

**JUDGMENT OF THE COURT**  
11 November 1997 \*

In Case C-349/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

**Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie,**

and

**George Ballantine & Son Ltd and Others**

on the interpretation of Article 36 of the EC Treaty,

**THE COURT,**

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm, M. Wathelet (Presidents of Chambers), J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, G. Hirsch, P. Jann and L. Sevón, Judges,

\* Language of the case: Dutch.

Advocate General: F. G. Jacobs,  
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie, by G. van der Wal, of the Hague Bar,
- George Ballantine & Son Ltd and Others, by W. A. Hoyng, of the Eindhoven Bar,
- the United Kingdom Government, by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, and M. Silverleaf, Barrister,
- the Commission of the European Communities, by H. van Lier, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Frits Loendersloot, trading as F. Loendersloot Internationale Expeditie, represented by G. van der Wal, of George Ballantine & Son Ltd and others, represented by W. A. Hoyng, of the United Kingdom Government, represented by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and M. Silverleaf, and of the Commission, represented by H. van Lier, at the hearing on 7 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

### Judgment

- 1 By judgment of 3 November 1995, received at the Court on 13 November 1995, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Article 36 of that Treaty.
- 2 Those questions were raised in proceedings between Frits Loendersloot, residing in the Netherlands, trading as F. Loendersloot Internationale Expeditie (hereinafter 'Loendersloot'), and George Ballantine & Son Ltd and 14 other companies established in Scotland or England (hereinafter 'Ballantine and others').
- 3 Ballantine and others produce and market alcoholic drinks, particularly whisky. Their products enjoy a high reputation and are sold in almost all countries of the world.
- 4 Those drinks are marketed in bottles to which the manufacturers affix labels bearing their respective trade marks. Those marks also appear on the packaging of the bottles. In addition, Ballantine and others place identification numbers both on the labels or elsewhere on the bottles and on the packaging.
- 5 Loendersloot is a transport and warehousing firm. Its customers include traders who engage in 'parallel' trade. They buy the products of Ballantine and others in countries where prices are relatively low, and resell them in countries where prices are higher.

- 6 In 1990 Ballantine and others brought proceedings against Loendersloot in the Arrondissementsrechtbank (District Court) Breda seeking an order restraining Loendersloot from doing certain actions which infringed their trade mark rights or were otherwise unlawful, in particular:
- removing the labels bearing their trade marks and reapplying them by reaffixing the original labels or replacing them with copies,
  - removing the identification numbers on or underneath the original labels and on the packaging of the bottles,
  - removing the English word 'pure' and the name of the importer approved by Ballantine and others from the original labels, and in certain cases replacing that name by the name of another person, and
  - exporting the products thus treated to traders in France, Spain, England, the United States and Japan.
- 7 Loendersloot argued that even if it had carried out those actions, they did not constitute infringements of trade mark rights, nor were they unlawful on other grounds. It submitted in particular that the actions were necessary to allow parallel trade in the products in question on certain markets.
- 8 The Arrondissementsrechtbank held that the removal of the identification numbers constituted an unlawful act for reasons not connected with trade mark rights, and prohibited Loendersloot from removing them from the bottles and packaging and from exporting the products thus treated. It also found that removing the trade

marks from the bottles and packaging and reapplying them constituted infringements of trade mark rights, and therefore ordered Ballantine and others to produce evidence of the trade mark rights they claimed.

- 9 Loendersloot appealed against that judgment to the Gerechtshof (Regional Court) 's-Hertogenbosch. Ballantine and others cross-appealed.
  
- 10 The Gerechtshof set aside the judgment of the Arrondissementsrechtbank in so far as it prohibited the removal of the identification numbers and the export of the products in question. With respect to the alleged infringements of trade mark rights, however, the Gerechtshof held that the Arrondissementsrechtbank had rightly concluded that the removal and reapplication of a trade mark by a third party constituted an unlawful use of that mark. It rejected Loendersloot's argument that Articles 30 and 36 of the EC Treaty precluded the court from ordering the injunctive relief sought by Ballantine and others, on the ground that the exclusive right of a trade mark owner to affix that mark formed part of the specific subject-matter of trade marks.
  
