OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 7 March 2006 [1]

I — Introduction

1. The Landericht Nürnberg-Fürth (regional court with jurisdiction in civil and criminal matters) wishes to know whether miniature models which reproduce the cars of a well-known German manufacturer infringe the trade mark right protected by Article 5(1)(a) of Directive 89/104/EEC [2] by applying the corresponding logo to the radiator grille. In the alternative, it inquires about the derogation in Article 6(1)(b) of that Community provision.

2. The doubt arises because the sign at issue, which was originally registered for real motor vehicles, was subsequently extended to apply to toys. The referring court is therefore examining the scope of the protection afforded to the emblem of the car-manufacturing company in respect of its use on toy cars by third parties.

3. In his Opinion in *OHIM* v *Zapf Creation*, [3] Advocate General Jacobs rightly observed that 'it is an essential characteristic of many toys [...] that they represent something'. I would add that the essence of a toy is that it recreates objects and events in world history in a form acceptable to the mind of a child or of anyone needing a more imaginative contact with his surroundings, transcending the hardship and suffering which are sometimes part of human existence. Before the Second World War, an Anglo-American expedition discovered, in the Caldean city of Ur, the tomb of a child who died four thousand years B.C.; also in the tomb was a little silver boat. So, more than six thousand years ago, there were traces of those artefacts which have accompanied the dreams of people setting out on the adventure of life. In this question referred for a preliminary ruling, it is therefore necessary to consider whether a replica of a trade mark also

1 — Original language: Spanish.

2 — 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).

3 — Delivered on 19 February 2004 in Case C-498/01 P *OHIM* v *Zapf Creation* [2004] ECR I-11349, point 28.

registered for toys, which imitate reality, infringes the rights of the proprietor of the trade mark or whether it may be regarded as one of the restrictions of those rights.

II — Legislative framework

4. In order to decide the case, the referring court requests the interpretation of Article 5(1)(a) and Article 6(1)(b) of Directive 89/104, equivalent to Article 14(2)(1) and Article 23(2) of the Markengesetz [4] (German Trade Mark Act) which therefore need not be reproduced here.

5. Article 5(1)(a) of the Directive, under the heading 'Rights conferred by a trade mark', provides:

'1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

...'

6. Under the heading 'Limitation of the effects of a trade mark', Article 6(1)(b) of the Directive states:

'1. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade,

(a) ...

(b) indications 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 goods or services;

...

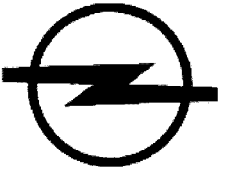
4 — Gesetz über den Schutz von Marken und sonstigen Kennzeichen (MarkenG) of 25 October 1994 (BGBl. I p. 3082).

provided he uses them in accordance with honest practices in industrial or commercial matters.

...'

III — The facts in the main action and the questions referred for a preliminary ruling

7. The plaintiff in the main proceedings, Adam Opel AG ('Opel'), is one of the largest companies in the European automobile industry, and one of the most well-known. [5] It has used the so-called 'Opel Blitz' as its logo for many years and is proprietor of the figurative Trade Mark No 1157264, reproduced below:



8. This emblem was entered in the German register on 10 April 1990 for various products and also for 'toys'. The plaintiff therefore uses the trade mark for model cars, although it manufactures them through licensees and also sells them as part of its accessories line.

9. AUTEC AG, the defendant before the Landgericht Nürnberg-Fürth, produces remote-controlled scale model cars and markets them under the trade mark 'Cartronic'.

10. In early 2004, Opel AG discovered that prototypes of remote-controlled cars in a scale of 1:24 were being sold on the German retail market for EUR 9 each. They included a replica of the Opel Astra V8 Coupe on which the protected trade mark had been applied to the radiator grille in the same way as on the original model of that vehicle.

11. It is apparent from the order for reference that the front of the user instructions provided with the packaging is clearly marked 'cartronic®' and the rear refers to 'AUTEC® AG' and 'Autec AG Daimler Strasse 61 D-90441 Nürnberg'. Similarly, the transmitter for the car is clearly marked 'cartronic®' on its front side and its underside bears a sticker with the designation 'AUTEC® AG D 90441 Nürnberg'.

