

## AIPPI – Parody (and freedom of expression) as a defence to trade mark infringement

### Questions

#### I. Current law and practice

*Please answer all questions in Part I on the basis of your Group's current law.*

- 1) Does your law or case law recognise parody or freedom of expression as a defence to trade mark infringement. YES or NO. Please comment, addressing, in particular, if such defence is:
  - a) statutory,
  - b) judicially developed,
  - c) based on general principles such as honest practices or constitutional rights?

Yes.

Parody or freedom of expression is not expressly recognised as an independent defence under Danish trade mark law. The Danish Trade Mark law does not contain a specific provision allowing parody as a defence to trade mark infringement.

However, freedom of expression enjoys protection under broader legal principles. Denmark has incorporated the European Convention on Human Rights, under which Article 1 protects the right to property. This protection extends to intellectual property rights, including trade marks. At the same time, Article 10 of the Convention protects freedom of expression. As a result, parody as a form of expression is not grounded in statutory trade mark law in Denmark, but derives its relevance from constitutional and human rights principles, in particular Article 10 in the European Convention on Human Rights.

Furthermore, Danish law follows the harmonized EU trademark Regulation as well as the EU Trademark Directive, which again is affected by the EU Charter, art. 11. The CJEU has on several occasions held that IP rights and the fundamental rights of Freedom of Expressions must be balanced. See to this C-201/13 (*Deckmyn*) about parody in copyright law and C-240/18P (*Constantin Film*) about parody in connection with trademark registrations.

In practice, parody is not recognized as a separate defense but is instead reflected in how the scope of trade mark protection is defined. Danish case law suggests that the key issue is whether the sign is used as a trade mark or as a form of expression. Where the use is editorial, artistic, or

socially critical, and does not serve to indicate commercial origin, it will generally fall outside the scope of trade mark protection.

If the use is commercial and functions as a trade mark, the infringement rules apply. In such cases, the fact that it is a parody does not in itself avoid liability, but it may still be considered in the overall assessment.

- 2) Does your law or case law define or characterise “parody” in the framework of trade mark infringement? YES or NO. Please explain, indicating how “parody” is understood (e.g. must it be humorous, critical, or transformative?) and by whom (legislature, courts, or doctrine).

No.

Parody is not defined or characterized in Danish trade mark law. Neither legislation nor case law provides a clear or autonomous definition of parody in this context. However, Danish courts have offered some guidance. In a 2025 decision (BS-62403/2023-SHR - *COOP Danmark A/S vs. Artpusher Gallery ApS*), a Danish court noted that parody is understood as an expression of humour or mockery. Furthermore, the court indicated that for a parody to be considered lawful, it should not be driven by commercial purposes. The key question is whether the use functions as a trade mark or is associated with commercial activity, meaning whether it indicates commercial origin, or whether it is just a form of expression.

- 3) Do any of the following aspects impact whether a parody of a trade mark may or may not be considered a trade mark infringement (please explain):
  - a) The parody constitutes an expression of humour or mockery;
  - b) The parody has a critical intent (i.e. the parody is intended to express criticism or commentary, and not merely to entertain or to promote goods or services.);
  - c) The parody is directed at the original mark, and is used to criticize, disparage or discredit the original trade mark, or otherwise affect its reputation;
  - d) The parody is noticeably different from the original trade mark;
  - e) The parody is not directed at the original mark (i.e. targeting at society or other aspects unrelated to the original mark);
  - f) The parody is non-commercial and purely artistic;
  - g) The parody is non-commercial and used to draw attention to political or social message;
  - h) The parody is used “in the course of trade” and is used to sell competing, similar and/or related goods or services;

- i) The parody is used “in the course of trade” and is used to sell noncompeting and unrelated goods or services;
- j) The parody involves monetisation (e.g. sales or advertising revenue);
- k) The trade mark being parodied is considered to be well-known or famous;
- l) Other.

Yes.

These aspects are relevant as they help determine whether the use is perceived as trade mark use or as an expression.

Elements such as humour or mockery and critical intent (a-c), as well as uses that are artistic, political, or not directed at the original mark (e-g), generally point towards an expressive use. The same applies where the parody is clearly different from the original mark (d). In such situations, the use is less likely to be understood as an indication of commercial origin. Use for commercial purposes is a key factor. If the parody is used in the course of trade (h-i) or involves monetisation (j), this points towards trade mark use and increases the likelihood of infringement.

- 4) Does the function in which the trade mark is used have an impact on liability - in particular, does liability depend on whether such use constitutes use in the function of indicating the origin of goods or services? YES / NO. Please explain.

Yes.

