

marketing of the products in the EU where the proprietor sold the products in issue outside the EU single market.⁸⁸⁸ Thus, code numbers would for all practical matters enable the producer to identify importers who infringe the specific subject of his trade mark rights.

c) Reworked products

Article 13(2) of CTMR is relevant in many aspects. The clothing sector is not an exception to the rule stipulated in Article 13(2) of CTMR. The “Dyed Jeans” case⁸⁸⁹ clearly reveals that the trade mark owner can legitimately prohibit the sale in the EU of jeans bearing its trade mark but which have been dyed by another party without the proprietor’s consent, when they have been put on the market with the proprietor’s consent in the EU. However, the court admits that not every incidence of dyeing will infringe the trade mark proprietor’s legitimate interests and thus allowing him to interfere with further commercialisation of the goods – a right which would otherwise be considered exhausted but for the dyeing. The dyeing must be conducted in a way that changes the characteristics of the branded goods so that the trade mark owner is entitled to oppose further commercialisation of the goods. In this particular case, the court concluded that the defendant’s act of dyeing the jeans in flashy colours interfered with the inherent quality of the jeans in question. The court had to analyse the defendant’s motive behind the dyeing and found that the use of flashy colours instead of the original muted ones aimed to meet the interests especially demonstrated by young persons in flashily coloured jeans. In the court’s view, the modification made to the jeans was tantamount to creating some new jeans.⁸⁹⁰

D. Concluding summary

The discussion in this chapter has revealed a healthy interplay between intellectual property rights and the single market’s principle of free movement of goods achieved in the EU through some necessary concessions. The interplay

888 See the judgment of the Germany’s Federal Supreme Court in “Dyed Jeans” 28(1) IIC 131 *et seq.* (1997), in which Article 13(1) of the CTMR applied and not Article 13(2), since the products whose original condition was claimed to have been changed were first sold in the US, and thereafter imported into the EU.

889 German Federal Supreme Court, “Dyed Jeans” 28(1) IIC 131, 133 (1997).

890 German Federal Supreme Court, “Dyed Jeans” 28(1) IIC 131, 133 (1997).

ensures that intellectual property rights – trade marks in particular – are not based upon to distort competition in the EU's internal market. This has led to the acceptance of the basic principle that as long as the trade mark proprietor basis on the specific subject-matter of his trade mark rights to prohibit free movement of goods, such reliance is not a disguised restriction on trade between the Member States since, it is the only means for the trade mark concerned to perform its essential function.

The essential function of a trade mark does not entitle a trade mark proprietor to monopolise the after-market goods. Except where goods initially marketed by the trade mark proprietor are subjected to further processing or repackaging which affect or impair the condition of the goods, trade mark owners are not allowed to prohibit third parties from further commercialising the goods. It has thus emerged in this chapter that under certain circumstances, it will be necessary for the third parties to repackage the products, to re-affix the trade mark, and to rebrand the products, without a permission of the trade-mark proprietor. These activities are only allowed insofar as they are objectively necessary for the third party to access the market for the goods concerned. Where it is clear that the third party seeks to secure commercial advantages at the expense of the trade mark proprietor, the above-mentioned acts will be enjoined in the proprietor's commercial interests.

