

IP_LAW_GALLI *Newsletter*

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RECENT DEVELOPMENTS IN ITALIAN IP LAW

- ✓ *The Italian Constitutional Court cancels the company procedure from IP cases*

With its ruling no. 170 of 17 May 2007, published in the *Official Gazette* of 23 May 2007, the Italian Constitutional Court held that Art. 134 of the Code of Industrial Property (CIP) (Legislative Decree no. 30/2005) under which the so-called company procedure is applied to IP cases had gone beyond the delegation granted to the Government to reorganize IP legislation, on the basis of which the Code had been introduced. Consequently, the article was declared **partially unconstitutional**, for what concerns that part which applied the company procedure to these cases (and to antitrust cases relating to IP rights).

There will probably be few regrets about the abandonment of application of the company procedure to IP cases. The special procedural discipline provided by Legislative Decree 17 January 2003, no. 5,

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better known as the «company procedure», as it had originally been intended only for corporate cases, markedly complicates cases involving a number of parties (a very common scenario in the IP field). In any case it makes it necessary to exchange briefs which are often superfluous, since their aim is solely to refute the factual allegations made by the opponent, which in the absence of specific objections should have been considered self-evident, on the basis of the so-called «**ficta confessio**» mechanism, provided solely for this procedure.

These disadvantages are not offset by what could have been the advantage of cases having a shorter duration. This outcome was, at least initially, considered feasible with this procedure. However, it has failed to shorten the duration of IP cases to less than 2-3 years. This can, however, be achieved under the ordinary civil procedure, after the revision which came into force at the beginning of 2006. It concentrates all the preliminary activities of the proceedings, from the confirmation that the proceedings have been duly started to any additions made to the claims, into **one single hearing** (plus a possible second hearing, held only at the request of the parties, during which an attempt is made to reach an agreement), providing for **one single exchange of briefs and reply briefs between the parties**, in order to submit motions for evidence gathering, before the Court decides, in chambers, whether or not to admit these motions. Furthermore, the ordinary civil procedure **offers greater protection to foreign defendants**, giving them more time in which to prepare their case (150 days rather than the 90 days given to Italian defendants). Under the company procedure all defendants were given 60 days.

As a member of the **Commission for the Revision of the Code of Industrial Property** set up during the previous legislature at the Ministry of Productive Activities, Professor Cesare Galli had asserted that it would be opportune to introduce, as a matter of urgency, a **decree-law** by virtue of which the company procedure would not be applied to IP proceedings, providing instead for extension of the ordinary civil procedure to these proceedings. This proposal was approved by the Commission and the competent Minister. However, a decree-law failed to be introduced as it was eventually considered preferable to use the ordinary instruments of law in a matter of a procedural nature. The delegation for **revision of the Code** had, however, expired with the end of the legislature and has not yet been renewed, although renewal is already provided for in the «Industria 2015» Bill proposed by Mr. Bersani, the Minister for Economic Development. This expressly provides, *inter alia*, that the company procedure will not be applied to IP cases. Now, however, the ruling of the Constitutional Court has pulled up the problem by its roots.

While the proposal of the Commission for the Revision of the Code also provided for a transitory interim system, whereby proceedings which had already commenced would continue with the company procedure, the ruling of the Court also applies to **pending proceedings**.

With these proceedings, it therefore seems that **this procedure needs to be replaced** by the ordinary civil procedure, as provided under Art. 16 of Legislative Decree no. 5/2003 for cases in which proceedings commenced with the company procedure but which do not come within the scope of cases to which the company procedure applies by law. This article establishes that the Court assigns the case to an Examining Magistrate and schedules a hearing, after which the case will continue according to the ordinary civil procedure. However, it excludes «**deadlines which have already been reached**», which seems to imply that if, under the company procedure, a stage has been reached in which the parties can no longer submit new motions for evidence gathering or new documents (in practice, after the exchange of the first briefs subsequent to the Writ of Summons and entry of appearance), it will no longer be possible to do so even under the ordinary civil procedure.

It is, however, uncertain whether the same rule may be applied in our case, in which the decision to adopt the company procedure was not the result of error, but was imposed by a law which was declared unconstitutional only subsequently. It therefore appears likely that in doubtful cases the Courts will always allow extra documents and motions for evidence gathering to be submitted, giving the deadlines provided by Art. 183 CCP. Replacing the procedure will therefore mean that pending proceedings **will be lengthier**, although to what extent will depend on the situation.

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✓ *Industrial design: 70 year copyright protection – but only for works subsequent to 2001. The restriction, however, appears to be unconstitutional*

Law 6 April 2007, no. 46 (Official Gazette of 11 April 2007) of conversion of Decree Law 15 February 2007, no. 10 loosened a series of knots which had laid Italy open to a number of rebukes, due to the fact that Italian domestic legislation did not comply with EU law. These also concerned the **copyright protection on industrial design works**, introduced in Italy in 2001 by Legislative Decree 2 February 2001 no. 95 in implementation of EC Directive 98/71 and reserved for works of design possessing «artistic value» (in practice, those of higher quality), but with a duration – 25 years after the year of death of the author – different to and much shorter than the protection provided for all other works covered by copyright. It was exactly in relation to this duration, and to the relative transitory system, that the European Commission, on the prompting of INDICAM (l'Istituto di Contramarca per la Lotta alla Contraffazione) opened a **contravention procedure** against Italy.

Law no. 46/2007 (and, prior to this, Decree Law no. 10/2007) modifies Art. 44 of the CIP, bringing the duration of protection for works of industrial design into line with the **seventy years** provided (on the basis of another EU Directive) for all other works protected by copyright, thus taking on board the proposal submitted in 2005 by the Commission for the Revision of the Code at the request of Professor Galli.

The new law has also affected Art. 239 of the Code, i.e. the **transitory article** relating to works created prior to introduction of this protection into Italy in 2001. The text of Art. 239 prior to this reform provided (implicitly but unequivocally) that works created before the legislative modification of 2001 would also be protected, but at the same time it attempted to safeguard the position of third parties who, in good faith, trusting in the absence of protection, had produced products similar to such works before that date (mainly lamps and armchairs, the creators of which are undisputed masters of design, such as Mies Van Der Rohe, or Le Corbusier). These parties were allowed to continue this formerly lawful activity for ten years. However, the new text of Art. 239, which has now been introduced, **completely excludes from protection works created prior to entry into force of Legislative Decree no. 95/2001** which are thus deprived of this protection *a posteriori*.

The new article thus entails a sort of **expropriation without indemnity** of the rights conferred by Legislative Decree 95/2001 on the earlier works and as such clearly appears to be **constitutionally unlawful**. Since in 2001 this protection was provided *both* for works of industrial design realized *after* entry into force of the law *and* for those created *prior* to that date, it is unthinkable that today, in 2007, the legislator would renege on that decision and state that only works created after 2001 can benefit from this protection. Moreover, the EU contravention procedure was undertaken in relation to the old text of Art. 239 of the Code which, according to the Commission, excessively limited the rights of creators of works prior to 2001, obliging them to accept limitless continuation of the pre-users' activity for a decade. This criticism evidently applies with all the more reason to the new article which actually cancels this protection completely.

A different solution had been proposed by Professor Galli on the Commission for Revision of the Code (and was the subject of a number of amendment proposals, examined by Parliament in the context of converting the Decree Law, but all rejected without being studied in any particular depth) , which provided for harmonization of the rights of the creators of the works with those of the parties who, prior to introduction of copyright on works of industrial design, were already producing and selling products similar to the protected works. According to this proposal, since this activity was then completely lawful it should remain so also subsequently, provided, however, that it continues within the **(also quantitative) limits of pre-use**.

Now we can only wait for the Constitutional Court to decide on the issue, as it will probably do so very shortly, in line with the timescales of Italian constitutional justice. In fact, there are numerous cases pending which concern the infringement of works covered by copyright prior to 2001, and all these cases are evidently compromised, at least for the future, by the new article. It is therefore reasonable to

think that in these cases the **question of the legitimacy of the new transitory system** may be raised. However, uncertainty in this matter remains and is increasing, something which the businesses and professionals involved most definitely do not need.

✓ *Patent duties in Italy: implementation decree issued*

In the November 2006 issue of this Newsletter we announced that the Italian government intended to **reintroduce duties for filing, publication and renewal of patents, utility models and designs and models**. These had been abolished on 1 January 2006 on the basis of an article in the 2006 Financial Law. Their reintroduction was the work of the 2007 Financial Law, then not yet passed, which had postponed the fixing of definite methods for determining these fees (now called «**duties**») to an implementing decree to be adopted by 31 January 2007.

Although late, the decree was passed and published in the *Official Gazette* of 6 April 2007. As predicted, the adopted solution represents a sort of **compromise** between the old system and the system which did not provide for any duties, since it states that the «**duties**» for maintaining a right are in any case **due only in the fifth and successive years for patents and in the tenth and successive years for utility models and designs and models**, so as to encourage companies to patent, avoiding, however, the possibility that patents which do not earn enough for their owners even to pay patent duties remain in force until the maximum deadline provided by law. The new legislation **has also avoided introducing the «duties» with a retroactive effect back to 2006**, as was feared would happen, also providing that annual payments for patents due to expire between 1 January and 30 April 2007 may be made by the last working day of June (or during the following six months, with interest for late payment); for models, if a five year period for which payment is due begins to run in 2006, the decree provides for the payment of a lump sum by the last working day of June (or during the following six months with interest for late payment).

✓ *Protection of Made in Italy: new measures under examination in Parliament*

The Bill entitled «**Norme per la riconoscibilità dei prodotti italiani**» (Provisions for the Recognition of Italian Products), is again under examination in Parliament. It had already been submitted in the previous legislature but had not been approved in time before Chambers were dissolved. The text currently under discussion, which «**consolidates**» two different proposals (C. 664 and C. 848) provides for an «**origin marker**» (the quality trade mark «**100% Made in Italy**») which is purely optional so as not to contravene EU law; the «**identity card**», which will likewise be introduced for these products, is also optional for the same reason.

Monitoring the use of these «**origin markers**» is (under Art. 6 and Art. 12) **the remit of the High Commission for the Fight against Infringement**: However, this risks altering and distracting the Commission from its real task of coordinating the fight against infringement. The High Commission would be entrusted (Art. 12.2) with an incomprehensible «**right to submit a compensation claim pursuant to Art. 2043 Civil Code**», in the case of fraudulent use of the «**identity card of Made in Italy products**», without it being clarified in any way which damage is being referred to. The proposal also provides for **considerable appropriation** of public funds (5 million Euro per year for three years: Art. 6.6) to finance this project, sums that could be better spent on strengthening the police forces involved in the fight against infringement.

THE CASE

✓ *Publicly claiming that a Court finding of infringement has been issued when, in actual fact, a description has simply been ordered is an act of unfair competition (Court of Venice, interim order 21 March 2007) – The text of the order and the petition*

On 21 March the Specialized IP Division of the Court of Venice issued an interim order admitting a petition submitted by two well-known nurserymen of the Venetian area who were represented by our firm. It is of great interest because it outlines a sort of «**code of fair conduct**» in **giving information**

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to third parties regarding IP judicial proceedings which are in course. What gave rise to the ruling was the fact that the holder of a patent on a new plant variety, had sent out a letter to potential buyers of the goods of the alleged infringer, informing them of the judicial patent protection proceedings it had begun. It stated, however, that the Court, «in an emergency procedure, had provisionally declared its claims well-founded», while, on the contrary, the Court had simply issued an order for description, i.e. a measure provided by the CIP and by Copyright Law, the aim of which is to acquire evidence of an alleged IP tort and which **does not have any advance bearing as to the merits of the decision.**

Case law normally holds that whether information regarding judicial proceedings, just like warning letters for trade mark and patent infringement, is to be considered lawful or unlawful from a competition standpoint depends on the outcome of the proceedings into the merits, i.e. if the Court issues a ruling of infringement the letters will be lawful but if the plaintiff's claim is rejected, the letters will be considered (*a posteriori*) acts of denigration against the party wrongly accused of infringement. In this case, however, the Court of Venice went beyond this criteria, ruling that it was not necessary to wait for the outcome of the proceedings into the merits (in which the alleged infringer is defending itself against the opponent's claims, asserting that they are completely unfounded) and that **warning letters are most definitely to be considered unlawful from a competition standpoint and forbidden, when their contents appear to be tendentious and inexact.** This was exactly the situation in the case in question, in which the plaintiff made out that its claim had already been upheld when, in actual fact, it was still *sub iudice*, and the information was worded in such a way as to create a climate of generalized suspicion and fear amongst operators in the field. Thus, in this matter, the Court declared a **criterion of «contingency»** for the diffusion of information relating to judicial orders in proceedings involving rival companies. What is particularly significant is that the Court, by admitting the petition, not only issued an injunction on further diffusion of the letter but also ordered that the **order** ascertaining the unlawfulness of the letter **be published in full**, in the same press publications (specialized reviews) in which the denigrating letter had appeared, so as to immediately re-establish «parity of arms» between the opposing parties: all, naturally, at the expense of the author of the enjoined letter.

There now follows the text of our petition, followed by that of the order admitting the petition. All references to the names of the opposing parties and their lawyers have been removed from both.

COURT OF VENICE

Specialized IP Division

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Petition for an urgency measure

Pursuant to Art. 24.1 Legislative Decree no. 5/2003 and Art. 700 Code of Civil Procedure

On behalf of

Johann (Hans) Huber, owner of the homonymous business and Dr. **Roberto Cavaler**, owner of Vivai Cavaler, both represented by Attorneys-at-law Professor Cesare Galli, Giancarlo Saguatti, Barbara Saguatti and Mariangela Bogni

- defendants -

in the case brought by

Mr. **(XX)** and **(YY) s.n.c.**, both represented by (...)

- plaintiffs -

also against

Mr. **(ZZ)**

- other defendant -

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1.- This case was brought by the plaintiffs Mr. (XX) and (YY) s.n.c. in their stated respective qualities of creator and exclusive licensee for the EU of a new plant variety called “(**)”, consisting in a “species of apple tree, more precisely, a mutation forming part of the “Braeburn” variety, characterized by its **“red colour which develops early with respect to the apple’s stage of ripeness and ... which is deep and uniform on all parts of the fruit, even those parts less exposed to solar radiation”**, which distinguishes it from other varieties belonging to the group (writ of summons pp. 2-5): a variety which, according to the plaintiffs, is protected at EC level by patent certificate no. (...) pursuant to EC Regulation no. 2001/1994 (*ibid*, p. 2); and which, again according to the plaintiffs, the petitioners Mr. Huber and Dr. Cavaler violated, by producing and selling trees of the protected variety with the wording “Mema Braeburn” or “Braeburn”.

Therefore, in order to acquire evidence of this violation the plaintiffs turned to the President of this Court seeking, against Mr. Huber, Dr. Cavaler and Mr. (ZZ) (purchaser of some of the disputed trees), a description order concerning the “trees and fruit” which allegedly violated the plaintiffs’ rights and, against Mr. Huber and Dr. Cavaler only, an order to submit their accounting books. The requested description was authorized by an *ex parte* ruling of 2/3 October 2006 and then carried out at the premises of the parties indicated in the petition.

