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A Break For Art: Evaluation of the Conflicts Between Trademark Rights and the Freedom of Artistic Expression Considering Turkish and European Union Regulations

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Abstract The repealed Regulation (EU) 2015/2424 on the Community Trade Mark introduced a specific rule to safeguard the freedom of artistic expression against trademark rights. According to this rule stated in Recital 21 of the EU Trade Mark Regulation 2017/1001 and Recital 27 of the EU Trade Mark Directive 2015/2436, which are currently in force, the use of a trademark by third parties for the purpose of artistic expression should be considered as fair, provided that it is in accordance with honest practices in industrial and commercial matters. In Turkish law, there is no special provision regarding the issue. However, since this rule is explicitly mentioned in the referred EU regulations that were taken into consideration during the legislative process of Industrial Property Code no. 6769, it is possible to adopt the same approach for our law system. In addition, the general prerequisites required for trademark infringement and fair use exceptions may help to safeguard the freedom of artistic expression. On the other hand, it is unclear whether these provisions are adequate to fully protect the freedom of artistic expression. In particular, it may be quite challenging to safeguard freedom of expression against the extended protection granted to well-known trademarks. In this respect, based on US, EU and Turkish law, legal regulations that can be applied in cases of conflict between freedom of artistic expression and trademark rights and whether they are adequate to safeguard the artistic expressions are evaluated in this study.

Keywords Freedom of Expression · Trademark Rights · Fair Use · Trademark Infringement · Honest Practices

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I. Introduction

Freedom of expression, which holds significant importance within fundamental rights and freedoms, primarily aims to safeguard the expression of thought. It is essential for individuals to have unrestricted access to information sources and the freedom to select the information they acquire in order to form their own opinions. However, accessing information alone is not adequate; individuals must also have the right to freely express their thoughts. Indeed, the emergence of new ideas and their free discussion, giving individuals the opportunity to choose among different opinions, expressing existing flaws, and eliminating wrong practices are crucial for the progress of societies. In fact, today, the right to freedom of expression stands as one of the most significant rights in democratic states under the rule of law.[1]

Freedom of expression is regulated in Article 10 of the European Convention on Human Rights[2] (ECHR). This provision affirms that everyone has the right to freedom of expression and specifies the freedoms protected under this right. It then outlines the legitimate restrictions that can be imposed on freedom of expression. Accordingly, it delineates the permissible restrictions that can be imposed on freedom of expression, specifying the circumstances under which freedom of expression may be subject to formalities, conditions, restrictions, or penalties. Indeed, in a democratic society, defining the boundaries of freedom of expression is equally crucial as protecting the right itself[3]. Similar to the relevant provision of the ECHR, Article 26 of the Constitution of the Republic of Turkey[4] also safeguards freedom of expression.

Freedom of artistic expression, which is our topic of focus, falls within the scope of Article 10 ECHR, thereby it utilizes the protection afforded by this provision, while being subject to the restrictions outlined in the second paragraph of the same article. Under Article 10/2 of the ECHR, restrictions on the freedom of expression, including artistic freedom of expression, are permissible only for specific legitimate purposes. According to the Article, these restrictions can be made for the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

A trademark right is considered an absolute right and grants exclusive rights to its owner. However, this right is subject to certain limitations by considering the interests of third parties and especially the interests of society. The only provisions explicitly safeguarding freedom of expression are found in Recital 27 of the EU Trade Mark Directive 2015/2436[5] (TMD) and Recital 21 of the EU Trade Mark Regulation 2017/1001[6] (EUTMR). However, in these provisions, the protection of freedom of expression is subject to certain conditions. In addition, the prerequisites required for trademark infringement can also help to safeguard the freedom of artistic expression. It is also possible in some circumstances for third parties using the trademark for artistic purposes to rely on the fair use exceptions regulated in Article 14 of TMD and EUTMR and Article 7/5 of Industrial Property Code No. 6769[7] (IPC). However, it remains unclear whether these provisions are adequate

[1] Özcan Özbey, 'Avrupa İnsan Hakları Sözleşmesi Işığında İfade Özgürlüğü Kısıtlamaları' (2013) 62(1) Ankara Üniversitesi Hukuk Fakültesi Dergisi 93, 95-97.

[2] The European Convention on Human Rights is an international convention that was signed in Rome on November 4, 1950 and entered into force on September 3, 1953. The aim of the Convention is to protect human rights and political freedoms in Europe. Turkey ratified the Convention on November 4, 1954 and approved it in 1954.

[3] Özbey (n 1) 97; Yakup Yıldırım, *AİHM Kararlarında İfade Özgürlüğü ve İtibarın Korunması Hakkı* (Adalet 2023) 119, 120.

[4] Constitution of the Republic of Turkey, No. 2709, OG. 09.11.1982/17863.

[5] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1.

[6] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark [2017] OJ L154/1-99.

[7] Industrial Property Code No. 6769, OG. 10.01.2017/29944.

to fully protect the freedom of artistic expression. In particular, it can be quite challenging under current legal regulations to protect the freedom of artistic expression against the extended protection granted to well-known trademarks. In contrast, it can be seen from the legal regulations under US law that the use of famous trademarks in parodies by third parties falls within the scope of fair use exceptions. In practice, conflicts between trademark rights and the freedom of artistic expression usually arise when third parties use famous trademarks as parodies. However, unlike US law, there is no specific provision regarding the issue in the legal frameworks of the EU and Turkish law.

This study aims to assess the adequacy of existing provisions in EU legislation concerning the freedom of expression and determine whether an additional provision is necessary to safeguard the freedom of artistic expression against trademark rights. First, the legal frameworks governing the protection of the freedom of artistic expression within trademark law will be examined considering the US, EU and Turkish law systems. Specifically, this section analyzes how the prerequisites required for trademark infringement impact the freedom of artistic expression. Following this, the subject will be discussed with regard to the extended protection granted to well-known trademarks. It will then be considered whether the freedom of artistic expression can be invoked as a defense of fair use in trademark infringement claims by examining the legal regulations and practices in US, EU and Turkish law. Finally, the study will address whether there is a requirement for an additional exception provision specifically aimed at safeguarding the freedom of artistic expression within fair use defenses by considering the opinions of legal scholars from different law systems.

II. Legal Protection Granted to Freedom of Artistic Expression Under Trademark Law

A. In the United States (US) Law

In the Lanham Act, which constitutes the fundamental legislation regarding trademarks in US law, there is no specific provision regulating the use of another's trademark for the purposes of freedom of expression such as parodies. There is a specific provision regarding the issue only for famous trademarks (15 U.S.C. § 1125/c-3). Therefore, as a solution for the parodies including others' trademarks, it has been argued that the 'fair use' test, which is applied in copyright infringement claims, could also be applied for the trademark infringement claims, and the practice has developed in this direction. However, for the use to be considered fair, it must not be likely to cause consumer confusion or take advantage of the original trademark's customer base.[8]

In addition, it is a common practice to invoke freedom of expression as a defense in trademark infringement claims. In relevant cases, third parties using another's trademarks can claim that their uses fall within the scope of freedom of expression stated in the First Amendment[9] to the United States Constitution, and therefore, do not constitute trademark infringement. The First Amendment prohibits the government from making laws that restrict freedom of speech. However, not all expressions can be considered to have equal importance under the First Amendment. From a constitutional protection standpoint, for instance, political, non-violent and non-commercial expressions are granted the highest level of protection. Such expressions

[8] Çiğdem Yatağan Özkan, 'Markayla Şaka Olur mu? Marka Parodilerinin Hukuka Uygunluğu Üzerine Düşünceler' Prof. Dr. Sabih Arkan'a Armağan (On İki Levha 2019) 1349, 1369.

[9] The First Amendment to the United States Constitution is part of the Bill of Rights, a collection of ten amendments ratified on December 15, 1791. It prohibits the government from making laws that restrict the freedom of religion, freedom of speech, freedom of the press, the right to peaceably assemble, or the right to petition the government for a redress of grievances.

can only be restricted under specific legal provisions or if they are combative or obscene in content. In contrast, commercial expressions are subject to a lower level of constitutional protection.[10]

The dilution of famous trademarks is specifically regulated under the Trademark Dilution Revision Act (Revision Act). With this Act, the protection of trademark rights against dilution was reviewed from all aspects and section 43/c (15 U.S.C. § 1125/c) of the Lanham Act was revised[11]. In the Revision Act, the use of famous trademarks in parodies is considered one of the defenses that third parties can raise against dilution claims (§ 43/c-3).

