OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 18 November 2008 [1]

I — Introduction

1. In a relatively superficial analysis, trade mark law is imbued with at least two antithetical approaches when it comes to resolving conflicts which arise between marks. The first approach regards signs as mere intangible assets which must be protected by registration, emphasises their nature as rights *in rem* and affords precedence to *ius civilis* aspects, particularly the rules on the right of ownership.

2. The second, by contrast, emphasises the economic perspective, drawing attention to their undeniable links with the regulation of trade, specifically the rules on competition (as legal monopolies), whose principles delimit the powers derived from registered trade marks.

3. Thus, in the event of a dispute over a sign, the first approach described tends to protect a trade mark proprietor by reason of the primacy of the rights of ownership, while the second generally protects the principle of free trade and the rules of competition.

4. Although Directive 89/104/EEC [2] does not openly adopt either of those approaches, it reflects the tensions caused by the hybridity of trade marks as property rights and as tools for the regulation of the market by the State.

5. The arguments in favour of both approaches arise in the question referred to the Court of Justice for a preliminary ruling by the Oberster Patent- und Markensenat (the Austrian Supreme Patent and Trade Mark Court), since the dispute concerns the confines of the genuine use of marks. The question focuses on determining whether marks are put to genuine use when they have been registered for clothing and drinks but are used in respect of the latter category of goods only on a free gift to purchasers of

1 — Original language: Spanish.

2 — First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

clothing bearing the same mark. Although I am more inclined to the second approach described, I have endeavoured to draft this Opinion in line with the guidance of that great Portuguese writer, following '… the sacred instinct of having no theories...'. [3]

II — The legislative framework

A — *Directive 89/104*

6. The eighth recital in the preamble to Directive 89/104 refers to the requirement of genuine use and to the consequences of failure to comply with that requirement, stating that 'in order to reduce the total number of trade marks registered and protected in the Community and, consequently, the number of conflicts which arise between them, it is essential to require that registered trade marks must actually be used or, if not used, be subject to revocation'. The recital goes on to state that 'a trade mark cannot be invalidated on the basis of the existence of a non-used earlier trade mark, while the Member States remain free to apply the same principle in respect of the registration of a trade mark or to provide that a trade mark may not be successfully invoked in infringement proceedings if it is established as a result of a plea that the trade mark could be revoked'.

7. Article 10(1) of the Directive, under the heading 'Use of trade marks', provides:

'If, within a period of five years following the date of the completion of the registration procedure, the proprietor has not put the trade mark to genuine use in the Member State in connection with the goods or services in respect of which it is registered, or if such use has been suspended during an uninterrupted period of five years, the trade mark shall be subject to the sanctions provided for in this Directive, unless there are proper reasons for non-use.'

8. Article 12(1) of the Directive, harmonising revocation of registered marks, provides:

'A trade mark shall be liable to revocation if, within a continuous period of five years, it has not been put to genuine use in the Member State in connection with the goods or services

3 — Pessoa, F., *The Book of Disquiet,* translated by Richard Zenith, Penguin Classics, London, 2003, p. 218.

in respect of which it is registered, and there are no proper reasons for non-use; ...'

B — *The Austrian Law on the protection of trade marks*

9. Under Paragraph 33a(1) of the Markenschutzgesetz (Austrian Law on the protection of trade marks),[4] anyone may apply for the cancellation of a mark which has been registered in Austria for five years or which enjoys protection in Austria pursuant to Paragraph 2(2), if genuine and distinctive use of the mark for the goods or services in respect of which it is registered has not been made either by the proprietor of the mark or with his permission by a third party within the last five years before the date of the application (Paragraph 10a of the Law), unless the proprietor of the mark can justify the non-use.

10. In accordance with Paragraph 10a of the Austrian Law on the protection of trade marks, the following, in particular, are regarded as use of a sign: (1) affixing the sign to the goods or to the packaging thereof, or to items in relation to which the service is offered or to be offered; (2) use of the sign on goods which are offered, put on the market or stocked for subsequent sale or to designate the services which are supplied; (3) importing or exporting the goods under the sign; and (4) using the sign on business papers, in announcements or in advertising.