5 — Details of the volume of sales given in the observations of Opel AG's representative reveal the company's financial strength: in 2004 it sold 351 955 vehicles on the German market and more than a million on the European market; for the same year, its market share in Germany was 10.24% and the level of brand recognition was about 96%.

12. Opel AG considers that the presence of its logo on the products of the other party to the proceedings infringes its industrial property rights. It claims that the defendant is using it in the same way for identical goods, namely toy cars, and therefore requests the following form of order: that the defendant be ordered to pay a fine of up to EUR 250 000.00, or alternatively to serve a term of imprisonment, and to remove the sign in question from commercial products, to pay compensation for all the damage suffered, and that it be prohibited from selling scale replicas of vehicles with that sign. It also requests that all the miniature cars marked with its logo be destroyed. [6]

13. The defendant in the main proceedings and the party intervening on its behalf, the German toy industry association (Deutscher Verband der Spielwaren-Industrie e.V.), contend that Opel AG's claims should be dismissed.

14. Since the national court considers that a decision in this case depends on the interpretation of the aforementioned provisions, it has decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the use of a trade mark registered also for "toys" constitute use as a trade mark for the purposes of Article 5(1)(a) of Directive 89/104, if the manufacturer of a toy model car copies a real car in a reduced scale, including the corresponding trade mark, and markets it?

(2) If the answer is in the affirmative,

Is the type of use of the trade mark described in Question 1 an indication of the kind or quality of the model car within the meaning of Article 6(1)(b) of Directive 89/104?

(3) If the answer is in the affirmative,

In cases of this type what are the decisive criteria to be applied in assessing whether the use of the trade mark corresponds to honest practices in industrial or commercial matters?

6 — It is easier to gauge the scope of these claims in the light of the figures adduced as proof by Opel AG at the hearing; it stated that it works with 23 licensees, who cover 85% of production, with sales of 600 000 products in 2004, and about 760 000 in 2005.

Is this in particular the case if the manufacturer of the model car applies to the packaging, and to an accessory required in order to use the toy, a mark recognisable to the trade as its own trade mark together with its company name and the address of its seat?'

IV — Procedure before the Court of Justice

15. The order for reference was lodged at the Registry of the Court of Justice on 8 February 2005.

16. Written observations were submitted, within the period prescribed for the purpose by Article 20 of the EC Statute of the Court of Justice, by Opel AG, AUTEC AG, Deutscher Verband der Spielwaren-Industrie e.V., the French and United Kingdom Governments and the Commission of the European Communities.

17. The parties to the main proceedings, the intervener, the representatives of the United Kingdom Government and of the Commission presented oral argument at the hearing on 2 February 2006.

V — Analysis of the questions referred for a preliminary ruling

A — *Question 1*

18. By its first question, the Landericht Nürnberg-Fürth wishes to know whether, in the circumstances of the main action, the Opel AG logo has been used 'as a trade mark', in accordance with the case-law of the Court of Justice. It is therefore necessary to analyse in detail some opinions and judgments in the light of which the facts in the case must be considered.

19. Academic lawyers are unanimous in describing the rights of the owner of a registered sign as 'exclusive rights', [7] which allow him to prohibit third parties from using the trade mark without his consent.

20. The interpretation of Article 5(1)(a) of Directive 89/104 starts in the judgment in

7 — In German law, on Article 14(1) of the Markengesetz, Ekey, F.L., *Markenrecht*, C.F. Müller Verlag, Heidelberg, 2003, p. 170, point 2; in Spanish and Community law, Fernández Nóvoa, C., *Tratado sobre derecho de marcas*, Ed. Marcial Pons, Madrid/Barcelona, 2004, p. 433; on Article 9 of Regulation No 40/94 on the Community trade mark [Council Regulation of 20 December 1993 (OJ 1994, L 11, p. 1), amended by Council Regulation (EC) No 3288/94 of 22 December 1994 for the implementation of the agreements concluded in the framework of the Uruguay Round (OJ 1994 L 349, p. 83), and by Council Regulation (EC) No 422/2004 of 19 February 2004 (OJ 2004 L 70, p. 1)], corresponding to Article 5 of Directive 89/104, Von Mühlendahl, A. and Ohlgart, D.C., *Die Gemeinschaftsmarke*, Verlag C.H. Beck and Verlag Stämpfli + Cie AG, Berne and Munich, 1998, pp. 45 et seq.