Arguing that the description had yielded proof of the alleged tort, the plaintiffs then summonsed Mr. Huber, Dr. Cavaler and Mr. (ZZ) before this Court seeking, subject to an Expertise in which a pomological comparison would be conducted between the plant matter extracted from the trees bearing the label “Mema Braeburn” taken from the (ZZ) orchard and the “(**)” plant matter, an injunction against the defendants Mr. Huber and Dr. Cavaler, ordering them to refrain from “producing, reproducing, putting on sale or marketing the ‘(**)’ plant matter, in any form and under any name and, in particular, under the name ‘Mema Braeburn’” with a fine also being established; orders to destroy the “mother plants and trees” constituting infringement and to publish the ruling; and an order against the said defendants to pay compensation for the damage incurred or, as a subordinate claim, payment of a fair setting off.

2.- Mr. Huber and Dr. Cavaler filed an entry of appearance which was served on the opponent on 8 January 2007. They stated that the opponents’ claims were **completely unfounded, in fact and in law**, and sought their full rejection with a ruling of abuse of process to be issued against the plaintiffs, pursuant to Art. 96 Code of Civil Procedure (CCP).

They also maintained that **the plaintiff (YY) s.n.c. was guilty of unfair competition on the grounds that it had denigrated them**, and thus entered a counterclaim of unfair competition against this plaintiff.

They also stated that Mr. Huber had been in the nursery business for many years, specializing in the cultivation of apple trees, which were then sold to fruit farmers who follow the trees in their fruit production; and that Mr. Huber, in his activity, which gained him a reputation as a respected nurseryman and authoritative member of the *Konsortium Südtiroler Baumschuler* – i.e. the consortium which brings together operators in this sector from the Autonomous Region of Bolzano, in which he held the posts of President and Director –, dedicated himself to **selecting varieties of apple trees** to satisfy all the needs of both apple tree growers and apple consumers.

They added that Mr. Huber’s research had led to the selection in progressive stages (grafts and selection), carried out **from the beginning of 1994**, of a **new variety** belonging to the Braeburn group, which produces red apples possessing **singular characteristics** which may be distinguished from the other plants in the group – and in particular from those which, according to the opponent, were exactly those of the alleged “(**)” variety – and which he sold under the registered trade mark “**Mema**” (our doc. 1): a variety which is also sold by Dr. Roberto Cavaler, in turn a well-known and respected nurseryman in the Veronese area, a graduate in agrarian science and an expert in the reproduction of new plant varieties in the organic products sector.

They stated in particular that in **1994**, on a branch of one of the plants (the so-called “mother plant”, still in the Huber nursery in Appiano) **a number of fruits appeared whose red colour was**, albeit not homogeneous, **more marked than the others**, obviously originating from a **gemmaceous**

mutation (our documents 3 and 4, the first of which shows a row on which the apples presented the characteristic feature of all standard “Braeburn” apples, while the other shows, *inter alia*, the branch affected by the mutation, bearing the apples of a deeper red colour); and that Mr. Huber had taken the **plant matter** from this branch and **grafted it onto other plants**. This phenomenon occurred again in the following years so much so that it was noted and photographed in 1999 (our doc. 5) also by Mr. (...), then working at the *Istituto Sperimentale Laimburg (Fachschule für Obst-, Wein- und Gartenbau)* of Ora (Bolzano), and also affected, to differing degrees, the grafted plants, from which point on Mr. Huber effected **further grafts and selections**, until he managed to obtain a **stable and homogeneous variety** called “**Braeburn 1/10/78**” which Mr. Huber grafted for the first time in 2003 in his nursery, as shown in the **self-producing graft report** submitted on 30 June 2003 to the Agricultural Inspectorate of the Autonomous Province of Bolzano (our doc. 6).

The petitioners also offered **witness evidence** as to these circumstances, formulating a series of questions to put to witnesses: it being understood that the diversity between the plants of their variety and that of the variety being sued upon by the plaintiffs must of necessity be shown by the **Expertise** which they also requested be carried out.

3.- These being the facts it is all too easy to imagine the stupor with which Mr. Huber and Dr. Cavaler underwent the description operations effected at their nurseries and the cultivation areas of Bolzano and Erbè (Verona) of Mr. Huber. The description order was obtained by the opponent passing off as established fact **hearsay** which the plaintiffs themselves had to admit **was not confirmed** even by the alleged authors of the hearsay, and basing its case on the **unacceptably convenient theory**, completely uncorroborated, whereby since “in Alto Adige apple trees ‘*circulate*’” (*sic* Writ of Summons, p. 6) with the typical characteristics of the “(**)” and since Mr. Huber has in the past lawfully produced plants of this protected variety (on the basis of an agreement with the assignor of (YY), which expired on 30 June 2003), then the “Mema Braeburn” deriving from the latter would be the “(**)” camouflaged.

However, as mentioned previously, not only did the opponent base its case on this “theory”, which must be most firmly refuted, but it is also **systematically operating on the market in such a way as to discredit the petitioners, by spreading to their detriment false and tendentious information and judgments among operators in the field**.

In fact, as was fully recounted and documented in our entry of appearance, Mr. Huber and Dr. Cavaler were **denigrated** in particular on the occasion of the international sectoral trade fair “**Interpoma 06**”, held in Bolzano from 9 to 11 November 2006 (our doc. 7), when representatives of the exclusive licensee for Italy of (YY), (...), **tendentiously reported** these proceedings to operators in the sector, presenting Mr. Huber and Dr. Cavaler as infringers whose nurseries were soon to be closed down and with whom it would be better not to have business relations, and warned that purchasers of the “Mema Braeburn” trees would have said trees seized.

More recently, the opponent’s strategy of creating “scorched earth” around the petitioners took on a more tangible form with the sending of **warning letters to potential purchasers of “Mema Braeburn” trees** (our doc. 8), the content of which was patently untrue, in which (YY) **in essence makes out that the conduct of Mr. Huber and Dr. Cavaler has already been adjudged unlawful by this Court** and effects **real psychological terrorism**. It is in relation to this tort that an interim measure must be issued in order to bring an end to the **campaign of denigration** of which the petitioners are victims.

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The unlawfulness of the campaign of denigration carried out by (YY).

4.- As mentioned in the previous paragraph, with their entry of appearance the defendants Huber and Cavaler sought a ruling that plaintiff (YY) was guilty of unfair competition for the denigration carried out by the latter against them, firstly at one of the main sectoral trade fairs (Fiera Interpoma 2006) and then, above all, by sending warning letters to potential clients, on (YY) headed paper (our doc. 8), which Huber and Cavaler became aware of just before their entry into the proceedings.

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These letters signaled a real *escalation* in the aggressive nature of the opponent's conduct. Evidently well aware that it had brought a clearly unfounded case, it tried all the same to draw some "advantage" from it, **by using it instrumentally as a wedge within a systematic intimidation campaign**, openly aimed at **damaging the image of the petitioners and at removing them from the market before a decision could be reached** establishing the truth of the situation and the lawfulness of Huber and Cavaler's activity.

This is clear from the content – which, as is plain at first glance, speaks for itself – of the letter sent to potential clients of Huber and Cavaler.

In this letter the plaintiff, did not simply give **information, in an objective manner**, of the legal proceedings in course and warn potential clients against buying the allegedly infringing trees. If it had been the case, the unlawfulness of this conduct would have depended on the outcome of the proceedings into the merits, i.e. the conduct would have been judged unlawful only if the court had ruled, as we maintain it should, that the conduct of Huber and Cavaler is entirely legitimate, according to the clear dicta expressed in both legal theory and case law whereby **"Warnings and information shall be considered lawful if and when the disputed tort is accepted by the court. However, if the disputed tort is judged not to exist the warnings and information shall be illicit"**: VANZETTI-DI CATALDO, *Manuale di diritto industriale*⁵, Milan, 2005, pp. 83 and 84; in the same sense see, in case law, amongst others, Supreme Court 3 July 1980, no. 4225, in *Giust. civ., Mass.*, 1980, which states that **"The extra-judicial warning, by means of which an entrepreneur attempts to block the spread of its competitor's product, alleging without grounds that entry of the product onto the market would violate its exclusive rights, may give rise to unfair competition, pursuant to Art. 2598 no. 2 and no. 3 Civil Code; and Court of Milan, 6 March 1997, in *Giur. ann. dir. ind.*, 1998, 230 et seq., whereby "A warning draws its competitive legitimacy from the validity of the exclusive right, thus a warning is undoubtedly illicit if it is based on a patent which is subsequently declared null"**.

5.- On the contrary, the plaintiff went well beyond this, stating that it had **"started actions against nurserymen who reproduce the MEMA BRAEBURN variety, (and that) these actions had been, by means of an emergency measure, provisionally declared well-founded by the Court of Venice"**.

This is patently **untrue**, given that the Court only authorized a **description** to be carried out against Mr. Huber and Dr. Cavaler, i.e. a prior technical ascertainment measure, **with the sole aim of gathering evidence of a possible tort**, and which therefore does not constitute punishment of an already ascertained tort, even of a provisional nature.

Nor did this suffice. In order to create a climate of **generalized suspicion and fear**, (YY) alleged in its letter that **"other varieties of the red Braeburn are also currently sold, which due to their lack of distinctive nature, most probably constitute infringement of the patented (**) variety"**. (YY) then openly threatened to **"take legal action against each individual fruit farmer who, even after publication of this letter, still purchased MEMA BRAEBURN or other varieties of plants, belonging to the red Braeburn type and which infringe the (**) variety ... in order to obtain an order to uproot the trees and confiscate the fruit"**.

The plaintiff concluded its letter with "paternal" advice to all operators in the sector, which clearly reveals its **real objective**, i.e. to use these proceedings as a weapon to impose its products on the market and attempt to buttress its dominant position. In fact, (YY) writes that by means of its warning letter it **"informs all farmers, such as cooperatives and consortia which are interested in the production of 'Braeburn red' varieties, in their interests, to buy in future only 'Braeburn red' varieties which have been awarded a certificate and are patented and thus to purchase or recommend the (xx) and (**) varieties, in order to avoid further risks of serious legal consequences"**.

Thus, it **invites operators, in order to avoid problems, to purchase only the varieties it owns, i.e. the (xx) and (**) varieties!**

6.- It is perfectly clear that by issuing the above text the opponent **completely overstepped the boundaries of fair business practice**.

Once again the teaching of legal theory and case law comes to our aid. It asserts that there is a need to **“avoid competition taking on an aggressive and quarrelsome nature”**: a need which is understood as a demand that **“for lawfulness to be admitted ... the discrediting assertions must not be made in a tendentious manner and thus one which may have a discrediting effect which goes beyond the need for public information”**; and that, in other words, **“they are judgments which are not only strictly true but are also expounded in an objective manner”**: see, for all, VANZETTI-DI CATALDO, *Manuale di diritto industriale*⁵, *op.cit.*, p. 77-78; and, in the same sense, in case law, Court of Bologna, 5 January 2000, in *Giur. ann. dir. ind.*, 2001, 160 *et seq.* whereby **“Spreading a true piece of information, but reporting it in a tendentious manner, with the clear intention of damaging a competitor, may constitute unfair competition by way of denigration”**; Court of Appeal of Brescia, 14 October 2003, *ibid*, 2003, 1178 *et seq.* which states that **“Spreading true information may also constitute denigration if it is carried out in a discrediting fashion”**; and again Court of Bologna, 14 June 2004, *ibid*, 2004, 1139 *et seq.*, whereby **“Commercial denigration may arise even in the case of spreading true information because the entrepreneur takes the place of the public in formulating a judgment which should be reserved to the public”**.

These principles are particularly suitable for our case: and, more precisely, they must be applied to it *a fortiori*, given that the opponent **not only overstepped all limits of objectivity, non-tendentiousness and contingency** (which would already render its conduct unlawful), but actually spread information and judgments which were radically **untrue**, and threatened purchasers with **sanctions simply for purchasing products other than those covered by its patents**, thus defending an unlawful **monopoly** position.

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The need for an urgency measure to put an end to the opponent’s “summary justice”

7.- In the light of the above, no doubts can reasonably be raised as to the unlawfulness of the opponent’s conduct.

Likewise, there is no doubt that, in the case in question, **the requirements of necessity and urgency** hold for the issue of interim measures pursuant to Art. 700 CCP. and 24 Legislative Decree no.5/2003 to bring to an end diffusion of the above text (or texts of a similar nature) and the climate of “summary justice” which the opponent has decided to create.

In fact, due to the opponent’s denigrating campaign, the petitioners are suffering **serious and irreparable damage** which consists not only in the fact that it is **impossible for them to sell** the “Mema Braeburn” apple trees (what is more, in this period of the year in which sales are normally concentrated) but above all in the **loss of reputation** which they had, with great effort, won in the sector: a reputation which even a ruling in the petitioners’ favour **can never completely restore**; let alone the fact that – given the need for a technical expertise in the proceedings into the merits – **it will still take some time** for the ruling to be issued, leaving plenty of room in the meantime for (YY) to push Huber and Cavaler **out of the market**.

(YY)’s warning letter runs the risk of giving rise to strong adverse repercussions not only on the petitioners but more generally **on all the other growers of Braeburn red apple trees** who the opponent has had no scruples about **accusing, all without exception, of infringement**, with the only aim of pushing the sales of the “(**)” and “(^^)” variety apple trees which it owns.

Therefore, an injunction must be issued, as an interim measure, on continuation of the tort of denigration.

Likewise – in order to **apprise the public as to the truth of the situation which has been distorted by the information spread by (YY)** – the ruling must be **published** in newspapers and specialized reviews.

Legal theory and case law clearly state the legitimacy of publishing the ruling already as an interim step, in that it constitutes a measure, pursuant to Art. 700 CCP, **“which can provisionally ensure the effects of the ruling on the merits”**: in fact, it is evident that a ruling at the end of the proceedings into the merits that the opponent’s conduct is unlawful, and issue of the consequent injunction, would

be completely in vain if, as the case is pending, the warning of the opponent were not refuted and thus continued to have a destructive effect on the image of its rivals at which (YY) – not content with already being a thriving concern – aims, in order to support its foolish ambitions of creating a monopoly.

