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On the Infringement of Freedom of Speech Caused by Excessive Protection of Trademark Rights under European Union Legislation

Chaoran Zeng

Faculty of International Law, China University of Political Science and Law, Beijing, China
13910685231@163.com

Abstract: With the expansion of trademark rights under European Union (EU) law, tensions between trademark protection and freedom of expression have intensified. This paper examines how the EU's broad interpretation of "use in the course of trade" has led to the infringement of both commercial and non-commercial speech. Cases such as *APT Training v. Birmingham NHS Trust* and *SodaStream v. MySoda* show how courts often classify charitable and environmental initiatives as commercial, exposing them to infringement claims. In the commercial sphere, the investment and communication functions of trademarks are increasingly used to suppress comparative advertising and parody—key forms of expressive conduct. These findings suggest that the EU legal framework disproportionately favors trademark protection, creating a chilling effect on public-interest speech and artistic or critical expression. The paper concludes by calling for clearer legislative guidelines and stronger recognition of freedom of speech as a fundamental right in trademark disputes.

Keywords: Trademark infringement, freedom of expression, EU legislation, comparative advertising, trademark parody

1. Introduction

In the evolving landscape of intellectual property law, trademark protection has gained prominence within the European Union. Initially intended to prevent consumer confusion and protect brand reputation, trademarks now also cover investment signaling, advertising, and communication. While this expansion benefits brand holders, it increasingly threatens freedom of expression—especially when expressive activities reference brands in both commercial and non-commercial contexts.

Legal scholars and courts have turned attention to the tension between fundamental rights and economic interests. The European Court of Human Rights (ECtHR) affirms that all expression, including commercial speech, falls under Article 10 of the European Convention on Human Rights. Yet the Court of Justice of the European Union (CJEU) often subordinates expression to trademark rights, treating speech-based defenses as internal to trademark doctrine [1]. While recent studies discuss comparative advertising, dilution, and parody, few examine how trademark law affects

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public-interest communication and emerging practices like upcycling. There's persistent uncertainty around “use in the course of trade,” particularly concerning artists and charitable organizations.

This paper explores how the EU’s expansive trademark regime may infringe upon expression in both commercial and non-commercial contexts. It contributes to the growing discourse on intellectual property and human rights, emphasizing the need for reform to better balance economic rights with democratic freedoms.

1.1. The scope of freedom of expression

Article 10 of the ECHR protects the right to hold opinions and to receive and impart information without interference. This includes verbal, artistic, commercial, and symbolic expression—such as advertising, satire, and parody.

The ECtHR has consistently affirmed this scope. In Casado Coca v. Spain, the Court confirmed that advertising is protected under Article 10 [2]. Expression in democratic societies spans political, cultural, artistic, and economic domains, especially when it contributes to public discourse [3].

Any interference must be lawful, pursue a legitimate aim, and be necessary in a democratic society under Article 10(2). The principle of proportionality ensures that limitations do not unduly favor intellectual property at the expense of expression.

1.2. The imbalance in legislative structure

Despite Article 10’s broad protections, EU trademark law’s structure creates imbalance. The CJEU often evaluates expression not as a constitutional right but within trademark infringement frameworks. This subordinates expressive interests to economic ones.

As Martin Senftleben notes, courts interpret free expression claims merely as defenses within trademark doctrine, not as independent fundamental rights [1]. When assessing infringement, courts prioritize trademark functions—origin, advertising, investment—without adequately considering expressive use under Article 10. This bolsters brand owners’ control over discourse and limits artistic, critical, or non-commercial speech.

Thus, while the ECHR promises robust free expression, EU law lacks safeguards to prevent trademark enforcement from intruding on expressive domains. This is especially problematic when cases involve socially valuable expression like charity work, environmental advocacy, or parody, where speech is often sidelined in favor of brand protection.

2. The infringement under non-commercial context

The "use in the course of trade" threshold has been shaped highly flexible. Courts routinely stretch "commercial use" definitions to override non-profit initiatives. For instance, in charity events and environmental protection projects that upcycle brand waste.

2.1. Case study on charity context

In APT Training v Birmingham & Solihull Mental Health NHS Trust case, charities offering free services still face infringement risks if using trademarks in event promotions or donor interactions. The court clarified that a charitable association not seeking profit does not mean its objective cannot be to create and preserve an outlet for its goods or services [4].

