

**Questionnaire
Sessions IIA and IIB**

**ALAI 2001 Congress, New York, June 13-17:
Adjuncts and Alternatives to Copyright**

Session II: The Relationship of Copyright and Trademarks

Part A. Copyright, Trademarks and Trade Dress: the overlap (and conflict?) in intellectual property regimes concerning designs and visual images

Part B. Exceptions to protection where copyright and trademark overlap: parody, news reporting and other "speech" use of trademarks.

Combined Questionnaire

General Reporters, Prof. Graeme Dinwoodie, Chicago-Kent Law School; Annette Kur, Max Planck Institut, Munich

We would be grateful if those national reporters who can answer the questionnaire in both French and English would do so.

To the extent that your answers reflect or refer to relevant case law, please include citations to the cases. We would also be very grateful if you could provide copies of the text of any statutory provisions referenced in your answers.

1. What is the notion of a "work of art" in the relevant country?
2. Does the country follow a "unity of art" approach (under which useful articles receive the same treatment as purely decorative works), or does the copyright law exclude or limit protection for certain categories of work? Is there a difference in law or practice between the protection offered different categories of work?

N.B. We are most interested in whether copyright protection for the design of useful or consumer articles is limited and how.
3. What is the relationship between copyright and design right? Is cumulative protection available? Which criteria apply to determine whether cumulation is permitted?
4. Does trademark or unfair competition law protect visual images or the design of three dimensional articles? If so, does trademark law exclude such protection in certain cases? If so, what are the grounds for the exclusion? To what extent does this exclusion differ from the exclusion, if any, from copyright protection?

N.B. If the nature or scope of trademark protection and unfair competition protection differ, please mention the difference.
5. Does trademark law contain any exclusion from protection for works that are already protected by copyright? Does it contain any exclusion for subject matter that is patented?
6. To which extent is cumulative protection granted under copyright and trademark law for the following:
 - (a) work titles
 - (b) emblems
 - (c) the name, appearance, and other aspects of fictitious (e.g. cartoon) characters?

- (d) costumes and clothing designs
- (e) furniture design
- (f) architectural designs
- (g) labeling or packaging
- (h) musical works
- (i) appearance of books or periodicals

N.B. If there are other items for which cumulative protection under copyright or trademark law has been sought (or obtained), please mention them.

7. Has the attitude towards protectability of the items mentioned in Question 6 above under trademark and/or copyright law changed in recent years? In which respect?
8. To what extent is trademark or unfair competition protection available in circumstances where copyright law affirmatively denies protection? (For example, where copyright protection has expired, where copyright law exempts certain conduct from infringement, where the defendant's conduct would be regarded as appropriation only of ideas, etc.) Does the extent of trademark protection differ depending upon the reason that copyright protection is not available?
9. To what extent is trademark or unfair competition protection available in circumstances where patent law affirmatively denies protection? Does the extent of trademark protection differ depending upon the reason that patent protection is not available?
10. To what extent does trademark law protect against non-attribution or misattribution of authorship? Is this protection coterminous with protection offered by moral rights?
11. Please make reference to existing case law regarding the overlap between trademark and copyright law, in particular as regards the following topics:
 - (a) differences regarding the scope of protection (e.g. copyright protection extending beyond similar goods)
 - (b) what is required to sustain a claim of copyright infringement, as compared to trademark infringement or trademark dilution
 - (c) exemptions permitting parodies and other issues concerning free speech
 - (d) exhaustion of rights/first sale
 - (e) limits on the transfer of rights (We are interested here in limits under one intellectual property regime that might prevent the right holder from fully exercising its rights, or from effectively obtaining the same rights, under a different intellectual property regime. For example: limits on the transfer of authors' rights that might prevent unfettered assertion of trademark rights by an assignee of both sets of rights; or conditions on the transfer of trademark rights that limit the ability of an assignee to use trademark law to restrain the same conduct as could be restrained by the owner of a valid copyright.)
 - (f) differences in the relief available for copyright and trademark infringement.
12. Please add anything which might be of interest in the context (e.g. the attitude towards trademark protection for works of art in the public domain), etc.

N.B. We are especially interested in whether the rules permitting or excluding protection discussed in your answers are derived from statutory rules, have been developed by courts, or are grounded in national constitutions.

We are trying to collect visual or audio-visual examples of the items at issue in the types of cases discussed above. If you have any such examples, or know where would obtain them, we would be very grateful for that information.