reforming the derivative action is that it is virtually obsolete in any case, a situation which the Law Commission's recommendations seem unlikely to alter.

The other area of reform suggested by the Report concerns the encouragement of self-help by shareholders, principally via the insertion of specific provisions into Table A, to deal with the situation in which shareholders in small private companies (with no obvious market for their shares) want to get out of the company without recourse to litigation. The extensive suggestions in the Consultation Paper were heavily criticised for their lack of practicality, and those relating to arbitration and valuation provisions have been dropped. All that remains, albeit in amended form, is the suggested exit article. A draft article in the Report suggests that shareholders would need to pass an ordinary resolution to attach exit rights to particular shares. The exit rights would then be activated by service of a notice requiring those on whom it is served to purchase the shares of the outgoing shareholder at a "fair price", as defined by the shareholders.

Whilst the Law Commission's agenda was bold, the large-scale rationalisation which was hoped for has not been forthcoming. Many of the assumptions which lie at the heart of the Law Commission's work, such as the idea that a division between the personal actions and derivative actions of shareholders is a necessary one, needed reappraisal. Although the detail of the reforms proposed in the Report are generally to be welcomed, the opportunity for a more fundamental rethink of the content of a minority shareholders' armoury has been lost.

JENNIFER PAYNE

THE VALUE OF A REPUTATION

IN the global market, the value of a growing number of trade marks lies in qualities which adhere to the marks themselves rather than those intrinsic to the goods to which they are attached. Since Nike and Adidas produce shoes of similar quality and price, their ability to maintain or expand their respective market share depends, in large measure, upon nurturing the attractive image of their marks. For such companies, the reputation of their marks is an appreciating currency, rapidly overtaking in importance the traditional role of the marks as indicators of origin. Two recent cases before the European Court of Justice have explored the extent to which the new European trade mark regime, introduced by the European Directive (89/104/

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EEC), has broadened the protection given to the reputation of registered marks.

The first, *Sabel BV* v. *Puma AG, Rudolf Dressler Sport,* case C-251/95 [1997], raised the question of whether the Directive has introduced the concept of "dilution" into Community trade mark law. Article 4(1)(*b*) of the Directive provides that a trade mark conflicts with an earlier mark if because of the identity or similarity between the trade marks and the goods or services covered, there exists a likelihood of confusion on the part of the public which includes the likelihood of association between the two marks. These grounds, which also apply to a finding of infringement, were incorporated into the UK Trade Marks Act 1994, and the Trade Marks Act 1995 in Germany, from where this case originated.

Interpreting the words "likelihood of association" has raised considerable controversy. Likelihood of confusion is generally accepted to mean the likelihood that the public will be confused as to the origin of the marks. The additional words "including the likelihood of association" has been interpreted by the Benelux courts to widen the protection given to trade marks beyond their function as indicators of origin to include their "reputation", which might be "diluted" by association with another mark, even where the public is not confused as to origin. It has been argued that the Directive intended the Benelux interpretation to be adopted across the EU, a view rejected by Laddie J. in *Wagamama Ltd.* v. *City Centre Restaurants plc & another* [1995] F.S.R. 713. In particular, proponents of the Benelux approach have noted an apparent paradox. Articles 4(3), 4(*a*) and 5, which permit the proprietor of a mark which has a reputation to oppose registration or prohibit the use without due cause of signs identical with or similar to his mark on dissimilar goods, does not call for a finding of confusion, merely that the use of the latter mark would take unfair advantage of, or be detrimental to, the distinctive character of his mark. If a narrow interpretation of "likelihood of association" is followed, the finding of conflict between an earlier mark with a reputation and an identical or similar mark on identical or similar goods appears to require a higher standard of proof than where the goods are dissimilar, since there is the additional requirement of a finding of confusion.

In the *Puma* case, Puma's registered mark and Sabel's sign showed bounding felines, although the latter had the word "sabel" printed below. Both were applied to leather goods and clothing. Neither mark nor sign was especially well known. Puma lodged an opposition to the registration of the Sabel sign. The German Supreme Court determined that the mark and sign taken as a whole were not sufficiently similar to give rise to a likelihood of confusion.

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However, the question remained whether the resemblance between their semantic content, the bounding felines, was sufficient to give rise to a likelihood of confusion because of the mere association that the public might make based on this resemblance. This, in essence, was the question referred to the ECJ. The ECJ ruled that the resemblance was not sufficient, explicity rejecting the Benelux approach. The proper interpretation of Article 4(1)(*b*) is that the concept of "likelihood of association" is not an alternative to "likelihood of confusion" but serves to define its scope. Where there is no "likelihood of confusion" on the part of the public the provision does not apply. Nor, according to the ECJ, is this interpretation inconsistent with those provisions relating to marks with a reputation on dissimilar goods. The Preamble to the Directive sets out a number of elements upon which "likelihood of confusion" depends, including recognition of the trade mark on the market, the associations which can be made with the used or registered mark as well as the degree of similarity between marks and the relevant goods and services. The likelihood of confusion must therefore be appreciated globally, weighing all these relevant factors. Where the mark is particularly distinctive or enjoys a reputation, confusion may arise, even if the resemblance is confined to the mark's semantic content alone. Accordingly, marks with a reputation will have greater protection than other marks under Article 4(1)(*b*). By contrast, in the present case, where the marks were conceptually similar but neither particularly well known nor distinctive, the facts were not sufficient to give rise to a likelihood of confusion. The *Puma* judgment suggests that the surprising decision by a Deputy Judge in *Baywatch Productions Co. Inc.* v. *The Home Video Channel* [1997] F.S.R. 22, that conflict between a mark with a reputation and a later mark on dissimilar goods necessitates a finding of a "likelihood of confusion" between the marks, may well be open to question.

