark, in which you have invested not only a great amount of money through advertising, marketing, etc. but also, one would imagine, a degree of professional pride and sense of self-worth, is being publicly displayed combined with Nazi symbolism. There is a serious reputational and dignitary harm involved,

its image is not actionable under an anti-dilution statute because of the free speech protections of the First Amendment’. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 812 (9<sup>th</sup> Cir. 2003) (citation and internal punctuation omitted).

<sup>58</sup>In US law, the Federal Trademark Dilution Act exempts ‘noncommercial uses’, including parodies and satires, from its reach, 15 USC para. 1125(c)(4)(B) but the courts have been inconsistent in the interpretation of this exemption, see Cantwell, *supra* n. 37, p. 565-580.

<sup>59</sup>From a doctrinal-legal point of view, in many systems of intellectual property law, such a possibility is triggered by the provisions which locate dilution by tarnishment (or its equivalents in local legal parlance) in the context of the use of a trademark ‘in the course of trade’ (or *as a trademark*, which implies also a commercial activity), see for example Art. 5(2) of the European Directive (First Directive of the Council of the EU, 89/104 of 21 Dec.) which speaks about ‘using in the course of trade’ of signs where use of that sign is, *inter alia*, ‘detrimental to ... the distinctive character or the repute of the trade mark’; virtually the same language is used by Section 10(3) the UK Trade Marks Act 1994. So, if there is no ‘course of trade’, i.e., when the putative infringer is not engaged in a commercial activity (or the commercial activity is clearly secondary to the communicative action), no ‘dilution by tarnishment’ occurs. But the point I am making is that, from a normative point of view, there *is* at least a reputational harm on the side of the trademark owner, and the harm specifically occurs through the trademark deformation. This harm *should* be recognized by the law even if it will be outweighed by counter-claims based on freedom of expression.

<sup>60</sup>Spence, *supra* n. 24, p. 611.

and even if at the end we will conclude (as I will, in this article) that freedom of speech in such cases should prevail, it does not render those reputational harms non-existent. It is one thing to say that your harm simply does not count, and another to say that it is real but must yield to a higher value in the circumstances. It would seem more faithful to the real conflict of interests and values 'on the ground' to have a language which may recognize the reality of harm, on both sides, and then subject them to a reasonable exercise of weighing and balancing, than to dismiss one of the conflicting harms as having no legal traction.

Third, admitting that the claims of trademark owners such as Allegro have *some* weight, renders meaningful those judicial decisions in various jurisdictions around the world which do not strike us as fundamentally erroneous or absurd and which proceeded, in precisely such cases, through a balancing analysis. When a South African Constitutional Court, in a unanimous decision in the *Laugh It Off* case (discussed below) which may be seen as analogous to that of Allegro, gave precedence to the freedom of speech of a parodist over the rights of the trademark owner, it did not dismiss the latter altogether but simply considered them outweighed by the former, saying that it was 'obliged to balance out the interests of the owner of the marks against the claim of free expression',<sup>61</sup> a point well observed in a brilliant concurring opinion by Justice Sachs that 'what is in issue is not the limitation of a right, but the balancing of competing rights'.<sup>62</sup> Such balancing would make no sense if there was nothing of legitimate interest on the side of the trademark owner. Or when, in a characteristically US legal parlance the Court of Appeal for the 10<sup>th</sup> Circuit said: 'The tension between the first amendment and trademark rights is most acute when a non-commercial parody is alleged to have caused tarnishment, a situation in which first amendment protection is greatest',<sup>63</sup> no such 'tension' could be legally recognizable if the tarnishment through non-commercial parody was invisible to the law of trademark protection. We may of course conclude that these cases – or any other cases of the same sort where we have an explicit or implicit balancing by the court – were wrongly decided, and so cannot serve as an argument for anything. But it would render the whole set of cases from jurisdictions such as South Africa,<sup>64</sup> the United States<sup>65</sup> and France<sup>66</sup> fundamentally mistaken: a conclusion better avoided if we can find – in the balancing procedure – a better way of making sense of them.

<sup>61</sup> *Laugh It Off*, *supra* n. 2, para. 44.

<sup>62</sup> Sachs J in *Laugh It Off*, *supra* n. 2, para. 84.

<sup>63</sup> *Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1490 n. 7 (10<sup>th</sup> Cir. 1987). An 886 F.2d 490 (2 Cir. 1989).

<sup>64</sup> See *Laugh It Off*, *supra* n. 2.

<sup>65</sup> See, e.g., *Smith v. Wal-Mart Stores*, 537 F. Supp. 2d 1302 – Dist. Court, ND Georgia 2008, and *Cliffs Notes v. Bantam Doubleday Dell*, 886 F.2d 490 (2 Cir. 1989).

<sup>66</sup> The case of Esso suing Greenpeace, see text to n. 82 *infra*.

It has been pointed out that the infringement of ‘dilution by tarnishment’ may be based not so much on ‘source identification’ as a justification for trademark protection but on an alternative justification: the preservation of the mark owner’s goodwill.<sup>67</sup> Common sense may suggest that the actual harm (in economic terms) of such a tarnishment is unlikely or very small: will Allegro customers desist from making their good deals online because some progressive campaigners put Nazi letters into the famous logo? Will the fans of South African Black Label beer abstain from quenching their thirst with their favourite drink because a small T-shirt company suggested that the brewery had been involved in nasty apartheid practices – as had nearly every South African company established before the fall of apartheid?<sup>68</sup> But the fact that the harms are negligible simply means that they will weigh very little in the balancing analysis – not that the harms are non-existent. And the reputational harms to the owners, shareholders or the staff of the companies whose trademarks are ‘tarnished’ in such ways are more difficult to deny – even if at the end of the day they cannot prevail over freedom of speech values of the competing interests.