In this sense see, amongst others, *Pretura* of Afragola, 6 February 1967, in *Riv. dir. comm.*, 1968, II, 77 *et seq.* Numerous decisions have reiterated the same principle: from amongst the many see *Pretura* of Milan, 31 July 1967, in *Foro pad.*, 1967, 923 *et seq.*; *Pretura* of Rome, 6 May 1974, in *Foro it.*, 1974, I, 1, 1806 *et seq.*; *Pretura* of Rome, 7 September 1978, in *Giust. civ.*, 1978, 1904 *et seq.*; *Pretura* of Catania, 9 December 1980, in *Giur. ann. dir. ind.*, 1980, 684 *et seq.*; *Pretura* of Catania, 23 March 1983, *ibid*, 1983, 541 *et seq.*; *Pretura* of Legnano, 3 May 1985, *ibid*, 1985, 586 *et seq.*; *Pretura* of Catania, 23 February 1987, *ibid*, 1987, 377 *et seq.*; *Pretura* of Catania, 25 July 1987, *ibid*, 673 *et seq.*; Court of Catania, 17 October 1988, *ibid*, 1988, 800 *et seq.*; Court of Rome, 25 February 1988, *ibid*, 512 *et seq.*; *Pretura* of Legnano, 4 May 1988 (interim order), *ibid*, 1988, 612 *et seq.*; Court of Catania, 17 October 1988 (interim order), *ibid*, 1988, 792 *et seq.*; *Pretura* of Turin, 28 November 1990 (interim order), in *Foro it.*, 1991, I, 954 *et seq.*; Court of Florence 15 May 1993 (interim order), *Giur. ann. dir. ind.*, 1995, 270 *et seq.*; Court of Pistoia, 12 November 1993 (interim order), in *Giur. ann. dir. ind.*, 1993, 760 *et seq.*; Court of Turin 22 March 1995 (interim order), *ibid*, 1995, 921 *et seq.*; Court of Florence, 5 March 1998 (interim order), *ibid*, 1998, 569 *et seq.*; Court of Napoli, 11 July 2000 (interim order), *ibid*, 2000, 1053 *et seq.*.

The need to grant this measure in the case in question must be strongly stressed, since the tort committed to the detriment of Mr. Huber and Dr. Cavaler has had (and continues to have!) a **special efficacy of a diffusive nature**, as it takes place through the sending of a **real and proper circular letter**, widely distributed among potential clients of the petitioners, so much so that **it is absolutely imperative that corrective information be immediately published** which rectifies the false and tendentious messages spread by (YY).

*** **

For all the above reasons Mr. Johann (Hans) Huber, owner of the one-man business of the same name and Dr. Roberto Calaver, owner of the one-man business *Vivai Cavaler dott. Roberto*, represented as indicated at the beginning of this petition

request

that the Court appointed to decide on the case:

- subject to scheduling a hearing pursuant to Art. 24, no. 2, Legislative Decree no. 5/2003;

1) Provisionally enjoin (YY) s.n.c. not to continue in its tort of denigration, committed to the detriment of the petitioners and, in particular, enjoin the diffusion of the warning letter submitted as doc. 8 by Huber and Cavaler or the diffusion amongst third parties of texts of a similar nature;

2) Order publication of the ruling, on two consecutive occasions, in double size characters and with the names of the parties and the operative part highlighted, in the newspapers *L'Arena* and *Dolomiten* and the specialized reviews *Apfel Aktuell*, *Rivista di frutticoltura e ortofloricoltura*, *Südtiroler Landwirt* and *Frutta e vite, rivista specializzata del Centro di Consulenza*.

Milan-Venice, 29 January 2007.

Case no. (...)/06

The Judge, having read the petition submitted by

Johan (Hans) Huber and Roberto Cavaler, represented by the attorneys-at-law Professor C. Galli, G. Saguatti, B. Saguatti and M. Bogni

Against (XX) and (YY) s.n.c. represented by the attorneys-at-law (...)

rules as follows

Mr. Huber and Dr. Cavaler have requested by means of petition under Art. 24 Legislative Decree no. 5/03 and 700 CCP. that (YY) s.n.c. be provisionally enjoined from further diffusion of a letter sent

IP_LAW_GALLI Newsletter

to clientele entitled “Warning to all nurserymen, fruit farmers and their co-operatives” claiming that the plaintiffs falsely and tendentiously reported, by means of said letter, news of a favorable ruling at the interim stage of a dispute, concerning the alleged infringement by the producers of the Mema Braeburn plant variety of the (***) variety, even though only a description order had been issued.

Plaintiff (YY) s.n.c. requested that the petition be rejected claiming that it had reported the outcome of the dispute in question in an objective, non-tendentious manner.

The petition has merit and is therefore admitted.

By sending its letter to all nurserymen, fruit farmers and their co-operatives, (YY) has undoubtedly gone beyond the boundaries of fair business practice.

Firstly, that part of the letter which states that the legal action brought against the nurserymen and producers of the Mema Braeburn variety “was ruled well-founded by the Court of Venice at the preventive proceedings stage” is to be criticized. In this regard, it may be observed that the Court had actually simply authorized a description i.e. a measure which is still like those issued in proceedings aimed to acquire evidence even though the CIP does not cite the articles of the Code of Civil Procedure concerning said procedures. The only reason why all reference to these procedures has been eliminated from the CIP derives from the fact that the measure of description, albeit retaining its characteristics, is now disciplined in an articulated and autonomous fashion without there being the need to refer to other institutes of laws.

Furthermore, although it is true that a description also entails an examination of *fumus boni juris* and *periculum in mora*, this examination is completely different in its requirements and rather less qualified in comparison to that of proceedings aimed to acquire evidence, also in relation to the different effects which follow on from a description, which are most definitely less invasive than an injunction, on condition that the relative operations are ordered and take place in such a way as to ensure the protection of confidential information.

With regard to this latter aspect, it is not by chance that in the case in question photocopies of invoices and other accounting documents were ordered to be kept in a sealed envelope and representatives of the petitioners and/or advisors were not allowed to read the contents. It is undoubtedly the fact that a description has less serious consequences for the party against whom it is issued, compared to a seizure order and injunction, which has led to the derogation under Art. 128 CIP to the order that the parties always appear and that a decision is taken after the parties have been heard. Unlike a description, in which the judge is allowed to close the procedure with an *ex parte* ruling, the seizure and injunction procedures are, pursuant to Art. 129 and Art. 131 CIP, regulated by those articles of the Code of Civil Procedure concerning urgency proceedings, with the consequent obligation to set up (albeit only subsequently) the evidence gathering stage, and this since such institutes respectively aim to remove the alleged infringer’s access to its assets (seizure) and stop it continuing with further production and sale of same (injunction).

The only aim of an *ex parte* description is to allow its beneficiary to obtain data proving the alleged violation of an exclusive right. It does not authorize the beneficiary, in relations with third parties, to “use” the, albeit summary, recognition that the sued upon reasons are well-founded. In fact, in order not to compromise any possibility that the petitioners might have in the future of their right being recognized, the Court’s ruling is issued without listening to the opponent’s version and without giving the opponent the chance to refute the opponent’s allegations by means of documentation.

It is exactly from this perspective that (YY)’s letter, in that part which states that the legal action against the nurserymen and producers of the Mema Braeburn variety was held to be “well-founded” by the Court of Venice at the preventive proceedings stage, not only contains information which is untrue with regard to the interim nature of the action undertaken but is also reported in a tendentious manner with the clear intention of harming its competitors.

In fact, a reader of the letter is reasonably led to believe – and has no reason to think otherwise – that (YY)’s reasons have passed the, albeit summary, jurisdictional scrutiny, after the examination and comparative assessment of the arguments of the producers of the Mema Braeburn variety. It may in no

way be imagined, by someone unaware of the characteristics and aims of the description, moreover not mentioned in the above letter, that the content of the Court's ruling is only of an evidence gathering nature and that it was issued, what is more, without both the parties appeared before the Court.

Generally speaking, an entrepreneur's artful diffusion of a letter whose content is misleading as to the outcome of court proceedings which saw – or see – him positioned against his competitors, undoubtedly adds an element of unfair competition by virtue of denigration pursuant to Art. 2598 no.3, this being conduct which goes against the principles of fair business practice.

The tort is all the more evident when the author of the letter is fully aware that in the proceedings its opponent's version of the facts was not even examined, exactly as happened in the description issued *ex parte*, the aim of which, we repeat, is not to award protection but to obtain proof to be used in other proceedings.

What is more, it needs to be pointed out that, in the case in question, that part of the letter which states “it has been shown that other varieties of the red Braeburn, currently on sale, also very probably constitute infringement of the (**) variety by reason of insufficient distinction” is also denigrating.

Firstly, the wording “it has been shown” causes the reader to believe that objective data has been gathered which corroborates this assertion, without however indicating which. The adverb “also” functions as a link to the previous expression which reports the Court's finding that the (**) variety was infringed by the Mema Braeburn variety and insinuates a syllogism in the reader, not particularly weakened by the expression “very probably” with reference to the other varieties.

Nor does the use of the word “constitute” in the subjunctive form have the function of tempering the weight of the assertion or of simply reporting the opinion of the claimant as argued by same. The use of the subjunctive is imposed by the relative structure of the sentence. Any use of the conditional “would constitute” would have a completely different meaning.

Having ascertained the existence of *fumus boni iuris*, *periculum in mora* must also be considered to exist. It is clear that further diffusion of the misleading letter, in the period necessary to reach a decision in the proceedings into the merits, concerning infringement by the Mema Braeburn variety of the (**) variety, creates a real risk of irreparably damaging the reputation of the nurserymen and producers of the “Mema Braeburn” variety, as well as distancing operators in the sector from this variety even though a summary technical finding on the infringing nature of same has not even as yet been given.

Therefore, (YY) s.n.c. must be enjoined against further continuation of the above tort of denigration and, in particular, diffusion of the letter entitled “Warning to all nurserymen, fruit farmers and their cooperatives” in suit and its German translation (doc. 8 Huber e Cavaler file), plus diffusion to any third parties of texts of a similar nature.

The Court also orders, in accordance with Art. 126 of the CIP, in order to contain and eliminate the effects of the denigrating message, publication of this ruling in the specialized reviews *Apfel Aktuell*, *Rivista di frutticoltura e ortofrutticoltura*, *Südtiroler Landwirt* and *Frutta e vite*, a specialized review of the *Centro di Consulenza*. However, the request for publication in newspapers is not admitted since no proof was given that diffusion of the letter in suit was not limited to workers in the sector.

for these reasons

On the basis of articles 24 Legislative Decree no. 5/03 and 700 CCP.,

enjoins (YY) s.n.c. against continuation of the tort of denigration above and, in particular, diffusion of the letter entitled “Warning to all nurserymen, fruit farmers and their cooperatives” in suit and its German translation (doc. 8 Huber e Cavaler file), plus diffusion to any third parties of texts of a similar nature; orders publication of this ruling in the specialized reviews *Apfel Aktuell*, *Rivista di frutticoltura e ortofrutticoltura*, *Sudtiroler Landwirt* and *Frutta e vite*, a specialized review of the *Centro di Consulenza*.

Venice, 21 March 2007

The Appointed Judge
Dr. A. FidanZIA

THE ARTICLE

✓ *Protection against Parasitism in the «New» Code of Industrial Property. An article by Professor Cesare Galli soon to be published in Quaderni di AIDA*

A collective volume on the revision of the Code of Industrial Property (CIP) is soon to be published in the series *Quaderni di AIDA*. It will include an essay by Professor Cesare Galli who states that the **protection of IP rights against parasitic exploitation by non-authorized parties** is one of the mainstays of the CIP and proposes systemization of the various rules relating to this matter which are contained in the CIP, which also considers the new rules introduced by the decree implementing the so-called **«Enforcement» Directive**, whilst waiting for the already provided revision of the Code to complete them and make them fully consistent.

There now follows a full summary of this essay.

CESARE GALLI

PROTECTION AGAINST PARASITISM IN THE «NEW» CODE OF INDUSTRIAL PROPERTY

SUMMARY: 1. Protection against parasitism in trade mark matters prior to introduction of the CIP. – 2. Parasitism in the CIP: use «in economic activity» of the trade marks of imitators and protection of non-registered trade marks and «business» domain names. – 3. Revision of the Code and the attempt to make the laws on protection against parasitism fully consistent with the system. – 4. Protection of non-registered trade marks. – 5. Technological innovation and design: the search for balance between the various interests at play. – 6. The retroversion of profits.

1.- At least since the introduction of EEC Directive 89/104 to approximate the laws of the Member States relating to trade marks and then EC Regulation 94/40 on the Community Trade Mark – but, in actual fact, already prior to these two laws in Italy ⁽¹⁾ – the question of the **protection of IP rights against parasitical exploitation** carried out to the detriment of their holders by non-authorized third parties (so-called **free riders**) has become an increasingly key issue in the debate on the protection of these rights and in particular trade marks, so much so that reflections on the likelihood of confusion, especially for the latter, have become progressively less topical. Despite recurrent attempts at restyling, the notion of likelihood of confusion no longer seems able to effectively fight against all the phenomenon of the **«new» infringement** which must now be tackled, at least for the trade marks and signs which are the most famous and thus most threatened.

In fact, for these trade marks it is their very reputation which makes it highly unlikely that the public will be mistaken as to the origin of products which, due to the differences between the imitators mark and the mark to be protected, and well-known by the public, or between the products bearing their respective trade marks (often of a quality which is visibly very different or belonging to product types and sectors famously not frequented by the holder of the imitated trade mark), in addition to the marketing methods employed, are patently non-original. In relation to these situations, it is therefore necessary to avail ourselves of the laws which now protect the trade mark also **beyond the likelihood of confusion** rather than rely on the «new» criteria for the ascertainment of the likelihood of confusion, proposed by some Italian scholars², which disregard the actual methods of use of the imitator's trade mark and public perception – in open contrast to the teachings of EU case law, which consistently give weight to all factors which may influence the public's actual perception of the trade marks ⁽³⁾.

⁽¹⁾ For an examination of the various attempts which had been made, even before the introduction of EEC Directive 89/104, in Italy and abroad to widen the protection of trade marks beyond the limit of likelihood of confusion as to origin see my *Funzione del marchio e ampiezza della tutela*, Milan, 1996, p. 126 *et seq.*; for Italy see in particular LEONINI, *Marchi famosi e marchi evocativi*, Milan, 1984, especially 460 *et seq.*, which cites and updates for this purpose considerations which, in their greatest and most extensive formulation, date back to the famous article by OPPO, *Creazione ed esclusiva nel diritto industriale*, in *Riv. dir. comm.*, 1964, I, 187 *et seq.*, especially p. 194.

⁽²⁾ See especially SENA, *Il nuovo diritto dei marchi*³, Milano, 2001, 74.

⁽³⁾ Almost all ECJ rulings express themselves in this sense with regard to the scope of trade mark protection, just like those relating to the parallel problem of establishing the existence of distinctive capacity, especially in «non-conventional» trade marks, such as shape, colour and sound trade marks. For what concerns the first, see, in ECJ rulings, 29 September 1998, C-39/97 (Canon) and 22 June 1999, C-342/97

Since these rules were first introduced into Italian law, by Legislative Decree no. 480/92 which implemented EEC Directive 89/104, their centrality has been increasingly confirmed, so much so that they have also imposed themselves on rulings of the ECJ, which first broadened the scope of trade marks to which protection under Art. 5.2 of the Directive is applied, covering all trade marks known to the public in the sector in which they are used ⁽⁴⁾; then stated that this protection also applies when the products bearing the conflicting trade marks are of the same kind or of similar kinds⁽⁵⁾; and finally stated that the common requirement for protection against unfair advantage and detriment is that there be «a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, **establishes a link** between them even though it does not confuse them» ⁽⁶⁾, so this connection, i.e. the **calling to mind of the other's famous trade mark, even though it may only be psychological**, seems to emerge as the common denominator of the two situations of advantage and detriment considered by Art. 5.2 of the Directive, being analogous to the «likelihood of association», as it was defined – prior to implementation of the Directive – in Benelux case law.

