



## QUESTION Q214 - PROTECTION AGAINST THE DILUTION OF A MARK

**National Group:** The Danish Group

**Title:** Protection against the dilution of a mark

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**Date:** 31 March 2010

### Summary:

In Denmark the law provides protection against dilution of a trademark. Protection is offered to well-known trademarks. A trademark is considered well-known if it is known by a significant part of the public concerned with the product and in a substantial part of Denmark. No specific thresholds of knowledge is necessary since the issue is evaluated based a global appreciation of the mark. Recognition in niche-markets may be enough. The trademark must be well-known in Denmark or in the EU if it is a European trademark registration. There is no registry for well-known trademarks. Infringement requires a mental link between the well-known trademark and the subsequent mark as well as a change in economic behaviour of the customers. The burden of proving a mental link lies on the holder of the well-known trademark and must be assessed based on a global appreciation. The Danish group finds the regulations adequate, all though the requirement of proving a change in economic behaviour is logically wrong. Detriment to a well-known trademark will appear long before a change in economic behaviour is found. The group is against the creation of a registry for well-known marks but in favour of introducing regulations.

Au Danemark, la loi fournit protection contre la dilution d'une marque. Protection contre la dilution est offerte aux marques bien connues. Une marque est considérée comme bien connue si elle est connue par une partie significative du domaine public concerné par le produit et dans une partie significative du Danemark. Aucun seuil spécifique de connaissance n'est nécessaire, la question étant évaluée à titre d'appréciation globale de la marque. Reconnaissance auprès d'un public spécialisé peut suffire. Il faut que la marque soit bien connue au Danemark ou bien dans l'UE s'il s'agit d'un enregistrement de marque européenne. Il n'y a pas de registre pour les marques bien connues. La violation de marque exige une association mentale ou bien un lien mental entre la marque bien connue et la marque subséquente aussi bien qu'un change dans le comportement financier de la clientèle, ou bien qu'un tel change soit probable. La charge de la preuve d'un lien mental incombe à celui qui possède la marque bien connue et doit être évalué sur la base d'une appréciation globale. Le groupe danois trouve que les règlements soient suffisants, bien que le groupe ne supporte pas la maintenance de l'obligation de faire preuve d'un tel change dans le comportement financier et qu'un tel change soit probable. Préjudice à une marque bien connue surgira bien avant qu'un change dans le comportement financier soit établi. Le groupe s'oppose à la création d'un registre pour marques bien connues, mais supporte l'introduction de règlements qui fournissent des lignes directrices pour la détermination de l'existence d'une association mentale ou bien d'un lien mental.

In Dänemark wird der Schutz gegen die Verwässerung einer Marke durch das Gesetz gewährt. Der Schutz gegen Verwässerung wird für bekannte Marken angeboten. Eine Marke wird als bekannt eingestuft, wenn sie einem bedeutenden Anteil des das Produkt nachfragenden Verkehrskreises und in einem wesentlichen Teil von Dänemark bekannt ist. Keine spezifischen Bekanntheitsgrade sind erforderlich, da die Frage auf der Basis einer globalen Einschätzung der Marke geprüft wird. Die Wiedererkennung in "Nischenmärkten" kann ausreichend sein. Die Marke muss in Dänemark oder in der EU, wenn es sich um eine europäische Registrierung der Marke handelt, bekannt sein. Kein Register für bekannte Marken ist vorhanden. Eine Verletzung erfordert eine gedankliche Verbindung oder Verknüpfung zwischen der bekannten Marke und der nachfolgenden Marke sowie ei-

ne Beeinflussung im wirtschaftlichen Verhalten des Verbrauchers oder die Tatsache, dass eine solche Beeinflussung wahrscheinlich ist. Die Beweislast zum Nachweis einer gedanklichen Verbindung trägt der Inhaber der bekannten Marke und muss auf der Basis einer globalen Einschätzung geprüft werden. Die dänische Gruppe findet die Bestimmungen angemessen, obwohl die Gruppe das Aufrechterhalten der Anforderung eines Nachweises einer Beeinflussung im wirtschaftlichen Verhalten sowie der Anforderung, dass eine solche Beeinflussung wahrscheinlich ist, nicht unterstützt. Eine Schädigung einer bekannten Marke wird schon lange vor dem Feststellen einer Beeinflussung im wirtschaftlichen Verhalten vorkommen. Die Gruppe ist gegen die Bildung eines Registers für bekannte Marken, sie ist jedoch für die Einführung von Vorschriften, die eine Anleitung für die Bestimmung, ob eine gedankliche Verbindung oder Verknüpfung vorliegt, enthalten.