4 — Markenschutzgesetz 1970, BGBl. 260/1970, last amendment in BGBl. I 151/2005.

III — The main proceedings and the question referred for a preliminary ruling

11. Maselli-Strickmode GmbH ('Maselli') owns the Austrian word mark No 127 803 WELLNESS, which, with effect from 20 October 1989, the company registered for goods in classes 16 (magazines and books), 25 (clothing) and 32 (non-alcoholic drinks, with the exception of alcohol-free beer), in accordance with the nomenclature of the Nice Agreement.[5]

12. Although, from the outset, the main focus of its activity was fashion, Maselli used the mark in 1999 and 2000 to designate an alcohol-free drink which, according to its business documents relating to the promotion of its clothes, was given as a gift to individuals who bought those clothes.[6] The soft drink was bottled under the name WELLNESS-DRINK, for which purpose the company had printed 3 100 labels bearing that name and filled 800 0.35 litre bottles with the drink.

5 — Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

6 — At the hearing, in response to a question I put to it, Maselli confirmed the information provided by Silberquelle in its observations to the effect that it gave away the soft drink for purchases of six jumpers priced EUR 100 each.

13. Silberquelle GmbH ('Silberquelle') applied to the Austrian Patents and Trade Marks Office for the cancellation of that mark on the grounds of non-use in class 32. Silberquelle argued that the sign had been registered over five years ago but that it had not actually been used for goods in Class 32, either by the proprietor or by a third party with his permission. Silberquelle stated that Maselli wished only to promote the sales of its textile goods but not to open up or secure a market for goods in Class 32. In addition, Silberquelle asserted that Maselli made only token use of its mark.

14. It is clear from the order from the referring court that the Cancellation Division of the Austrian Patents and Trade Marks Office granted the application of Silberquelle and cancelled the trade mark in respect of goods in Class 32 (non-alcoholic drinks with the exception of alcohol-free beer) with effect from 2 August 1997.

15. In the main proceedings, the Oberster Patent- und Markensenat is seised of the appeal brought by Maselli against that decision, which Maselli claims is invalid on the grounds that sufficient and genuine use has been made of the mark since 1999, albeit, it admits, with a 'secondary function'.

16. Silberquelle, on the other hand, argues that the decision of the Austrian Patents and Trade Marks Office to cancel the trade mark should be upheld.

17. In those circumstances, the Oberster Patent- und Markensenat took the view that the resolution of the dispute turns on the interpretation of Directive 89/104 and it therefore decided to refer the following question to the Court of Justice of the European Communities for a preliminary ruling under Article 234 EC:

'Are Articles 10(1) and 12(1) of... Directive 89/104/EEC … to be interpreted as meaning that a trade mark is being put to genuine use if it is used for goods (here: alcohol-free drinks) which the proprietor of the trade mark gives, free of charge, to purchasers of his other goods (here: textiles) after conclusion of the purchase contract?'

IV — The procedure before the Court of Justice

18. The order for reference was received at the Registry of the Court of Justice on 14 November 2007.

19. Written observations were submitted, within the period laid down in Article 23 of the Statute of the Court of Justice, by

Silberquelle, Maselli, the Portuguese Government, the Czech Government and the Commission, and oral argument was presented by both undertakings and the Commission at the hearing on 23 October 2008.

V — Analysis of the question referred for a preliminary ruling

A — *Summary*

20. The Oberster Patent- und Markensenat seeks a definition of the requirement of use, under Directive 89/104, from a qualitative rather than a quantitative point of view, in order to determine whether the type of use which Maselli made of the trade mark WELLNESS-DRINK satisfies the requirements of the Community legislation, not by virtue of the extent to which it is present on the market but rather as a result of its connection with the functions of a trade mark.