In turn, the Court of First Instance of the European Communities, in a recent ruling, identified the subject-matter of the protection under Art. 5.2, stating – completely in keeping with what Advocate General Jacobs had remarked in the conclusions in the Adidas case⁽⁷⁾ – that there is detriment to distinctive character «where the earlier mark is **no longer capable of arousing immediate association with the goods for which it is registered and used**» (point 43 of the decision); that detriment to reputation is made out «where the goods for which the mark applied for is used appeal to the public's senses in such a way that **the earlier mark's power of attraction is diminished**» (point 46 of the decision); and that unfair advantage must «be intended to encompass instances where there is clear exploitation **and free-riding on the coattails of a famous mark or an attempt to trade upon its reputation**» (point 51 of the decision) ⁽⁸⁾. Likewise, on a more general level, the rulings of the EU courts have increasingly spoken of **juridically protected "functions" of the trade mark** ⁽⁹⁾, and not of a single function, thus recognizing that the indication

(Lloyd) and, more recently, 6 October 2005, C-120/04; see also ECJ, 7 January 2004, C-100/02 and ECJ, 17 March 2005, C-228/03, which, in order also to apply the cause of non-sanctioning under Art. 6 of the Directive (corresponding to Art. 21 CIP) held that «account should be taken of the overall presentation of the product marketed by the third party, particularly the circumstances in which the mark of which the third party is not the owner is displayed in that presentation, the circumstances in which a distinction is made between that mark and the mark or sign of the third party, and the effort made by that third party to ensure that consumers distinguish its products from those of which it is not the trade mark owner» (point 46 of the decision in C-228/03). As regards the second, again by way of example, see ECJ, 7 October 2004, C-136/02 P (Mag).

⁽⁴⁾ ECJ, 14 September 1999, C-375/97 (General Motors), in *Riv. dir. ind.*, 2000, II, 255 *et seq.*, with note by CALBOLI and in *Giur. ann. dir. ind.*, 1999, no. 4120.

⁽⁵⁾ ECJ, 9 January 2003, C-292/00 (Davidoff). It is interesting to note that the ECJ reached this conclusion essentially «in the light of the overall scheme and objectives of the system» of which Art. 5.2 of EEC Directive 89/104 is part (point 24 of the decision), essentially to fill the gap in regulation which arose following the restrictive interpretation which the ECJ had given to the notion of «likelihood of association», under Art.5.1.b of the Directive itself. See GALLI, *La protezione del marchio oltre il limite del pericolo di confusione*, in Various Authors, *Segni e forme distintive. La nuova disciplina*, Milan, 2001, p. 19 *et seq.*, especially pp. 26-28, where it is argued that the interpretation given by the ECJ to the requirements for protection under Art. 5.2 of the Directive allows «the dispute over the meaning to be given to the notion of 'likelihood of association' to be overcome or rather set aside, i.e. the problem of establishing whether this reference has already broadened trade mark protection beyond the limit of confusion as to origin», in that «the need for protection other than that against confusion may hold only for trade marks which transmit a message which may "benefit" the product or service for which the imitating trade mark is used even should the consumer not confuse the two, i.e. not attribute that product or service to the same commercial origin as that bearing the original trade mark (or a connected source)», trade marks which, on the basis of ECJ case law are undoubtedly capable of benefiting from protection under Art. 5.2 of the Directive in all cases in which use by a third party leads to a linkage to the message of which they are carriers.

⁽⁶⁾ ECJ, 23 October 2003, C-408/01, on which see, for a more detailed examination, my comment *I limiti di protezione dei marchi rinomati nella giurisprudenza della Corte di Giustizia C.E.*, in *Riv. dir. ind.*, 2004, II.

⁽⁷⁾ Conclusions filed on 10 July 2003 in C-408/01. These definitions correspond perfectly to the results of the reflections made on the point in Italian legal theory: see in particular VANZETTI-DI CATALDO, *Manuale di diritto industriale*⁵, Milan, 2005, pp. 227-228; VANZETTI-GALLI, *La nuova legge marchi*², Milan, 2001, pp. 39-40; and more fully GALLI, *La protezione del marchio oltre il limite del pericolo di confusione, cit.*, pp. 15 *et seq.*

⁽⁸⁾ Court of First Instance of the European Communities, Second Chamber, 25 May 2005, T-67/04.

⁽⁹⁾ See in particular ECJ rulings 12 November 2002, C-206/01 (Arsenal), 9 January 2003, C-292/00 (Davidoff), *op.cit.*. In particular, in the first ruling (which does not concern Art. 5.2 of the Directive but Art. 5.1.b) the Court stated (in point 51 of the decision) that «the exclusive right under Article 5(1)(a) of the

of origin function is no longer the only one to receive protection within the context of Community Trade Mark Law.

In keeping with this idea which gives increasing weight to the function of the trade mark as an instrument of business communication, the ECJ has likewise stated, in dealing with the cause of non-sanctioning under Art. 6 of EEC Directive 89/104 (corresponding to Art. 1-*bis*.1 Patent Law and now Art. 21 CIP), that the requirement that use comply with «honest practices in industrial and commercial matters» provided by this article translates into «a duty to act fairly in relation to the legitimate interests of the trade mark owner» and that therefore the limitation does not apply first of all when use by a third party «is done in such a manner that it may give the impression that there is a commercial connection between the reseller and the trade mark proprietor», but also when use «**affects the value of the trade mark**, by taking unfair advantage of its distinctive character or repute», or when it «**discredits or denigrates** that mark», or even if «the third party presents its product as an **imitation or replica** of the product bearing the trade mark of which it is not the owner» (points 41-45 of the decision) ⁽¹⁰⁾: i.e. essentially it rules out the possibility of being declared in keeping with fair business practice the use of a trade mark which gives rise to a «likelihood of confusion for the public, which may also consist in a likelihood of association» or to one of the two situations of «**linkage**» under Art. 5.2 of the Directive, as here too was argued by some Italian legal theorists ⁽¹¹⁾.

This developing line of thought, although not yet complete, seems therefore to confirm that the **rule-exception relationship between protection against imitation giving rise to confusion and that against imitation not giving rise to confusion is no longer up-to-date** and that, therefore, the situations in which the likelihood of confusion arises must rather be understood as particular cases of use which can lead to parasitic advantage being taken of the reputation and distinctive nature of the trade mark or to detriment to same.

2. EU case law has, however, left it up to individual Member States to decide on an issue which has particular importance with regard to differences in the treatment of the parasitic exploitation of another's trade marks, i.e. establishing whether the uses of an identical or similar trade mark which, albeit capable of causing the public to make a connection between the sign and the trade mark, are not effected in a distinctive function of the goods to which the sign refers, also come within its scope of protection.

In fact, the ECJ held that the meaning of Art. 5.5 of EEC Directive 89/104, which refers to this situation, is to leave it entirely up to Member States to do as they feel fit, i.e. to exclude this specific matter from the harmonization created by the Directive ⁽¹²⁾. The reasoning of the conclusion started off from the literal tone of this article, which the Court considers in keeping with what was established by the third whereas of the Directive whereby «it does not appear to be necessary to undertake full-scale approximation of the trade mark laws of the Member States and ... it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market» (points 30-32 of the decision). Practical experience shows however that **parasitic exploitation of another's trade mark through uses considered non-distinctive** (at least in the «traditional» sense of this expression) is becoming more and more common and important at an economic level. The actual cases which gave rise to referral to the ECJ in the «Arsenal» ⁽¹³⁾ and «Adidas» cases were essentially of this type. The fact that the decisions

Directive was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions. The exercise of that right must therefore be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods»; and also confirmed, citing previous rulings, that «the proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it» (point 50 of the decision).

⁽¹⁰⁾ ECJ, 17 March 2005, in C-228/03, *op.cit.*

⁽¹¹⁾ See in particular GALLI, *Attuazione della Direttiva n. 89/104/C.E.E.. Commentario*, in *Nuove leggi civ. comm.*, 1995, p. 1133 *et seq.*, p. 1151; and in the same sense VANZETTI-GALLI, *La nuova legge marchi*², Milan, 2001, p. 48. In case law see Supreme Court, 22 November 1996, no. 10351, in *Giur. ann. dir. ind.*, 1996, which stated that «Pursuant to Art. 1-*bis* Trade Mark Law use of one's own name and address in a business activity is lawful with respect to a previous registered trade mark if ... it does not lead to any kind of parasitic exploitation of the other's trade mark».

⁽¹²⁾ ECJ, 21 November 2002, C-23/01 (Robelco).

⁽¹³⁾ It is significant that a UK writer, commenting on the «Arsenal» decision, held that the ECJ had replied negatively to the question of whether «trade mark use (is) still necessary to infringe a registered trade mark

issued in these two cases examined this aspect, though both proceedings dealt with use of the disputed trade mark in all likelihood not effected as an indicator of the origin of the goods onto which it was affixed, is, moreover, a clear indicator of the difficulty in distinguishing the two situations, when it is held (as the ECJ also holds) that trade marks are protected not only against the likelihood of confusion but also against parasitic exploitation of their reputation and distinctive character, or against the detriment caused to their reputation and distinctive character. In fact, at least under Italian law, it would become extremely difficult – and maybe also constitutionally illegitimate by virtue of violation of the principle of equality – to discriminate between parasitical uses of a trade mark with a distinctive function and parasitical uses with a non-distinctive function⁽¹⁴⁾.

Insertion by the Italian legislator, upon introduction of the CIP, of a specification into Art. 20 CIP, which is not present in the corresponding article of the Trade Mark Law (Art. 1), that uses of the trade mark which the holder is entitled to forbid are those **effected «in economic activity»** thus undoubtedly appears opportune. This expression, what is more, appears broader than the corresponding expression to be found in EEC Directive 89/104 («in trade»). In fact, even though this specification may, at first sight, seem to be a limitation with respect to the previous text ⁽¹⁵⁾, in reality it lends itself to be interpreted – all the more so in application of the principle of interpretation adapting to constitutional values – as recognition of the unlawfulness of any use of a sign which is identical or similar to the trade mark which possesses the requirements under Art. 20 CIP (and in particular those under letter c), on the sole condition that it is effected in an economic context (i.e. **in relation to the sale and supply of goods or services**), and therefore also when this use is not effected in order to distinguish these goods or services, but, for example, has an ornamental function. Therefore, it seems to confirm the choice made under Italian law which is to recognize the unlawfulness also of uses which, on the basis of Art. 5.5 of Directive 89/104, individual Member States are free to consider infringing or non-infringing and which, what is more, had already for some time been considered in Italy in a number of judicial rulings and by some legal scholars as unlawful.

Insertion by the Code of «**non-registered trade marks**» (including «business domain names») in the list of IP rights, with the consequent strengthening of their protection, thanks to typical remedies being applied to them which had previously only been applied to registered trade marks, indicates from this perspective a significant buttressing of protection against parasitism, allowing in particular more efficacious protection against the increasingly widespread phenomenon of the so-called **look-alike** ⁽¹⁶⁾, i.e. the adoption (usually not leading to confusion) of the packaging of the

since the coming into force of the Directive» (ADAMS, *Arsenal v Reed: No favours from ECJ*, in *I.P.Q.*, 2003, 229 *et seq.*, p. 233). On the problem of the possible infringing nature of non-distinctive use of another's trade mark under Italian law, with specific reference to sports trade marks, see GALLI, *Estensione e limiti dell'esclusiva sui nomi e segni distintivi dello sport tra merchandising e free-riders*, in *AIDA*, 2003, p. 231 *et seq.*

⁽¹⁴⁾ For a fuller examination of the problem see again GALLI, *Estensione e limiti dell'esclusiva sui nomi e segni distintivi dello sport tra merchandising e free-riders*, *op.cit.*, especially pp. 244-246, where it is stated that in Italian case law the ornamental use of another's trade mark in a product sector which is completely different to that in which it was registered has also been held unlawful (the Agip six-legged dog on T-shirts together with a parodical expression, which linked it to drugs), only on the basis that this use could take unfair advantage of the reputation of the imitated trade mark and damage its image (Court of Milan, 4 March 1999, in *Giur. ann. dir. ind.*, 1999, no. 3987), and likewise the use of the name and other distinctive signs of a soccer team (Juventus) in a calendar (Court of Turin, 5 November 1999, in *Repertorio di AIDA*, 2000, entry IV.3.3, after the same Court had already expressed itself in the same sense at an interim stage: see Court of Turin, interim order, 8 March 1996, in *Il dir. ind.*, 1996, 1005 *et seq.* and Court of Turin, interim order 13 April 1996, *ibidem*, 1007 *et seq.*). See also an extremely recent case, likewise adjudged unlawful, of use of a luxury goods trade mark in an erotic calendar where it was used as the pseudonym of a pornographic actress portrayed nude (Court of Milan, Judge *Rapporteur* Bonaretti, interim order 28 October 2005, subsequently upheld by a ruling of 14 November 2005, both as yet unpublished).

⁽¹⁵⁾ Thus argued by MANSANI, *Le disposizioni in materia di marchi nella bozza di codice dei diritti di proprietà industriale*, in Various Authors, *Il Codice di Proprietà Industriale* edited by UBERTAZZI, Milan, 2004, p. 69 *et seq.*, pp.72-73, in which he reveals his concern about «the risk of speculative interpretations of the limitation introduced».

⁽¹⁶⁾ On this matter see, in particular CASABURI, *Look-alike: situazione e prospettive*, in *Il dir. ind.*, 2003, 560 *et seq.* In the sense that «advantage is taken of the reputation of another's product, another's work in launching the product on the market is exploited ... and thus the qualities of the product are appropriated, also when a competitor places on the market and pushes the qualities of a *new* product distinguished not only by a name trade mark but also by a *particular* shape for the product itself or its container» see VANZETTI-DI CATALDO, *Manuale di diritto industriale*⁵, Milan, 2005, p. 93 and in case law, prior to entry into force of the Code, Court of Milan, interim order 21 July 2004, in *Giur. ann. dir. ind.*, 2005, which recognized «the existence of undue

product of the imitator which closely resemble the characteristics of that of the original product or of a shape of the product which virtually corresponds to that of another's new product, albeit without imitating its registered trade mark but still having a linkage effect. The fact that non-registered trade marks under Italian law give the holder a right whose content defines it as an **exclusive right** was in reality already undisputed prior to introduction of the Code, and not only in that minority of decisions which applied the rules provided by the Trade Mark Law in the same way to non-registered trade marks (including the system of protection), but also in the majority of decisions and in legal theory which held that these signs could be protected only on the basis of the Civil Code and, in particular, on those articles relating to unfair competition. It was, in fact, noted that since these provisions, and in particular Art. 2598, no. 1 Civil Code, offered these signs only an essential discipline, it was necessary to add to this discipline by proceeding with «the application, through analogy (and therefore through a comparison of the structural and functional affinity of the various institutes), of provisions laid down for the most completely regulated sign, i.e. the registered trade mark»⁽¹⁷⁾.