### *Case-law*

Perhaps the closest legal analogy to the *Allegro* case found in US law was an attack upon Wal-Mart whereby its trademark was encrusted by a critic with Nazi symbolism.<sup>69</sup> On 20 March 2008 the US District Court in the Second Circuit handed down a decision which originated from an action by Wal-Mart against Mr George Smith who was campaigning against the big retail chain by deforming the registered Wal-Mart marks, e.g., by transforming them into ‘Wal-Qaeda’ or ‘Walocaust’ and including the Nazi eagle into the design.<sup>70</sup> He arranged for some of his designs to be printed on T-shirts, mugs, bumper stickers, etc. that could be purchased online. The company asserted the violation of its trademark rights and demanded that he cease selling all such products. In response, Mr Smith filed an action seeking a declaratory judgment of his right to sell the ‘Walocaust’ merchandise. In its decision, the Court first considered the ‘consumer confusion’ test and concluded that it did not occur here: the use by Smith of the sign ‘Walocaust’ was an obvious ‘parody’ and was unable to confuse the consumers about the origins

<sup>67</sup> Rierson, *supra* n. 50, p. 23.

<sup>68</sup> This is one of the points made by Justice Sachs in his concurrence in *Laugh It Off*, *supra* n. 2, para. 99.

<sup>69</sup> Nazi symbols are popular in trademark parodies on both sides of the Atlantic: Cornish mentions a Dutch case regarding ‘incorporation into the Philips logo of a swastika in an article illustrating the company’s wartime activities’, Cornish, *supra* n. 30 p. 796, n. 566. So the *Allegro* case had several precedents.

<sup>70</sup> *Smith v. Wal-Mart Stores*, 537 F. Supp. 2d 1302 – Dist. Court, ND Georgia 2008.

of the product.<sup>71</sup> When it comes to ‘trademark dilution’, the court considered the test of ‘dilution by tarnishment’ which occurs when ‘a trademark is ... portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product’.<sup>72</sup> The Court found – relying upon established case-law – that such ‘dilution by tarnishment’ may be found only with respect to commercial expressions, while in the context of parody or satire it cannot be established because of the clash with First Amendment’s free speech rights.<sup>73</sup>

Another important US decision on ‘trademark parody’ was a decision in *Cliffs Notes v. Bantam Doubleday Dell*.<sup>74</sup> The defendant published *Spy Notes* as a parody of novels depicting drug abuse to mimic the popular *Cliffs Notes* study guides. The cover of *Spy Notes* resembled closely the *Cliffs Notes* cover design but the court vacated the injunction against the defendant because the likelihood of consumer confusion was very slight, and was outweighed by the public interest in free expression: ‘the parody cover of *Spy Notes* ... raises only a slight risk of consumer confusion that is outweighed by the public interest in free expression, especially in a form of expression that must to some extent resemble the original’.<sup>75</sup> Generally, US law acknowledges a parody defence for trademark infringement, although usually US courts do not treat parody as a separate defence but rather as a rebuttal of the likelihood of confusion rationale for trademark protection.<sup>76</sup>

Looking at some other jurisdictions, as already mentioned, South African case-law supplies an interesting example of a case which resembles trademark deformation in *Allegro*. Its Constitutional Court considered the use of a trademark of the popular Carling Black Label beer by a company called Laugh It Off (specialized in altering the images and words on well-known trademarks and printing them onto T-shirts) in order to criticize the brewery’s labour relations and work practices.<sup>77</sup> It created a sign, printed on T-shirts, which is written in the type-font of ‘Black Label’ but reads ‘Black Labour’. In its judgment, the Court has squarely articulated the issue as a conflict between freedom of speech and intellectual

<sup>71</sup> *Smith, supra* n. 70, at p. 1335: ‘Although it is undisputed that Wal-Mart possesses strong and widely recognized marks, the Court is persuaded that Smith’s use of the marks is unlikely to cause confusion. The terms ‘Walocaust’ and ‘Wal-Qaeda’ are clearly a play on the famous Wal-Mart name. The fact that the real Wal-Mart name and marks are strong and recognizable makes it unlikely that a parody – particularly one that calls to mind the genocide of millions of people, another than evokes the name of a notorious terrorist organization ... – will be confused with Wal-Mart’s real products’.

<sup>72</sup> *Smith, supra* n. 70, at p. 1339, quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F3d 39, 43 (2d Cir. 1994).

<sup>73</sup> 537 F.Supp.2d 1339-1340.

<sup>74</sup> 886 F.2d 490 (2 Cir. 1989)

<sup>75</sup> *Id.* at 497.

<sup>76</sup> *See, generally*, Baxter, *supra* n. 38.

<sup>77</sup> *Laugh It Off, supra* n. 2. For a critical discussion of this decision, *see* Dean, *supra* n. 39.

property: 'If the expression is constitutionally protected, what is unfair or detrimental [in terms of South African trademark infringement standards] must then be mediated against the competing claim for free expression'.<sup>78</sup> It has established that, in order to defend its claim, the trademark owner would have to demonstrate the likelihood of substantial material harm. The trademark owner has failed to demonstrate this (relying rather on an alleged self-evidence of the harm)<sup>79</sup> so its claims were dismissed. As Justice Moseneke declared in the opinion for the Court, 'the mere fact that the expressive act may indeed stir discomfort in some and appear to be morally reprobate or unsavoury to others is not ordinarily indicative of a breach of [the anti-dilution prohibition of the trademarks law]. Such a moral or other censure is an irrelevant consideration if the expression enjoys protection under the Constitution'.<sup>80</sup>

*En passant* it can be added that both in the *Wal-Mart* case and in *Laugh It Off*, there was residual commercial activity by the critics of trademark owners: Mr Charles Smith had been selling online T-shirts with the Walocaust signs, and so did Laugh It Off, which was selling the Black Labour T-shirts. But in both these cases, the courts found wisely that this 'commercial' activity was insignificant and that the main point of Smith's and Laugh It Off's activities was not commerce but a communicative action – hence their conduct has to be protected by freedom of speech rules, not the rules applying to commercial activities.<sup>81</sup> *A fortiori*, when there is no commercial activity by a critic of trademark owner at all, as in *Allegro* case or in the *Esso* case, discussed below, the weight of freedom of speech rights is even higher.