- 11 Loendersloot appealed on a point of law to the Hoge Raad, and Ballantine and others cross-appealed. Loendersloot argued in particular that the possibility for the owner of a trade mark, under his national legislation, to prevent a third party from removing and reapplying his mark did not form part of the specific subject-matter of trade mark rights, and that Ballantine and others were using their trade mark rights in order to be able to maintain a system of identification numbers whose sole purpose was to combat parallel trade by means incompatible with Community law.
  
- 12 Ballantine and others argued that the exclusive right they relied on formed part of the specific subject-matter of trade mark rights, and that the identification numbers pursued only legitimate interests such as the recall of defective products and the need to combat counterfeiting.

- 13 In the judgment making the order for reference, the Hoge Raad held that the removal and reapplication of a trade mark by a third party without the consent of the trade mark owner were prohibited by the relevant national law. Since it considered that it could not rule on the arguments relating to Article 36 of the Treaty without first making a reference to the Court of Justice, the Hoge Raad stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

‘1. Is the specific subject-matter of the rights attaching to a trade mark to be regarded as including the possibility afforded to the proprietor of a trade mark under national law to oppose, with regard to alcoholic drinks manufactured by him, the removal by a third party of labels affixed by the proprietor on bottles and on the packaging containing them, and bearing his mark, after the drinks have been placed by him on the Community market in that packaging, and the subsequent reapplication of those labels by that third party or their replacement by similar labels, without thereby in any way damaging the original condition of the product?

2. In so far as the labels are replaced by other similar labels, is the position different where the third party omits the indication “pure” appearing on the original labels and/or, as the case may be, replaces the importer’s name with another name?

3. If Question 1 falls to be answered in the affirmative, but the proprietor of the trade mark avails himself of the possibility referred to in that question in order to prevent the third party from removing the identification marks which the trade mark proprietor has affixed on or underneath the labels in order to enable the trade mark proprietor to detect shortfalls within his sales organization and thus to combat parallel trade in his products, must such an exercise of the trade mark right be regarded as a “disguised restriction on trade between Member States” aimed at achieving an artificial compartmentalization of the markets?

4. To what extent is the answer to Question 3 affected where the trade mark proprietor has affixed those identification marks either pursuant to a legal obligation or voluntarily, but in any event with a view to making a “product recall” possible and/or in order to limit his product liability and/or to combat counterfeiting, or, as the case may be, solely in order to combat parallel trade?’

### Preliminary remarks

- 14 The national court put its questions on the basis of the following three premisses:
- the removal and reapplication or replacement of the trade marks of Ballantine and others constitute infringements of their trade mark rights under national law;
  - the injunctive relief sought by Ballantine and others create barriers to the free movement of goods between Member States, which are contrary in principle to the relevant provisions of the Treaty, and
  - such barriers may be permitted under Article 36 of the Treaty if they are justified for reasons of the protection of industrial and commercial property, provided that they constitute neither an arbitrary means of discrimination nor a disguised restriction on trade between Member States.
- 15 As to the second premiss, Ballantine and others deny that the injunctive relief sought constitutes barriers to intra-Community trade, since there is nothing to prevent Loendersloot from exporting the products in question in their original condition to other Member States.
- 16 On this point, as the Advocate General has observed in point 25 of his Opinion, there is no reason to question the national court's assessment that prohibitory measures such as those sought by Ballantine and others constitute barriers to the free movement of goods between Member States laid down by Articles 30 and 34 of the EC Treaty.