Moreover recognition of an exclusive right on non-registered trade marks is **fully in line with EU legislation**. Art. 4 of EEC Directive 89/104 allows Member States to consider earlier non-registered trade marks as invalidating subsequent registered trade marks in that there have been acquired «rights to a non-registered trade mark or to another sign used in the course of trade and that non-registered trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent trade mark», i.e. in that these signs are the subject of an exclusive right. Art. 8 of EC Regulation 94/40 on the Community Trade Mark expresses itself in the same way, by contemplating an opposition to registration by «the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance», when this sign, according to the legislation of the member State which regulates it, «confers on its proprietor the right to prohibit the use of a subsequent trade mark»⁽¹⁸⁾. Since there has never been any doubt, either in Italian legal theory or case law, as to the fact that *de facto* trade marks whose reputation is not purely local were,

linkage pursuant to Art. 2598 no. 2 Civil Code carried out by the defendant with respect to the activity and product of the claimant, aimed at exploiting the reputation and success of its competitor by reproducing the shapes of the external appearance of the product in order to gain unfair advantage of the positive acclaim already gained amongst consumers so as to cover the cheaper product with the effect of the reputation of the competing products». See also, after entry into force of the Code, Court of Milan, interim order 17 January 2006 (unpublished, but soon to appear in *Il dir. ind.*; this order was then upheld by a ruling of 1 February 2006, which was not challenged and thus became final), which held that the identical copy of a product which is well-known on the market, even should it not be registered either as a trade mark or design, may be considered unlawful, both as an infringement of a «*de facto* trade mark», forbidden by the CIP and as an act of unfair competition, the latter due not only to servile imitation (which postulates the existence of a likelihood of confusion), but also to the appropriation of qualities, i.e. parasitical linkage to the reputation of the imitated product and to the business image of its producer.

⁽¹⁷⁾ Thus expressly stated by DI CATALDO, *I segni distintivi*, Milan, 1985, p. 4. In fact, all legal theory examination of unfair competition due to the likelihood of confusion, starting from that to be found in manuals, ends up by proceeding to this application, naturally excluding those articles of the Trade Mark law which establish registration as a specific requirement with all that this involves.

⁽¹⁸⁾ On this point see SENA, *Confondibilità e confusione. I diritti non titolati nel CIP*, in *Riv. dir. ind.*, 2006, I, 17 *et seq.*; in the opposite sense, but without considering this point (nor those contained in this text) VANZETTI, *Osservazioni sulla tutela dei segni distintivi nel CIP*, *ibidem*, 5 *et seq.*. The clear provisions cited in the text refute even partial readings of the EU law which interpret the fact that EEC Directive 89/104 imposed harmonization only of provisions relating to registered trade mark matters as an advantage of EU law for registration, which would lead to all definite factors linked to the actual presence of the trade marks on the market being disregarded or, in any case, undervalued, in establishing the contents and the extension of these rights. On the contrary, we have seen that use, and the perception which the public has of the used trade mark, is given weight by EU law and case law as a determining factor in also definitively establishing the scope of protection and the same possibility of protection as registered trade marks. What is more, even more recently, an EU Regulation – in design and model matters – has instituted a right which arises with *de facto* use (the Community non-registered model), previously unknown in Italian law. These «formalistic» readings recall the analogous interpretations which some made of the German 1894 Trade Mark Law, in the sense that on the basis of this Law «non-registration lacks legitimacy; registration, preceded by careful official examination, cannot but have legitimacy», all because «thus the security of commerce, it was said, was assured to the utmost»; interpretations which, however, even at that time were abandoned within a very few years, and led to a new and more modern consideration of trade marks «from a stricter private perspective», which saw the trade mark not as a privilege conferred by the State but as a sign deriving from the market which had to be protected as such, in relation to the real needs of commercial life: thus the memorable essay of GHIRON, *Il marchio nel sistema del diritto industriale italiano*, in *Riv. dir. civ.*, 1915, 150 *et seq.*, pp. 162-163 and *ID.*, *La riforma delle leggi industriali in Germania*, in *Riv. dir. comm.*, 1914, I, 436 *et seq.*, especially pp. 437-438.

already prior to entry of the Code into force, priorities which invalidated subsequent trade marks, which gave their holders the right to forbid use of subsequent infringing trade marks and could actually be transferred ⁽¹⁹⁾, their being considered exclusive rights, more than simply being permitted, had to be deemed **imposed by the above EU legislation**. Thus, it may really be said that from this perspective the Code has done nothing other than render explicit a consideration of these rights which was already present in the discipline previously in force.

In this regard it needs to be stressed that, again prior to adoption of the CIP, the invalidating effect of non-registered trade marks extended beyond the limit of likelihood of confusion as to origin, at least for those signs which could be considered «well-known» pursuant to **Art. 6-bis of the Paris Convention**, on the basis of Art. 17.1.h Trade Mark Law (now Art. 12.g of the C.I.P.), introduced by Legislative Decree no. 196/98 in implementation of the TRIPs Agreement, which equated this effect to that of registered trade marks with a reputation and therefore – for the above reasons, in addition to the obvious need to have a consistent system – it involves the scope of protection of these signs also having a corresponding extension and therefore in some cases the old limit of likelihood of confusion as to origin is exceeded ⁽²⁰⁾.

Nor, on the other hand, may it be said that this strengthening, which is in fact essentially procedural, of the protection of non-registered trade marks discourages registration of these distinctive signs as trade marks, since the equating of the two categories of signs is obviously not complete, in that all the provisions which have registration as a requirement still do not apply to non-registered trade marks, and thus all the provisions which determine the scope of protection of registered trade marks regardless of use, from a geographical as well as a product type point of view, and – above all – regardless of the reputation gained by the signs which are protected by them and of the proof of actual extension of this use and reputation (and also of when they came into being), proof which must obviously be given by the party asking for protection of a non-registered sign.

Finally, the express protection of «**company**» domain names as IP rights, beyond the unfortunate choice of this adjective (which, moreover, did not stop the Courts extensively interpreting the range of signs which can be described by this expression, including «all domain names used in a business or, in any case, an advertising context, with important financial consequences» ⁽²¹⁾), has made it possible to turn, for protection of these signs – particularly vulnerable to linkage without the likelihood of confusion – also to previous procedural instruments provided only for registered trade marks and has therefore likewise strengthened the level of protection offered by the Italian law against parasitism. Again in relation to the Internet, the introduction of two procedural provisions seems particularly opportune. These allow the Judge to order transfer to the entitled party of the domain names registered in violation of another's trade mark or other distinctive sign, and this both by final ruling (Art. 118.6 C.I.P), and at the interim stage (Art. 133 C.I.P, which also provides for the possibility that the beneficiary of the transfer be obliged to pay the appropriate bond), thus solving a deeply-felt problem to which different solutions had been applied by the Courts ⁽²²⁾, within whose scope cyber-squatters had found a way of executing easy blackmailing operations.

3. With the revision proposal for the Code, attempts have been made to **bring into a consistent system** these various provisions which were already in the legislative text – and to a large part, as we have seen, in the pre-existing discipline – which protected IP rights against parasitic exploitation by non-authorized third parties, considering this protection to be one of the mainstays of the Code.

In this sense the amendment of Art. 8 of the Code is justified first of all. This article, in addition to prohibiting registration, also **prohibits the non-authorized use in the business of signs which**

⁽¹⁹⁾ Expressly in this sense see Supreme Court, 11 March 1975, no. 897, in *Giur. ann. dir. ind.*, 1975, no. 897 and in First Instance and Appeal Court case law, for example, see Court of Milan, 10 December 1992, *ibid*, 1994, no. 3044, which stated that «The *de facto* use of a trade mark gives rise to an absolute right which can be legitimately transferred according to the conditions set forth in Art. 15 Trade Mark Law for the transfer of registered trade marks».

⁽²⁰⁾ On this argument see GALLI, *Commento agli artt. 1-5*, in Various Authors, *Decreto legislativo 19 marzo 1996, n. 198. Commentario* edited by AUTERI, in *Nuove leggi civ. comm.*, 1998, 76 *et seq.*, pp. 80-82.

⁽²¹⁾ Court of Naples, interim order 7 July 2005, in *AIDA*, Rep. 2005, entries IV.4, IV.4.1, IV.4.5 and IV.3.3, which held that domain names used in the business also benefited from «the regulations laid down in the CIP for distinctive signs and in particular for trade marks, in that it is compatible and not derogated by the provisions expressly laid down for domain names».

⁽²²⁾ See GALLI, *I domain names nella giurisprudenza*, Milan, 2001, pp. 100-105, and the various editions of GALLI, *Segni distintivi e industria culturale* published annually in *AIDA*.

are famous in the non-business field, in order to impede their parasitic exploitation by third parties. Already in relation to the corresponding article of the Trade Mark Law it had been highlighted how it «was extremely far from the traditional constructions of the trade mark as a distinctive sign and from the arguments which limited its protection to its distinctive value and not to what it was able to suggest» and satisfied the aim of impeding «parasitic operations»⁽²³⁾. This is exactly why it is clear that the ban on registration of these signs by third parties not authorized by those parties to whom the reputation of the signs themselves was due also had to be accompanied by a ban on the use of the signs themselves. In fact, legal theorists did not hesitate to state that with regard to these signs the article entailed a «reserve of their use»⁽²⁴⁾, and therefore not only of registration, in favour of those parties. Case law expressed itself in the same way, on the basis of the reasoning that if the ban on registration was not accompanied by a «general ban on another's non-authorized use», «the aim of the provision, which is to combat commercial parasitism by ensuring protection for the sign's so-called 'ability to suggest' would be rendered vain»⁽²⁵⁾. Therefore, in this case too just like that of non-registered distinctive signs, it may be said that the provided intervention would simply make explicit and definite a ban which was already present in Italian Law.

The ban on the use of these signs is, moreover, once again **imposed by EU law**: In fact, Art. 4.4 of EEC Directive 89/104 provides that Member States may order that a trade mark be excluded from registration or, if registered, that it may be declared null if «the use of the trade mark may be prohibited by virtue of an earlier right other than the rights referred to in paragraphs 2 (registered trade marks: *writer's note*) and 4 (b) (non-registered trade marks recognized by national law: *writer's note*) and in particular: (i) a right to a name ; (ii) a right of personal portrayal; (iii) a copyright; (iv) an industrial property right». Thus, in this case too, the **correspondence between invalidating power and the scope of the exclusive right** is absolutely clear and the proposed article simply makes it explicit.

Nor may it be said that this ban on use as a trade mark can give rise to problems of third party trust, since we are dealing here with famous signs of which third parties cannot but be aware. It must also be said that this argument is pushing it a little too much, since it applies in the same way to the ban on use and the ban on registration which is not under discussion here. All the less reason to argue that this reserve of use discourages registration of these signs as trade marks, as exactly the same considerations as those expressed above in relation to non-registered distinctive signs can be repeated here, considerations which apply here on a much stronger basis, as the sanctions apparatus of the Code has obviously not been drawn up in favour of these signs (which, as long as they are not registered as trade marks, are not IP rights real and proper).

With a view to making protection against parasitism consistent and complete, there have been a number of «minor» amendments in distinctive sign matters, which are however important with regard to the system, in relation to the general design underlying this revision. I am referring in particular to the decision to speak of «domain names used in economic activity», rather than of «company domain names», taking up the expression used in Art. 20 CIP to define the scope of trade mark protection; and the decision to add any «other distinctive sign» to the list of signs which may interfere with the trade mark (and with which the trade mark may interfere) in Art. 22 CIP indexed «Unitariness of distinctive signs». In both cases, what was involved was making it clear that **each sign used with economic effect or aims** – which, for domain names, also includes use in order to distinguish sites which are not «business» sites, even in a general commercial sense, but which contain advertising⁽²⁶⁾ – **belongs to the sphere of application of the law of business distinctive signs**, and is therefore protected, but at the same time it is the subject of possible action taken by the proprietor of the rights against another of these signs, if this use actually interferes with one of their juridically protected functions. Therefore in principle (and save for the peculiar aspects of the system of protection of each of these signs) if this use involves parasitic exploitation of the protected signs, in the form of likelihood of confusion or linkage.

⁽²³⁾ VANZETTI, *La nuova legge marchi*, Milan, 1993, p. 103.

⁽²⁴⁾ VANZETTI-DI CATALDO, *Manuale di diritto industriale*⁵, *op.cit.*, pp. 197-198, which likewise stresses that for these signs «protection is provided which, in the article under examination, is represented by giving only certain parties the possibility of using them».

⁽²⁵⁾ Court of Modena, interim order 26 June 1994, in *Giur. ann. dir. ind.*, 1994, 805 *et seq.* and in *Nuova giur. civ. comm.*, 1995, 99 *et seq.*, with note by AUTERI.

⁽²⁶⁾ On this point see my *I domain names nella giurisprudenza*, *op.cit.*, pp. 5-6 and SPADA, *Domain names e dominio dei nomi*, in *Rev. dir. civ.*, 2000, I, 713 *et seq.*, pp. 721-722.

This same perspective can explain the rewording of the article which defines the scope of protection of **geographical indications** (Art. 30), and also the article which allows use in business of geographical names, even if registered as a collective trade mark, on the one condition that this use complies with fair business practices, canceling the limitation of the lawfulness of this use to the situation in which the name is used «as an indication of (geographical) origin» (Art. 11). According to the proposed amendment, Art. 30 would take up word for word the provision of Art. 13.1. *a* of EC Regulation 2006/510 (which replaced EEC Regulation 92/2081), in PAO and PGI matters, which obliges Member States to protect these appellations also against any non-authorized use of them «in so far as using the name exploits the reputation of the protected name», i.e. against parasitic exploitation; Art. 11, on the other hand, establishes the lawfulness of the use of geographical names which give rise neither to confusion nor to linkage, by applying the rule provided by Art. 21 CIP for individual trade marks also to collective trade marks. In both cases **parasitism thus marks the extent and the limits of protection**, acknowledging the progressive coming together of the disciplines for appellations of origin and trade marks, which has taken place not only as regards protection but also – closely connected to the former for what concerns the balancing of interests⁽²⁷⁾ – as regards the primary importance attributed to the fact that the sign **does not mislead** (which is always fundamental for appellations of origin and which has now become the key of the new Community Trade Mark Law), creating a sort of common law of business signs. This obviously does not mean uniformity of discipline for signs of different types, but undoubtedly the existence of a common denominator between them .

Here too it needs to be pointed out how unfounded seems to be the concern of whoever fears that also providing this rule for «qualified», but not registered geographical names, may create problems as to the certainty of the right, since exploitation of reputation presupposes reputation and thus a situation of **being well-known**. This is, in essence the same situation as that which justifies protection for trade marks also beyond the limits of registration, and which is in turn a *de facto* situation, deriving from use, which will have juridical effects. This too has been stated clearly in EU case law, which has actually refused to have recourse to «mechanical» criteria (such as a certain percentage of awareness of the sign amongst the interested public) in determining the prerequisite of reputation⁽²⁸⁾.

4. Revision of the Code could also have been the occasion for another amendment which in my opinion is opportune from the above perspective of making the system fully consistent, i.e. the insertion of an express article relating to **prerequisites for the protection of non-registered distinctive signs** and the applicable discipline.