1. Rogers Test

The criteria drawing the boundary between trademark rights and freedom of expression were determined in Rogers v. Grimaldi decision[12]. The case was brought by Ginger Rogers against Alberto Grimaldi and MGM for the unauthorized use of the names Ginger Rogers and Fred Astaire in a film titled 'Ginger and Fred'. Rogers asserted that the title of the film misleads the public and causes a false impression that the film is about her or that she had sponsored or otherwise been involved in the film; therefore, she claimed that the film violates her trademark rights, right of publicity and privacy. To substantiate her claims, Rogers submitted a market research survey to the court, which indicated that 43% of respondents believed there was a connection between her and the film. The defendant, on the other hand, argued that the use should be considered within the scope of freedom of expression under the First Amendment to the US Constitution. The US Court of Appeals for the Second Circuit acknowledged that the dispute in the specific case arose from the conflict between protecting Rogers' trademark rights and the rights of third parties to freedom of expression when creating works of art. The Court also noted that it should be determined whether the plaintiff could prohibit the use of her name in a fictional film that was just indirectly related to her. According to the Court, the confusion among consumers did not stem from an explicit deceptive or false statement made by the defendant. Therefore, freedom of expression should not be restricted due to confusion that may arise solely from the title of the film. The Court stated that the name used in the film should be considered within the scope of the freedom of artistic expression. While recognizing films, stage plays, and songs as forms of artistic expressions, the Court also pointed out the commercial nature of these products and emphasized the importance of taking appropriate precautions to avoid misleading consumers, just like the other commercial products. According to the Court, unless explicitly misleading, using a famous person's name in the title of a film or book does not automatically violate the Lanham Act. Therefore, if the title is artistically relevant to the content of the work and not inherently misleading, the Lanham Act will not apply, and the use of such a title cannot be prohibited. Even if there is a slight possibility that such a title may mislead the public, this low probability should not lead to the restriction of the freedom of artistic expression. On the other hand, an explicitly misleading title that has no artistic relevance to the content of the work will not be protected under the freedom of expression. Furthermore, also, even if it is artistically related to the content of the work, misleading titles will not fall within the scope of freedom of expression. In conclusion, the Court rejected Rogers' claims, asserting that the names Ginger and Fred used in the film were not chosen to benefit from the fame of the artists Ginger Rogers and Fred Astaire, but rather had a genuine connection to the story of the film. The Court also stated that the title used in the film does not include a clear statement that the plaintiff supported the film or took part in its production, and that the survey results submitted to the court were inadequate to restrict the freedom of artistic expression.

[10] Tamer Soysal, 'Markanın İnternet Ortamında Eleştiri Amaçlı Kullanımı: Anayasa Mahkemesi'nin 9 Ocak 2019 Tarihli Naif Şaşma Kararı Çerçevesinde Bir Değerlendirme' (2019) 11(40) Türkiye Adalet Akademisi Dergisi 53, 67, 68.

[11] Gül Büyükkılıç, *Marka Hukukunda Tanınmış Markanın Sulandırmaya Karşı Korunması* (On İki Levha 2019) 109.

[12] *Rogers v Grimaldi* [1989] 2nd Cir., 875 F.2d 994.

The Court considered whether the public interest in avoiding consumer confusion outweighs the public interest in protecting freedom of expression. In other words, both interests evaluated in the decision are public interests, and the Court did not try to establish a balance between the rights of the trademark owner and the public interest in protecting the freedom of expression; instead, a direct comparison was made between one public interest to another[13]. The criteria established in the relevant case are known as the '*Rogers test*' and are used to determine the boundary between the trademark rights and freedom of artistic expression[14].

It is important to note that under US law, for third-party use to fall under the protection of freedom of expression, it must serve an 'expressive purpose'. In this case, third parties using the trademark, even in a parody, to market their own goods or services will not utilize from the defense of freedom of expression stated in the First Amendment to the US Constitution[15].

2. Parody as a Defense in Trademark Dilution Claims

In US law, special emphasis has been placed on the protection of famous trademarks[16] against dilution, and with regard to this, the Trademark Dilution Revision Act amending the relevant provisions of the Lanham Act has come into force[17]. The Revision Act (§ 43/c-3), includes defenses that can be raised by third parties against dilution claims of famous trademarks, including the use of trademarks in parodies. Pursuant to § 43/c-3 (15 U.S.C. § 1125/c-3) of the Lanham Act, the fair use of a famous mark by third parties in comparative advertising or for the purpose of parody, criticism, commentary, or identification of the mark owner or the mark owner's goods or services and the use in news reporting and commentary, as well as non-commercial uses, shall not be considered dilution by blurring[18] or tarnishment[19], as long as such use is not intended to designate the source of the goods or services.

As seen above, defenses against the dilution claims of famous trademarks are specifically regulated under a provision in the Lanham Act, and unauthorized use of the mark in parodies by third parties is considered within the scope of fair use. However, for these exceptions to apply, two conditions must be met. The first one is that the use must be fair, and secondly, the use should not aim to indicate the source of goods or services[20]. Since there is no specific legal provision on this issue, courts will evaluate the fairness

[13] It is also stated in the doctrine that the Rogers test should be interpreted accurately; however, some courts focus on the balance between private property and public interest in the relevant cases, which leads to confusing and inconsistent assessments. Pratheepan Gulasekaram, 'Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works' (2005) 80(4), Washington Law Review 887, 903-905.

[14] For a sample judgment where the Rogers test is applied, *see Mattel, Inc. v MCA Records, Inc.* [2002] 9th Cir., 296 F.3d 894, 902. However, the criteria established in the Rogers decision have been applied by some courts only in cases where the unauthorized use of a trademark by third parties occurs on the titles or covers of artistic works. For sample decisions, *see* Gulasekaram (n 13) 918, 919.

[15] Diana D Chiampi Ohly, 'Trademark Protection Versus Parodic Use in Commerce: A Comparative Analysis of the US Approach Post Jack Daniel's Properties v VIP Products and the German Likelihood of Confusion Analysis' (2024) 73(3) GRUR International 198, 202. *See also Harley-Davidson, Inc. v Grottanelli* [1999] 2nd Cir., 164 F.3d 806, 812.

[16] In the Revision Act, and correspondingly in the Lanham Act, the term the '*famous mark*' is used instead of '*well-known trademark*'. The definition of a famous trademark is outlined in the Revision Act [§ 43/c-2 (A)]. Accordingly, a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of the source of the goods or services of the mark's owner.

[17] The Revision Act was passed through the United States House of Representatives in April 2005 and the Senate in March 2006 and entered into force in October 2006.

[18] The definition of dilution by blurring has been revised by the Revision Act [§ 43/c-2 (B)]. According to this, 'dilution by blurring' is an association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.

[19] Dilution by tarnishment has also been defined in the Revision Act [§ 43/c-2 (C)]. According to this, 'dilution by tarnishment' is an association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

[20] A case related to this issue has recently been considered by the US Supreme Court. The case was brought on the use of the famous trademark Jack Daniel's Tennessee whisky by VIP Products in dog toys called 'Bad Spaniels', which resemble the whisky bottle in shape and design, but include some humorous alterations. The US Supreme Court acknowledged that the trademark was used in a parody by VIP Products but noted that this use was intended to indicate the origin of its own goods or services by the third party, and therefore, could not fall within the scope of the fair use exception under the Lanham Act. *Jack Daniel's Props. v VIP Prods.* [2023] U.S. Supreme Court, 143 S. Ct. 1578. A similar case occurred between Louis Vuitton Malletier S.A. and My Other Bag, Inc. The defendant, My Other Bag, Inc., is a company that sells simple canvas tote bags

of third-party uses on a case-by-case basis. In addition, non-commercial uses are considered within the fair use defense. However, the fact that a trademark is used in a parody will not directly lead to its consideration within the scope of the exception for non-commercial use, since these two exception clauses are different from each other[21].

B. In the EU and Turkish Law

Freedom of expression is not listed as an exception to trademark infringement in the legal regulations of Turkish trademark law. In other words, in the case of the unauthorized use of a registered trademark by third parties, freedom of expression is not included among the fair use defenses that third parties can rely on. However, it is stated in Recital 27 of TMD and Recital 21 of EUTMR that the use of the trademark by third parties for the purpose of artistic expression should be considered as fair provided that it is in accordance with honest practices in industrial and commercial matters. It is also stated in the relevant provision that when applying the relevant legislation, full respect must be shown to fundamental rights and freedoms, and in particular the freedom of expression. Although there is no specific provision regarding the issue in IPC, it is possible to say that a similar approach can be adopted for our law system since it is explicitly mentioned in the referred (repealed) Regulation 2015/2424 on the Community Trade Mark[22] and Directive 2015/2436, which were taken into consideration during the legislative process of IPC.