The function of the use is important. If the sign is not used as a trade mark (i.e. as a sign of origin), there is generally no infringement. If the use is not seen as indicating the origin of goods or services, it will normally be lawful, even if it involves another party's trade mark.

- 5) Is the parodic nature of the use, including the specific type of parody (e.g. commercial, artistic, political or satirical), taken into account as a relevant factor in the assessment of the likelihood of confusion? YES / NO. Please explain.

Yes.

The nature of the use is relevant for how the average consumer perceives it. Satirical, artistic, or political elements may reduce the likelihood that the use is seen as a trade mark and therefore reduce the risk of confusion. At the same time, the use must not create a significant risk of confusion or weaken the identity of the original trade mark. The overall context and the way the parody is presented on the market are therefore decisive.

- 6) Does your law or case law address conflicts between parody and the protection of well-known, reputed or famous trade marks? YES / NO. Please explain in particular, does your jurisdiction recognize a statutory fair-use exemption, apply a “due cause” balancing test, or afford stricter protection to reputation?

Yes.

The Danish trade mark law provides extended protection for well-known trade marks. This protection applies where the use harms or takes advantage of the trade mark’s reputation or distinctiveness. It applies regardless of whether the goods or services are identical, similar, or different from those for which the trade mark is protected. The Danish trade mark law does not specifically address parody, and there is no statutory fair-use exemption, but since the law provides for a due course exemption against infringement, parody may be considered as a defense, which may be claimed. The extent of such a defense is however very limited.

- 7) Does your law or case law allow a trade mark parody to be registered as a trade mark? YES / NO. Please explain, also addressing how local practice deals with such applications.

Yes, in principle, but unlikely in practice.

Under Danish trade mark law, a sign must be distinctive and clearly different from existing marks to be registered. This is assessed from the perspective of the average consumer. For parody marks, this can be difficult. If the sign is clearly different from the original mark, it may be registrable. If it is too similar, it will usually be refused due to a risk of confusion or conflict with earlier rights. In practice, parody marks are rarely registered, as they are often too close to the original mark. Registration is only likely where the parody is clearly different from the original trade mark. In this connection it should be brought in mind, that the Danish Trademarks Office

does not examine prior rights and thus the answer to this question only relates to the situation, where the rightsholder files an opposition against the registration of the parody mark.

## **II. Policy considerations and proposals for improvements of your Group's current law**

- 8) Could your Group's current law or practice relating to parody defences to trade mark infringement be improved? YES / NO. Please explain.

Yes.

The current Danish trade mark law could be improved by providing clearer guidance on parody. As parody is not specifically regulated in Danish trade mark law, the assessment relies on general principles and case law, which can create uncertainty.

It could be considered to introduce a provision similar to section 24 b(1) in the Danish Copyright Law, which allows for parody. A similar rule in trade mark law would make the framework clearer and more predictable. At the same time, it should be clear that parodies used for commercial purposes and functioning as trade marks would still be considered an infringement.

- 9) In your Group's view, what policy objective (such as free speech, or another objective) would a defence of parody promote and help accomplish? Does the policy objective drive the types of expression that should be allowed under a parody defence? YES / NO. Please explain.

It depends.

The policy objective underlying the parody exception is to protect freedom of speech and freedom of expression, in particular the use of humour, satire, and critique. Parody allows individuals to comment on and challenge ideas, authorities, and cultural phenomena, which constitutes an important element of a democratic society. However, when a parody is mainly used for commercial purposes and takes advantage of the value of the original mark, there is less reason to protect it even if it is presented as a parody.

10) Are there any police considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question? YES / NO. Please explain.

Yes.

There is a need to better balance trade mark protection with freedom of expression. Parody should be more clearly recognised as a legitimate form of expression, while still preventing consumer confusion and unfair commercial use. The Danish trade mark law should place more emphasis on context, especially whether the use is commercial and whether it clearly expresses parody or criticism. These considerations can already be derived from the Danish case law, but it may be beneficial to include them in the legislation.

### III. Proposals for harmonisation

11) Do you believe that there should be harmonisation in relation to exceptions and defences to trade mark infringement based on parody? YES / NO. Please explain. If YES, please respond to the following questions without regard to your Group's current law or practice. Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

Yes.

Harmonisation of parody defences would improve legal certainty and consistency across jurisdictions. As trade marks are often used across borders, differences in legal approaches may create uncertainty in parody cases. A more uniform approach would allow for a clearer and more balanced assessment while still taking context into account.

12) Should different standards apply when assessing whether a parody infringes a trade mark, depending on the nature of the parody (e.g. commercial use, artistic expression, brand criticism, or political parody)? YES / NO. Please explain.

Yes.

Different types of parody should be treated differently. Parodies that are artistic, political, or otherwise non-commercial should be given more room, as they relate to freedom of expression.