- 17 As to the third premiss, it has been suggested that the national court's questions should be answered within the framework not of Article 36 of the Treaty but of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), which was to be transposed into the national laws of the Member States by 31 December 1992 at the latest.
- 18 On this point, it suffices to note that it is for the national court to determine whether, from the point of view of the national rules applicable to orders such as those sought in the main proceedings, the dispute before it is to be resolved on the basis of Article 36 of the Treaty or of Directive 89/104, Article 7 of which regulates the question of exhaustion of trade mark rights in relation to goods which have been put on the market in the Community. However, Article 7 of that directive, like Article 36 of the Treaty, is intended to reconcile the fundamental interest in protecting trade mark rights with the fundamental interest in the free movement of goods within the common market, so that those two provisions, which aim to achieve the same result, must be interpreted in the same way (Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others v Paranova* [1996] ECR I-3457, paragraph 40; Joined Cases C-71/94, C-72/94 and C-73/94 *Eurim-Pharm v Beiersdorf and Others* [1996] ECR I-3603, paragraph 27, and Case C-232/94 *MPA Pharma v Rhône-Poulenc Pharma* [1996] ECR I-3671, paragraph 13).

### The questions

- 19 By its four questions, which should be considered together, the national court essentially asks whether Article 36 of the Treaty is to be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, where the original condition of the products is not affected.



20 The questions concern more particularly situations where the relabelling is done for the purpose of

- removing the identification numbers placed by the trade mark owner on or underneath the labels and on the packaging of the bottles, and
  
- removing the English word 'pure' and the name of the approved importer from the labels, and in certain cases replacing that name with the name of another person.

With respect to the first situation, the Court is asked to rule on whether it is significant, first, that the trade mark owner makes use of his rights in order to prevent a third party from removing the identification numbers which enable him to detect weaknesses in his sales organization and so combat parallel trade and, second, that the identification numbers have other purposes, such as complying with a legal obligation, making it possible to recall the product, limiting the manufacturer's liability or combating counterfeiting.

### *The case-law of the Court*

21 In answering those questions, it should be noted that, according to the Court's case-law, Article 36 allows derogations from the fundamental principle of the free movement of goods within the common market only in so far as such derogations are justified in order to safeguard the rights which constitute the specific subject-matter of the industrial and commercial property in question.

- 22 With respect to trade mark rights, the Court has held that they constitute an essential element in the system of undistorted competition which the Treaty is intended to establish. In such a system, undertakings must be able to attract and retain customers by the quality of their products or services, which is made possible only by distinctive signs allowing them to be identified. For the trade mark to be able to fulfil that function, it must constitute a guarantee that all products which bear it have been manufactured under the control of a single undertaking to which responsibility for their quality may be attributed (see, in particular, Case C-10/89 *CNL-SUCAL v HAG GF* (hereinafter '*HAG I*') [1990] ECR I-3711, paragraph 13, and *Bristol-Myers Squibb*, cited above, paragraph 43). Consequently, the specific subject-matter of a trade mark is in particular to guarantee to the owner that he has the exclusive right to use that mark for the purpose of putting a product on the market for the first time and thus to protect him against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it (see, in particular, Case 102/77 *Hoffmann-La Roche v Centrafarm* [1978] ECR 1139, paragraph 7; *HAG II*, paragraph 14; and *Bristol-Myers Squibb*, paragraph 44).
- 23 It follows in particular that the owner of a trade mark protected by the legislation of a Member State cannot rely on that legislation in order to oppose the importation or marketing of a product which has been put on the market in another Member State by him or with his consent (see, in particular, *Bristol-Myers Squibb*, paragraph 45). Trade mark rights are not intended to allow their owners to partition national markets and thus assist the maintenance of price differences which may exist between Member States (see *Bristol-Myers Squibb*, paragraph 46).
- 24 With respect more particularly to the question whether a trade mark owner's exclusive right includes the power to oppose the use of the trade mark by a third party after the product has been repackaged, the Court has held that account must be taken of the essential function of the trade mark, which is to guarantee to the consumer or end user the identity of the trade-marked product's origin by enabling him to distinguish it without any risk of confusion from products of different origin. That guarantee of origin means that the consumer or end user can be certain that a trade-marked product offered to him has not been subject at a

previous stage of marketing to interference by a third party, without the authorization of the trade mark owner, in such a way as to affect the original condition of the product (see, in particular, *Hoffmann-La Roche*, paragraph 7, and *Bristol-Myers Squibb*, paragraph 47).