Furthermore, the use of a trademark by third parties in comparative advertising contrary to Directive 2006/114[23] is regulated among the actions that trademark owners may prohibit (Article 10/3 of TMD and Article 9/3 of EUTMR). In line with these, the use of another person's trademark in a manner that is against the law in comparative advertising, provided that the use is made in trade, is regulated as an action that can be prohibited by the trademark owner in Article 7/3-(f) of IPC[24]. Therefore, in cases where the trademark is used by third parties in comparative advertising, the burden of proof will rest on the trademark owner, which means that the trademark owner will be responsible to prove that the use made by the third party is

featuring the phrase 'My Other Bag' on one side and drawings intended to evoke iconic handbags from luxury designers, such as Louis Vuitton, Chanel, and Fendi, on the other. Louis Vuitton, a world-renowned luxury fashion house known for its high-quality handbags and other luxury goods, filed a lawsuit in the US District Court for the Southern District of New York, claiming trademark dilution and copyright infringement against My Other Bag.The drawings on My Other Bag's tote bags use simplified colors, graphic lines, and patterns that resemble Louis Vuitton's famous Toile Monogram, Monogram Multicolore, and Damier designs, but replace the interlocking 'LV' and 'Louis Vuitton' with an interlocking 'MOB' or 'My Other Bag.' The Court determined that My Other Bag's use of Louis Vuitton's marks constituted a parody, as it communicated to consumers that the defendant was a separate entity with no affiliation to the trademark owner, merely poking fun at the trademark or the policies of its owner. This parody humorously contrasted the defendant's inexpensive bags with Louis Vuitton's luxury items. The Court concluded that the defendant's use was fair and would not harm the distinctiveness or reputation of the famous mark, as consumers would perceive it as a parody. Therefore, trademark dilution did not occur. The plaintiff appealed the decision, but both the Court of Appeals and, subsequently, the Supreme Court upheld the ruling. *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 117 U.S.P.Q.2d 1537 (S.D.N.Y. 2016). In another similar case related to the issue, a campaign featuring the slogan 'Stop the Olympic Prison' was examined, which was created to criticize the restrictions on entry and exit to the Olympic Village constructed for the 1980 Olympic games in New York. The campaign used the Olympic Committee's registered trademark, consisting of the five colorful rings, alongside the slogan, with prison bars superimposed on the symbol and the Olympic flame extending through them. The Court ruled that the use for criticism should be considered under the scope of freedom of expression, since there was no likelihood of confusion between the two uses. *Stop the Olympic Prison v. U.S. Olympic Com.*, 489 F. Supp. 1112 (S.D.N.Y. 1980); Yatağan Özkan (n 8) 1359, 1360. For another case related to the issue, *see Hormel Foods Corp. v. Jim Henson Productions*, 73 F.3d 497 (2d Cir. 1996).

[21] Chiampi Ohly (n 15) 205.

[22] Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) [2015] OJ L.341/21. This Regulation was repealed by the new EU Trade Mark Regulation 2017/1001, which entered into force after the implementation of the IPC.

[23] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (Text with EEA relevance) [2006] OJ L.376.

[24] It is stated in the doctrine that the phrase 'against the law' in the relevant provision of the IPC is not clear as in the EU legislation. Therefore, when evaluating whether the use of a registered trademark by third parties in a comparative advertisement is lawful, it is necessary to take into account Article 7 and 29 of IPC regarding trademark infringement, Article 61 et seq. of Consumer Protection Law No. 6502, Article 55 of Turkish Commercial Code No. 6102 and Article 8 of Regulation on Commercial Advertisements and Unfair Commercial Practices all together. Uğur Çolak, *Türk Marka Hukuku* (5th edn, On İki Levha 2023) 753, 754.

not fair[25]. Furthermore, if the trademark owner fails to provide persuasive evidence, infringement will not occur. It is stated in the doctrine that a similar principle should apply to the freedom of artistic expression, as the European Court of Human Rights has prioritized artistic or political expression over commercial expression in its rulings. Therefore, the measures taken to protect artistic expression should be at least as robust as those taken to protect commercial expression. Accordingly, since the burden of proof rests on the trademark owner to prove that the use in comparative advertising is against the law, it has been stated that it would be consistent to take the same step for the artistic activities involving another's trademark. The relevant opinion points out that an opposite approach is taken in the provisions concerning the freedom of artistic expression outlined in the TMD and EUTMR. According to these provisions, the third party using the trademark for artistic expression will be responsible for proving that the use complies with the standards of honesty in commercial and industrial matters.[26]

1. Evaluation of the General Prerequisites Required for Trademark Infringement in Terms of Freedom of Artistic Expression

a. Condition of 'Use in the Course of Trade'

The first condition required for trademark infringement is the unauthorized use of the registered trademark by a third- party in the course of trade. This matter is explicitly stated in Article 10/2 of the TMD and Article 9/2 of the EUTMR, as well as in Article 7/3 of the IPC. To determine whether the condition of 'use in the course of trade' is met, the use should take place in the context of commercial activity with a view to economic advantage and not as a private matter[27]. However, it is also stated that the concept of 'economic advantage' should be interpreted broadly and that the search for profit is not decisive for the qualification of use in the course of trade[28]. It should be emphasized that the use in the course of trade should be related to the marketing of a good or the provision of a service, in accordance with the purpose of the trademark, which is to designate the commercial origin of a good or service[29]. For instance, in a relevant case, the General Court asserted that despite some differences, the registered trademark was imitated in a mocking manner to create a trademark and attempted to sell products under this trademark, which constituted trademark infringement[30]. In the related case, the third party did not intend to convey any message through the mocking imitation of another person's trademark but merely sought to sell its own products under that trademark[31]. Hence, it can be argued that the private uses that are not conducted for the purpose of gaining economic advantage, e.g., the use of the trademark right for educational or research purposes, or for political debates, or for artistic or cultural purposes, etc., may not be prohibited by the trademark

[25] Annette Kur and Martin Senftleben, *European Trademark Law A Commentary* (Oxford University Press 2017) 380. According to the authors, this issue is a corollary of the freedom of lawful comparative advertising granted to third parties by the CJEU in the cases of O2 v. Hutchison and L'Oréal v. Bellure. *See* Case C-533/06 *O2 Holdings Limited and O2 (UK) Limited v Hutchison 3G UK Limited* [2008] ECR I-04231, para 45; Case C-487/07 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd.* [2009] ECR I-05185, para 54.

[26] Martin Senftleben, 'Robustness Check: Evaluating and Strengthening Artistic Use Defences in EU Trademark Law' (2022) 53(4) International Review of Intellectual Property and Competition Law 567, 569.

[27] Çolak (n 24) 632; Sevilay Uzunallı, *Marka Hukuku* (2nd edn, Adalet 2021) 161; Hamdi Yasaman and Zeynep Yasaman, SMK Şerhi (Tolga Ayoğlu, Fülürya Yusufoğlu Bilgin, Pınar Memiş Kartal and Sinan H. Yüksel) *Sınai Mülkiyet Kanunu Şerhi, C. III* (Seçkin 2021) 2700; Rıza Ayhan, Hayrettin Çağlar, Burçak Yıldız and Dilek İmirlioğlu, *Sınai Mülkiyet Hukuku* (Adalet 2021) 94, 95. *See also* Case C-206/01 *Arsenal Football Club plc v Matthew Reed* [2002] ECR I-10273, para 40. The CJEU referred to this ruling on several occasions in its subsequent decisions. *See* Case C-245/02 *Anheuser Busch Inc. v Budějovický Budvar, národní podnik* [2004] ECR I-10989, para 62; Case C-48/05 *Adam Opel AG v Autec AG* [2007] ECR I-01017, para 18; Case C-17/06 *Céline SARL v Céline SA* [2007] ECR I-07041; Case C-533/06 *O2 Holdings Limited and O2 (UK) Limited v Hutchison 3G UK Limited* [2008] ECR I-04231, para 60.

[28] Michal Bohaczewski, 'Conflicts Between Trade Mark Rights and Freedom of Expression Under EU Trade Mark Law: Reality or Illusion?' (2020) 51 International Review of Intellectual Property and Competition Law 856, 859; Çolak (n 24) s. 633.

[29] Bohaczewski (n 28) 859.

[30] Case T-265/13 *The Polo/Lauren Company, LP v. OHIM* [2014].

[31] Marta Carmona López, 'Should European Trade Mark Law Include an Explicit Parody Exception as a Limitation to Trade Mark Rights? A Focus on Consumers of Trade Marks With Reputation' (Master's Thesis, Uppsala University Department of Law 2019) 31, 32.

owner. In other words, the condition of 'use in the course of trade' required for trademark infringement can be considered as a condition in favor of third parties when the trademark is used for the purposes of artistic expression. Indeed, the existence of this condition alone may prevent trademark owners from making infringement claims against third parties. For example, in the Esso case, Greenpeace France, which fights against environmental pollution and aims to protect the environment, launched an online campaign to emphasize the adverse environmental impact of activities by the oil company Esso; however, it has faced a trademark infringement claim because of the use of phrases such as 'Esso', 'stop Esso', 'stop E$$O' and 'E££O' in the source code of its website. The Court of Appeal of Paris stated that the use made by Greenpeace was not intended to market competing goods or services; therefore, the Court held that there was no commercial use in the case and that the use fell within the scope of freedom of expression. Consequently, the Court rejected the infringement claims[32]. Also in the Danone case, the Court of Appeal of Paris stated that the use of the domain names 'jeboycottedanone.com' and 'jeboycottedanone.net' meaning 'I boycott Danone' did not include commercial implications and the use fell within the scope of freedom of expression; therefore, the Court rejected the infringement claims[33].