Another analogy with the *Allegro* case – and sign – can be found in the deformed logo of Esso used by Greenpeace: in its campaign against the oil giant, the leading international environmental group transformed Esso into E\$\$O, using the identical font and design, but substituting middle letters SS with dollar signs. Esso France sued Greenpeace in Paris. After decisions by several judicial instances,<sup>82</sup> the French Supreme Court in its decision of 8 April 2008 refused to find that Greenpeace has committed trademark infringement and dismissed Esso's claim. With regard to trademark protection, the Court (following the appellate court's judgment in the same case) recognized that no 'consumer confusion' is likely. In turn, the claim based on general reputational grounds (protection of the company

<sup>78</sup> *Laugh It Off*, *supra* n. 2, para. 44.

<sup>79</sup> *Laugh It Off*, *supra* n. 2, para. 56.

<sup>80</sup> *Laugh It Off*, *supra* n. 2, para. 55.

<sup>81</sup> *Smith*, *supra* n. 70: 'Smith primarily intended to express himself with his Walocaust and Wal-Qaeda concepts and ... commercial success was a secondary motive at most'.

<sup>82</sup> For a description, see J.F. Bretonnière and C. Fleurens, 'France: Trademark Rights v. Free Speech: Can Prejudicial Trademark Use Still Be Prevented?', <[www.iam-magazine.com/issues/Article.aspx?g=46a24ecb-1bcd-4c10-be35-4854fdb8a9da](http://www.iam-magazine.com/issues/Article.aspx?g=46a24ecb-1bcd-4c10-be35-4854fdb8a9da)> (visited 22 Dec. 2011).

against disparagement) was dismissed on the basis that the use of a deformed logo for the purposes of 'parody and critique' is protected by the principle of freedom of speech.

### *Doctrine*

Summarizing the dominant view in IP scholarship, trademark parody<sup>83</sup> seems to generate conflict between freedom of speech and commercial interests in which freedom of speech normally prevails because the trademark owner's claims do not resonate with the main rationales for trademark protection in the commercial sphere. In an important article on the subject, Kelly L. Baxter summarizes the dominant US legal position as follows:

To determine whether the First Amendment interests outweigh the trademark interests, courts can evaluate factors that may include (1) the primary intent to parody for artistic or political rather than economic reasons and (2) the presence of a disclaimer to inform consumers that it is a parody.<sup>84</sup>

It is clear that in the cases such as *Allegro*, the first tier of the test is fully met; the second tier often has to be left to the intelligence of the readers/consumers but is frequently so explicit as to be obvious (as in *Walocaust* or *Spy Notes* cases) to an average person, or better still, the disclaimer is sometimes replaced by the text, which explains the point and purpose of the use of a deformed trademark (as in *Allegro* or *Esso*).

The test proposed by Baxter may be usefully supplemented by the following account of approaches taken by US courts given by Mark Partridge: 'a plaintiff is most likely to succeed against a trademark parody when the parody is disparaging or offensive, the parody is identical or closely similar to the original trademark, and the interest of the public in avoiding confusion is strong'.<sup>85</sup> In the trademark parody cases such as in *Allegro*, these three criteria generate difficult judgments of degree. The parody indeed may be considered offensive to the trademark owner. In fact, the very nature of 'parody' is such that its object is likely to be offended, or upset. But offensiveness is very much in the eyes of beholder,<sup>86</sup> and the common criteria of offense are hard to ascertain in an open and diverse society. More

<sup>83</sup>I am using the concept of 'parody' in a broad sense, subject to an important caveat, see footnote 24 above. It is consistent with the use of 'parody' in the US law of copyright and trademark protection, see Baxter, *supra* n. 38.

<sup>84</sup>Baxter, *supra* n. 38, at p. 1209.

<sup>85</sup>M.V.B. Partridge, 'Trademark Parody and the First Amendment: Humor in the Eye of the Beholder', 29 *John Marshall Law Review* (1995-1996) p. 877 at p. 890.

<sup>86</sup>As Justice Harlan famously observed, 'one man's vulgarity is another's lyric', *Cohen v. California* 403 US 15, 25 (1971).

importantly, offensiveness *per se* (that is, unless it is associated with a defamatory or other prohibited aspect of speech, such as its capacity to incite violence, etc) is an unlikely candidate for restricting speech; at least in the United States (and, consequently, the legal systems which follow expressly or implicitly the lead of US First Amendment jurisprudence),<sup>87</sup> it has been established that ‘the fact that society may find speech offensive is not a sufficient reason for suppressing it’;<sup>88</sup> as a matter of fact, this proposition has been even characterized by the Supreme Court as ‘a bedrock principle underlying the First Amendment’.<sup>89</sup>

While some courts in the US used the ‘sleaze factor’ *against* the parodists,<sup>90</sup> others flatly refused to do so, on the basis that ‘judicial evaluation of offensiveness or unwholesomeness’ of a parody is inappropriate and represents ‘a threat to free speech’.<sup>91</sup> Note, incidentally, that the offensiveness *reduces* the likelihood of consumer confusion which, at least in non-dilution cases, is the main factor of finding a trademark infringement.<sup>92</sup> Second, the similarity of parody to the original trademark is a condition of its effectiveness (and so to deny it a right of being similar would amount to denying it a right of being a parody and therefore freedom of expression), but if it is ‘identical’, it ceases to be a parody but becomes simply a replication of a trademark. The whole point about parody is that it is in some respects the same as, and in other respects different from a parodied object. And third, countering the consumer confusion is indeed a strong criterion, but it is safe to say that in the trademark parody used for social and political criticism, the risk of such confusion is extremely low, if non-existent. (If a risk is high, then it is simply a bad and ineffective parody, failing to achieve the parodist’s aims.) It is hardly imaginable that the passers-by or Internet surfers, receiving or seeing the

<sup>87</sup> It has to be said, however, that there are differences of degree in achievement of balance between the protection of trademark against dilution and freedom of expression in different legal systems, with the US providing the strongest protection for the latter when the conflict arises, *see*, e.g., R.C. Dreufuss, ‘Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity’, in G.B. Dinwoodie and M.D. Janis (eds.), *Trademark Law and Theory* (Edward Elgar 2008) p. 261 at p. 277. For a general comparison of the US approaches to freedom of expression with other democratic systems, *see* E. Barendt, ‘Importing United States Free Speech Jurisprudence?’, in T. Campbell and W. Sadurski (eds.), *Freedom of Communication* (Dartmouth 1994) p. 57.