- 25 The Court has thus held that the right conferred upon the trade mark owner to oppose any use of the trade mark which is liable to impair the guarantee of origin, as so understood, forms part of the specific subject-matter of the trade mark right, the protection of which may justify derogation from the fundamental principle of the free movement of goods (*Hoffmann-La Roche*, paragraph 7, Case 1/81 *Pfizer v Eurim-Pharm* [1981] ECR 2913, paragraph 9, and *Bristol-Myers Squibb*, paragraph 48).
- 26 Applying those principles in the context of disputes concerning the repackaging of pharmaceutical products for purposes of parallel trade, the Court has held that Article 36 of the Treaty must be interpreted as meaning that a trade mark owner may in principle legitimately oppose the further marketing of a pharmaceutical product where the importer has repackaged it and reaffixed the trade mark (see, in particular, *Hoffmann-La Roche*, paragraph 8, and, with respect to Article 7(2) of Directive 89/104, *Bristol-Myers Squibb*, paragraph 50).
- 27 Contrary to Loendersloot's assertion, that case-law applies also to cases such as that in the main proceedings. The product bearing the trade mark has in the present case likewise been subject to interference by a third party, without the authorization of the trade mark owner, which is liable to impair the guarantee of origin provided by the trade mark.
- 28 It should be noted, however, that according to the case-law of the Court (see, in particular, *Hoffmann-La Roche*, paragraph 10, Case 3/78 *Centrafarm v American Home Products* [1978] ECR 1823, paragraphs 21 and 22, and *Bristol-Myers Squibb*, paragraphs 49 and 50) Article 36 does not permit the owner of the trade mark to oppose the reaffixing of the mark where such use of his trade mark rights contributes to the artificial partitioning of the markets between Member States and where the reaffixing takes place in such a way that the legitimate interests of the trade

mark owner are observed. Protection of those legitimate interests means in particular that the original condition of the product inside the packaging must not be affected, and that the reaffixing is not done in such a way that it may damage the reputation of the trade mark and its owner.

29 It follows that under Article 36 of the Treaty the owner of trade mark rights may rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the trade mark, unless:

— it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to the artificial partitioning of the markets between Member States;

— it is shown that the repackaging cannot affect the original condition of the product, and

— the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner.

30 According to the Court's case-law a person who repackages pharmaceutical products is also required to inform the trade mark owner of the repackaging, to supply him, on demand, with a specimen of the repackaged product, and to state on the repackaged product the person responsible for the repackaging (see, in particular, *Bristol-Myers Squibb*).

- 31 The application of those conditions to circumstances such as those of the main proceedings must therefore be examined.
- 32 As to the original condition of the product, the wording of Question 1 indicates that in the national court's opinion the relabelling at issue in the main proceedings has no adverse effect upon it.
- 33 As to protection of the reputation of the trade mark, a third party who relabels the product must ensure that the reputation of the trade mark — and hence of its owner — does not suffer from an inappropriate presentation of the relabelled product (see, in particular, *Bristol-Myers Squibb*, paragraphs 75 and 76). To assess whether that is the case in the main proceedings, the national court must take into account in particular the interest of Ballantine and others in protecting the luxury image of their products and the considerable reputation they enjoy.
- 34 It appears from the case-file that the crux of the dispute is, in particular, application of the condition relative to the owner's use of the trade mark contributing to artificial partitioning of the markets between Member States.
- 35 On this point, the Court held in *Bristol-Myers Squibb*, paragraph 52, that use of trade mark rights by their owner in order to oppose the marketing under that trade mark of products repackaged by a third party would contribute to the partitioning of markets between Member States, in particular where the owner has placed an identical pharmaceutical product on the market in several Member States in various forms of packaging and the product may not, in the condition in which it has been marketed by the trade mark owner in one Member State, be imported and put on the market in another Member State by a parallel importer.

