TRADEMARK PARODY SHOULD BE ASSESSED UNDER THE ORDINARY RULE OF CIVIL LIABILITY

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After many years, a case law position has developed concerning the application in trademark law of the parody exception existing in copyright law.

Indeed, Article L. 122-5-4 of the Intellectual Property Code on copyright states that "*when the work has been disclosed, the author may not prohibit […] parody, pastiche and caricature, observing the rules of the genre*".

Parody can be defined as the imitation of the characteristic style of an author or work for comic or satirical effect.

It is this comic intent that allows the author of a parody to appropriate a work yet not be liable.

Relying on this exception and on the French tradition of parody, many practitioners have attempted to extend it to the field of trademark law, which has traditionally been more geared towards an economic logic.

The idea is to gain acceptance of the reproduction of a trademark (which, without the authorization of its holder, is strictly prohibited pursuant to Article L. 713-2 of the Intellectual Property Code) without any liability being incurred on the basis of infringement if the trademark was reproduced for parody purposes.

Two recent court decisions recall that trademark parody must be assessed in view of the ordinary rule of law on civil liability in tort.

■ *Camel / CNMRT decision*

On 19 October 2006, the 2nd civil division of the *Cour de cassation* rendered a decision in a dispute opposing the holders of the famous cigarette brand, "Camel", and the Comité National contre les Maladies Respiratoires et la Tuberculose ("CNMRT", standing for the National Committee against Respiratory Diseases and Tuberculosis).

In that case, which involved an awareness campaign of the risks of tobacco, the CNMRT had reproduced the famous camel which symbolizes the "Camel" brand, by humoristically depicting it in the position of a smoker on whom smoking has had harmful effects.

When the case came before it, the Court of Appeals of Paris had considered that *"the campaign admittedly pursues a legitimate public health objective, since what is involved is the fight against the harmful effects of cigarettes; however, reference to a specific brand of cigarettes, even in the form of parody, in the context of this campaign had the effect of discrediting one manufacturer in relation to others whose image was not used, and the legitimacy of the public health objective pursued by the CNMRT, as well as the freedom of expression it asserts, do not authorise it to infringe the rights of a third party [Camel] that is carrying out its activity pursuant to the law"* (CA Paris, 14 January 2005).

The *Cour de cassation* disagreed, considering that the CNMRT had not made unfair use of its freedom of expression.

■ *Greenpeace / Areva ruling*

On 17 November 2006, the Court of Appeals of Paris handed down a ruling in a lawsuit between Greenpeace and Areva group.

In the present instance, Greenpeace had reproduced the "Areva" trademarks on its website by associating them to macabre symbols so as, according to it, to increase public awareness of the dangers associated with nuclear activities.

Areva had based its complaint on civil liability (article 1382 of the Civil Code), considering that the use Greenpeace had made of its trademarks had devalued and denigrated its activities.

For its part, Greenpeace invoked the law of 29 July 1881 on freedom of expression of the press.

In that lawsuit, two main principles were in conflict: property law and freedom of expression.

The Court of Appeals had considered that while freedom of expression entails the right to inform the public, this right is not absolute and must not present *"by its form or its content, an excessive nature constitutive of abuse."*

It is therefore on the basis of denigration that the *Cour de cassation* positioned itself in cracking down on Greenpeace's campaign.

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