On the other hand, it is necessary to have freedom not only to create new works but also to bring these new works to the attention of the public and create a market for them. In other words, it will not be sufficient for artists using the registered trademarks in their workshops or studios to have the right to use the works they create; freedom of expression will only be fully ensured when they also have the freedom to sell and promote these works.[34] In this case, the concept of commercial use becomes important in determining what it entails.

Expressions can be categorized into three groups based on their commercial nature. The first category is non-commercial expressions, the second one is commercial expressions, and the third category is mixed expressions containing both commercial and non-commercial aspects. Since commercial use is required for trademark infringement, it is almost impossible for non-commercial expressions to constitute infringement. And for commercial expressions, it is not possible to say that they directly constitute infringement[35], the decision should be made by considering all the conditions of the concrete case and adopting an approach in line with the balance of interests[36]. However, commercial expressions receive less protection under Article 10 of ECHR compared with non-commercial expressions[37]. The main problem arises at the point where an artistic or other expression is combined with commercial activity, which is called mixed expressions.

[32] *Esso SA v Greenpeace France* [2005] Court of Appeal of Paris, 4th Chamber, Section A, 16 November, Hamdi Yasaman and Zeynep Yasaman, SMK Şerhi (Tolga Ayoğlu, Fülürya Yusufoğlu Bilgin, Pınar Memiş Kartal and Sinan H. Yüksel) *Sınai Mülkiyet Kanunu Şerhi*, *C. II* (Seçkin 2021) 1793; Eniko Karsay, Laetitia Lagarde and Nikos Prentoulis, 'When Trade Mark Rights Meet Free Speech' (2014) 243 Managing Intellectual Property 16, 17.

[33] *M. Olivier et Association Réseau Voltaire pour la liberté d'expression v Compagnie Gervais Danone et Groupe Danone* [2003] Court of Appeal of Paris, 4th Chamber, Section A, 30 April., Yasaman and Yasaman (n 32) 1792, 1793.

[34] Senftleben (n 26) 572, 573. Indeed, international art auctions generating millions of dollars in sales are increasing day by day and with technological advancements, online databases accessible to collectors worldwide, virtual art fairs, and similar platforms contribute significantly to contemporary artists achieving commercial success in the art market. Alexandra Olson, 'Dilution by Tarnishment: An Unworkable Cause of Action in Cases of Artistic Expression' (2012) 53 Boston College Law Review 693, 705, 706.

[35] Soysal (n 10) 68.

[36] To determine whether the use of a third party's trademark in commercial expressions is fair, it must not cause consumer confusion, should not be used to market or promote the user's own goods or services, or harm the trademark's origin function. Additionally, it should convey a legitimate message. Yatağan Özkan (n 8) 1364-1366.

[37] Wolfgang Sakulin, 'Trademark Protection and Freedom of Expression: An Inquiry Into the Conflict Between Trademark Rights and Freedom of Expression Under, European, German and Dutch Law' (PhD Thesis, University of Amsterdam Faculty of Law 2010) 146; Yıldırım (n 3) 82; Soysal (n 10) 69. Indeed, it has been noted that the European Court of Human Rights has not consistently taken a strongly protective stance toward freedom of expression in its rulings. It has been indicated that when conflicts arise between freedom of expression and other interests, Member States should strike a necessary balance to resolve them. Consequently, it is stated that the defense of freedom of expression based on Article 10 of ECHR is less likely to succeed in cases involving commercial use. Büyükkılıç (n 11) 643.

What is crucial for our discussion is whether the condition of 'commercial use' covers only commercial expressions or whether it also includes non-commercial forms of expression as well as mixed type of expressions. In the decisions of the CJEU, the condition of 'use in the course of trade' is defined as the use of another person's trademark for gaining economic advantage[38]. It is observed that mixed expressions containing both commercial and non-commercial elements are often classified as commercial use in many legal systems[39]. The courts' interpretation of these mixed expressions is crucial for resolving conflicts between trademark rights and freedom of expression, since, as mentioned above, commercial expressions receive less protection than non-commercial expressions, and commercial use is a prerequisite required for trademark infringement. Thus, if mixed expressions are categorized as commercial, the likelihood of receiving protection against trademark rights will be quite low. It has been argued that when evaluating such expressions, courts should consider the intention of the person making the expression and whether the expression contributes to the public interest, and even if the expression causes a certain degree of economic damage to the registered trademark, freedom should still be granted to the mixed type of expression if the expression is in the public interest[40].

Additionally, it is important to note that commercial use is also required to rely on the fair use defenses against infringement claims. Indeed, the prerequisite for considering the use of a registered trademark by third parties as fair is that this use must be 'in the course of trade' (Article 7/5 of IPC, Article 14 of TMD and EUTMR). Therefore, neither commercial expressions nor mixed expressions classified as commercial use should be automatically deemed unfair; instead, they should be evaluated on a case-by-case basis, taking fair use exceptions into account.

b. Condition of 'Use as a Trademark'

The condition of 'use in the course of trade' is not sufficient to constitute a trademark infringement, it is stated that the registered trademark should also be used by third parties to designate goods or services and to link them to a commercial origin by distinguishing them from other goods or services. For example, parodies also have a commercial aspect as their creators derive economic benefit from them, but since the purpose of the trademark use in parodies is not to designate commercial origin, this use will not constitute infringement.[41] Accordingly, for an infringement action, the unauthorized use of the registered trademark shall be made for distinguishing goods or services that are marketed or offered by third parties. For example, if a journalist cites a trademark in a press article, although the sign used in the article reminds the consumer of the goods of the trademark owner, it has been argued that such use cannot be considered as a trademark infringement because it does not have the purpose of indicating the origin of the journalist's own goods or services.[42] It is also stated that the action cannot be considered as an infringement where the trademark is used by a third party in an economic context and in relation with his/her own goods or services, but the sign is not perceived by the public as an indication of the commercial origin of those goods or services. For example, in a related case, the use of a trademark registered for films and digital media in the title of a DVD marketed by a third party was not considered as an infringement on the grounds that it indicated a

[38] *See in.* 27.

[39] For instance, under German or Benelux law, many expressions involving the use of another person's trademark are categorized as commercial use. For the sample decisions, *see* Wolfgang Sakulin, 'Dilution and Freedom of Expression in Europe' in Daniel R. Bereskin (ed.) *Trademark Dilution and Free Riding,* (Edward Elgar Publishing 2023) 467, 497-500.

[40] Sakulin (n 37) 156.

[41] Bohaczewski (n 28) 861.

[42] Bohaczewski (n 28) 864. For example, the use of the trademark Dolce&Gabbana in a film, presented on a t-shirt worn by one of the characters, was not considered as a trademark infringement by the Court. The Court determined that the use was not intended to market the third- party's own goods. Case No. 10/09164, *Dolce & Gabbana Sri (Italie), Gado Sri (Italie) c v Pathé Distributıon, Pulsar Productions,* Court of First Instance of Paris, 3rd Chamber, 4th Section, 10 November 2011, Bohaczewski (n 28) 865, in. 54.

cinematographic work but was not perceived by the public as an indication of the commercial origin of the product.[43] Indeed, the signs used in the titles of works are not intended to indicate commercial origin but rather directly to describe the work itself.

On the other hand, it can be observed from the CJEU decisions that trademark infringement can occur not only when a trademark is used to indicate commercial origin, but also in other contexts. For example, pursuant to Article 9/2-(a) of EUTMR, Article 10/2-(a) of TMD and Article 7/2-(a) of IPC, the unauthorized use of any sign identical to the registered trademark and on the goods or services which are identical with those for which the trademark is registered in the course of trade can be prevented by the trademark owner. This provision referred to as the 'double identity rule' primarily safeguards the function of indicating the origin of a trademark (Recital 11 of EUTMR), but the CJEU's case law broadened the application of the provision to also protect the other functions of the trademark. With this approach, which is called the 'function theory[44],' trademark owners can prohibit the use of an identical sign by a third party where such use adversely affects or is liable to affect the functions of the trademark. In this case, trademark infringement can occur even if the uses made by third parties do not intend to indicate commercial origin. Indeed, it is stated in the doctrine that the condition of 'use as a trademark' is required for infringement, but this condition should be interpreted broadly. Accordingly, when assessing the condition of 'use as a trademark', not only the function of indicating origin but also the functions of advertising, communication, investment, quality and guarantee should also be taken into account.[45] Therefore, in this case, even if the use of the trademark by third parties did not cause any confusion about the commercial source, infringement may also occur if the use damaged the economic and communication value of the trademark[46]. For example, the use of another person's trademark in a parody may not cause confusion about the commercial source, but it may have a negative impact on the brand value.