Parodies used for commercial purposes should be assessed more strictly, in line with current case law.

13) Should there exist exceptions or limitations to trade mark protection for the purpose of parody or freedom of expression? YES / NO. Please explain.

Yes.

Exceptions are needed to protect freedom of expression. Trade marks may be used in parody or other expressive contexts, as long as the use does not indicate commercial origin.

14) Should any of the following aspects impact whether a parody defence for trade mark infringement should be available (please explain):

- a) The parody constitutes an expression of humour or mockery;
- b) The parody has a critical intent;
- c) The parody is noticeably different from the original trade mark;
- d) The parody is not directed at the original mark (i.e. targeting at society or other aspects unrelated to the original mark);
- e) The parody is non-commercial and purely artistic;
- f) The parody is non-commercial and used to draw attention to political or social message;
- g) The parody is directed at the original mark, and is used to criticize, disparage or discredit the original trade mark, or otherwise affect its reputation;
- h) The parody is used “in the course of trade” and is used to sell competing, similar and/or related goods or services;
- i) The parody is used “in the course of trade” and is used to sell non-competing and unrelated goods or services;
- j) The parody involves monetisation (e.g., sales or advertising revenue);
- k) The trade mark being parodied is considered to be well-known or famous;
- l) Other. Please explain.

Yes.

These aspects are relevant as they help determine whether the use is seen as trade mark use or as an expression of freedom of expression. Humour or mockery (a) and a critical intent (b) point towards an expressive use and support the fact that a parody defence for trade mark infringement should be available. The same applies where the parody is noticeably different from the original trade mark (c), as this reduces the risk of confusion. Uses that are not directed at the original mark (d), as well as non-commercial, artistic or political uses (e-f), also support protection.

By contrast, use in the course of trade (h-i) points towards trade mark use and therefore weighs against the availability of a defence.

- 15) Should the function in which the trade mark is used have an impact on liability - in particular, should liability depend on whether such use constitutes use in the function of indicating the origin of goods or services? YES / NO. Please explain.

Yes.

Liability should depend on how the sign is used, in particular whether it serves to indicate the origin of goods or services. If the use is expressive rather than a trade mark use, this should weigh against a finding of infringement.

- 16) Should the availability of a parody defence be subject to the demonstration of the following (please explain):

- a) Absence of likelihood of confusion or association as to source, affiliation, sponsorship?
- b) That the parody does not take unfair advantage of, or cause undue detriment to, the reputation or distinctiveness of the mark?
- c) That use of the parody is consistent with honest commercial practices?

Yes.

The availability of a parody defence should be subject to certain conditions. There should be no likelihood of confusion or association as to origin, as Danish trade mark law aims to prevent such confusion. It should also be required that the parody does not take unfair advantage of, or cause detriment to, the reputation or distinctiveness of the mark, in particular for well-known marks. Finally, the use should be consistent with honest commercial practices, especially in cases involving commercial use.

- 17) Should well-known, reputed or famous trade marks benefit from additional protection against trade mark parody? YES / NO. Please explain.

No.

Under Danish trade mark law, well-known marks already benefit from extended protection.

This extended protection may also be relevant in parody cases. However, it should not exclude legitimate expressive use, in particular where the parody is not used in a commercial context.

18) What approach best balances parody and freedom of expression with the protection of well-known, reputed or famous trade marks, should the law provide for:

- a) a statutory fair-use exemption, under which parody would not constitute trade mark infringement if specific legal conditions are met;
- b) a “due cause” balancing test, under which parody could justify the use of a trade mark on a case-by-case basis, following a judicial assessment; or
- c) stricter protection of trade mark reputation in cases involving parody?

a) a statutory fair-use exemption

A statutory fair-use exemption would provide the best balance. It creates clarity and makes it more predictable when parody is allowed. This way commercial uses that make use of the well-known trade mark for commercial gain can be kept outside the scope of the exemption.

19) Should a sign which parodies a third-party’s trade mark be allowed to be registered as a trade mark? YES / NO. Please explain, also addressing how TM Offices should deal with the situation.

Only, if there is no likelihood of confusion

A sign that parodies a third party’s trade mark will usually not be accepted for registration, if the rightsholder objects to the registration. Under Danish trade mark law, the sign must have distinctive character and be clearly different from existing marks, as perceived by the average consumer. Parody signs will often be too close to the original mark and will therefore normally be refused due to a risk of confusion or conflict with earlier rights. Registration may only be possible where the parody is sufficiently different from the original mark. TM Offices should assess this as part of the normal examination of the application.

20) Please comment on any additional issues concerning exceptions and limitations to trade mark protection related to parody you consider relevant to this Study Question.

21) Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.