It has already been seen how the protection of non-registered distinctive signs – and in particular their protection as exclusive rights – is fully admitted by the EU Law (and is actually imposed by it, when these signs come to be considered as possible invalidating priorities with respect to subsequently registered trade marks, as has always been self-evident in Italy). However, the CIP, albeit including (in Art. 1) non-registered distinctive signs among those signs covered by IP rights, and thus implicitly considering these signs as being protected by an exclusive right, does not contain any express discipline of these signs, and in particular does not define either the requirements for their protection or the contents of this protection, as it does, on the other hand, more or less succinctly, for all the other IP rights. This was immediately noted by legal theorists who criticized the Code for this gap⁽²⁹⁾.

In actual fact, there is no real gap in this regard. Art. 2.4 of the Code states that these signs are protected «if the requirements of law hold» and these requirements may easily be reconstructed starting first of all from Art. 12 of the Code relating to novelty, which lays down both the requirements that these signs need to meet in order to invalidate subsequent registered trade marks, and the scope of this invalidating power, which, as we have seen, must be accompanied by a

⁽²⁷⁾ For these points see my *Globalizzazione dell'economia e tutela delle denominazioni di origine dei prodotti agro-alimentari*, in *Riv. dir. ind.*, 2004, I, 60 *et seq.*, especially p. 79. On the new balance of economic interests underlying the new protection of distinctive signs (and appellations of origin) see KAMPERMANN SANDERS-MANIATIS, *A Consumer Trade Mark: Protection Based on Origin and Quality*, in *EIPR*, 1993, 406 *et seq.*, especially p. 411; and more fully my *Protezione del marchio e interessi del mercato*, in Various Authors, *Studi in onore di Adriano Vanzetti*, Milan, 2004, p. 661 *et seq.*

⁽²⁸⁾ ECJ, 14 September 1999, C-375/97 (General Motors), *op.cit.*

⁽²⁹⁾ See in particular VANZETTI, *I segni distintivi non registrati nel progetto di «Codice»*, in *Riv. dir. ind.*, 2004, I, 99 *et seq.*

corresponding scope of protection. As for the other rules applicable to these signs, we have already likewise seen that, prior to the EU legislator's intervention in the matter, all those provisions in registered trade mark matters whose rationale was not linked to the existence of registration were likewise considered to be applicable to these signs, in order to complete the scanty discipline contained in the Civil Code (and of Copyright Law, since titles and newspaper names – regulated respectively by articles 100 and 102 of this Law among the so-called neighboring rights – are protected in that they are distinctive signs).

Fabrizio De Benedetti and Giorgio Floridia, as members of the Ministerial Commission for the Revision of the Code, suggested that it would be opportune to add the reference of Art. 2 to the «requirements of law» with a more specific reference to the «requirements provided ... in articles 2563, 2564 and 2598 of the Civil Code», which contain, respectively, the discipline of the business (articles 2563 and 2564) and that of unfair competition (Art. 2598). I took the liberty of opposing this proposal observing that, apart from the incomplete nature of the reference (which does not consider, for example, the provisions for special distinctive signs of the Copyright law, which I have just mentioned) and the fact that this would contradict the obvious need for **completeness and self-sufficiency** which a Code, by definition, must have (and which, in actual fact, the CIP also has, for all the rights considered with the exception only of this one), **Art. 2598 Civil Code in no way defines the requirements for the protection of distinctive signs**, but simply forbids the use of signs «which can give rise to confusion with the names or with the distinctive signs used legitimately by others». Furthermore, just as the Report to the Code highlights, the provisions regulating unfair competition are of a different nature to those regulating IP rights, so much so that Art. 2598 Civil Code (CC) begins with the words: «Without prejudice to the provisions which relate to the protection of distinctive signs and patent rights».

This reference, above all, risked being misleading because it could be interpreted as aimed at the protection of non-registered signs only within the limit of the existence of a likelihood of confusion, i.e. within the limit of Art. 2598, no. 1 CC, while we have seen that the invalidating power of these signs goes beyond this limit when they are well-known (i.e. essentially on the same conditions required in order to benefit from the protection of trade marks with a reputation ⁽³⁰⁾). This, moreover, goes against the development of legal theory and case law, which tended to state, prior to entry into force of the Code, that *de facto* distinctive signs (and in particular the shape of products and their packaging and the general appearance of these two aspects) were to be protected not only against imitation giving rise to confusion but also against imitation giving rise to **parasitic linkage** to the sign and to its reputation, latching the imitator's product onto it, according to the typical mechanism of the so-called look-alike, and thus connecting this situation to that covered by Art. 2598 no. 2 CC, on the appropriation of qualities ⁽³¹⁾. In any case, the requirement for protection under Art. 2598, no. 1 CC is the existence of a **competitive relationship**, and, given the still rather restrictive interpretation which is given of this notion in Italy (unlike other European countries, such as Germany, where protection against competition was invoked, prior to implementation of EEC Directive 89/104, in order to confer protection on the famous trade mark which went beyond its product sector ⁽³²⁾), this means that this latter kind of protection based on unfair competition would

⁽³⁰⁾ That the reputation required by Art. 6-*bis* of the Convention coincides with that required by EU Law for a trade mark to be considered to possess renown and therefore eligible for the corresponding protection is much discussed (on this matter see KUR, *Well-Known Marks, Highly Renowned Marks and Marks having a (High) Reputation – What's It All About?*, in IIC, 1992, 218 *et seq.*), and in fact the ECJ in its oft-cited ruling of 14 September 1999, C-375/97 (General Motors), seems to conceive of renown as a *minus* with respect to reputation under Art. 6-*bis*. However, the fact that the scope of protection of trade marks possessing renown, like the scope of invalidating efficacy of Art. 12 CIP (formerly Art. 17 Trade Mark Law) confers on trade marks with a reputation are both delineated by the existence of detriment to the reputation or distinctive character of the imitated trade mark, or unfair profiting from same, tends inevitably to make these two aims actually coincide, in that in both cases the earlier sign needs to be a carrier of a «message» such that the interested public is able to establish the «connection» between it and the later sign, which is the common denominator of profiting and detriment.

⁽³¹⁾ See the authors and provisions cited above in note 15. This development can be seen also in relation to the enormous spread of counterfeiting in the last few years – very often originating in developing Asian countries – which often imitates not registered trade marks but the whole external appearance of the product and results not in cases of confusion or servile imitation but parasitic linkage to the goodwill and renown of the original products. It is above all the small and medium sized firms which suffer due to this phenomenon (the so-called look-alikes) but even the bigger firms suffer, which are not in any case able to systematically register the formal characteristics of their products' packaging.

⁽³²⁾ For the extension of the protection of a famous trade mark awarded in Germany especially in the

never be possible for non-registered distinctive signs, while we have seen that a power of invalidating subsequent trade marks is conferred by Art. 12.1.g (previously Art. 17.1.b Trade Mark Law) on famous «*de facto*» distinctive signs which goes beyond that product sector.

As for articles 2563 and 2564 CC, they relate to a specific category of signs (the business), which obviously does not cover all the class of non-registered distinctive signs. These two articles, moreover, lay down a special discipline for the business which can most definitely not be extended to other «*de facto*» distinctive signs: thus the reference to them in the Code would be doubly misleading and incorrect for what concerns the system.

Therefore, as an alternative to this reference, I suggested during the work of the Commission, the possibility of inserting in the Code a brief regulation of non-registered distinctive signs⁽³³⁾, which expressly states the requirements for protection of these signs (defining them in the way in which they were already considered in legal theory and case law) and, as for the substantive discipline and the scope of protection, recalls (also to avoid pointless repetition) the discipline, obviously more articulated, provided in the Code for registered trade marks, defining the limits within which this discipline may also be applied to these other distinctive signs. These limits are to be found in the **express exclusion of non-registered signs from application of articles laid down for registered trade marks whose specific requirement is registration** and in excepting the **derogations** to this discipline contained in other laws in relation to specific categories of distinctive signs (particularly trade names, regulated by the Civil Code and titles and newspaper names, regulated by the Copyright Law). The proposed text indicated use with a distinctive function and the reputation attained by the sign due to this use – and thus as a «*de facto*» distinctive sign – as requirements and limits of its protection, also at territorial level, thus stressing the main difference of existing protection with respect to registered trade marks, which are always protected throughout the State also before they have actually been used and, in any case, before real reputation has been attained through to this use, on the basis of mere registration (and without their proprietor being asked to prove anything else, if not to enjoy even stronger protection); and as for protection, expressly excluding the sole application of the situation covered by Art. 20 C.I.P. (the article which refers to «abstract» protection which is difficult to conceive of in the absence of registration), made explicit what today is considered to be in the process of being interpreted, i.e. that **these signs can also enjoy a protection corresponding to their invalidating effect**, and thus beyond the limit of likelihood of confusion, when the alternative conditions of detriment and unfair advantage hold: i.e. essentially that these signs are also protected against parasitic linkage, which is today the real frontier in the protection of IP rights.

5. Certainly, with respect to IP rights other than registered trade marks, the «new» CIP's focusing on protection against parasitism is less evident. In fact, as is obvious, this protection is not a convenient *passé-partout* to identify margins of unlawfulness in conduct which *per se* respects these rights, but on the contrary presupposes the pre-emptive determination of the scope of protection assigned to each of these rights and the *ratio legis* underlying this protection, such as the balance of interests which the discipline of each right aims to attain. Thus **parasitism here means the**

1980s on the basis of protection on the grounds of competition through a restrictive interpretation of the notion of competitive relationship, see in particular Bundesgerichtshof, 9 December 1982, in *IIC*, 1984, 240 *et seq.*; Bundesgerichtshof, 29 November 1984, *ibid*, 1986, 271 *et seq.*; and Bundesgerichtshof, 4 June 1987, *ibid*, 1988, 682 *et seq.*; and in legal theory SCHRICKER, *La tutela della Ausstattung e del marchio celebre nella Germania Federale*, in *Riv. dir. ind.*, 1980, I, 254 *et seq.*; and LEHMANN, *Rafforzamento della tutela del marchio attraverso le norme sulla concorrenza sleale*, in *Riv. dir. ind.*, 1988, I, 19 *et seq.*. More in general, for a full overview of foreign attempts to construct «extended» protection for a trade mark which disregards entirely confusion as to the business origin of the goods or services bearing the trade mark, looking for the basis outside the special law, in provisions relating to unfair competition and extra-contractual liability and to those relating to enrichment without due cause see BRANDT, *La protection élargie de la marque de haute renommée au-delà des produits identiques et similaires*, Genève, 1985, especially pp. 245-312. A part of these experiences is also discussed by GUGLIOMETTI, *Il marchio celebre o «de haute renommée»*, Milan, 1977, pp. 39-165.

⁽³³⁾ The article I proposed – which I held could be inserted as a third paragraph to Art. 22 C.I.P. – was worded as follows: «**3. The use with a distinctive function of non-registered distinctive signs, in that it may acquire reputation for them, gives rise to the exclusive right to use of said signs within the limits, also territorial, of the reputation acquired and, in any case, within the limits under Art. 20.1.b and c of this Code. Save for the application of the provisions relating to unfair competition, the provisions of this Code for registered trade marks shall be applied to non-registered distinctive signs, in that they are compatible with the absence of registration and do not run contrary to the provisions relating to certain categories of said signs contained in the Civil Code and the special laws.**».

appropriation of utility which the legislator wishes to reserve to the holder of the right.

For what concerns patents in particular, the provision on the scope of patent protection in Art. 1 Patent Law (in the text introduced by the 1979 reform), and now reproduced in Art. 66 CIP, reserves to the holder the right «to implement the invention and to profit from it» within the State, with a wording on the basis of which it has in fact been possible in the Italian courts to prosecute a typical parasitical phenomenon in patent matters i.e. the so-called **contributory infringement** ⁽³⁴⁾. It was exactly for this reason that the Commission decided that it would be superfluous to insert in the Code an express provision for contributory infringement, proposed by me and modeled on the provision contained in the Convention of Luxembourg on the Community Trade Mark, which, as is well-known, has never come into force.

In the patent field, the identification of the limits of lawfulness of conduct in which the various aims of the patent system are, at least in part, in conflict is rather delicate. This applies in particular to the provision on the **limitations of the patent right**, which the Code has rewritten (Art. 68), rewording the so-called galenic exception in such a way as to impede possible abuses of the exception, which are incompatible with the rationale of the patent right and for this reason typically of a parasitic nature. In the same provision, however, the exception on the **experimental uses** of another's invention has also been reworded in an ambiguous manner, incorporating the new discipline relating to activities preliminary to grant of Marketing Authorization for a drug whose patent or complementary certificate of protection has not yet expired. In fact the new wording lists these activities among the «acts carried out ... experimentally», which could offer an argument in claiming that this definition and the correlating exclusion from the scope of patent protection now also comprise all the experimental activities prior to the marketing of a product, or to the industrial application of a process, and not only those at least potentially able to result in new inventions: while it is clear that the justification of the experimental use exception is only that of «**stimulating, in the case of already patented inventions, technical progress** ... in harmony with the provisions of the institute of the patent ... which takes care that the invention, even if patented, enters as soon as possible into the domain of technical-scientific data accessible to all» ⁽³⁵⁾, i.e. to avoid patent protection putting a brake on **derived innovation**.

In order to avoid ambiguity in the present wording, the proposal for revision of the Code therefore provided for «splitting» these two hypotheses of exclusion, therefore keeping, on the one side, experimental use (to be understood as limited only to **experimentation carried out on the invention in order to improve on it, and not to implement it**) and, on the other, activities preliminary to grant of **Marketing Authorization for the drugs**, for which the rationale underlying exclusion from the scope of patent protection is different ⁽³⁶⁾. Rather, in relation to this latter hypothesis, a margin of uncertainty derives from the difficulties in coordinating Art. 68 C.I.P. and Art. 61.5 CIP, which, literally, seem to allow submission of the application for marketing authorization of a drug only in the last year prior to expiry of the relative complementary certificate of protection. The delicacy of the matter, defined by the Italian Patent and Trade Mark Office as «politically sensitive», stopped the Commission intervening in a more decisive fashion in this regard. However, it at least proposed that the two articles be **coordinated better**, by inserting in Art. 61.5 the disjunctive «or» between the words «patent» and «complementary», so as to make it clear that the

⁽³⁴⁾ On this argument see DI CATALDO, *Sistema brevettuale e settori della tecnica*, in *Riv. dir. comm.*, 1985, I, 346 *et seq.*; SENA, *I diritti sulle invenzioni e sui modelli industriali*², Milan, 1990, p. 403 *et seq.*, which also carries the text of the US law; GUGLIELMETTI, *Le invenzioni e i modelli industriali dopo la riforma del 1979*, Turin, 1982, pp. 77-78; and in case law Supreme Court, Joint Sitting, 11 November 1994, no. 9410, in *Giur. ann. dir. ind.* 1994, 119 *et seq.* (which held the decision of the Appeal Court of Milan, 15 July 1992, unpublished, to be congruously grounded); Supreme Court, 24 October 1956, no. 3387, in *Riv. dir. ind.*, 1958, II, 3 *et seq.*, with note by LA GIOIA; and amongst the lower court decisions Court of Turin, 12 October 1981, *ibid.*, 1985, II, 334 *et seq.*, with note by ZAMBON; Court of Milan, 25 October 1984, in *Giur. ann. dir. ind.*, 1984, 718 *et seq.*; and Appeal Court of Milan, 23 June 1992, *ibid.*, 1992, 718 *et seq.*

⁽³⁵⁾ MARCHETTI, *Commento all'art. 1 l. invenzioni*, in *Revisione della legislazione nazionale in materia di brevetti per invenzioni industriali in applicazione della delega di cui alla legge 26 maggio 1978 n. 260. Commentario*, in *Nuove leggi civ. comm.*, 1981, 677; and more fully in GALLI, *L'uso sperimentale dell'altrui invenzione brevettata*, in *Riv. dir. ind.*, 1998, I, 17 *et seq.*, where I also cited the consideration of the constitutional values at play and in particular that of the promotion of «scientific and technical research» under Art. 9 of the Constitution. It must not be forgotten that this article forms the basis of the decision with which in 1978 the Constitutional Court found unlawful and thus cancelled the ban on patenting drugs (Constitutional Court, 20 March 1978, no. 20, in *Riv. dir. ind.*, 1978, II, 3 *et seq.*; in *Nuove leggi civ. comm.*, 1978, 873 *et seq.*, with the *Comment* of MARCHETTI and VANZETTI and in *Giur. comm.*, 1978, II, 619 *et seq.*, with note by SENA, *Impresa farmaceutica e brevettabilità dei medicinali*).