## I. ANALYSIS OF CURRENT LAW AND CASE LAW

The Groups are invited to answer the following questions under their national laws:

1. *Do the laws of your country provide for protection against dilution of a trade mark? If so, which laws?*

By way of introduction the group wishes to mention that Denmark is a member of the EU. Accordingly Danish law and Danish case law complies with decision from the ECJ. As there is no relevant reported Danish case law after the Intel case C-252/07 and only a very limited amount of relevant reported Danish case law before Intel the major part of the case law referred to below are decisions from the ECJ.

Also the group notes that Danish law does not acknowledge dilution as a strictly defined principle of law such as the US. Danish law, however, acknowledges the protection for well-known marks against such use by third parties of an identical or similar mark for dissimilar as well as for similar products and services, which may lead to detriment to the distinctive character of the mark. This protection is often referred to as protection against dilution ('udvanding').

Finally the group notes initially that Danish law provides for trade mark rights to be obtained by way of registration as well as by way of use. The mere use is sufficient to obtain a trade mark right, no further establishment is required. Danish law provides that through use a designation will be able to acquire the necessary distinctiveness to serve as a trademark, and the as such distinctive trademark will through use be able to obtain firstly establishment and reputation, and then to obtain a position as being a well-known mark and finally obtain a position as being a famous mark.

Replying to question 1 above, yes, the Danish legislation provides for protection against dilution of a trade mark.

The legal basis is art. 5(2) of the Directive 2008/95/EC of 22 October 2008 of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks, which amends the First Council Directive 89/104/EEC of 21 December 1988 (hereinafter the 'EU trade marks directive').

In Denmark, the corresponding provision for protection against dilution of a trade mark is set out in section 4(2) of the Danish trade marks Act (consolidated act no. 90 of 28 January 2009).

2. *Is there a legal definition of dilution in your legislation or case law?*

No, in Denmark there is no legal definition of dilution in either legislation or case law.

However, the fundamental principle of dilution is well accepted in legal literature and applied by the Danish courts.

3.1. *Which trade marks are afforded protection against dilution? What are the eligibility criteria? (Please only briefly list the eligibility criteria here; more detailed explanations will be required below).*

In Denmark, the trade marks afforded protection against dilution are the marks that are considered to be well-known.

In respect of the eligibility criteria reference is made to 3.3.1, (ii) below.

3.2. *To be eligible for protection against dilution, does a mark need to be distinctive? If so, does the protection depend upon the mark being inherently distinctive or are marks that have acquired distinctiveness through use also protected?*

(i) *To be eligible for protection against dilution, does a mark need to be distinctive?*

Yes, a trade mark always needs to be distinctive in order to be protected. For this reason, the protection against dilution is basically also conditional on the mark to be distinctive.

(ii) *If so, does the protection depend upon the mark being inherently distinctive or are marks that have acquired distinctiveness through use also protected?*

No, the availability of the protection against dilution does not depend on whether the mark is inherently distinctive or the distinctiveness of the mark has been acquired through use.

Even though the distinction between a mark being inherently distinctive and a mark having acquired distinctiveness through use is not relevant in the assessment of whether a mark is well-known and hence is afforded protection, the distinction may be essential when determining the scope of protection, and accordingly may have an impact on the scope of protection within which dilution protection is available.

The issue was implicitly considered by the Danish Supreme Court in U.2006.600H (Adidas v. FDB). The Supreme Court granted adidas' three stripes a very narrow scope of protection, explicitly mentioning the fact (i) that the distinctiveness of the three stripe mark had been acquired through use, and (ii) that accordingly the ordinary consumer would be aware that the adidas' trademark exists of precisely three stripes and not of another number of stripes. Accordingly the protection rendered to the three stripe mark was very limited to only comprise identical or close to identical marks.

However, the Danish adidas Supreme Court decision may now be argued to be contradictory to the subsequent case law of the European Court of Justice, cf. adidas – Marca II, C-102/07.

*3.3.1 To be eligible for protection against dilution, does a mark need to have a reputation or be well-known or famous? If so, when does a mark have a reputation, when is it well-known or when is it famous? Are the factors mentioned in paragraph 15 and 22 above relevant for determining whether a mark has a reputation, is well-known or famous? For what point in time does this have to be assessed?*

*(i) To be eligible for protection against dilution, does a mark need to have a reputation or be well-known or famous?*

For a mark to be protected against dilution, it needs to be well-known.