The Charities Act 2011 sets out two requirements. First, it needs to falls within Section 3(1), which includes the advancement of health or the saving of lives. The NHS Trust satisfy this

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standard. Second, it needs to meet public benefit requirement. According to Section 185 and 186, remuneration of trustees or employees does not per se defeat the public character. According to PB2 (Public benefit: the public benefit requirement), charging fees also does not automatically negate public benefit, but requires proportionate mitigation measures. Therefore, the court cannot conclude that there is a profit-making purpose based solely on the paid contracts between the NHS Trust and Birmingham Hospitals, or on the existence of competition between the NHS Trust and other private healthcare providers [4].

This case essentially acknowledges that charitable activities in the public domain have potential commerciality and predicts that charitable activities will enter the commercial field in the future. Directly assuming uncertain future events as inevitable outcomes clearly constitutes excessive protection of trademark rights.

2.2. Case study on upcycling context

In recent years, upcycling has emerged as a sustainable fashion practice, transforming existing garments into new pieces without altering their original composition, thereby reducing textile waste and contributing to a more sustainable fashion world [5]. However, upcycling face infringement claims, because the artists often advertise their work to draw public attention, which transfers the environmental protection-oriented intention into commercial use. Once upcycling crosses the “use in the course of trade” threshold, tit struggle to escape infringement claims.

In the case of Soda-Club (CO2) SA and SodaStream International BV v. MySoda Oy, the CJEU ruled that trademark owners may oppose third-party commercialization of their branded products if alterations damage the trademark's reputation or create misleading commercial connection [6]. Such risks are assessed based on product labeling, presentation, industry practices, and consumer awareness. Therefore, the assessment should include not only the appearance of the trade mark on the upcycled products but also, the way the products are marketed [7].

In AGA Rangemaster v UK Innovations case, the court found that in any event, the average consumer considering the purchase of a second-hand AGA Cooker would not necessarily expect that replacement parts would be of equal quality to original ones, so the damage to the trademarks reputation can’t established. However, the court also held that the defendant's use of phrases like "Purchase eControl AGA" on its website created an impression of commercial connection with the plaintiff, thereby constituting infringement [8]. This case implies that upcycling may not display the original material's trademark, which conflict with upcycling's fundamental purpose to preserve historical and material authenticity, and cause limitation on leveraging the reputation of established brands to promote sustainable upcycling concepts.

This judicial elasticity effectively reclassifies public-interest actions as commercial activities. However, the guarantee of freedom of expression and freedom of art requires that artists also be free to sell and promote their artwork. The sufficient scope of the freedom of expression must be provided not only for the creation of art but also for its marketing [7].

3. The infringement under “use in the course of trade” context

Once commercial use is established, trademark law’s overreach intensifies. Two battlegrounds exemplify this.

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3.1. Case study on comparative advertising

One major area of conflict between trademark protection and freedom of expression lies in comparative advertising. Over time, the CJEU has produced a series of landmark decisions that reflect an evolving attitude toward the permissibility of using trademarks in comparative or critical contexts.

In BMW v. Deenik, the court adopted a relatively liberal stance, allowing a car mechanic specializing in repairing BMW vehicles used the trademark in advertising his services. The court held that such use was permissible as long as it was accurate, non-misleading, and descriptive, recognizing the informational role of comparative references [9].

The tone shifted in Arsenal v. Reed, where the court reaffirmed the exclusive rights of trademark holders. It held that even if the use of a sign may not cause consumer confusion, the trademark owner can prohibit such use if it affects function of the trademark, especially its essential function of guaranteeing the origin of goods [10]. This judgment laid the foundation for expanding trademark protection beyond confusion-based theories, emphasizing the broader role of trademarks in modern commerce.

The shift culminated in L'Oréal SA v. Bellure NV, a decision that marked a notable strengthening of the trademark holder's position. The court ruled that comparative advertising which highlights the qualities of one product by referencing defects in another may be found detrimental to the trademark's investment or advertising function, even if there is no confusion or misleading conduct [11]. This judgment created an opening for brand owners to assert infringement based on reputational harm, invoking Article 10(2)(c) of Directive (EU) 2015/2436, which prohibits use that "takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark" without due cause.

Taken together, these three cases reveal a judicial trajectory. From the relatively speech-tolerant interpretation in BMW v. Deenik, the CJEU moved toward a more rights-holder-centric approach in Arsenal v. Reed, and ultimately arrived at a highly proprietary stance in L'Oréal v. Bellure, where even accurate, non-confusing references could constitute infringement.

This progression illustrates the increasing judicial emphasis on protecting the multifaceted functions of trademarks, often at the expense of commercial and comparative expression. Without clearer legislative boundaries or defenses—such as explicit recognition of public interest or fair use—comparative advertising now exists in a climate of legal uncertainty, where the risk of litigation may discourage even truthful market commentary. The trend reflects a broader structural imbalance in EU trademark law, where the expanding scope of trademark rights threatens to silence valuable forms of economic and expressive speech.