On the other hand, the function theory developed by the CJEU in terms of the double identity rule requires the identity of both the signs used and the goods or services. Since it is often not feasible for both the sign and the goods or services to be identical in artistic expressions (especially in parodies[47]), we believe that the function theory will not have a significant impact on freedom of expression[48].

Moreover, it is argued that as a consequence of the function theory, the condition 'use in relation to goods or services' stipulated in Article 9/2 of EUTMR and Article 10/2 of TMD required for trademark infringement

[43] Case No. 07/03947, *BQHL Productions Éditions SARL c v Galatée Films SAS,* Court of Appeal of Paris, 4th Chamber, 28.05.2008, Bohaczewski (n 28) 866.

[44] For information, *see* Martin Senftleben, 'Function Theory and International Exhaustion – Why Is It Wise to Confine the Double Identity Rule to Cases Affecting the Origin Function' (2014) 36(8) European Intellectual Property Review 518, 518-524; Özgür Arıkan, 'Revisiting the Conflict Between the European Trade Mark Rights and Parallel Importation' (2015) (64) Rekabet Dergisi 3, 5-12.

[45] Çolak (n 24) 601; Gül Büyükkılıç, 'Avrupa Birliği ve Türk Marka Hukuku Doktrini ve Yargı Kararları Işığında Dürüst Kullanım Savunmasının Koşullarına İlişkin Bazı Tespit ve Değerlendirmeler' (2023) 9(2) Ticaret ve Fikri Mülkiyet Hukuku Dergisi 199, 207-209. ARKAN, on the other hand, does not directly interpret the concept of 'use as a trademark' broadly, but states that the legal regulations are intended to safeguard not only the function of indicating origin, but also the other functions of the trademark; therefore, trademark infringement may occur in cases beyond those involving 'use as a trademark'. Sabih Arkan, 'Marka Hakkına Tecavüz-İşaretin Markasal Olarak Kullanılması Zorunluluğu?' (2000) 20(3) BATİDER 5, 9-11. Another opinion in the doctrine suggests that the concept of 'use as a trademark' should be interpreted broadly only in the cases of infringement of the well-known trademarks. İsa Başbüyük, *Marka Hakkının İhlalinden Doğan Cezai Sorumluluk* (2nd edn, Adalet 2018) 135. For information, *see* Başak Karmutoğlu, 'Avrupa Birliği Adalet Divanı Kararları Işığında Tescilli Markalara İlişkin Olarak Üçüncü Kişiler Tarafından Gerçekleştirilen ve Ayırt Edici Nitelikte Olmayan Kullanımların Marka Hakkının Kapsamı ve İstisnaları Çerçevesinde Değerlendirilmesi' (2024) 10(1) Ticaret ve Fikri Mülkiyet Hukuku Dergisi 119, 125, fn. 21.

[46] On the other hand, it has been argued in the doctrine that although the function theory has some disadvantages, it is also used by the courts as a tool for balancing the interests between trademark owners and third parties using the sign. Lukasz Zelechowski, 'Invoking Freedom of Expression and Freedom of Competition in Trade Mark Infringement Disputes: Legal Mechanisms for Striking a Balance' (2018) 19(1) ERA Forum 115, 120-123.

[47] Since parodists usually change the sign to make fun and convey a message.

[48] *See* López (n 31) 16.

has been interpreted quite flexibly by the CJEU[49]. Accordingly, merely establishing a connection between the registered trademark and the goods or services of a third party is considered adequate to meet the condition of 'use in relation to goods or services'. In such a case, even signs used for artistic expression may constitute trademark infringement. For example, in a case regarding the issue, the CJEU decided that the fact that a sign is viewed as an embellishment by the relevant section of the public is not, in itself, an obstacle to the existence of infringement where the degree of similarity is none the less such that the relevant section of the public establishes a link between the sign and the trademark[50]. As a result, even references to trademarks solely for the purpose of identifying the goods or services of the trademark owner and which are not perceived by the public as indicators of commercial origin may still constitute infringement and the condition of 'use in relation to goods or services' will be inadequate to prevent infringement claims.[51]

2. Evaluation of the Issue in Terms of Well-Known Trademark Protection

The debate on the conflicts between trademark rights and the freedom of artistic expression usually arises in terms of well-known trademarks because such marks mostly constitute the main target for parodists[52]. Furthermore, most of the disputes at this point are resolved through the legal regulations regarding the infringement of well-known trademarks[53].

The use of a sign by third parties that is identical with, or similar to, the trademark irrespective of whether it is used in relation to goods or services that are identical with, similar to, or not similar to, those for which the trademark is registered can be prevented by the owner of the registered trademark where the registered trademark has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark [Article 10/2-(c) of TMD, Article 9/2-(c) of EUTMR and Article 7/2-(c) of IPC[54]]. This extended protection granted to well-known trademarks may raise concerns about safeguarding the freedom of artistic expression[55]. Indeed, the likelihood of confusion as to the origin is not required for the infringement of well-known trademarks. For the existence of dilution, it is adequate to establish a mental connection between the well-known trademark and the sign used by third parties in a way that creates an impression of dilution. It is accepted that this connection can be established where an average consumer simply recalls the well-known trademark when he/she sees the sign used by a third party.[56] This scenario is particularly significant for artistic expressions like parodies, as for the parody to be effective, people have to recognize the trademark to which the parody refers[57].

It has been argued in the doctrine that setting higher standards for the proof of dilution claims in the relevant cases may reduce the conflict between trademark rights and freedom of expression. It is stated that the owners of well-known trademarks should provide convincing evidence of how the trademark has

[49] Case C-17/06 *Céline SARL v Céline SA* [2007] ECR I-07041, para 23; Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECR I-06011, para 92.

[50] Case C-408/01 *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd.* [2003], paras 39-41.

[51] Senftleben (n 26) 576-579.

[52] Yatağan Özkan (n 8) 1358.

[53] Bohaczewski (n 28) 872. For instance, in a relevant case, the Court rejected the defendant's argument that its trademark, consisting of a jumping ornamental dog with the inscription 'PUDEL', was used as a parody and fell within the scope of freedom of artistic expression, thereby not constituting trademark infringement. According to the Court, a well-known trademark cannot be registered by someone else under the pretext of parodic use. The Court determined that the use made by the defendant was intended to take unfair advantage of the plaintiff's well-known trademark 'PUMA'. Federal Court of Germany, 02.04.2015, I ZR 59/13, Çolak (n 24) 919.

[54] The relevant provision contains similar content for trademarks that have become well-known in Turkey.

[55] Robert Burrel and Dev Gangjee, 'Trade Marks and Freedom of Expression: A Call For Caution', (The University of Queensland, TC Beirne School of Law Legal Studies Research Paper Series, Research Paper No. 10-05, 2010) 5.

[56] Büyükkılıç (n 11) 150, 151.

[57] López (n 31) 18.

suffered actual harm or why such harm is likely and also the judges in the related cases should demand persuasive evidence that dilution is likely to occur.[58]

For instance, in the case of Mattel, Inc. v. MCA Records[59], Mattel, the owner of the trademark 'Barbie', filed a lawsuit based on trademark infringement against MCA Records and other related companies due to the song 'Barbie Girl' performed by the music group Aqua, which appeared on an album released by MCA Records. The US Court of Appeals for the Ninth Circuit held that the use in the concrete case was a mocking and humorous use, and it would not cause any confusion about the commercial source, so the Court decided that there was no trademark dilution. Emphasizing that such use falls under the protection of the First Amendment to the US Constitution, the Court stated that the Lanham Act should be applied to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. However, consumer confusion is not required for trademark dilution[60].

In addition, although Mattel, the plaintiff in the concrete case, initially filed a lawsuit claiming that the reputation of its trademark was damaged, after a long period of time since the lawsuit has been filed, Mattel licensed the use of Aqua's song for its own Barbie advertisements[61]. As a result, it seemed that the song contributed to the brand's promotion. Therefore, it has been stated that the extended protection granted to well-known trademarks should be applied cautiously, and if there is no persuasive evidence for the actual harm or why harm is likely, then trademark dilution claims should be rejected. Therefore, it is important not to automatically assume that the unauthorized use of a similar sign in different goods or services will directly have an adverse effect on the well-known trademark.[62] According to this opinion, it is not appropriate to assume that using a trademark in a negative or derogatory manner directly damages the image[63]; it should be accurately assessed whether the use made by a third party targets the image

[58] Burrel and Gangjee (n 55) 14.

[59] *Mattel, Inc. v MCA Records, Inc.* [2002] 9th Cir., 296 F.3d 894.