*(ii) If so, when does a mark have a reputation, when is it well-known or when is it famous? Are the factors mentioned in paragraph 15 and 22 above relevant for determining whether a mark has a reputation, is well-known or famous?*

The term 'well-known' is not well-defined in Danish law.

The question of, when a trade mark is considered well-known has been interpreted by the ECJ, e.g. in C-375/97 General Motors/Yplon. The ECJ ruled that the trade mark must be known by a significant part of the public concerned by the products or services which it covers and that the trade mark must be known in a substantial part of the country in which the mark enjoys protection.

When assessing whether a trade mark is well-known the Danish courts will apply the principles as set out by the ECJ, and the factors mentioned in paragraph 15 and 22 above are all relevant elements to the assessment.

None of the factors mentioned in paragraph 15 and 22 are set out by law, but to they have all been addressed and considered relevant in Danish case law.

(iii) *For what point in time does this have to be assessed?*

The relevant point in time for the assessment of whether a mark is well-known is depending on whether the assessment relates to the question of infringement or to the question of remedies against an infringement, or whether the argument of well-knownness is brought up in an opposition or cancellation action.

In relation to infringement the relevant point in time for assessing whether a mark is well-known is the time of the infringement.

In relation to claims for damages and injunction the relevant point in time is not only the time of the infringement but also the time of the Court deciding the case, claims for damages and injunction depends upon the mark still being valid at the time of the decision.

During an opposition and cancellation action before the Danish TMO the relevant point in time is the filing date, where the opponent/proprietor must show that the earlier mark was well-known by the filing date of the contested application/registration.

3.3.2 *For a mark to have a reputation or to be considered well-known or famous, must it meet a certain knowledge or recognition threshold? If so, what is that threshold? What percentage of population awareness is required? How widespread must the awareness be across the country? If a mark is well-known or famous in one country, what effect, if any, does this have with regard to other countries?*

(i) *For a mark to have a reputation or to be considered well-known or famous, must it meet a certain knowledge or recognition threshold? If so, what is that threshold? What percentage of population awareness is required? How widespread must the awareness be across the country?*

No, in the Danish legislation there exist no thresholds of certain knowledge or recognition for a mark to be considered well-known. The legal assessment of whether a trade mark is to be considered well-known is based on a principal of global appreciation of all relevant factors.

(ii) *If a mark is well-known or famous in one country, what effect, if any, does this have with regard to other countries?*

As mentioned above Denmark is a member of the EU. Within the EU if a registered community trade mark is having a reputation in one country/member state this may have an effect in other member states/countries. In the case C-301/07 (Pago), the ECJ ruled with reference to the General Motors/Yplon case C-375/97, cf. 3.3.1. (ii) above, in relation to the term 'has a reputation in

the Community' that the territory of one member state may be considered to constitute a substantial part of the territory of the Community.

It seems likely that the PAGO decision will apply not only to marks having a reputation but also to well-known or famous trade marks. Accordingly, a mark being well-known in one member state may enjoy dilution protection in the other member states, i.e. Denmark.

Danish law provides as required by the Paris Convention article 6 (b) that famous marks ('vitterligt kendte' mærker) are a hindrance to the registration of identical or similar marks for goods and services identical to those for which the famous mark is known.

3.3.3 *What is the relevant population in determining the knowledge, recognition or fame of the mark, the general public at large or the relevant sector of public? Is recognition or fame in a limited product market ('niche market') sufficient?*

In Denmark, when determining whether a trade mark is to be considered well-known the relevant population is the relevant sector of public and not the general public at large. Recognition or fame in a limited product market ('niche market') may be sufficient.

The leading case law in this respect is C-375/97 General Motors/Yplon, cf. 3.3.1 (ii) above.

3.4. *To be eligible for protection against dilution, is it required that the mark has been used in, or that the mark has been registered or that an application for registration of the mark has been filed in the country where protection is being sought?*

To be eligible in Denmark for protection against dilution the mark must be well-known in Denmark. In this connection it is required for a mark to be well-known in Denmark either that the mark has been used in Denmark or that the mark has been registered as a community trade mark, cf. the PAGO case, C-301/07, 3.3.2, (ii) above.