<sup>88</sup> *FCC v. Pacifica Found.*, 438 US 726, 745 (1978) (plurality opinion).

<sup>89</sup> *Texas v. Johnson*, 491 US 397, 414 (1989): ‘If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable’ (citations omitted).

<sup>90</sup> For a discussion of representative cases, *see* Cantwell, *supra* n. 37, p. 568-570.

<sup>91</sup> *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 34(1<sup>st</sup> Cir. 1987).

<sup>92</sup> As Cantwell notes, ‘the fact that the courts were not amused does not mean that consumers are confused. Indeed, the more outrageous the parody the less supportable is a finding of confusion’, Cantwell, *supra* n. 37, p. 556.

leaflets with Allegro in Nazi letters, or McDollar, or Walocaust, will believe that it is the 'real thing'.

This last point, that trademark protection is mainly based on the concern for identifying the source of a product, is a dominant theme in academic writings about trademarks. In her article, Patricia Loughlan discusses the Australian courts' approach to intellectual property, and summarizes the central doctrine as proclaiming that

in order to find an infringing use of its registered trade mark, a trade mark owner must be able to show not just that the defendant has used the owner's mark, but that it has used the mark in a particular and quite precise way namely *as* a mark, a badge of origin, to signal a trade source. All other uses of and references to registered trade marks are in the public domain and available to pop groups, trade rivals and political satirists alike.<sup>93</sup>

This suggests that the use and deformation of a trademark for the purposes of parody should be protected by a constitutional principle of freedom of speech unless there is a real danger that a parody (trademark deformation) may confuse the consumer as to the source of origin of a product, and in this way (but *only* in this way) endanger the economic interests of the trademark owner. This is how a general doctrinal consensus on trademark protection can be articulated.

Even when the concerns for constitutional freedom of speech are not expressly articulated (which is likely to be the case without constitutional bills of rights enshrining freedom of speech in a constitutional text), the claims of trademark owners for protection against parody are often viewed with scepticism, regardless of any balancing against counter-claims. Here is how a respected intellectual property textbook summarizes the dominant British view: 'in Britain there has traditionally not been much sympathy for attempts to stop the deployment of trade marks in parody advertisements, counter-cultural advertising or other forms of social comment'.<sup>94</sup> The immediately following comment by the textbook authors is interesting as it makes no reference to the countervailing values of freedom of speech but rather to the resilience of trademarks themselves: 'Strong marks should be able to survive such knocks: they can even emerge the stronger'.<sup>95</sup> And if they do not? Well, one may say, they have no one else to blame but themselves.<sup>96</sup> More

<sup>93</sup> P. Loughlan, 'Protecting Culturally Significant Uses of Trade Marks (without a First Amendment)', 32 *European Intellectual Property Review* (2000) p. 328 at p. 329, footnote omitted.

<sup>94</sup> Cornish, *supra* n. 30, p. 796, footnotes omitted.

<sup>95</sup> Cornish, *supra* n. 30, p. 796. See also Bently and Sherman, *supra* n. 47, p. 888: two British authors of this major UK textbook on IP; when briefly mentioning the 'tarnishing' of a trademark 'in a way that is denigratory' fail to mention freedom of speech as a countervailing value in the UK law.

<sup>96</sup> Note this observation by a US court: 'When businesses seek the national spotlight, part of the territory includes accepting a certain amount of ridicule [in the form of parody], *Nike, Inc. v. 'Just Did It' Enterprises*, 6 F.3d 1225, 1227 (7<sup>th</sup> Cir. 1993).

typically, however, the doctrinal consensus – especially in Europe and in the US – emphasizes that when there is a clash between freedom of expression and trademark protection, the latter must be interpreted narrowly, in order not to intrude excessively upon the freedom of expression. For instance, the evolution of French case-law is characterized as follows: ‘While these lawsuits [by trademark owners] initially succeeded in the French courts, case-law now seems to have evolved towards a tolerance of trademark use for the purpose of humour or criticism, based on the principle of freedom of speech’.<sup>97</sup>

Michael Spence had, some time ago, argued for the relevance of a distinction between ‘target parody’ and ‘weapon parody’: the former uses a text (or a sign) to comment upon it or its creator while the latter uses it to criticize another object. Spence suggested that, while the latter poses some complex and real problems of balancing with free speech, and may be often legitimately prohibited by intellectual property regimes (including trademark protection), in the case of ‘target parody’, the balancing should typically favour free speech.<sup>98</sup> While Spence’s claims are asserted rather than argued,<sup>99</sup> the intuition seems to be right: when someone ‘parodies’ X’s work to use it for social commentary on something else, then one may think that the author of the original work is treated purely instrumentally, and the parodist might be expected to use her own inventiveness to attach causes of her choice. But when the parody is used to critique that which is being parodied (or its creator), then it may be simply the most effective method of making a comment on that topic, and the charge of unfair instrumentalization cannot be made in such a situation (the creator and her sign are not being used as a means to some other, extrinsic aims, but constitute the aims themselves). This, at least, is the case of all ‘parodies’ mentioned in this article, and most certainly the central case of *Allegro*.<sup>100</sup>

<sup>97</sup> Bretonnière, *supra* n. 82, p. 136.

<sup>98</sup> Spence, *supra* n. 24, p. 612–615.

<sup>99</sup> The closest Spence comes to an argument is when he suggests that in the cases of target parody, but not of weapon parody, allowing free speech to prevail ‘only marginally compromises a society’s claim to respect intellectual property rights’, Spence, *supra* n. 24, p. 612. I agree with the intuition but in itself, it is question-begging: those who believe in strong rights in trademarks will probably see such balancing as detrimental to the integrity of an intellectual property regime. Spence develops his assertion by saying that intellectual property is not addressed against unfair criticism (the latter being regulated, if at all, by the law of injurious falsehood and defamation), p. 612–613, though the very concept of ‘dilution by tarnishment’ seems to come close to this. Spence also argues in terms of autonomy of the creator but, controversially, links it to the creator’s freedom of speech, p. 614–615, which in the case of trademark owners (as contrasted with copyright holders, as discussed earlier) seems to be less credible. I believe that a Kantian principle of non-instrumental treatment of other people (here, creators of trademarked signs) may better explain the difference between treatment of ‘target parody’ and ‘weapon parody’ which is the main point of Spence’s article.