21. The Court of Justice has laid down a number of criteria concerning the necessary quantity of a product on the market for use of a mark to be considered genuine, holding that use need not be quantatively significant, [7] and accepting that minimal use may be sufficient on condition that such a small amount of use is deemed to be justified in the economic sector concerned for the purpose of preserving or creating market share for the goods or services protected by the mark. [8]

22. However, with regard to the qualitative aspects of genuine use, that is, its essential defining characteristics, the Court has assigned to it — in accordance with the trade mark's essential function of guaranteeing the identity of the origin of the goods or services for which it is registered — the aim of creating or preserving an outlet for those goods or services, and held genuine use does not include token use for the sole purpose of preserving the rights conferred by the registration. [9]

23. Accordingly, the central issue in this reference for a preliminary ruling concerns the qualitative criteria laid down by the Court, and, in the observations submitted in these proceedings, the two conflicting approaches referred to above may be seen. Without prejudice to a more detailed discussion later, those approaches may be summarised as follows: the first, favoured by Maselli and the Czech Government, draws attention to the essential function of a trade mark as the conclusive criterion for finding in favour of the owner of the WELLNESS mark; in the

7 — Case C-40/01 *Ansul* [2003] ECR I-2439, paragraph 39.

8 — Order of the Court in Case C-259/02 *La Mer Technology* [2004] ECR I-1159, paragraph 21.

9 — *Ansul*, paragraph 43, and my Opinion in that case, points 52 to 58.

second approach, which is advocated by the other parties to these proceedings, the important criterion is the capture of new market shares or the preservation of market shares previously obtained.

24. Consequently, the question referred by the Oberster Patent- und Markensenat calls for a determination of whether one of those criteria takes precedence and for clarification of the case-law of the Court which I outlined very briefly in the opening points of this Opinion.

25. It is appropriate to point out that the Court has also held that the assessment of quantitative and qualitative elements, a task which falls to the national court, must be based on all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly the kinds of use regarded as warranted in the particular economic sector to maintain or create a share in the market for the goods or services protected by the intellectual property right, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark. [10]

10 — *Ansul*, paragraph 43, and order in *La Mer Technology*, paragraph 22.

B — *Positions adopted and assessment*

1. Arguments of the parties to the preliminary-ruling proceedings

26. As I observed in point 22 of this Opinion, the observations of those who have participated in the proceedings may be placed into two groups, according to whether they propose a negative or an affirmative reply to the referring court.

27. Among those who contend that use of the WELLNESS mark in the circumstances described cannot be regarded as genuine, Silberquelle bases its claim on a comparative analysis of Articles 5 and 10 of Directive 89/104, stating that the latter article does not mention advertising as a method of using a trade mark. Silberquelle also puts forward an *a contrario* argument in support of its contention, to the effect that by repeatedly emphasising, in *Ansul*, the requirement that use of a trade mark must increase the presence on the market of goods which bear that mark, the Court was tacitly denying that there is genuine use where goods bearing a particular mark increase the sales of other goods.

28. The Portuguese Government, which is also part of that group, merely points out that the activities in which the WELLNESS drink was acquired as a free gift following the purchase of textiles did not create any market share for the soft drink and that consumers only obtained the drink by indirect means.

29. The Commission, also proposing a negative reply, takes the view that usage of the mark must be assessed in respect of each class of product or service.

30. Maselli and the Czech Government, who advocate an affirmative reply, both maintain that the distribution of the drink without charge leads to that product indirectly entering the relevant market, that is the market for non-alcoholic drinks, thereby promoting the capture of market shares.

31. Maselli maintains that, in this case, there is compliance with the principle of use in accordance with the function of the mark as a guarantee of origin, since it states that the soft drink comes from the same undertaking as the clothing. Maselli is concerned about the damage it would suffer if it is not regarded as putting the mark to genuine use, since the revocation and subsequent registration of its mark by a competitor would require it to amend its advertising strategy, making a mockery of its marketing system in general.

32. In addition to the argument relating to the main function of trade marks, the Czech Government contends that genuine use means in practice that consumers associate the WELLNESS clothing which they purchase with the soft drink which is given to them, and, in its view, that link is sufficient for a finding that there is genuine use within the meaning of Directive 89/104 and the case-law of the Court.

2. Assessment

33. To my mind, it is essential in this case to interpret the *Ansul* judgment in the light of the aims pursued by the Directive. [11] However, I will state here and now that, for the reasons set out below, I do not agree with the interpretation of Maselli and the Czech Government and that, instead, I favour the approach put forward by the first group of parties referred to above, although I will qualify their arguments.