3.5. *Are there any other criteria a mark must comply with to be eligible for protection against dilution?*

No, the only criterion to be eligible for protection against dilution is the mark being well-known.

3.6. *Is eligibility for protection against dilution a matter of law or an issue of fact? Who bears the burden of proof regarding the eligibility criteria? How does one prove that a mark meets the eligibility criteria? Are sales and advertising figures sufficient or is survey evidence required? Which evidential standard must this proof satisfy?*

(i) *Is eligibility for protection against dilution a matter of law or an issue of fact?*

It is an issue of fact, whether a trade mark is considered well-known, accordingly eligibility for protection against dilution is an issue of fact although it is assessed on basis of law.

(ii) *Who bears the burden of proof regarding the eligibility criteria?*

The trade mark owner bears the burden of proof.

(iii) *How does one prove that a mark meets the eligibility criteria? Are sales and advertising figures sufficient or is survey evidence required? Which evidential standard must this proof satisfy?*

The proof of a mark being well-known can be lifted by any kind of evidence that can substantiate the degree of knowledge of the mark. Sales and advertising figures will be important but not necessarily sufficient. Survey evidence is not required. Survey evidence obtained before and independently of court proceedings are generally permitted by Danish Courts to be produced as evidence during proceedings whereas it is possible to object to surveys being produced as evidence if obtained unilaterally by one party during court proceedings. There is no evidential standard for such evidence to satisfy.

3.7. *Is there any registry of eligible marks in your country? If so, what is the evidentiary value of registration? Can it be challenged in litigation?*

There exist no registry, list or alike of eligible marks for dilution protection in Denmark.

4. *Does your law require the existence of a 'mental association' or 'link' between the earlier trade mark and the later trade mark? If so, in which circumstances does a 'mental association' or 'link' between the earlier trade mark and the later trade mark exist? Are the factors mentioned in paragraph 27 and 28 above relevant for assessing the existence of such a 'mental association' or 'link'? Are there other factors to take into account? Is the assessment of a link a question of fact (so something that can be established by market surveys), or is it a question of law to be established by the courts or authorities on the basis of such factors?*

References to C-252/07 Intel and C-487/07 Bellure are made in the following. There is no national Danish dilution case law subsequent to these decisions and thus, it remains to be seen how Danish courts will interpret the decisions.

(i) *Does your law require the existence of a 'mental association' or 'link' between the earlier trademark and the later trademark?*

It follows from C-425/98 Marca Mode/adidas, C-408/01 adidas/Fitnessworld and C-252/07 Intel that a 'mental association' or 'link' is required in order to obtain protection against detriment to repute or distinctive character, detriment being equivalent to dilution.

(ii) *If so, in which circumstances does a 'mental association' or 'link' between the earlier trademark and the later trademark exist? Are the factors mentioned in paragraph 27 and 28 above relevant for assessing the existence of such a 'mental association' or 'link'? Are there other factors to take into account?*

The existence of a 'mental association' or 'link' must be appreciated globally, taking into account all factors relevant to the circumstances of the case, cf. C-408/01 adidas/Fitnessworld. These factors are equivalent to the factors applied in cases regarding likelihood of confusion. According to C-252/07 Intel the following factors, also mentioned under paragraph 27, are relevant:

- the degree of similarity between the conflicting marks;
- the nature of the goods or services for which the conflicting mark was registered, including the degree of closeness or dissimilarity between goods or services
- the strength of the earlier mark's reputation;
- the degree of the earlier mark's distinctive character, whether inherent or acquired through use;
- the existence of likelihood of confusion on the relevant part of the public.

As mentioned above, under Danish law when assessing and deciding the concept of mental association and link, the Courts take into account all factors relevant to the circumstances of the case. Thus, Danish law does not operate an explicit list comparable to the factors mentioned under paragraph 28 for assessing the existence a 'mental association' or 'link'.

If the relevant public perceives a sign exclusively as an embellishment 'mental association' or 'link' is not likely to exist, cf. C-480/01 Fitnessworld and the Danish Supreme Court decision U.2006.600H in adidas v. FDB, mentioned above under question I, 3.2, (ii).

(iii) *Is the assessment of a link a question of fact (so something that can be established by market surveys), or is it a question of law to be established by the courts or authorities on the basis of such factors?*

The assessment of whether a 'mental association' or 'link' exists is a question of law although it is assessed on basis of facts.