⁽³⁶⁾ On this argument again see again GALLI, *L'uso sperimentale dell'altrui invenzione brevettata*, *op.cit.*, 23 *et seq.*

article also applies should the complementary certificate not have been applied for or granted, and that in this case the period of one year provided by the article is to be calculated backwards from the date of patent expiry; and to place before the article the words «without prejudice to the contents of Art. 68», so as to make this latter article **prevail** in the case of persistent doubt as to the type of activities which both articles allow third parties to carry out even though another's patent or complementary certificate are in force.

The proposal to reword Art. 99, dedicated to the protection of **confidential information**, responds to the need to precisely delimit the scope of rights, so as to overcome possible uncertainty which could favour elusive and thus parasitic conduct. The new proposed wording⁽³⁷⁾ aims to make it clear that what is forbidden is all conduct aimed at acquiring, disclosing or using confidential information without the consent of the lawful holder, according to the typical mechanism of IP rights, conceived as the right to «forbid, save with consent», and at the same time to clearly exclude from protection a situation in which information has been attained autonomously by the alleged counterfeiter (or by his assignor), so as to make it clear that **the right does not in this case concern the information per se but this information in that it has (unlawfully) left the holder's sphere of confidentiality**. The *incipit* of the article, which leaves «Without prejudice to the discipline of unfair competition» (taking up the wording of the old Art. 6-*bis* Patent Law), wishes then to confirm not only that violation of secrets by a competitor continues (also) to constitute an act of unfair competition but also – and above all – that alongside the confidential information under Art. 98 CIP there may also be other information that does not possess all the requirements indicated in that article and which can therefore not be awarded protection as IP rights but whose acquisition using methods running contrary to fair business practice may still be sanctioned on the basis of Art. 2598, no. 3 Civil Code⁽³⁸⁾.

The problem of balancing interests was also raised in relation to modification of Art. 44 C.I.P. intended to extend the duration of rights on **works of design** protected by copyright to 70 years after that of the death of the author instead of the 25 years provided by the present provision, which takes up the provision in that sense already contained in Art. 25-*bis* of Legislative Decree no. 95/2001 (i.e. the legislative provision which implemented EC Directive 98/71 of 13 October 1998 on the harmonization of the legislation of Member States in design and model matters), added to this Decree by Art. 1.2 of Legislative Decree no. 164/2001. This extension in actual fact had to be introduced, since the provision for a different and lesser duration of protection for this category of creative works was in open conflict with EEC Directive 98/93, which extended the protection of all copyright to 70 years, in addition to entailing a clear violation of the constitutional principle of equality. In fact the European Commission brought a **contravention procedure** against Italy for violation of the Directive claiming that Italy was guilty of said violation due to the fact that it only provided a 25-year duration of this right and also provided a **transitory system** peculiar to works created prior to entry into force of the 2001 reform, which allows third parties who have exploited said works while they were in the public domain to continue said exploitation for ten years, without any limit even of a quantitative nature.

However, the Commission was again divided on this question of the transitory system of the new provision which would extend the copyright of these works to 70 years. This time too Fabrizio De Benedetti and Giorgio Florida had proposed definitely excluding from protection works created prior to entry into force of Legislative Decree no. 95/2001 and actually this transitory rule was later adopted by Decree Law no. 10/2007 then converted in Law no. 46/2007. As an alternative I had

⁽³⁷⁾ «Without prejudice to the discipline of unfair competition, it is forbidden to acquire, disclose to third parties or use, without the consent of the holder, confidential information and experiences under Art. 98, unless they have been attained autonomously».

⁽³⁸⁾ In this sense, in relation to Art. 6-*bis* Patent Law, AUTERI, *Commento al nuovo art. 6 bis l. invenzioni, nel Commentario al d.lgs. 19 marzo 1996, n. 198*, in *Le nuove leggi civ. comm.*, 1998, p. 124 *et seq.* and especially p. 131; and also in relation to the present text of Art. 98 CIP (which, less perspicaciously, «excepts» the unfair competition discipline) VANZETTI-DI CATALDO, *Manuale di diritto industriale*⁵, *op.cit.*, p. 117, which reads that «it seems that the citing of unfair competition (under Art. 98 CIP: *writer's note*) can only be interpreted as an opening to a protection of confidential information which is broader than that provided by the article» of the Code. In case law, in the sense that Art. 2598 no. 3 CC aims in general at striking «forms of lateral parasitic competition, against the principles of fair business practice, and as such unlawful» see Supreme Court, 20 March 1991, no. 3011, in *Giur. ann. dir. ind.*, 1991, 58 *et seq.*; and from among the lower court rulings, limiting ourselves to the most recent decisions, Court of Appeal of Milan, 29 November 2002, *ibid*, 2003, 622 *et seq.*; Court of Reggio Emilia, interim order, 15 January 2003 (interim order), *ibidem*, 725 *et seq.*; and Court of Brescia, interim order 29 April 2004, *ibid*, 2004, 1079 *et seq.*.

proposed saving only the right «of whoever, prior to 19 April 2001, undertook the manufacture, offer for sale and marketing of goods realized in compliance with designs or models, which were in or had entered the public domain» prior to that date to continue their activity «within the limits of pre-use».

If the problem had been raised when copyright for works of industrial design was first introduced into Italian Law, the first solution would not have been without its logic. As I myself wrote at the time, the decision to protect by copyright also works created prior to entry into force of Legislative Decree 2 February 2001 no. 95 did not seem to be imposed by EC Directive 98/71. ⁽³⁹⁾. Thus the Italian legislator could easily have provided this new protection only for works created subsequently. However, since the 2001 legislator provided this protection both for works of industrial design created after entry into force of the law and for those created prior to that date, it would be unthinkable now at a distance of 4 years for the legislator to renege on that decision and provide for this protection only for works created after 2001. This move entailed, in fact, a **retroactive expropriation without compensation** of the rights conferred by Legislative Decree 95/2001 on prior works and as such would clearly be constitutionally unlawful. Rather, it would seem reasonable to think that the transitory discipline of this protection fully guarantees the parties who, prior to introduction of copyright on works of industrial design, produced and sold goods corresponding to the works already protected. Since this conduct was then completely lawful, it must subsequently remain so, provided naturally it continues within the (also quantitative) limits of pre-use.

The transitory article which I proposed would, moreover, comply with that adopted on the occasion of other reforms which extended the protection of IP rights and it does not seem that it can be criticized either in terms of constitutional legitimacy or for non-compliance with the Directive. In particular, a similar discipline has been expressly adopted in another EEC Directive (89/104) to regulate the transitory system of the new protection of trade marks with reputation beyond the limits of likelihood of confusion introduced by said Directive (Art. 5.4) and in implementation of this article the Italian legislator with Art. 88 of Legislative Decree no. 480/92, now reproduced as Art. 232 C.I.P., has expressly allowed «further use» of signs which are identical or similar to another's trade mark which were lawful prior to reforms. It may be noted, moreover, that the transitory article which completely excludes works created prior to the 2001 reform from copyright protection only apparently protects these pre-users to a greater extent. In fact, if such an article is declared constitutionally unlawful, as seems reasonable to predict will happen, its elimination would leave these pre-users completely vulnerable to the actions of copyright holders, while the solution which I proposed seems able to protect, in compliance with the Constitution and EU Law, the interests of the creators of these works and those of parties who lawfully reproduced said works prior to 2001 reform.

6. At procedural level too, protection against parasitism has been at the centre of discussions which have led to the partial rewriting of the Code.

Probably the most important provision from this point of view is that regarding the specific discipline of the so-called **retroversion of profits**, adopted in implementation of EC Directive 2004/48 on the enforcement of IP rights ⁽⁴⁰⁾ and inserted in the final paragraph of Art. 125 CIP.

This latter provision – which is a sort of undue enrichment *sui generis* – merits particular examination. The remedy of returning profits, provided as an alternative to compensation for the profits which the holder of the infringed right was unable to earn (or for the part in which these profits exceed the holder's non-earned profits), will make it easy for the latter to acquit his **burden of proof**, thus consolidating the development taking place in the most recent Italian court decisions, in that higher levels of compensation are awarded than in the past in cases of violation of IP rights.

⁽³⁹⁾ See GALLI, *L'attuazione della Direttiva comunitaria sulla protezione di disegni e modelli*, in *Nuove leggi civ. comm.*, 2001, 883 *et seq.*, p. 901.

⁽⁴⁰⁾ In fact this provision is one of the few to have already come into force, since it was removed with a few others from the proposal of the Commission and inserted in Legislative Decree 16 March 2006, no. 140, together with the corresponding articles provided in order to implement the same Directive in copyright matters, and in some cases not entirely coordinated with the former. In particular, the rule on retroversion of profits does not have an equivalent in the Copyright Law: even though it must be said that in this field the reintegration of profits had already been admitted in previous court rulings as a form of minimal settlement of compensation, also on the basis of arguments deduced by the preparatory works of the 1941 Law, when a similar provision to the one now introduced in the CIP had been proposed but then failed to be inserted because it was held to be superfluous (Supreme Court, 24 October 1983, no. 6251).

This remedy, combined with the possibility of obtaining a **description of the accounting books** of the alleged counterfeiter (and also the **submission of his banking documentation**, provided in the new wording of Art. 121 CIP ⁽⁴¹⁾), making a tenacious defence on the part of the infringer increasingly less opportune, will thus also be an incentive to try and resolve IP disputes according to the terms of settlement agreements, as already happens with increasing frequency today. It appears particularly appropriate in all cases in which the violation of a right occurred in an activity which the holder of the right would not have carried out – such as use of a distinctive sign for goods which, due to the product categories to which they belong or due to their level of quality the holder would not have produced, nor had a third party produce, or a poor quality infringement of a patent – and which are thus unlikely to justify the award of compensation for loss of profits, but at the same time represent the **parasitic appropriation of a utility reserved to the proprietor**, which it would appear iniquitous not to punish. If the article which refers to complete repayment of profits is interpreted as meaning that the profits to be repaid are not only those directly attributable to what has been appropriated but to the whole tort it may serve as a useful deterrent to engaging in these counterfeiting activities, in relation to which the perpetrator of the violation had hoped to get off relatively cheaply ⁽⁴²⁾.

Thus, this provision too may be inserted in a consistent fashion into the new order that the revision intends to give to the CIP, confirming the **systematic value** of the proposed amendments ⁽⁴³⁾, which as such seem able to reflect also on those parts of the Code which have remained unchanged.

CESARE GALLI

ABOUT US

✓ *The work of Professor Cesare Galli on the Technical Committee of the High Commission for the Fight against Infringement*

Last October, a decree issued by Mr. Bersani, the Minister for Economic Development, on the proposal of the High Commissioner, Dr. Giovanni Kessler, called upon Professor Cesare Galli to join the **Technical Committee of the High Commissioner for the Fight against Infringement**, i.e. the small group of experts which will assist the Commissioner in his activities.

After its establishment in November 2006, the Technical Committee examined a series of questions of especial interest for what concerns the protection of IP rights, providing opinions in particular on the problems of **seizure and description at a trade fair**, the **destruction of goods which are the subject of criminal and administrative seizure** and the placing of **markers** on original goods so as to make it easier to distinguish them from fakes. In particular, Professor Galli re-submitted the proposal, already made within the context of the **Commission for the Revision of the CIP**, that administrative seizure be extended to all cases of evident infringement of registered trade marks, designs and models carried out on commercial scale, calling attention to the need to

⁽⁴¹⁾ This provision has also already entered into force, as it was one of the new provisions introduced with Legislative Decree 140/2006.

⁽⁴²⁾ This aspect is also underlined by BARBUTO, *La retroversione degli utili come sanzione per la contraffazione di marchi e brevetti*, in *Impresa c.i.*, 2005, 1327 *et seq.*. For further, more detailed investigation and a critical examination of the various opinions expressed in this regard in legal theory see the paragraph «Le novità legislative» in GALLI, *Segni e forme distintive*, in *AIDA*, 2006, in particular note 2.

⁽⁴³⁾ Again in a procedural context, in addition to the numerous detailed interventions aimed at making the response of the Civil Courts to counterfeiting more effective, another three provisions proposed by the Commission are worth mentioning: a) a fine for the wilful violation of IP rights, and thus trade mark infringement also not leading to confusion, which would be increased to € 20.000 (as compared to the present € 1.032,91: Art. 127); b) administrative seizure of pirated goods, which would be extended to all instances of «evident counterfeiting of registered trade marks, designs and models», thus making the provision easy for the competent administrative authorities to apply (Mayors and Prefects: Art. 144); and c) an administrative sanction up to a maximum of € 10.000 Euro for purchasing objects which «due to their quality or the conditions of the party offering them or the price» appear to be counterfeit, which would be provided in addition and no longer as an alternative to any criminal sanction, here too making application easier (Art. 146). In fact, the aim of these provisions is to put a full range of remedies at the disposition of the holder of the infringed rights, which can be graduated according to the type of infringement, thus making protection more complete and consistent.

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coordinate civil, criminal and administrative measures in the fight against infringement, in such a way that the first would essentially be an instrument to counter infringement of a business nature and the second a form of effective reaction against activity linked to criminality and, in particular, organized criminality, entrusting the task of «cleaning up the market» to administrative measures, striking the final links in the chain, i.e. above all street trading and purchasers «aware» that they are buying counterfeit goods, plus naturally that of blocking entry of counterfeit goods into the EU customs area by employing border measures.

As part of the Committee, Professor Galli also insisted on the CIP being revised speedily, by absorbing those proposals already submitted by the Commission set up in the previous legislature.