11 — Judgment of the Court is pending in another reference for a preliminary ruling on Article 12(1) of Directive 89/104. However, it may be deduced from the Opinion of Advocate General Mazák, delivered on 18 September 2008, in which he differentiates between external and internal use of a sign (in particular, points 29 and 30), that the facts are substantially different from those of the present reference for a preliminary ruling.

(a) The view based on the function of the trade mark as a guarantee of origin

34. It is appropriate to draw attention in my interpretation to a point which is not rendered any less fundamental by the fact that it is well known, namely that Directive 89/104 governs certain aspects of the market and is closely linked to competition. [12] The Directive contains two categories of provisions, as follows: provisions relating to the organisation of national trade mark registrations (Articles 2, 3, 4 and 10 to 14) and provisions relating to the rights conferred by registration of a trade mark (Articles 5 to 9).

35. The function of a trade mark as a guarantee of origin, which Maselli and the Czech Government single out as the key to the resolution of the dispute, [13] is connected with the second category of provisions, and, in particular, as far as Directive 89/104 is concerned, with Articles 4(1) and 5(1) which are closely linked to the likelihood of confusion, [14] that is, to the risk that the public may believe that the goods or services in question come from the same undertaking or from economically-linked undertakings. [15]

36. According to the case-law of the Court on the obligation to put signs to genuine use, such use must be 'in accordance with [the] essential function [of the trade mark], which is to guarantee the identity of the origin of the goods or services for which it is registered'. [16]

37. However, that extract from the *Ansul* judgment is not its essential core.

38. First, from a grammatical point of view, by using the term 'in accordance', [17] the Court suggests that the use of a mark is always geared to its essential function, making that premiss secondary to the main requirement, which — as the Court goes on to state in the *Ansul* judgment — is that a mark must be used 'in order to create or preserve an outlet for those goods or services'.

39. Second, the *Ansul* judgment provides a significant clue to interpretation when the Court states that the essential function of a trade mark is to enable, without any possibility of confusion, a particular product or service to be distinguished from others which have another origin, [18] which draws attention to

12 — First recital in the preamble to Directive 89/104.

13 — The repeated references at the hearing by Maselli's representative to Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273 do not conceal the lack of a connection between that case and the main proceedings in the present reference for a preliminary ruling.

14 — Hildebrandt, U., *Marken und andere Kennzeichen — Einführung in die Praxis,* Ed. Carl Heymanns, Berlin, 2006, p. 173.

15 — Case C-39/97 *Canon* [1998] ECR I-5507, paragraphs 29 and 30; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17; and Case C-120/04 *Medion* [2005] ECR I-8551, paragraph 26.

16 — *Ansul*, paragraph 43.

17 — My interpretation is borne out by other language versions: 'conformément à sa fonction essentielle', in French; 'entsprechend ihrer Hauptfunktion', in German; 'in accordance with its essential function', in English.

18 — *Ansul*, paragraph 36.

the connection between the function as a guarantee of origin and the likelihood of confusion.

40. In that regard, Maselli and the Czech Government are guilty of an oversight in their reasoning since, had they considered in more detail their view on the importance of using a mark in accordance with its essential function, they would have realised that the likelihood of confusion only arises where a consumer discovers similar marks at the crucial moment when he chooses between goods and their marks, particularly in the case of goods like soft drinks, the objective characteristics of which do not mean that the average consumer purchases it only after a careful examination. [19]

41. Since, according to the order for reference, the drinks which Maselli hands out to its customers in the textile sector are not made available to the public in the usual soft-drink retail establishments, any comparison is impossible and, therefore, any possibility of confusion on the part of those customers is avoided.

42. With regard to the association between the sign and the reputation which its clothing brand has begun to forge for itself, Maselli complains that Silberquelle would benefit from that reputation if the WELLNESS trade mark were cancelled and re-registered in the name of that company. However, in my view, that would be the price which the current proprietor of the mark would have to pay for its strategic error of remaining outside the relevant market, that is, the soft-drinks market, since the battle for market share takes place in that sector, which is the only place where competitors are required to respect their rivals' trade marks. It would be unjust to require commercial competitors to research markets that are unconnected with the relevant market, which comprises the categories of goods designated in the register and is the only market in respect of which they have a duty not to infringe the trade mark rights of others, with the exception of well-known marks which, in any event, are not pertinent to the present proceedings.