Thus, due to the fact that it is most often difficult to collect documentation in the form of advertising, size, marketing expenditure etc. which is unambiguous in relation to the actual relevant public, market surveys, if allowed to be submitted by the court, are of substantial importance in some cases and ignored in other cases in regard of proving reputation – case law is not stringent on this point.



5. *Does such 'mental association' or 'link' between the earlier trademark and the later trademark automatically result in detriment to the earlier trademark's repute or distinctive character? Or does detriment have to be proved over and above the existence of a 'mental association' or 'link'?*

No, detriment must be proven over and above 'mental association' or 'link'. Detriment to the distinctive character or repute of the earlier trademark can not be assumed from the fact that 'mental association' or 'link' between the earlier mark and the later mark exist. This has been clearly established by the ECJ in C-252/07 Intel.

Further, in C-487/07 Bellure the ECJ has specified that detriment to a trademarks distinctive character occurs when the trademarks ability to function as a trademark – i.e. the ability to communicate the origin of goods or services – is weakened. Detriment to repute occurs when the trademarks power of attraction is reduced.

6. *Are the same factors taken into consideration to assess the existence of detriment as those already discussed for the link? Are there additional ones?*

Yes, the same factors are taken into consideration when assessing the existence or likelihood of detriment. In addition to these factors it follows from C-252/07 Intel that detriment – or likelihood of detriment – to the distinctive character of the earlier trademark requires evidence of a change in the economic behaviour of the relevant public, or a serious likelihood that such a change will occur in the future.

7. *Must actual dilution be proved or is a showing of likelihood of dilution sufficient? Whose burden of proof is it? How does one prove dilution or likelihood of dilution? Does detriment require evidence of a change in the economic behaviour of the average consumer or that such change in behaviour is likely? If so, what is a change in the economic behaviour of the average consumer? Is reduced willingness to buy goods sold under the earlier mark a change in the economic behaviour? How do you prove a change in the economic behaviour of the average consumer or likelihood of such change in behaviour?*

- (i) *Must actual dilution be proved or is a showing of likelihood of dilution sufficient?*

It is not necessary to establish actual dilution of the earlier trademarks distinctive character or repute – likelihood of dilution will suffice.

- (ii) *Whose burden of proof is it?*

The burden of proof rests with the owner of the earlier trademark. The burden of proof of a defence that use of the earlier mark is made in due cause rests with the owner of the later mark.

(iii) *How does one prove dilution or likelihood of dilution? Does detriment require evidence of a change in the economic behaviour of the average consumer or that such change in behaviour is likely?*

As mentioned above it follows from C-252/07 Intel that detriment – or likelihood of detriment - to the distinctive character of the earlier trademark requires evidence of a change in the economic behaviour of the relevant public, or a serious likelihood that such a change will occur in the future.

(iv) *If so, what is a change in the economic behaviour of the average consumer?*

Examples of or definition of *change in the economic behaviour of the average consumer* are not suggested in present case law.

(v) *Is reduced willingness to buy goods sold under the earlier mark a change in the economic behaviour?*

With reference to answer (iv) above, reduced willingness to buy goods sold under the earlier trademark may constitute a change in the economic behaviour.

(vi) *How do you prove a change in the economic behaviour of the average consumer or likelihood of such change in behaviour?*

Cfr. answer to question 1 and 6.

8 *What is the extent of protection afforded to marks which are eligible for dilution protection? May the owner of the earlier trademark object*

- *to the registration of a later trademark?*
- *to the actual use of a later trademark?*
- *in respect of dissimilar goods only or also in respect of similar goods?*

The owner of an earlier trademark with a reputation may object to the registration and/or the actual use of a later trademark in respect to both dissimilar and similar goods or services, cf. C-292/00 Gofkid.

9. *What are the legal remedies? May the owner of the earlier trademark file an opposition and/or a cancellation action? May he ask for injunctive relief or preliminary injunctive relief? Does your trademark office refuse the registration of a later trademark on grounds of likelihood of dilution?*

(i) *May the owner of the earlier trademark file an opposition and/or a cancellation action?*

Yes, the owner of the earlier trademark may file an administrative opposition and/or a cancellation action. Cancellation actions against a Community Trademark are regulated by the Council Regulation (EC) No 207/2009.

(ii) *May he ask for injunctive relief or preliminary injunctive relief?*

Yes, the owner of the earlier trademark may ask for injunctive relief or preliminary injunctive relief.