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✓ *After the «The World's Leading Lawyers for Business» Chambers Guide and the «Which Lawyer?» Guide, «Legal 500» has also placed Professor Cesare Galli and our Firm among the leaders in Italy in the IP sector. A survey carried out Top Legal also places our Firm among the first six Italian IP firms.*

More prestigious international acclaim for the professionalism of our firm comes from the «Legal 500» Guide, which has placed our Firm and Professor Cesare Galli in the list of best Italian legal practitioners in the IP sector.

This assessment joins those already expressed by the international guides of PLC «Which Lawyer?» and Chambers «The World's Leading Lawyers for Business», the latter considered to be the most authoritative independent publication reviewing international law firms on the basis of assessments received from the market and other professionals operating in the sector.

At the end of last year, the Chambers Guide had already placed Professor Cesare Galli among the six «Number 1» legal practitioners in IP law in Italy (together with Giorgio Florida, Mario Franzosi, Luigi Mansani, Giuseppe Sena and Adriano Vanzetti), in Band 1 of the indicated practitioners; and this assessment was very recently confirmed by Chambers Europe Guide 2007, just published and also to be found at www.chambersandpartners.com.

There follows the comment of «Legal 500» on Professor Galli and our firm : «*Cesare Galli of IP LAW GALLI is considered an excellent practitioner by peers. The firm has offices in Milan, Brescia and Parma specialising in biotech patents and cross-border litigation, trade marks, domain names, advertising and copyright. Clients tend to be foreign industrial groups from the food and chemical sectors and domestic companies within the design and technology industries.*».

The IP market survey published in the June issue of the Italian review *Top Legal* places our Firm among the Italian leaders in the sector, among the first six Italian IP firms, stressing in the summary of the article dedicated to client assessment that «*Sena e Tarchini and Cesare Galli stand out from among the boutique firms headed by Professors for their authoritativeness and the fact that they are at the complete disposition of the client.*». We also report the comment of *Top legal* on our firm: «*The boutique firm headed by Cesare Galli is augmenting its credit in the IP market. It is a reference point not only for clients but for whoever works in the sector, such as Patent and Trademark Attorneys. The team which works with Professor Galli is composed of ten people and has followed several clients including Okbaby, Isotta Fraschini Milan and Steb Tecnosiderurgica. Clients have stressed the high degree of specialization, in which all major operations are followed personally by the partners. 'Professor Galli', they say, 'has direct relations with the client, he can always be contacted and is always at the disposition of the client. He also personally handles work with foreign partners.*».

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✓ *A new Associate joins the team in the Milan offices of our firm*

The team of highly specialized IP lawyers at the Milan offices of our firm continues to grow. In April 2007 **Alberto Contini** came to join the team. He is a young lawyer who graduated from the University of Parma under Professor Galli, with a thesis on trade marks and appellations of origin in the wine making sector and has a great deal of professional experience in the IP field which he developed in the Studio Franzosi Dal Negro practice.

Alberto Contini works directly with Professor Galli, dealing in particular with trade mark and patent disputes.

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✓ *The review Top Legal places our Verona firm among the «excellent» law firms in the Veronese area*

The May 2007 issue of the review *Top Legal* carried a lengthy article on the law firms of Verona in relation to the socio-economic situation of the Region. Our Verona firm was named as one of the «excellent» practices offering legal services in the Veronese area.

After covering the activity of the Consortium for Technological Innovation, with which our firm collaborates and which «*works with businesses to launch patents on the market by means of transfer or exclusive licence agreements, with a view to finding resources to permit realization of the product and its launch on the market*», the article stressed the decision of the firm to «*focus on Verona in order to follow its Triveneto clients more closely The most important of these clients are Omac of Padova, which operates in the field of leather processing, the clothing label Mash, Santarossa of Udine for design and Kaufgut which produces household goods*», according «*to the method, adopted also in the past in setting up the Parma and Brescia offices, of a business agreement with a local prestigious lawyer*», Giuseppina Maritato.

«*In the Veronese area and more generally throughout Triveneto*» – the article concludes, citing the thoughts of Professor Cesare Galli –«*there are innovative firms which are coming to realize that the protection of intangible assets (trade marks, patents and design) is a key factor in facing up to the challenges presented by market globalization*».

✓ *Recent IP rulings obtained by our firm*

Trade Marks: Protection of trade marks having a reputation against tarnishing

The Court of Milan – Specialized IP Division, with an order of 9 March 2007, issued *ex parte* and subsequently confirmed by an unchallenged ruling of 27 April 2007, protected an extremely well-known trade mark in the luxury goods sector, whose owner was represented by our firm, against the use of a similar sign on a **calendar** as the **pseudonym of a pornographic actress**. The ruling follows in the wake of earlier decisions of the same Court, obtained again by our firm and which we reported in previous editions of this Newsletter, which have asserted the principle whereby **any use in economic activity of a sign which is identical or similar to another's well-known trade mark, which may lead to a likelihood of confusion or unfair advantage being taken of the reputation of the latter trade mark (or detriment to its reputation) constitutes infringement, even should said use not have a distinctive function.**

In the case in question, the Court found all parties involved in the publication and distribution of the counterfeit calendar, including the **printer** and **sponsors**, guilty of infringement.

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Patents: infringement of a European Patent before its formal issue

The Specialized Division of the Court of Trieste, with an unchallenged ruling of 14 December 2006, dismissed a request for interim measures submitted during proceedings against a client of our practice, a leading firm at European level in the field of stoves and fireplaces. The Court admitted

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our preliminary objection that the opponent **lacked the title** to justify its request, without entering into the merits of our other objections relating to the nullity of the patent, in that **the owner had filed with the Italian Patent and Trade Mark Office only the translation of the original claims of the European Patent application, which had in the meantime been overtaken by the grant of the patent itself with amended claims.**

In the subsequent order scheduling the hearing into the merits, the Judge *Rapporteur* also dealt positively with our objection that the **description** authorized before the proceedings **was ineffective**, again on the grounds that there was no title at the time of the request and enforcement.

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Patents: Description extended to accounting books

The Specialized Division of the Court of Venice, with an *ex parte* order of 5 May 2007, issued an order for a description which had been requested to protect a patent owned by a well-known Veneto mechanics firm, represented by our practice. This firm has also received international acclaim for the patent. The order concerned not only the counterfeit machine but also the **accounting books** of the counterfeiter. Enforcement of the order allowed for confirmation of the fact that the patent was infringed by the machine and for accounting data and sales invoices to be gathered. These were placed under a confidentiality order, as decided by the Court, but they may be used in the proceedings into the merits in order to determine compensation.

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Patents: Similarity of Object between Pending Cases

The Specialized Division of the Court of Milan, in a ruling of 5 May 2007, decided that our objection of **lack of competence on the grounds of similarity of object between pending cases** in a patent dispute involving infringement and nullity was well-founded.

A key factor in the decision of the Court was the fact, which we stressed in our briefs, that the Milan proceedings had been started when **another case before another Specialized Division (that of Bologna) was already pending in which the same plaintiff had summonsed other alleged counterfeiters manufacturing the same products** as those summonsed before the Court of Milan, with whom they had commercial links, and that they had in turn made a counterclaim for a declaration of nullity as regards the same patent.

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Designs and models: seizure extended to accounts

The Specialized Division of the Court of Milan, in a ruling of 8 January 2007, issued *ex parte* an **injunction and order to seize the counterfeit goods and accounting books of the counterfeiter of a design and model registration.**

Enforcement of the order allowed **the parties** organizing the import into Europe of the counterfeit goods (from China) through Bulgaria, **to be identified** and made it possible to rapidly reach a settlement at international level, also blocking the counterfeiting in Italy.

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Designs and models: seizure of counterfeit safes

The Specialized Division of the Court of Milan, by an order issued *ex parte* on 15 April 2007, later upheld and rendered final, admitted our petition for an **injunction and seizure order relating to the counterfeit goods and accounting books of the counterfeiter of a design and model registration** and of **non-registered distinctive signs**, protected on the basis of the CIP. One particularity of the case lies in the fact that the goods to which the design and the non-registered distinctive signs referred were **safes**. In this case too the order, granted in only three days and successfully enforced, led to an agreement being rapidly reached to the full satisfaction of the holders of the violated rights.

Competition: Limits on the spread of information relating to judicial proceedings

The Court of Venice – Specialized IP Division, in a decision of 21 March 2007, admitted an emergency petition submitted by two well-known nurserymen of the Triveneto area, represented by our firm, ruling that a letter which reported **inexact information on pending proceedings** was unlawful from a competition standpoint and forbade its diffusion. In admitting our requests, the Court also ordered the **full publication of its decision** in the same newspapers in which the denigrating letter had been published.

The full text of the decision, preceded by our petition, can be read in the «*The Case*» section of this Newsletter. The specialized press has also covered this decision, with a full article commenting on the decision being published in the financial newspaper *Italia Oggi*.

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Competition: Slavish imitation and proof of damage

The Court of Bolzano, in a decision of 24 April 2007, **rejected motions for evidence gathering** submitted against a client of the firm for alleged **unfair competition leading to confusion by virtue of slavish imitation** on the grounds that said requests were **explorative**. It admitted our objection relating to the absence of the preliminary demonstration of the existence of damage. The case was held in Bolzano due to the reasoning of the judges of the Specialized IP Division of the Court of Venice, who interpret the article on the remit of the Divisions restrictively.

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✓ *Husqvarna chooses our firm to coordinate defence of its trade mark in Italy*

Our firm has been chosen to **coordinate the defence of the «Husqvarna» trade mark in Italy**, within the context of international protection which has also involved, in the criminal sector, the attorney Riccardo Castiglioni of Studio Castiglioni Bonelli Marchetti le Divelec.

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✓ *Our latest publications and conferences*

An essay by Professor Cesare Galli, on ***La «nuova» contraffazione e la protezione del marchio oltre il limite del pericolo di confusione (The “New” Infringement and the Protection of the Trade Mark beyond the Likelihood of Confusion)***, has been published in the IPSOA review *Il diritto industriale*.

The Review of the Association of IP consultants has also published an essay by Professor Cesare Galli, entitled ***La protezione dei brevetti e dei segreti industriali dopo il CIP e l’attuazione della Direttiva «enforcement» (The Protection of Patents and Trade Secrets following Introduction of the CIP and Implementation of the “Enforcement” Directive)***. The same review has also published an essay by Mariangela Bogni of our Firm on ***La tutela della forma, fra design non registrato, marchi di fatto e concorrenza sleale (Shape Protection, including Non-Registered Designs, de facto Trade marks and Unfair Competition)***.

An article written by Professor Cesare Galli and Valeria Falce, entitled **Globalization of the Economy, Protection of Designations of Origin and Limits to Production** is soon to be published in the English-language Italian IP review *Italian Intellectual Property*.

An article by Professor Galli on the **reform of industrial design** appeared in the financial review *Italia Oggi*. Again on the subject of design Professor Galli has been writing his column in the specialized review *Luce e Design*.

The Reporter General of the A.I.P.P.I. has proposed Professor Cesare Galli as **Chairman of the Question Q 195 Working Group on Limitations on Trade Mark Protection**. As head of the Italian Trade Mark Group of AIPPI, Professor Cesare Galli has been responsible for the drafting of

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the Italian report on Question Q 195, also collaborating on the Question Q 194 report relating to *The Impact of Co-ownership of IP Rights on their Exploitation*. This year too Professor Galli has been appointed Italian Delegate at the meeting of the international Executive Committee (EXCO) of AIPPI, which will be held in Singapore next October.

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On 6 March 2007 in Bologna Professor Galli presented the juridical paper at the conference on *Tra proprietà intellettuale e sviluppo d'impresa: guadagnare con la tutela delle idee (Intellectual Property and Development of the Business: the Protection of Ideas Brings Gains)*, speaking on *I benefici offerti dalla tutela della Proprietà Industriale per le aziende (The Benefits Offered to Companies by IP protection)*. The High Commissioner for the Fight against Infringement, Dr. Giovanni Kessler, also took part in the conference

On 9 March 2007 Professor Cesare Galli took part in Milan, together with Dr. Antonio Pilati of the Autorità Garante della Concorrenza e del Mercato (Italian Government Competition and Antitrust Authority), in the presentation, organized by the Istituto Bruno Leoni, of the book *La proprietà (intellettuale) è un furto? (Is (Intellectual) Property Theft?)* to which he contributed the introductory essay, entitled *Il dibattito sulla proprietà intellettuale (The Debate on Intellectual Property)*.

On 27 March 2007 Professor Galli took part in a conference in Turin organized by the Chamber of Commerce on *“Brevetti. Procedimenti giudiziari e consulenza tecnica: l'interesse delle imprese” (Patents, Judicial Proceedings and Technical Consultancy: the Interests of the Company)*, during which he presented a paper entitled *“La consulenza tecnica brevettuale: il ruolo dei legali e dei consulenti e le strategie per le imprese” (The Patent Technical Consultancy: the Role of Counsel and Patent Attorneys and Company Strategies)*.

On 3 April 2007 Professor Galli gave a paper at a conference on *La tutela della proprietà intellettuale nei paesi dell'Estremo Oriente e dell'Est Europa (IP Protection in the Far East and Eastern Europe)* organized by the Chamber of Commerce of Milan in collaboration with Convey, speaking on the issue of *La difesa della proprietà intellettuale: gli strumenti per le imprese (IP Protection: Instruments at the Disposition of Companies)*.

On 20 June 2007 Professor Cesare Galli was one of the speakers at a conference on *Look-alike, free riders, parasitism. La contraffazione non confusoria, nuova minaccia per le marche (Look-alike, Free-riders, Parasitism. Non-confusing Infringement, a New Threat to Trade Marks)* organized in Milan by INDICAM, where he spoke on *La «nuova» contraffazione di marchio: dalla confondibilità all'agganciamento parassitario (The “New” Trade Mark Infringement; from Confusion to Parasitic Linkage)*.

On 2 July 2007 Professor Galli took part, together with the High Commissioner for the Fight against Infringement, Dr. Kessler, in a conference in Trento on the protection of **trade marks and appellations of origin in the agricultural foods sector**.

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The Abstracts of the papers given at the National Convention of IP Law *La forza dell'innovazione (The Strength of Innovation)*, held in Parma on 20 October 2006 and chaired by Professor Cesare Galli are still available.

The next IP National Convention, also chaired by Professor Galli, will take place in Parma on **26 October 2007**, on the issue of **Marchi, Marketing, Pubblicità. Diritto e strategie di comunicazione per le imprese nel mercato globale: dal diritto dei segni distintivi al diritto della comunicazione d'impresa (Trade Marks, Marketing, Advertising. Law and Strategies of Communication for Companies in the Global Market – from Distinctive Signs to Business Communication Law)**.

If you would like to receive the said Abstracts, or wish to have further information on the conferences mentioned, you can contact us at GALLI.PR@IPLAWGALLI.IT.

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STUDIO LEGALE

MILAN-BRESCIA-PARMA-VERONA

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(BREVETTI, MARCHI E DOMAIN NAMES,
CONCORRENZA SLEALE, ANTITRUST,
DIRITTO D'AUTORE), CONTRATTI
E DIRITTO COMMERCIALE GENERALE

IP LAW

(PATENTS, TRADEMARKS AND DOMAIN NAMES,
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