43. Contrary to those requirements, the interpretation proposed by Maselli is tantamount to adapting trade mark law to suit the strategies adopted by companies and to ignoring the fact that those companies must comply with the requirements laid down in the provisions governing that field.

(b) Importance of using the mark in the reference market

44. In any event, the position taken by Maselli and the Czech Government is not compatible

19 — Case C-361/04 P *Ruiz-Picasso and Others* v *OHIM* [2006] ECR I-643, paragraph 40, interpreted *a contrario*.

with an interpretation of the scheme of Directive 89/104. I have already explained in point 33 of this Opinion the two main types of provisions contained in the Directive; in that connection, the articles on which the present reference for a preliminary ruling turns are aimed at organising the harmonisation of national trade mark registrations. Therefore, those articles do not relate to the exercise of the rights derived from trade marks but rather to the guiding principles of registration in the sphere of the market, with special attention to the safeguarding of competition.

45. By explaining the obligation to provide evidence of the use of trade marks by reference to the aim of reducing the total number of marks registered in the Community and, consequently, the number of conflicts which may arise, the eighth recital in the preamble to Directive 89/104 draws attention to its objective of protecting freedom of competition in the markets for goods and services. Clearly, the Directive also seeks to speed up or, at least, reduce the work of trade mark offices to prevent them from becoming trade mark cemeteries, [20] but it genuinely reflects the reality of the market by providing competitors with the opportunity to apply to the registry in order to be certain that a sign may be registered, an act against which a trade mark corpse — an identical or very similar sign which is not alive on the market — may not be invoked in legal proceedings.

46. The fact that responsibility for 'cleaning up' registration falls to rival undertakings reinforces the central role of competition in bringing trade mark offices into line with the economic situation. Just as the owner of a mark is required to put it to genuine use in exchange for his intellectual property right, so a competitor is required to activate the mechanism for cleaning up registration, namely revocation, in order to register the mark in his name. Accordingly, the administrators who run trade mark offices must act in a neutral manner.

47. The transparency which must prevail in the market explains why competitors have the capacity to remove or cancel inactive registrations which do not fulfil the essential function of trade marks of identifying goods, since, in the economic sphere, if the goods concerned are not for sale, the mark does not generate any type of benefit. [21]

48. Accordingly, the basic premiss means that a trade mark proprietor must place his goods bearing the mark on the relevant market for those goods, [22] which, in the main proceedings, is the non-alcoholic drinks

20 — According to Lobato, M., *Comentario a la Ley 17/2001, de marcas*, Ed. Thomson-Civitas, Madrid, 2007, p. 650, that well-known metaphor is attributable to Francescehlli.

21 — Landes, W.M./Posner, R.A., *La estructura económica del Derecho de propiedad intelectual e industrial*, translated by V.M. Sánchez Álvarez, Ed. Fundación Cultural del Notariado, Madrid, 2006, p. 238.

22 — Fernández-Nóvoa, C., *Tratado sobre Derecho de marcas*, Ed. Marcial Pons, Madrid, 2001, p. 467.

market; if trade mark proprietors did not act in that manner, their goods would not be distinguishable from others. The consumer receives the WELLNESS drink as a free gift when he purchases clothing and, as such, the consumer does not perform any conscious act of acquiring the bottled drink by comparing it with other similar, substitutable ones; it follows that the trade mark is not strengthened vis-à-vis competitors' marks because of the customer's preference.

49. In those circumstances, the trade mark for the soft drink remains outside the reference market and, therefore, it does not compete with other marks, and so there is no impediment to the appropriation of the mark by third parties, [23] since its use on the bottles is a mere tool, a nice gesture to increase the consumer's loyalty to the WELLNESS mark in the clothing sector. However, the soft drinks market is unaware of Maselli's product and its mark. It appears unlikely that someone who, as a result of buying WELLNESS clothes, takes a liking to the drink, would be prepared to spend money on more clothes which they do not need simply to receive the drink. However, even if someone were to act in that way, their purchases would not increase the market share of the trade mark in the soft drinks market, although it would do so on the clothing market, which fits perfectly with the role Maselli assigned to the drink: as an advertisement to publicise its core business, that is, fashion.