(iii) *Does your trademark office refuse the registration of a later trademark on grounds of likelihood of dilution?*

No, refusal is made *ex officio* as earlier rights are considered relative grounds for refusal. During an opposition and cancellation action the trademark office can refuse/cancel registration of a later mark on basis of dilution.

## **II. PROPOSALS FOR ADOPTION OF UNIFORM RULES**

The Groups are invited to put forward proposals for adoption of uniform rules with a view to protecting trade marks against dilution. More specifically, the Groups are invited to answer the following questions:

1. *Which trade marks should be eligible for protection against dilution? What should the eligibility criteria be? Should recognition or fame in a limited product market ('niche market') be sufficient?*

We believe that the rules hitherto used for determining what trademarks should be eligible for protection should be maintained. We refer to the answers made to the above question I, 1-3 for explanation of the current Danish system.

In our opinion it is acceptable to allow trademarks to be acknowledged as being well-known even if the necessary recognition only relates to a 'niche market' to the extent that it is still necessary for the trademark owner to show a mental association or link between the well-known niche market trademark and the alleged infringing trademark.

2. *Should it be a criteria for being eligible for dilution protection that the mark has been used in, or that the mark has been registered or that an application for registration of the mark has been filed in the country?*

Protection should be afforded to marks that enjoy protection in the jurisdiction either by being covered by a registration covering the jurisdiction or by being protected under national laws allowing trademarks to gain protection through use.

Protection should not be afforded to trademarks that do not themselves enjoy protection under national law, except for trademarks covered by Paris Convention Art. 6<sup>bis</sup>.

3. *Should there be a registry of eligible marks? If so, what should the evidentiary value of registration be? Should it be possible to challenge it in litigation?*

No. Such registry would represent a peculiar legal source, since it could prove very difficult to make a determination as to what trademarks should be entered into the registry and what trademarks should be removed from the registry to keep the registry current since reputation of a mark may change over time also in a negative direction.

Furthermore the determination as to, what trademarks should be entered into the registry will be made at a time where an actual conflict has not arisen. The inclusion into the registry would be contestable by a possible infringer and this contest would result in the necessity to consider once again if the mark is well-known.

Finally it is difficult to determine who should administrate such a list. If the national PTOs were to administer the list it would bring them in a conflict of interest situation when they subsequently were asked to take a decision on an opposition/cancellation action involving the well-known trademark. They would then have to consider the legitimacy of their prior decision to enter the mark into the registry. This would be in conflict with the contradictory principle vested in the procedural laws of Denmark.

It is satisfactory that courts or administrative bodies make a determination regarding the reputation of a mark, when the trademark owner wants to challenge a third party's right based on grounds of well-knownness.

4. *Should the existence of a 'mental association' or 'link' between the earlier trade mark and the later trade mark be an independent requirement for a trade mark dilution claim?*

The basic idea behind requiring a mental association or link between the well-known trademark and the alleged infringing trademark is sound, since that is in fact the initial basic requirement for considering damage to a well-known trademark.

However, since a mental association or link is not a physical matter that may easily be proven in court we find that the laws should provide guidance for determining when a mental association can be considered proven. We do not find it advisable to carve out specific rules, such as threshold levels of recognition in a survey, but guidance in determining the existence of a mental association would surely help in making the right determination.

5. *Should detriment to the distinctive character or reputation of the earlier mark require evidence of a change in the economic behaviour of the average consumer or that such change in behaviour is likely?*

No. The damages of dilution start to appear before a change in the economic behaviour of the consumer can be traced. Accordingly if it is a requirement for dilution to be accepted to prove a change in the economic behaviour of the consumer it will lead to a situation where different third parties using a trademark that eventually is considered to infringe the well-known trademark would be treated differently. The Third parties who have started using the trademark before a change in economic behaviour can be traced may continue their damaging business, while subsequent users will commit trademark infringement by using the exact same trademark, because they have started using the mark after a change in the economic behaviour could be traced.

6. *What should the remedies be for dilution of a mark?*

We believe that the remedies offered today in our system are adequate. These are the right to seek a preliminary as well as a permanent injunction and the right to seek damages for proven loss of income etc. and the right to seek compensation for unlawful exploitation without having to prove any loss.

The group would find it appropriate to reintroduce legislation which made it possible to seek monetary compensation also from good-faith infringers if such compensation would be considered fair taking the facts of the conflict into consideration.