The second case, *Parfums Christian Dior SA (Dior France) and Parfums Christian Dior BV (Dior Netherlands)* v. *Evora BV,* case C-337/95 [1997 (1)], also concerned, *inter alia,* the breadth of protection given to a mark's reputation. In order to maintain premium prices and its luxurious image, Dior France distributes its products only through exclusive representatives (in the Netherlands, Dior Netherlands). Evora, which operates a chain of chemists shops in the Netherlands, sold Dior products obtained by means of parallel imports. These were advertised by Evora in leaflets which reproduced Dior's marks and which also advertised goods which were similar, but not necessarily of the same quality. The proceedings before the ECJ did not challenge the legality of the sale of these products.

The first question put to the ECJ by the Netherlands Supreme

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Court was whether a reseller of parallel imports might use the marks attached to such goods for the purpose of bringing their further commercialisation to the attention of the public, as in the leaflets distributed by Evora. If the answer was affirmative, the next question was whether there were exceptions to this rule, for instance, where the advertising function of the mark is endangered because, as a result of the manner in which the reseller uses the mark, he damages its prestigious image. Thirdly, does this reason fall within the meaning of Article 7(2) of the Directive, which provides that a proprietor of a trade mark which has been attached to parallel imports may oppose its use for further commercialisation where there are "legitimate" reasons, especially where the condition of the goods is changed or impaired after they have been put on the market? There is an equivalent provision, section 12(1), in the UK Trade Marks Act.

Article 7(2) has been primarily understood as applying to the repackaging of pharmaceutical products, where there is a risk that the goods might be physically impaired. It was Dior's argument that "legitimate reason" can include the way the reseller advertises the goods so that the "mental" condition of the goods—the prestigious image conjured up by the trade mark—is altered or impaired.

The ECJ held first that Article 7(1) of the Directive, which, in effect, permits parallel imports, also leaves the importer free to make use of the trade mark in order to advertise the goods. To decide otherwise would be to call into question the whole principle of exhaustion of rights. However, a proper interpretation of Article 7(2) is that physical impairment of the goods is only one example of a legitimate reason for a trade mark owner to oppose further commercialisation; damage to the reputation of the mark may be another. Nonetheless, a balance must be struck between the right of the trade mark owner to protect the reputation of his mark and the reseller's legitimate interest in advertising the goods through its use. Accordingly, a trade mark proprietor may not rely on Article 7(2) to oppose use of the mark by a seller who habitually markets articles of the same kind but not necessarily of the same quality, in ways customary to the reseller's sector of the trade, in order to bring the public's attention to the further commercialisation of the goods; unless, given the specific circumstances of the case, the use of the trade mark for this purpose seriously damages the trade mark's reputation. The Court gave as an example an advertising leaflet which put the mark in a context which "seriously detracted" from its image. The ECJ also confirmed that a proper interpretation of Articles 30 and 36 of the Treaty of Rome would produce the same answers to the same questions.

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The outcome of these two cases suggests that those who imagined and indeed hoped that the Directive marked a substantial increase in the breadth of protection afforded to a trade mark's reputation must for the moment be disappointed. The ECJ has chosen to strike a balance, recognising the value of a mark's reputation but carefully circumscribing the protection it is given beyond its function as an indicator of source. Given the value that now attaches to the image of a growing number of marks, the question remains as to how long the ECJ can maintain this cautious approach.

JENNIFER DAVIS

GAY SURVIVORS AND LESBIAN PARENTS: SEXUAL ORIENTATION IN FAMILY LAW

Two recent decisions have considered the relevance of sexual orientation to, respectively, family membership and qualifications to adopt. In *FitzPatrick* v. *Sterling Housing Association* (1997) 147 N.L.J. 1275, [1997] Fam. Law 784, the question was whether a gay man could succeed to the protected tenancy of his deceased partner. In *Re W (Adoption: Homosexual Adopter)* [1997] 2 F.L.R. 406 it was whether the adoption legislation or public policy precluded an adoption application by a woman in a long-term lesbian relationship.

The applicant in *FitzPatrick* had lived with the deceased in a monogamous and stable relationship for 18 years. His entitlement to succeed to the tenancy under the Rent Act 1977 turned on whether he could establish that at the date of death and for two years previously he had lived with the deceased "as his wife or husband" (sched. 1, para. 2(2)) or "as a member of his family" (sched. 1, para. 3(1)). As to the former, the majority in the Court of Appeal (Waite and Roch L.JJ.) followed the interpretation given to a similar phrase in the housing legislation in *Harrogate Borough Council v. Simpson* [1984] 17 H.L.R. 205 to the effect that it was apposite to include only *heterosexual* relationships. But, unlike the Housing Act 1985 (which governs succession to secure tenancies), the 1977 legislation does not define the term "family", and the central issue was whether its meaning extended beyond relationships constituted by ties of kinship (including adoptive ties) or marriage. As a matter of statutory interpretation and on the state of the authorities the majority felt constrained to hold that it did not, subject only to a relaxation in favour of treating long-term *heterosexual* cohabitants as if they were husband and wife.

Waite L.J. accepted that this was discrimination based on sexual orientation and offensive to modern ideas of social justice and

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