[60] It is also possible to apply the decision within the framework of Turkish law. Since there is no specific provision in Turkish law that safeguards the freedom of artistic expression against trademark rights, the prerequisites for trademark infringement and fair use defenses may lead to the same conclusion. The concrete case is related to trademark dilution, so consumer confusion is also not required for trademark dilution under Turkish law, nor is it relevant to dilution claims whether the use is made in relation to identical, similar, or different goods or services. For this reason, even if the use in the present case is not related to identical or similar goods or services or does not create consumer confusion, trademark dilution may still occur. However, in Turkish legal doctrine, it is accepted that 'trademark use' is necessary for trademark infringement, but this concept should be interpreted broadly. Therefore, even if the use does not serve to indicate origin, trademark infringement may still occur if the use harms the other functions of the trademark. The term 'Barbie' used in the song was not utilized to indicate origin; thus, in order to ascertain the existence of trademark use, it must be considered whether this use actually harms the trademark's other functions. Moreover, the third party in the present case, who uses the trademark in the context of artistic expression, may invoke the referential use defense, which is regulated among the fair use exceptions under the IPC. However, for the use to be considered fair, there must be no likelihood of confusion, and the use must consist of references to the trademark within reasonable limits. Additionally, it must not seek to take unfair advantage of the trademark's reputation or tarnish its image, nor should it harm the trademark's functions and distinctiveness. *See* Yatağan Özkan (n 8) 1361; Güldeniz Doğan Alkan, 'Marka Tecavüzü vs. İfade Özgürlüğü – Türk Hukukundaki Durum & Ikea Uyuşmazlığının Değerlendirilmesi – Bölüm II' (IPR Gezgini, 2024) <https://iprgezgini.org/tag/ifade-ozgurlugu/#_ftnref6> accessed 2 February 2025.

[61] Burrel and Gangjee (n 55) 11.

[62] Burrel and Gangjee (n 55) 12-14. The CJEU has also ruled that proof that the use of the third party is or would be detrimental to the distinctive character of the registered trademark requires evidence of a change in the economic behavior of the average consumer of the goods or services for which the trademark was registered consequent on the use of the third party, or a serious likelihood that such a change will occur in the future. Case C-252/07 *Intel Corporation Inc. v CPM United Kingdom Ltd.* [2008] ECR I-08823, para 77. BÜYÜKKILIÇ also asserted that in dilution cases, the party alleging dilution should present evidence to the court showing that the possibility of dilution is serious. She also argued that there is no need to prove the actual damage, but for proving the risk of harm, conclusions based solely on assumptions should be avoided. She suggested that in terms of proof, probabilities should be carefully analyzed, and all factors specific to the case and customary practices within the relevant commercial sector should be considered. However, according to the author, setting high standards for the proof of detriment to the repute of the trademark as in all types of infringement could hinder trademark owners from receiving adequate protection and such an approach would also be contrary to the purpose of the provisions intended to safeguard trademark owners' interests against dilution. Büyükkılıç (n 11) 691.

[63] Another opinion in doctrine suggests that the protection of freedom of expression should have limits and should not extend to cases where the third party uses the trademark in relation to his/her own goods or services or where the trademark is used only in an inappropriate content, without conveying any message. If such an approach is adopted, concerns regarding the dilution of well-known trademarks could be alleviated to some extent. Robert C. Denicola, 'Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols' (1982) 1982(2) Wisconsin Law Review 158, 202, 203. However, it is not easy to determine which uses are capable of conveying messages; therefore, it is rightly argued that relying on protective provisions regarding the dilution of well-known trademarks in cases of negative criticism

surrounding the owner's mark as used for particular goods or services. For example, it has been stated that activities such as criticizing the corporate policies of the trademark owner or critiquing a message bundled into a mark's image (such as endorsing conspicuous consumption) should not be considered as tarnishing the trademark's image.

A case related to the issue was held in Turkey. Yurtiçi Kargo, a well-known courier company in Turkey, filed the case by claiming trademark infringement and unfair competition due to the domain name created by the defendant, which incorporated the word 'victims' alongside 'Yurtiçi Kargo.' The website contains statements and assessments regarding the layoffs of the courier company. The First Instance Court found that although the plaintiff's trademark is used on the website, the use was not intended to market any good or services and take unfair advantage of the repute of the plaintiff's well-known trademark. Moreover, the Court determined that the use did not tarnish the trademark's image and was not made for commercial purposes; thus, trademark infringement did not occur. However, the Court concluded that the action in the concrete case constituted unfair competition on the grounds that the domain name and the content of the website created a negative perception in society and also damaged and humiliated the commercial reputation of the plaintiff's company.[64] The Court of Cassation upheld the decision[65]. Following this, the defendant filed an individual application to the Constitutional Court, but also the Constitutional Court did not consider the use within the scope of freedom of expression and ruled that the courier company's commercial reputation had been damaged[66]. As can be seen from the decision, using a well-known trademark in a negative or derogatory manner does not automatically constitute trademark infringement. On the other hand, the Constitutional Court's ruling regarding the existence of unfair competition due to the damage to the company's commercial reputation, despite the right to freedom of expression, has raised some questions[67]. Indeed, a more permissive approach should be taken toward criticisms that are non-commercial in nature, which do not intend to harm the trademark, and which are not made by competitors[68].

In conclusion, it is recommended that rather than introducing new defenses for free speech, the solution lies in considering the fundamental principles underlying trademark protection. By establishing certain standards, especially regarding the application of the provisions granted to well-known trademarks, the issue can be resolved effectively[69].

In some cases, the use of trademarks within the scope of freedom of expression is considered as 'due cause', which can serve as a defense against dilution claims[70]. For example, in a case held in Germany, the use of purple corresponding to Milka's abstract color mark with a poem mocking the nature of Milka's advertisements featuring cows and mountains on the background of the postcards was considered as 'due cause'. The Federal Court of Justice admitted that the use was sufficient to meet the threshold requirement of

would contradict freedom of expression. The author also points out the need to establish specific limitations regarding potential harm to the reputation of trademarks and emphasizes the necessity for guiding principles of judicial decisions on how the concept of 'inappropriate content' should be interpreted. Büyükkılıç (n 11) 460.

[64] Istanbul 4th Civil Court of Intellectual and Industrial Property Rights, Case No 2012/137, Decision No 2013/117, 02.07.2013, Çolak (n 24) 918, 919. In a similar case where a company's trademark was used as a parody in another company's advertisement, the Istanbul Commercial Court of First Instance ruled that the use constituted unfair competition. For information, *see* Yatağan Özkan (n 8) 1365.

[65] Court of Cassation 11th Civil Chamber, Case No 2013/15738, Decision No 2014/5119, 17.03.2014.

[66] Constitutional Court of the Republic of Turkey, Application No 2015/3782, 09.01.2019, OG. 20.03.2019/30720.

[67] *See* Doğan Alkan (n 60); Soysal (n 10) 100-105.

[68] Soysal (n 10) 104.

[69] Burrel and Gangjee (n 55) 19.

[70] Yatağan Özkan (n 8) 1377-1379; Burçak Yıldız, 'Tanınmış Markalarda Haklı Sebep Def'i -Özellikle Avrupa Birliği Adalet Divanı Kararları Işığında Bir Değerlendirme-'(2018) 39(4) Banka ve Ticaret Hukuku Dergisi 945, 961. It has been suggested in the doctrine that the 'due cause' exception can play a crucial role in balancing the interests of the trademark owners and the interests of third parties. This exception may also serve as a substantial foundation for arguments derived from fundamental rights and freedoms. Zelechowski (n 46) 130.

'use in relation to goods or services', but in this case the freedom of expression prevailed over the trademark rights[71]. On the other hand, it is also stated that the use of another person's trademark in the context of freedom of expression is not automatically considered as a 'due cause.' Accordingly, if the use is intended to take unfair advantage of the reputation of a trademark, it cannot constitute a 'due cause'[72]. For example, the Austrian Supreme Court held that the defendant's use of the trademark 'STYRIAGRA' for pumpkin seeds in a blue coating was intended to take unfair advantage of Pfizer's well-known trademark 'VIAGRA'. Despite the defendant's argument that the use was made in a humorous manner, and thus it should be considered as a 'due cause', the Court found that the defendant's intention to take unfair advantage of the reputation of Pfizer's trademark was predominant and rejected the claim of 'due cause'[73]. As seen in the concrete case, the interest in protecting the plaintiff's well-known trademark prevailed over the interest in protecting freedom of expression.