3.2. Case study on trademark parody

Another significant battleground where trademark law intersects with freedom of expression is trademark parody. Parody, as a form of humor and cultural critique, often involves the playful or satirical use of well-known trademarks to comment on brands, society, or politics. However, EU trademark law has yet to develop a clear and consistent legal standard to accommodate this form of expressive use, which has led to growing uncertainty and tension.

Unlike in copyright law—where parody is explicitly recognized as an exception in Article 5(3)(k) of the InfoSoc Directive, EU trademark law contains no equivalent statutory defense [12]. As a result, courts and scholars have debated whether parody may fall under the concept of "due cause" in Article 10(2)(c) of Directive (EU) 2015/2436, which allows trademark holders to oppose

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unauthorized use that damages the mark's reputation unless the user has a legitimate justification. However, the directive provides no definition of "due cause", and EU case law remains fragmented and cautious [13].

A notable example is the Polo/Lauren Company v. OHIM case, where the General Court of the EU concluded that parody alone does not constitute a valid defense against infringement [14]. The court emphasized the trademark's reputation and found no reason to limit the proprietor's rights based on the defendant's satirical intentions. This suggests that humor or criticism does not automatically outweigh commercial interests.

Further uncertainty arises from the Inter IKEA Systems BV v. Deckmyn preliminary reference, which, although primarily a copyright parody case, touched on the issue of brand image. The court rejected the "explicit intention to harm" standard proposed by some national courts but also failed to articulate a coherent alternative, leaving national judges without clear guidance on how to balance parody and trademark rights [15]. The case reflects the EU judiciary's discomfort with drawing clear boundaries that protect expressive uses when they clash with brand interests.

This legal vagueness creates a chilling effect on parody, particularly where the work may blur the lines between humor and commerce. Without a robust parody exception, creators face the risk of legal action merely for referencing or critiquing powerful brands. Scholars such as Ana Ramalho have argued that parody should be seen as a form of democratic speech, especially when used to criticize corporate behavior, social values, or economic systems [12]. Yet in practice, the burden of proof lies heavily on the parodist, who must justify their intent and show a lack of commercial exploitation, while trademark owners need only claim potential reputational harm.

Overall, the EU's current treatment of parody reflects a legal asymmetry. In the absence of clear legislative protection, trademark holders are increasingly able to suppress artistic or humorous expression under the guise of defending brand identity. As in the comparative advertising context, the trend points toward an expanding dominance of trademark protection, with insufficient safeguards for non-commercial, critical, or culturally significant forms of speech.

4. Strategies

To address these challenges, several strategic responses can be proposed. First, EU trademark legislation should adopt a narrower and more consistent definition of "use in the course of trade," one that distinguishes clearly between for-profit conduct and public interest expression. Second, courts should explicitly apply the proportionality principle when weighing trademark protection against fundamental rights—a method aligned with the EU Charter of Fundamental Rights. Third, codifying clear exceptions for parody and comparative critique would safeguard democratic expression. Finally, trademark enforcement policy should take into account the chilling effects on cultural, environmental, and charitable initiatives.

Case such as Rogers v. Grimaldi demonstrates that expressive use of trademarks in artistic contexts can coexist with trademark protection if the use is not explicitly misleading [16]. In the EU context, scholars like Helfer have proposed integrating a human rights framework into IP adjudication to prevent overreach [17]. Beebe's work similarly suggests that trademark law must consider the persuasive and expressive dimensions of speech, not merely the economic impact [18].

These strategies aim to restore balance between intellectual property rights and core democratic values, ensuring that the legal system protects both brand interests and public expression.

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5. Conculsion

This study demonstrates that the European Union's current approach to trademark protection—particularly its broad interpretation of "use in the course of trade" and overemphasis on trademark functions—poses significant threats to freedom of expression. In the non-commercial realm, expressive activities like environmental advocacy and charitable initiatives increasingly face infringement claims, discouraging socially beneficial communication. In the commercial sphere, legitimate practices such as comparative advertising and parody face legal uncertainty and chilling effects, undermining both market fairness and cultural critique.

The study is primarily doctrinal, based on legal texts, case law, and secondary literature. It does not employ empirical methods like interviews or surveys that could reveal how these legal developments affect stakeholders such as NGOs, artists, or small businesses. Future research could adopt empirical approaches to assess the real-world impact of trademark enforcement on freedom of speech, especially among vulnerable groups.

In conclusion, the EU should reconsider its trademark framework to ensure that economic interests do not override core democratic values. A recalibrated system would better serve individuals, civil society, and a more balanced intellectual property regime.

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