- 36 The Court went on to hold, in paragraphs 56 and 57 of that judgment, that the possibility for the owner of trade mark rights to oppose the marketing of repackaged products under his trade mark should be limited only in so far as the repackaging undertaken by the importer is necessary in order to market the product in the Member State of importation. It need not be established, on the other hand, that the trade mark owner has deliberately sought to partition the markets between Member States.
- 37 In the main proceedings Loendersloot submits that the owner's use of trade mark rights to prevent it from carrying out the relabelling at issue contributes to artificial partitioning of the markets between Member States thereby maintaining price differences which are not justified by differences in real costs. It considers that the relabelling is necessary for two reasons. First, it is essential in order to make it possible to remove the identification numbers placed on the bottles by Ballantine and others, that being necessary to preserve the anonymity of the dealers engaged in parallel trade. Without that anonymity Loendersloot would be unable to obtain supplies from traders authorized by Ballantine and others, who fear the imposition of sanctions on them by the producers if they know the identity of the dealers engaged in parallel sales. Second, relabelling is necessary in order to make it possible to remove the word 'pure' or alter the references to the importer, so as to permit marketing in the country of destination.
- 38 It should be observed that the task of the national courts, who have to assess whether the relabelling is necessary in order to prevent artificial partitioning of the markets between Member States, is different in cases such as that in the main proceedings and cases concerning the repackaging of pharmaceutical products. In the latter the national courts must consider whether circumstances in the markets of their own States make repackaging objectively necessary. In the present case, on the other hand, the national court must assess whether the relabelling is necessary to protect the sources of supply of the parallel trade and to enable the products to be marketed on the various markets of the Member States for which they are intended.

Removal of the identification numbers

39 With respect to the removal and reaffixing or replacing of labels in order to remove the identification numbers, Ballantine and others observe that that removal is not necessary to enable the products in question to be marketed on the markets of the various Member States in accordance with the rules in force there.

40 It should be observed that, while that statement is correct, removal of the identification numbers might nevertheless prove necessary, as Loendersloot has observed, to prevent artificial partitioning of the markets between Member States caused by difficulties for persons involved in parallel trade in obtaining supplies from distributors of Ballantine and others for fear of sanctions being imposed by the producers in the event of sales to such persons. Even if, as Ballantine and others-state, such conduct on the part of the producers would be in breach of the Treaty rules on competition, it cannot be excluded that identification numbers have been placed on products by producers to enable them to reconstruct the itinerary of their products, with the purpose of preventing their dealers from supplying persons carrying on parallel trade.

41 It must also be acknowledged, however, that for the producers application of identification numbers may be necessary to comply with a legal obligation, in particular under Council Directive 89/396/EEC of 14 June 1989 on indications or marks identifying the lot to which a foodstuff belongs (OJ 1989 L 186, p. 21), or to realise other important objectives which are legitimate from the point of view of Community law, such as the recall of faulty products and measures to combat counterfeiting.

42 In those circumstances, where identification numbers have been applied for purposes such as those mentioned in the preceding paragraph, the fact that an owner

of trade mark rights makes use of those rights to prevent a third party from removing and then reaffixing or replacing labels bearing his trade mark in order to eliminate those numbers does not contribute to artificial partitioning of the markets between Member States. In such situations there is no reason to limit the rights which the trade mark owner may rely on under Article 36 of the Treaty.

- 43 Where it is established that the identification numbers have been applied for purposes which are legitimate from the point of view of Community law, but are also used by the trade mark owner to enable him to detect weaknesses in his sales organization and thus combat parallel trade in his products, it is under the Treaty provisions on competition that those engaged in parallel trade should seek protection against action of the latter type.