23 — With regard to German law, see Bous, U.,'§ 26 MarkenG', in Ekey, F./Klippel, D., *Heidelberger Kommentar zum Markenrecht,* Ed. C.F. Müller, Heidelberg, 2003, p. 391.

(c) The use of trade marks in advertising

50. Those latter considerations lead me, lastly, to consider the views put forward in the observations submitted to the Court concerning the use of trade marks in advertising, in order to determine whether the genuine use referred to in Articles 10 and 12 of Directive 89/104 has taken place.

51. Academic writers [24] accept use in advertising as genuine use of a trade mark. The Court has also held that signs used in advertising campaigns for goods which are already marketed come under the classification of genuine use, as do signs that relate to goods and services which are about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of such campaigns. [25]

52. However, neither academic writers nor the Court have taken a view on the abstract use of a trade mark, in other words, where its use has no connection with the market for the goods on which it is fixed, as is the case with the WELLNESS-DRINK mark. It has been argued that merely placing a registered trade

24 — Ströbele, P., '§ 26 Benutzung der Marke', in Ströbele, P./Hacker, F., *Markengesetz,* 8th ed., Ed. Carl Heymanns, Cologne, 2006, p. 999; Fernández-Nóvoa, C., op. cit., p. 469 et seq.; and, with regard to the Community trade mark, von Mühlendahl, A./Ohlgart, D., *Die Gemeinschaftsmarke,* I C. H. Beck/Verlag Stämpfli + Cie AG, Berne/Munich, 1998, p. 67.

25 — *Ansul*, paragraph 37; order in *La Mer Technology*, paragraph 19.

mark on promotional items given as a gift, such as pens and T-shirts, does not satisfy the requirements of genuine use on the grounds that it has no connection with the product for which the application for trade mark protection was made. [26]

53. Although the situation described is reasonably similar to the one in the main proceedings, it is possible that the guidance it provides may not be fully transposable to the present case, since the protection afforded by the mark in this case extends to the category of goods handed out as a free gift. However, I am largely persuaded by the argument, to the extent that I believe that it is applicable to the present case because, in the absence of a link with the market, as I explained above, the bottles of soft drink bearing the WELLNESS-DRINK mark become an advertisement which is completely unconnected with the soft drinks market.

54. Moreover, in the context of advertising, I do not accept the argument of Maselli to the effect that, if its mark were revoked, its advertising of the WELLNESS mark would benefit a competitor who would then register the mark in its own name. Even if that were so, that outcome would be more logical than refusing revocation because the undertaking has advertised products which it does not subsequently sell, since, in that case, even the undertaking itself would not benefit from its efforts to publicise its soft drink, in the light of its absence from the non-alcoholic drinks market.

55. Upholding the argument put forward by Maselli would, therefore, be tantamount to allowing the obstructive use of trade marks, which would have the same effect as the purely token use of trade marks, since marks would exist which had no presence on the relevant market, leading to the unjustified blocking of trade mark registrations.

56. In summary, a trade mark which does not compete on the market for the goods for which it was registered, the only place where it would carry out its function as a guarantee of origin in order to distinguish the products which bear the mark from those of other undertakings, is not put to genuine use within the meaning of Directive 89/104, even where the goods bearing the mark are an advertisement to promote the sales of other products bearing the same mark.

57. Only a negative reply to the question referred to the Court is appropriate, since the protection of trade marks does not consist of merely guaranteeing the rights deriving from registration but rather of safeguarding positions on the market, and therefore the use obligation is the most appropriate method of resolving conflicts without economic justification. [27]

26 — Bous, U., op. cit., p. 389.

27 — Von Mühlendahl, A./Ohlgart, D., op. cit., p. 61.

VI — Conclusion

58. In the light of the foregoing considerations, I propose that the Court should reply to the questions referred for a preliminary ruling by the Oberster Patent- und Markensenat, declaring that:

Articles 10(1) and 12(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks are to be interpreted as meaning that a trade mark is not put to genuine use if it is used for non-alcoholic drinks which the proprietor of the trade mark gives free of charge to his customers when they purchase his textile goods.