<sup>100</sup> Note that Spence’s distinction between ‘target’ and ‘weapon’ parodies correspond roughly to the distinction made in US law and literature, between ‘parody’ (which ‘needs to mimic an original

In his recent, fundamental book on the topic, which takes in the law of the European Convention, of the European Union, as well as national legal systems (in Germany and the Netherlands in particular), Wolfgang Sakulin writes that

Article 10 ECHR places states under an obligation to ensure that the exercise of trademark rights does not violate the freedom of expression of third parties . . . . In order to achieve this, . . . it is necessary that legislators draft trademark laws in a manner that no disproportionate impairment of freedom of expression is caused by the exercise of trademark rights, and that courts and registering authorities interpret open norms of trademark law in light of freedom of expression.<sup>101</sup>

This statement which, it should be emphasized, does not reflect (or does not *solely* reflect) a normative position of the author but rather, in a nutshell, captures the dominant position of the European case-law on the subject, is a strong and persuasive ground upon which a balancing of conflicting claims can be conducted, including the claims of the trademark owners such as Allegro and its critics such as the Foundation.

#### SCHERZO. ALLEGRO: BALANCING OF FREEDOM OF SPEECH AND TRADEMARK PROTECTION

To summarize the argument so far: the rights of trademark owners are based on the general justification for trademark protection, which is to secure the legitimate economic interests of the owner. Their main function (that is, when they are used *as* trademarks) is to inform the potential buyer about the source of origins of a product, and to attract the buyers to the products of the maker they trust or like. The wrong of infringement of a trademark consists of misleading the potential buyer about the source of origin of a product, and it is *this* wrong which is mainly targeted by trademark law. Of course, there are many other ways of using

to make its point', *Campbell v. Acuff-Rose Music Inc.*, 510 US 569, 580-81) and 'satire' (which 'can stand on its own feet and so requires justification for the very act of borrowing', *id.*). While in *Campbell* the distinction was made by the Supreme Court in the context of a copyright infringement claim, the lower courts applied this distinction with the effect of offering less protection to satires rather than parodies also in trademark claims, *see* Cantwell, *supra* n. 37, p. 562-565 and p. 571-572. *See also* a dictum in the *Walmart* case: 'for the alleged infringer's work to be a "parody" in the legal sense, the senior user's protected work must be 'at least in part the target' of the alleged infringer's satire'. *Walmart* at 1336, quoting *Dr. Seuss Enters.*, 109 F.3d at 1400-0. Summarizing a representative decision, in the *Dr. Seuss* case, Cantwell concludes that 'the fact that the defendant's use involved satire rather than a parody (i.e., it did not target either the plaintiff's copyright or mark) was an important factor in the court's rejection of the defendant's asserted defenses to the copyright and trademark infringement claims', Cantwell, *supra* n. 37, p. 571.

<sup>101</sup> Sakulin, *supra* n. 1, p. 111.

a trademark by the third parties which may set back the interests of the trademark owner, but when they are not illegitimate the owner has no claims against them. (Consider a statement by a celebrity artist in a popular TV show that she ‘hates’ a particular soft drink – and here she mentions the name of the drink. Such a ‘use of a trademark’ for sure will have negative impact upon the sales of the drink, but a maker has no claim against such a ‘use of a trademark’). The use of a trademark in order to make a social or political protest against the trademark owner’s actions belongs to this category of uses of trademark.<sup>102</sup> Trademark law cannot prohibit such uses because (1) such a use does not run counter to the fundamental rationale for trademark protection in the first place, since it does not mislead or confuse the potential consumers as to the source of origin of a product, and (2) such a use belongs to a category of speech deserving a high constitutional protection, i.e., it is a ‘high value’ speech from the point of view of freedom of expression rationales. These two reasons, taken together, create powerful arguments for overcoming the claims of trademark owners against the speakers who deform the trademarks for the purpose of social or political critique.

So when it comes to the balancing, there is a strong temptation (which ultimately has to be resisted, for reasons stated below) to declare that there is nothing to balance, because on the side of the trademark owner, such as Allegro, there is no legitimate right at all. This would be a reflection of a ‘categorical’ approach to the competing constitutional values: the approach which aims at such elucidation of the real content and contours of rights which *prima facie* seem to be clashing in a given case. This approach is that on the one side there remains a genuine right and on another side, something that was only mistakenly considered to be a right, but which after its real contours have been properly elucidated, does not protect an activity in question. Just as freedom of speech does not protect defamation or advocacy of violence, the argument may go, neither does right to a trademark protect an owner against the trademark deformation for the purposes of parody or critique.

Using a time-honoured distinction between the scope and the strength of rights,<sup>103</sup> the ‘categorical’ approach focuses on the *scope* of rights, in contrast to the balancing approach which focuses on their *strength*. These are two alternative ways of conceptualizing, and conducting analysis of, conflicts of values underlying

<sup>102</sup> This applies, *mutatis mutandis*, to the uses of trademarks or logos of non-commercial entities: their misuse or deformation or presentation in a bad light will adversely affect the reputational value of the entity but the owner has no claim against it based in trademark ownership rights. See the example of ‘a drawing of a person urinating on the logo of a hunting federation’ used by German anti-hunting protesters, Sakulin, *supra* n. 1, p. 115: the fact that a logo is a registered sign does not protect it against such uses for the purpose of social criticism.