#### Removal of the word 'pure' and the importer's name on the labels

- 44 Loendersloot submits that the interest of its customers in removing the word 'pure' and the importer's name from the labels, and in certain cases substituting the parallel importer's name, is bound up with the provisions on labelling in force in the country of destination. By those actions Loendersloot merely makes the product marketable on the markets in question. Loendersloot observes here that some countries prohibit the use of the word 'pure' and that it may be necessary to remove the name of the official importer on the label or substitute for it the name of the parallel importer in order to comply with the rules of the country of destination of the product, even though those rules were harmonized in the Community by Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1).



45 On this point, it must be stated that use by Ballantine and others of their trade mark rights to prevent relabelling for the purposes mentioned by Loendersloot would contribute to artificial partitioning of the markets between Member States if it were established that the use of the English word 'pure' and the name of the approved importer on the original labels would prevent the products in question from being marketed in the Member State of destination because it was contrary to the rules on labelling in force in that State. In such a situation, relabelling would be necessary for the product to be marketed in that State.

46 The person carrying out the relabelling must, however, use means which make parallel trade feasible while causing as little prejudice as possible to the specific subject-matter of the trade mark right. Thus if the statements on the original labels comply with the rules on labelling in force in the Member State of destination, but those rules require additional information to be given, it is not necessary to remove and reattach or replace the original labels, since the mere application to the bottles in question of a sticker with the additional information may suffice.

#### Other possible requirements

47 Finally, it is necessary to consider the other requirements of the Court's case-law as regards repackaging of pharmaceutical products and referred to in paragraph 30 above, namely that a person who repackages products must inform the trade mark owner of the repackaging, must supply him, on demand, with a specimen of the repackaged product, and must state on the repackaged product the person responsible for the repackaging. Ballantine and others submit that if, in cases such as that in the main proceedings, Community law limits their right in accordance with national rules on trade marks to oppose the reattaching of the trade marks, then those same conditions must apply. Loendersloot, on the other hand, considers that those conditions apply only to the repackaging of pharmaceutical products.

48 On this point, the Court has considered that the imposition of such conditions on the person carrying out repackaging is justified by the fact that the essential requirements of the free movement of goods mean that that person is recognized as having certain rights which, in normal circumstances, are reserved for the trade mark owner himself (see *Bristol-Myers Squibb*, paragraph 68). In formulating those conditions, account was taken of the legitimate interests of the trade mark owner with regard to the particular nature of pharmaceutical products.

49 However, in circumstances such as those in the main proceedings, having regard to the nature of the action of the person carrying out the relabelling, the interests of the trade mark owner, and in particular his need to combat counterfeiting, are given sufficient weight if that person gives him prior notice that the relabelled products are to be put on sale.

50 In the light of the foregoing, the answer to the national court's questions must be that Article 36 of the Treaty is to be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, unless:

- it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to artificial partitioning of the markets between Member States;
- it is shown that the relabelling cannot affect the original condition of the product;
- the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner; and

— the person who relabels the products informs the trade mark owner of the relabelling before the relabelled products are put on sale.

51 It is for the national court to assess whether those conditions are satisfied in the case before it, taking account of the considerations mentioned above.

### Costs

52 The costs incurred by the United Kingdom Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

### THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 3 November 1995, hereby rules:

**Article 36 of the EC Treaty must be interpreted as meaning that the owner of trade mark rights may, even if that constitutes a barrier to intra-Community trade, rely on those rights to prevent a third party from removing and then**

reaffixing or replacing labels bearing the mark which the owner has himself affixed to products he has put on the Community market, unless:

- it is established that the use of the trade mark rights by the owner to oppose the marketing of the relabelled products under that trade mark would contribute to artificial partitioning of the markets between Member States;
- it is shown that the relabelling cannot affect the original condition of the product;
- the presentation of the relabelled product is not such as to be liable to damage the reputation of the trade mark and its owner; and
- the person who relabels the products informs the trade mark owner of the relabelling before the relabelled products are put on sale.

Rodríguez Iglesias

Gulmann

Ragnemalm

Wathelet

Moitinho de Almeida

Kapteyn

Murray

Edward

Hirsch

Jann

Sevón

Delivered in open court in Luxembourg on 11 November 1997.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President