3. Fair Use Doctrine in the EU and Turkish Trademark Law and its Evaluation in Terms of Freedom of Artistic Expression

A trademark right is considered an absolute right and grants exclusive rights to its owner. The aim of the protection granted by the trademark right is to safeguard not only the rights of the trademark owners by ensuring that their goods or services can be distinguished from the goods or services of other undertakings, but also the interests of consumers in terms of their choices for original goods or services, as well as the interests of society in general by contributing to the functioning of healthy competition in the market[74]. However, the rights conferred by a trademark are subject to certain limitations by considering the interests of third parties and the public[75]. Allowing trademark owners to prohibit all types of uses, including fair uses by third parties, would overly restrict their commercial and industrial activities, which goes beyond the intended scope of trademark protection[76]. Article 14 of the TMD and EUTMR, and Article 7/5 of the IPC govern the limitations on trademark rights, known as fair use exceptions. According to the relevant provisions, certain conditions must be met for the use of third parties to be considered fair.

a. Evaluation of the Condition of 'Honesty' Within the Scope of Freedom of Artistic Expression

It is stated in Recital 21 of EUTMR and Recital 27 of TMD that the exclusive rights conferred by a trademark should not entitle the proprietor to prohibit the use of signs by third parties that are used fairly and thus in accordance with honest practices in industrial and commercial matters. Furthermore, it is also regulated in the same provisions that the use of a trademark by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. According to Article 14 of TMD and EUTMR, for the use made by third parties to be fair, it should be in accordance with honest practices in industrial or commercial matters. Similarly, Article 7/5 of the IPC stipulates that in order for the use made by third parties to be considered as fair, it should be honest and occur in the course of trade[77].

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[71] The Federal Court of Justice (BGH), 03.02.2005, I ZR 159/02, Yasaman and Yasaman (n 32) 1792; Senftleben (n 26) 581, 582; Bohaczewski (n 28) s. 872.

[72] Yasaman and Yasaman (n 32) 1668; Arzu Oğuz, 'Yargı Kararları Işığında Tanınmış Marka İtirazında Haklı Sebep Kavramı' (2018) 9(1) İnönü Üniversitesi Hukuk Fakültesi Dergisi 419, 442; Martin Senftleben, 'The Perfect Match: Civil Law Judges and Open-Ended Fair Use Provision' (2017) 33(1) American University International Law Review 231, 264; Zelechowski (n 46) 130.

[73] Supreme Court (OGH), 22.09.2009, 17 Ob 15/09v, para. 3.4, Zelechowski (n 46) 130; Senftleben (n 72) 264.

[74] Büyükkılıç (n 45) 200.

[75] It is also stated in Article 17 of Trade-Related Aspects of Intellectual Property Rights (TRIPs) that Members may provide limited exceptions to the rights conferred by a trademark, provided that they take into account the legitimate interests of the owner of the trademark and of third parties.

[76] Burcu Bozkurt, 'Markanın Dürüst Kullanımı' (Master's Thesis, Ankara University Institute of Social Sciences 2020) 30.

[77] The preamble of the IPC states that the relevant provision has been drafted in line with the EU Trademark Regulation 2015/2424 and EU Trademark Directive 2015/2436. However, it has been rightly pointed out in the doctrine that the terminology used in the provision is not consistent with

The condition of 'honesty' required for fair use defenses in infringement claims can be assumed as a positive condition for third parties using the trademark for artistic purposes. However, in the corresponding EU provisions, it is explicitly stated that honesty should pertain to industrial and commercial matters; therefore, it will be open for discussion whether this condition is appropriate for the evaluation of artistic uses. Since it is very hard for an artist to be aware of behavioral standards in industry and commerce. Furthermore, assessing artists or artistic products from a commercial and industrial standpoint will significantly restrict the freedom of artists as well. In other words, artists should not be forced to align their work with behavioral standards that stem from other fields of society.[78] It is stated that art should remain independent of economic and political powers to reveal the deficiencies in society and to make the necessary warnings. Therefore, it is rightly suggested that when assessing whether third-party use of trademarks for artistic purposes is fair, such evaluations should not rely on norms from the industrial and commercial sectors. Otherwise, it would allow commercial interests over the field of art because even if third-party use is fair and legitimate based on artistic standards, it could still be deemed infringing if it does not align with norms in the industrial and commercial sectors.[79]

b. Evaluation of Artistic Uses in Terms of Fair Use Defenses

Fair use defenses are regulated in Article 7/5 of the IPC and Article 14 of the TMD and EUTMR. Pursuant to Article 7/5 of IPC, the trademark owner may not prohibit the use of a trademark by third parties in honestly and in the course of trade to indicate the name and address of natural persons; to make explanations concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of the goods or services; and in situations where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts or equivalent products. Although the EU regulations are similar, there are also some differences in the related EU regulations. In Article 14/1-(b) of TMD and EUTMR regarding the issue, it is stipulated that the use of signs by third parties in the course of trade that are not distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services may not be prohibited by the trademark owner, provided that the use made by the third party is in accordance with honest practices in industrial and commercial matters. As observed in EU regulations, unlike Turkish law, the use of non-distinctive signs, besides descriptive signs, is also included among the fair use exceptions[80].

It may be possible in some cases to rely on the descriptive use defense which is regulated among the fair use exceptions in the uses of trademark by third parties for artistic purposes. For example, descriptive signs that are accessible to everyone can be used freely for artistic expression purposes. However, it is argued that there should also be a limitation for the use of these kinds of signs, for instance, in the case

the terminology used in the EU Regulation and Directive. Actually, both Article 12 of the repealed Regulation No. 2015/2424 and Article 14 of TMD and EUTMR use the phrase 'in accordance with honest practices in commercial or industrial matters'. Therefore, it has been argued that the term 'honestly' in IPC creates uncertainty. Also, according to the author, the honesty referred to in the related article does not correspond to Article 2 of the Turkish Civil Code No. 4721 (TCC) but rather means conformity with commercial practices. Çolak (n 22) 845, 846. A similar opinion argues that Article 2 of the TCC focuses on the principle of honesty by treating the owner of the right as a subject, whereas the honesty stated in Article 7/5 of the IPC considers the uses of third parties rather than the trademark owner. It is also stipulated that a practice established by commercial custom that contradicts the principle of honesty would be contrary to the ordinary course of life and accepting a general principle of honesty beyond the limitation of commercial custom would mean interference with trademark rights and may disrupt the balance of interests against trademark owner. Büyükkılıç (n 45) 205. On the other hand, another opinion in the doctrine argues that Article 2 of the TCC should be applied in all private law relationships, so while interpreting Article 7/5 of the IPC, the general rule stated in Article 2 of the TCC should also be taken into consideration besides commercial customs. Bozkurt (n 76) 30; Esin Çamlıbel Taylan, *Marka Hakkının Kullanımıyla Paralel İthalatın Önlenmesi* (Seçkin 2001) 62, 63; Ünal Tekinalp, 'Markanın Üçüncü Kişi Tarafından Kullanılması' *Prof. Dr. Oğuz İmregün'e Armağan* (Beta 1998) 633, 641.

[78] Senftleben (n 26) 586, 587.

[79] Senftleben (n 26) 587, 588.

[80] It is important to note here that descriptiveness is a form of non-distinctiveness; however, non-distinctiveness is not limited solely to descriptive signs. In this context, under EU regulations, not only purely descriptive signs but also all non-distinctive signs may fall under the fair use exceptions, provided that their use complies with honest practices in industrial and commercial matters.

of using the portrait of a famous person registered as a trademark in parody, since the trademark itself will be incorporated in the product, in other words since the portrait will become the central element of the contents of the product, the descriptive use defense cannot be relied on. As the use in question is not descriptive here.[81] Furthermore, under EU regulations, the use of non-distinctive signs falls within the fair use exceptions. In such cases, trademark owners cannot prohibit the use of the non-distinctive form of the sign. The secondary meaning of the sign is considered its distinctive form. Therefore, for instance, the use of a non-distinctive sign in its original cultural context, regardless of its secondary meaning, which is acquired through use, may be considered as artistic use, and in such a case, a third party may rely on the descriptive use defense[82].

It may also be possible for third parties using the trademark for artistic purposes to rely on referential use defense which is regulated among the fair use exceptions. Indeed, prior to the 2015 reform of the European Trademark Law, the European Parliament had made a proposal to concretize the limitation on referential use defense with examples that included uses of the trademark for parody, artistic expression, criticism and commentary[83]. While these specific examples were not incorporated into the provision, it is recognized that the relevant provision is not limited solely to the mentioned cases[84]. Therefore, third parties may also rely on the referential use defense for expressive uses of trademarks[85]. In Turkish law, referential uses are also included among the fair use exceptions regulated in Article 7/5 of the IPC. The preamble of the article states that the provision is aligned with Article 12 of (repealed) Regulation 2015/2424 on the Community Trade Mark and Article 14 of Directive 2015/2436. Therefore, it is possible to apply the same approach under Turkish law. Furthermore, it can be clearly inferred from the wording of the provision that referential uses are not limited solely to those specified in the provision, as accepted in Turkish legal doctrine[86]. However, as previously mentioned, for third parties to rely on fair use defenses, such uses must be in accordance with honest practices in industrial or commercial matters.