<sup>103</sup> See, e.g., J.W. Nickel, *Making Sense of Human Rights* (University of California Press 1987) p. 48-51.

rights, and the practical consequences of choosing either of these methods may be none: neither is necessarily more rights-protective.<sup>104</sup>

In terms of the 'categorical' approach, focusing on the *scope* means that, when we encounter a conflict of rights, we need to better elucidate their proper boundaries until there is no overlap: once we do it, the conflict disappears.<sup>105</sup> It is a question of *coverage*, that is, the set of actions protected by this right. When, for example, a right to freedom of the press seems to conflict with a right to privacy, the judge's (or the analyst's) role is to narrow the scope of one right (the range of actions which the right protects) in such a way as to remove the conflict by re-aligning the coverage of both rights; what initially was thought to be covered by at least one of the rights now finds itself outside the perimeter of the right. Another way, belonging to this class of reasoning, is to narrow the category to which the right applies: in the 'freedom of the press' a given entity may be denied the status of the 'press'; in freedom of religion, a given set of beliefs may be denied the status of 'religion', in freedom of speech, a given communicative conduct may be characterized as non-speech, and so forth. So in a 'right to X' a scope-focused reasoning may proceed either by elucidation of the *scope* of conduct covered by a right, or by a *characterization* of a conduct in question so that it does not match the criteria of X. Either way, what seemed at first blush to be a conflict is only superficial: the conflict is a sign that we have not done our analysis of the *scope* of a right thoroughly enough.

In our case, the presumed conflict of trademark ownership and freedom of expression disappears once we conduct a serious analysis of the contours of trademark protection and realize that they are not so expansive as to protect an owner's right against trademark's deformation for the purposes of social criticism; this does not figure among the main rationales for having trademark protection in the first place. I will call it a 'categorical' approach, exploiting the double association of the word. It is 'categorical' in that it firmly precludes any competition with a given right from another right while that another right has been properly recalibrated; and also in that it proceeds from an analysis of a 'category' to which a given alleged right belongs, which needs to be properly ascertained and which informs the outcome of its apparent conflict with another category of rights (though perhaps a better adjective would be 'categorical').<sup>106</sup>

<sup>104</sup> See, similarly, F. Schauer, 'Categories and the First Amendment: A Play in Three Acts', 34 *Vanderbilt Law Review* (1981) p. 265 at p. 303.

<sup>105</sup> A nice example of the use of the 'boundaries' metaphor, within the scope-focused approach, is provided by the Hungarian Constitutional Court: 'The freedom of expression has only *external boundaries*: until and unless it clashes with such a constitutionally drawn external boundary, the opportunity and fact of the expression of opinion is protected, irrespective of its content', Decision 30/92, in Sólyom and Brunner, *supra* n. 25, p. 236, emphasis added.

<sup>106</sup> My use of the 'categorical' term roughly corresponds to what Fred Schauer called in his classical article a 'definitional-absolutist' approach which he described as 'combin[ing] close attention

But the usefulness of the ‘categorical’ approach (focusing as it does on the scope of the relevant rights) is questionable.<sup>107</sup> It has an appearance of defining the conflict of values out of existence, which runs counter to an intuitively persuasive impression conveyed by issues such as the *Allegro* case that we do indeed have a conflict of values here. The removal of the impression of conflict is illusory because much of the theoretical work which we do in the balancing approach is also done in the categorical approach, but at the stage of the elucidation of the contours of values (rather than ‘weighing’ one against the other, we are ‘demarkating’ one from the other). But the appearance – the rhetoric used to justify the judgment, whether judicial or theoretical – is of no conflict, and this is unfaithful to the powerful moral impression of conflict of values in such situations. We simply *feel* that, in real life, various values, interests and preferences conflict with each other, and our language of rights should reflect this reality of conflicts rather than define it away.

Second, and more importantly for our purposes here, the categorical approach may incorrectly imply that the two steps of arguing about the conflict of rights are conceptually separable and independent of each other. Remember the two points suggested as interim conclusions about trademark protection versus freedom of speech, at the beginning of this section: (1) Trademark law is incapable of prohibiting deformation of a trademark for the purpose of social criticism because such a deformation does not clash with the deep reasons we have for trademark protection in the first place (i.e., preventing consumer confusion); (2) Trademark deformation for the purposes of social critique belongs to the category of ‘high value’ speech, from the point of view of the rationales for freedom of expression. The ‘categorical approach’ suggests that these are two separate steps, taken one after the other, and it focuses on step number one. But if that were the case, the step number (2) would be redundant and unnecessary for the analysis: we could safely say that trademark protection has narrower contours than trademark owners might initially claim against their critics, and once we identify those contours properly and realize that they do not protect trademark owners against misuse of trademarks which do not run counter to the deep justifications of trademarks in the first place, that would be the end of the story.<sup>108</sup>

to defining the boundaries of the category with a desire to grant absolute protection within those boundaries’, Schauer, *supra* n. 104, p. 274, footnote omitted.

<sup>107</sup> More on categorical versus balancing approach: W. Sadurski, ‘Reasonableness and Value Pluralism in Law and Politics’, in G. Bongiovanni et al. (eds.), *Reasonableness and Law* (Springer 2009), p. 129 at p. 132-141.

<sup>108</sup> Elsewhere, I have suggested two other drawbacks of the categorical as oppose to the balancing approach: that it is less ‘transparent’ and that it is less consensus oriented, *see* Sadurski, *supra* n. 107, p. 139-141.

However, this would be deeply counter-intuitive: *both* steps are important to establish the right relationship between the rights claimed in cases such as *Allegro*. We need to understand the reasons why such an approach would be not only counter-intuitive but also false. The reason for the falsity of this approach is, it seems to me, that step number 2 is already present in step number 1: that considerations of the value of speech (the speech involving the trademark deformation) contaminate, so to speak, our considerations of the scope of the right to trademark protection. In effect, we do not proceed in two separate, independent steps but in one, double-pronged step. When we inquire about the 'scope' of a right in question (here, to trademark protection), not only do we think about the actions of the right-bearer protected by the right but also, and necessarily, we are reasoning against the actions of the third parties who may be potential or actual violators of this right. And when we come to the conclusion that the scope of the right in question is narrower than its bearer may have initially claimed (hence, that it does not entitle her to the protection against trademark deformation, notwithstanding her claim to the opposite), we necessarily build into this conclusion the considerations of the value of (and justifications for) the third party's action as protected by a competing right.

For these two reasons, the balancing approach seems to be superior to the categorical approach. (I put to one side the influence of the technique of constitutional drafting upon a choice of judicial method of rights adjudication. For instance, a US style of announcing constitutional rights lends itself better to a categorical approach because there are no constitutional instructions about the proper bases for restricting the rights. Thus, the appearance may be that rights are absolute while in fact a restriction must be a product of a narrowing-down of the scope of a right by a judge; on the other hand, the European style prompts a balancing approach because the grounds and standards for rights-restrictions are provided by the constitutional texts themselves.)

But how do we go about balancing the two rights: here, a right to trademark and a right to freedom of speech? To say that we compare the strength of two conflicting rights (as opposed to delimiting their scopes) is not enough: to declare that one of the rights is weightier than another (say, a right to freedom of speech is more important than a right to trademark protection) would be little more than an assertion without argument. It would sound arbitrary and would lead to counter-intuitive outcomes of 'lexical' priority of one right over another – preventing even the minimal restriction of a 'weightier' right would have to take precedence before even the prevention of the largest infringement of a 'weaker' right. In other words, such a simplistic declaration would plainly ignore the question of weighing and balancing of the issues in question (that is, the analysis of proportionality of restrictions to the aim). Second, such a balancing, if we characterized

*ex ante* one right as superior to another, would be disingenuous because the outcome of the balancing would be pre-determined at the stage of an abstract categorization of rights, and yet we must be open-minded about the outcome of balancing in a concrete situation. As Michael Spence observes, ‘in situations in which rights in intellectual property and free speech come in conflict it is not always apparent that rights in free speech should prevail’.<sup>109</sup>

What would a proportionality analysis look like in our case? I suggest that a good template for such an analysis is provided by the ECHR. Like many European national constitutions, it calls upon the European Court of Human Rights to subject restrictions and limitations of constitutional rights to a strict test of necessity. In Article 10.2 it provides, *inter alia*, that ‘the exercise of [the right to freedom of expression] ... may be subject to such ... restrictions... as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others’. The ‘rights of others’, as already said, are the most likely candidate for a basis for restriction of freedom of expression through the deformation of a trademark.

A preliminary point should be made about the method. Constitutional criteria for the assessment of the legitimacy of limitations on rights are valid for assessing the *constitutionality* of laws rather than for determining the proper judicial decisions in an individual case, such as *Allegro*. Hence the requirement for a statutory form of a restriction of a right (‘as are prescribed by law’). One may say that this constitutes a template for a constitutional court (or another court exercising constitutional review of a statute) providing it with a set of criteria to which a statutory limitation of a right should be subjected. But when a court – or indeed, a commentator – enquires into any balancing of two rights, this template is useful to subject a restriction of a right to a precise proportionality analysis. One may say that a constitutional court’s reasoning is exemplary for an analysis by any reasoner if she wants to follow the general logic of her constitution.

So in our case, the question boils down to whether the ban on a trademark deformation (as in the *Allegro* case) would be ‘necessary in a democratic society’ to protect rights of the trademark owner. As one sees, everything depends on *what* rights of the trademark owner are considered legitimate. If these were to be the rights of the trademark owner not to have her trademark deformed or misused for any purpose without her permission, then such a ban would be tautologically necessary. But it would be monumentally question-begging whether *such* a right is legitimate in the first place; in fact, everything we said earlier, in Part ‘*Scherzo*’ of this article, was meant to support a negative answer to that question. The argument developed was that the right to trademark protection (or at least its core) relies upon, and must be coextensive with, the fundamental rationale for having

<sup>109</sup> Spence, *supra* n. 24, p. 616.

trademark protection, which is to protect the commercial interests of the producer by preventing consumer confusion as to the source of origin of the product or service. It is definitely not necessary to restrict freedom of expression by banning any trademark deformation in order to protect a right of a trademark owner, so defined. To be sure, there are some secondary and less important rights involved in trademark ownership, such as dilution-related rights, but they are either not engaged in this case (no dilution by blurring occurring here; dilution by tarnishment is relevant only in the context of commercial uses of a trademark) or are of low intensity (such as in the case of general reputational interests) when compared with the value of freedom of speech.

There is one other constitutional criterion prominent in European constitutionalism, though absent in the text of the European Convention, and that is that a restriction of a right, quite regardless of its necessity to protect another right, must not infringe an 'essence' (or a 'core') of that right. This criterion has its origins in post-World War II German constitutionalism,<sup>110</sup> and since it has been picked up by the Constitution of Poland, the country which is the locus of *Allegro*,<sup>111</sup> may be considered here.<sup>112</sup> Will a prohibition on the (mis-)use of a trademark to make a social or political comment on a trademark owner affect an 'essence' or a 'core' of a right to freedom of expression? All depends on how we interpret the 'core' of a right. There has been academic controversy in German constitutional theory about whether such a 'core' should be understood in a 'relative' sense, as

<sup>110</sup> Art. 19(2) of the Basic Law: 'In no case may the core [essence] of a basic right be affected'. For a useful discussion, see R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002), p. 192-196. Though 'core' and 'essence' have quite distinct meanings, in English and in many other languages (including in Polish: '*istota*' and '*trzon*') they are both captured by German *Wesen*.

<sup>111</sup> See, e.g., Constitution of Poland, Art. 31(3) last sentence. The Polish Constitution talks about an 'essence' (*istota*) but Polish Constitutional Tribunal has interpreted the 'essence' using the language of the 'core' and referring explicitly to the German construction, see e.g., its judgment P 11/98.