III. Opinions of the Scholars on Whether an Additional Provision is Required to Safeguard the Freedom of Expression

There is a considerable debate in doctrine about whether a legislative framework is necessary to safeguard the freedom of expression against trademark rights. An opinion in the doctrine has argued that since trademarks have assumed the role of political, social and cultural symbols through their pervasive use in mass media and thus their high ability to convey information, the communication function of the trademark has become quite prominent. Therefore, when interpreting relevant provisions of trademark law, it is argued that the issue should be considered from the standpoint of freedom of expression. This opinion also argues that greater importance should be given to the interests of third parties using the trademark, rather than the interests of the trademark owner and advocates that it would be appropriate to introduce certain legal regulations regarding freedom of expression.[87]

[81] Senftleben (n 26) 583.

[82] Senftleben (n 26) 584, 585.

[83] European Parliament legislative resolution of 25.2.2014 on the proposal for a directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (recast) (COM(2013)0162—C7-0088/2013—2013/0089(COD), amendment 33.

[84] Case C-228/03 *The Gillette Company and Gillette Group Finland Oy v LA-Laborratories Ltd Oy* [2005] ECR I-02337, para 32. Indeed, this conclusion can easily be reached from the wording of the provision. Büyükkılıç (n 45) 210; Bozkurt (n 76) 61, 62; Zelechowski (n 46) 127.

[85] Zelechowski (n 46) 127.

[86] Yasaman and Yasaman (n 32) 1784, Büyükkılıç (n 45) 210, Bozkurt (n 76) 61, 62.

[87] Sakulin (n 37) 2-4. Another opinion in the doctrine similarly states that the courts have extended the rights of trademark owners to encompass uses made by third parties that are not intended to designate the origin and at this point, he advocates that a greater importance should

Another opinion in doctrine proposes the introduction of legal regulations for the uses regarding artistic expression similar to those governing the use of trademarks in comparative advertising. This opinion points out that although comparative advertisements are made by commercial entities, the burden of proof concerning that the use is contrary to the law rests on the trademark owner, but in uses made for the purposes of artistic expression, the artists carry the burden of proof. According to this opinion, since it is not expected for an artist to have sufficient confidence and financial resources to take the risks of lengthy lawsuits, they do not prefer to use the registered trademarks of others in their works when creating art. Therefore, the author argues that the current legal regulations are inadequate to safeguard the freedom of artistic expression and that a legal presumption of fair use in favor of third parties should be introduced for the uses regarding artistic expression, just as in comparative advertisements.[88]

Furthermore, another opinion examining the use of well-known trademarks in parodies argues that if an exceptional provision regarding parodies is introduced in trademark law, the interests of consumers must also be considered. According to this opinion, by taking into account the possible damages of the parties, the benefit of the relevant parody for the society should be compared with the damage suffered by the trademark owner due to the use of his/her trademark in the parody, and if the benefit for the society and the profit gained outweigh the damage of the trademark owner, the use of the parody should be permitted. The author suggests that if an explicit exception is to be introduced for parodies, this should only be possible for non-commercial expressions and mixed expressions, since the consumers of the well-known trademarks will be adversely affected by parodies containing commercial expressions.[89] As observed, the relevant opinion suggests that an evaluation should prioritize the public interest. To apply this approach correctly, the owners of well-known trademarks should provide convincing evidence of how the trademark has suffered actual harm or why such harm is likely.

In addition, there is also an opinion in the doctrine that argues that the use of a trademark in parodies can actually have a positive effect on the relevant trademark, since such use will not make the trademark generic and will strengthen the connection between the trademark and its owner rather than weaken it. According to this opinion, it can easily be understood by the relevant public that the references to trademarks made in parodies are not intended to promote the parodist's own goods or services and the uses of trademarks in expressive products reinforce the semantic connection between the brand and the product it refers to.[90] Indeed, in some cases, the use of a trademark in parodies may contribute to the enhancement of the trademark's reputation[91]. Therefore, trademark owners also use this approach in advertisements and other promotional materials to promote trademark development, enhance consumer recognition, strengthen the trademark's image, or reinforce trademark recall[92].

On the other hand, there are some scholars who are against the inclusion of an exceptional regulation regarding the uses made by third parties for the purposes of artistic expression. Accordingly, it is argued that the prerequisites required for trademark infringement are also adequate to safeguard the freedom of artistic expression and that fair use exceptions can sufficiently cover uses related to artistic expression; therefore,

be given to the interests of third parties. Steven Andreacola, 'Expressive Genericity: Trademarks as Language in the Pepsi Generation' (2001) 12(1) Journal of Contemporary Legal Issues 26, 27. We believe that it would not be appropriate to place greater importance on the interests of third parties directly. At this point, it would be more appropriate to compare the public interest in avoiding consumer confusion and the public interest in protecting freedom of expression.

[88] Senftleben (n 26) 568, 579, 580.

[89] López (n 31) 44-61.

[90] Mark A. Lemley, 'Fame, Parody, and Policing in Trademark Law' (2019) (1) Michigan State Law Review 1, 11, 15.

[91] Nurhan Babür Tosun, Aytaç Burak Dereli, 'Reklamda Parodi Kullanımının Marka İmajına Etkisi' (2016) 12(46) Marmara Üniversitesi Öneri Dergisi 321, 324.

[92] Yatağan Özkan (n 8) 1355.

there is no need for an additional legislative exception for freedom of expression, which could be interpreted broadly. This opinion also highlights that there are provisions safeguarding freedom of expression in the Recitals of TMD and EUTMR.[93] Another opinion also suggests that there is no need for a new exceptional provision regarding the issue; the main change should be made on certain principles in trademark law. According to this opinion, particularly for the extended protection granted to well-known trademarks, the judges should demand persuasive evidence that dilution is likely to occur. The author argues that since trademark rights are property rights and entitled to a degree of constitutional protection just like freedom of expression, there is no reason to give precedence to freedom of expression in case of conflict between the two constitutionally protected rights.[94]

IV. Conclusion

While there is no explicit provision for safeguarding the freedom of artistic expression in Turkish trademark law, the balance between the freedom of artistic expression and trademark rights can be achieved through the general prerequisites required for trademark infringement. Additionally, the protection of freedom of expression is mentioned in the Recitals of TMD and EUTMR, which can be considered when interpreting the relevant legislation. Although these provisions may be inadequate to fully protect artistic expressions against trademark infringement claims, we believe that it will be rare for artists to encounter unfavorable decisions in such cases. In fact, the freedom of expression guaranteed by both the ECHR and the Constitution should also be considered in the context of trademark law. Therefore, we find it appropriate to refrain from introducing an additional exception for uses concerning artistic expression within the framework of fair use exceptions. However, we also believe that the main problem may arise with the use of well-known trademarks in parodies. In practice, conflicts between trademark rights and the freedom of expression frequently arise when third parties use the well-known trademarks as parodies. This is because parodists generally prefer to use well-known trademarks as for the parody to be effective, people have to recognize the trademark to which the parody refers. However, the extended protection granted to well-known trademarks and the trademark owner's ability to prohibit any use that is detrimental to the repute of the mark may pose challenges to the freedom of artistic expression. It is also observed that artists hesitate to use such trademarks in their works due to the economic power of well-known trademarks. Therefore, we believe it is appropriate to introduce an additional fair use exception that specifically safeguards the freedom of artistic expression, which can be applied only in dilution claims of well-known trademarks. And US law can be taken as a model when drafting this exceptional regulation, which means that for the use of trademarks by third parties in the context of artistic expression to be considered as fair, it should be in accordance with honest practices and should not intend to designate origin. For the use to be considered fair, it will not be sufficient to merely lack the purpose of indicating origin; the use must not aim to exploit the trademark's recognition, and the user must refrain from damaging the trademark's other functions.

For trademarks other than the well-known ones, as mentioned above, we believe that current legal regulations are adequate to safeguard the freedom of artistic expression. For these kinds of trademarks, rather than balancing the public interest in protecting freedom of expression against the individual interests of the trademark owner, it would be more appropriate to compare the public interest in avoiding consumer confusion and the public interest in protecting freedom of expression, as in US law. In other words, the

[93] Bohaczewski (n 28) 866, 870, 871. Similarly, it is stated that the legislation on trademark law has balancing tools that can provide adequate protection to all parties and that there are certain provisions protecting the fundamental rights and freedoms in the Recitals of TMD and EUTMR, so when interpreting the provisions of the legislation, these provisions (in the Recitals) can be easily utilized. Zelechowski (n 46) 115-134.

[94] Burrel and Gangjee (n 55) 19-22.

comparison should not be between individual interests versus public interest, but rather between two different public interests. Only in this way can consumers' interests be considered and the most favorable approach to the balance of interests be achieved.

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