<sup>112</sup> Note that the metaphor of the core of a right to free speech is also occasionally used in US law and legal writings, with regard to First Amendment jurisprudence, e.g., Cass Sunstein says that 'An attack on private discrimination against homosexuals ... falls comfortably within the free speech *core*', Sunstein, *supra* n. 11, p. 131, emphasis added (see also: 'Ordinary political speech, dealing with governmental matters, unquestionably belongs at the *core*', *id.* at 9, emphasis added). However, consistent with Sunstein's two-tier theory of free speech protection, the 'core' is meant to identify this aspect of speech which warrants the highest degree of protection, not necessarily a 'core' absolutely immune to any governmental intervention. The Supreme Court, in its First Amendment jurisprudence on free speech, occasionally referred to the metaphor of the 'center' of the area of free expression, e.g., saying that 'the proposition relied on by the Alabama courts [finding certain statements critical of a local police commissioner libellous] strikes at the *very center* of the constitutionally protected area of free expression', *New York Times v. Sullivan*, 376 US 255, 292 emphasis added.

that which remains after the balancing of a given right with other constitutional values and rights has been done, or whether it is this core which cannot be affected, even as a result of balancing.<sup>113</sup> This way of formulating the alternative suggests the problem with the very idea of a ‘core’: under the former interpretation, it is redundant (because it does not add anything to the proportionality analysis) while under the latter, it implies that a right, in some of its scope (the core) may be absolute, and immune to any restrictions, which is deeply counterintuitive.

But if one insists, in deference to constitutional texts on the applicability of this test, then perhaps a formulation by a German scholar Friedrich Klein will provide a useful hint: the German inalienable core principle prevents ‘the applicability of a constitutional rights provision from being so reduced that it becomes meaningless for all individuals, or for a large part of them, or for life in society generally’.<sup>114</sup> An idea that a right must not be so limited as to become ‘meaningless’ to a right holder suggests, in my view, an appeal to the fundamental *justification* for recognizing this right in the first place; hence, to its main function. In addition to what was already said about the main functions (and justifications) of trademark protection in Parts 2.1 and 2.2 of this article, one may refer to important case-law of the European Court of Justice on the subject. The ECJ has recognised that trademarks perform a number of functions. The ‘essential function of a trademark’, to use the language of the Court, is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin.<sup>115</sup> In other cases the European Court of Justice has recognized that trademarks do have other functions which may be protected by law, although these take a lesser place in the conception of trade mark rights. In particular, trademarks perform ‘communication, investment or advertising functions’, which arise from the fact that the investment in the promotion of a product is built around the mark, and thus justify permitting the proprietor to control and protect the image of its own trade mark in the eyes of consumers. They also perform a ‘quality function’ – that of symbolizing the qualities associated by consumers with certain goods

<sup>113</sup> See Alexy, *supra* n. 110, p. 193-196.

<sup>114</sup> Quoted in Alexy, *supra* n. 110, p. 193.

<sup>115</sup> That this is the ‘essential function’ of trade mark is recognized in a series of cases dating back prior to the harmonization of trade mark law in Europe: Case 102/77 *Hoffmann-La Roche & Co AG and Hoffmann-la Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1978] ECR 1139, 9 IIC 580 (1978), para. 7; see also *Arsenal Football Club plc v. Matthew Reed* [2003] ETMR 19, 34 IIC 542 (2003); also First Council Directive 89/104/EEC of 21 Dec. 1988 to approximate the laws of the member states relating to trade marks, OJ L 040, 11/02/1989, p 0001-0007, 10<sup>th</sup> recital in the preamble, which states that the function of legal protection for trademarks is ‘in particular to guarantee the trade mark as an indication of origin’. See also Simon, *supra* n. 35.

or services, and guaranteeing that the goods or services measure up to expectations. The quality function is an aspect of the essential function of guaranteeing identity of origin, but the communication function is quite different, and may deserve protection even where there is no abuse arising from misrepresentations about either origin or quality: it is this function that is protected by laws such as laws against trademark dilution.<sup>116</sup>

An upshot is, if the 'essence' of a right is interpreted through the prism of its function or justification (as, in my view, it should be), then to allow a social critic to use and deform a trademark for an obvious purpose of parody or social criticism does not infringe an 'essence' of a right to trademark. In contrast, to prohibit such an action would amount to an infringement of an 'essence' of freedom of expression. This conclusion is based on the combined force of two arguments: (1) that social or political criticism, as exemplified by Allegro's criticism, belongs to the top tier of high-values speech, in terms of attracting the strongest constitutional protection, and (2) that the form of a speech is inseparable from its content, must lead to the conclusion that such a ban would affect the very 'essence' of a right to freedom of expression.

#### *FINALE*: CONCLUSION

The cases of deliberate trademark deformation in order to make a critical comment on public issues, especially related to the trademark owner or the trademark itself – such as in the recent Polish *Allegro* case – illustrate a conflict between two types of *prima facie* legitimate claims: claims based on fundamental values of freedom of speech and claims based on the values underlying a category of intellectual property, namely trademarks. The aim of this article was to do two things. On a substantive level, it argued that in the conflicts of values illustrated by trademark deformation or parody, the interests in freedom of speech should prevail, both because the speech in question belongs to the highest tier of constitutionally protected speech, and because the fundamental rationale for having trademarks protected in the first place is not engaged here: there is no risk that such a misuse of trademark will confuse the potential customers as to the origins of the product. While there may be some other ancillary rationales for trademark protection – a protection against the 'dilution' of the trademark resulting in the decrease of its economic value – they are not engaged by trademark parody either. Trademark parody may indeed adversely affect the trademark owner but in a way which does not give him a legitimate claim for injunction against such a misuse of trademark;

<sup>116</sup> These additional functions and their role in trademark law are discussed explicitly in *L'Oreal SA v. Bellure NV* (C-487/07) [2010] RPC 1.

it may also affect her reputational and dignitary interests, but these must yield to the higher societal interests of freedom of speech.

On a methodological level, this article can be seen as a case study in constitutional balancing. It demonstrates that the ‘balancing’ approach (weighing and balancing of competing rights viewed through their strength) is superior to a ‘categorical’ approach (delimiting the boundaries between rights viewed through their scope). The balancing approach is more faithful to our intuitive views about conflicts of values in social practice than the categorical approach, which may be seen as trying to define the real conflicts out of existence. It also better makes sense of case-law in a number of legal systems where courts in such cases as discussed in this article weigh and balance the interests of freedom of speech against the interests protected by trademark ownership. A properly conducted balancing analysis may reflect constitutional templates for testing the legitimacy of restrictions on constitutional rights, as exemplified, for instance, by the European Convention of Human Rights.