BMW,[8] paragraph 38 of which defined the scope of the provision as depending on whether the emblem was used for the purpose of distinguishing the goods or services in question as originating from a particular undertaking, that is to say, *as a trade mark*, or whether it was used for other purposes.

21. Accordingly, an examination of the case-law of the Court of Justice on the matter must focus on those two aspects: the use of the sign as a trade mark and its use for other purposes.

22. In the observations submitted to the Court of Justice the facts are not disputed and may therefore be regarded as established for the purposes of the exercise of the *ius prohibendi* by the holder of the industrial property right to which Article 5(1) of Directive 89/104 refers. Furthermore, it is for the national court to ascertain the facts. Something similar occurs with 'goods', within the meaning of that provision, since in the main proceedings there is a clear reference to manufactured articles.[9]

1. The use of a sign as a registered trade mark

23. Since the aforementioned judgment in *BMW*, the contours of the exclusive right conferred by Article 5(1) of Directive 89/104 have become more distinct in the light of subsequent judgments.

24. The *Arsenal Football Club* case is of paramount importance in this context. In my Opinion in that case, I pointed out that, when the Directive says that protection is absolute in the case of identity, it must be understood as meaning that, in light of the aim and the purpose of trade mark law, 'absolute' means that protection is afforded to the proprietor, irrespective of whether there is a likelihood of confusion, because in such situations there is a presumption that there is such a likelihood, and not, on the contrary, that protection is accorded to the proprietor erga omnes and in all circumstances. Article 5(1)(a) therefore creates a presumption *iuris tantum*, where there is identity between the products.[10]

25. Similarly, the judgments of the Court of Justice, taking a teleological approach to the provisions at issue, have held that the exclusive right under Article 5(1)(a) of Directive 89/104 was conferred in order to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions, in particular the function of guaranteeing to consumers the origin of the goods.[11]

8 — Case C-63/97 [1999] ECR I-905.

9 — Following the methodological approach of the judgment in Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273, paragraphs 40 and 41.

10 — Points 51 and 52 of the Opinion.

11 — Paragraph 51 of the judgment in the *Arsenal Football Club* case.

26. According to settled case-law, the essential function of a trade mark is to guarantee the identity of the origin of the product or service to the final purchaser by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin, confirming that they have been manufactured or provided by a single undertaking which is responsible for their quality. [12]

27. In the main proceedings it is clear that the toy models bear the Opel emblem on the bodywork, regardless of whether they have been manufactured by one of the undertaking's licensees or by a third party, and that the likeness is such that it hints at the identity of goods to which the provision at issue refers. However, it is for the national court to make that assessment, as I pointed out in the Opinion in the *Arsenal Football Club* case. [13]

28. Finally, the judgment in that case indicated the limits of the exercise of the powers conferred by Article 5(1) of Directive 89/104 on the proprietor of a sign, denying him the right to prohibit the use of an identical sign if that use cannot affect his own interests as proprietor of the mark in the terms set out. Thus certain uses for purely descriptive purposes are excluded from the scope of the provision. [14]

29. The judgment in *Anheuser-Busch* [15] indicated the means of establishing possible damage, indicating that this is the case when the use of that sign allegedly made by the third party is such as to create the impression that there is a material link in trade between the third party's goods and the proprietor of the trade mark. It must be established whether the consumers targeted interpret the sign, as it is used by the third party, as designating the undertaking which is the proprietor of the trade mark. [16] Immediately afterwards, it reiterates that the national court must establish whether that is the case in the light of the specific circumstances of the main case. [17]

2. Uses unrelated to the functions proper to trade marks

30. The use of a sign in accordance with the rules set out in the judgment in *BMW*, cited above, is the only one, in the system of the Directive, which escapes the powers conferred on the proprietor of a trade mark by Article 5(1)(a) of Directive 89/104.

12 — Judgments inter alia in Case 102/77 *Hoffmann La Roche* [1978] ECR 1139, paragraph 7; Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 30; and Case C-40/01 *Ansul* [2003] ECR I-2439), paragraph 43.

13 — Points 53 and 54.

14 — Paragraph 54 of the judgment in the *Arsenal Football Club* case.

15 — Case C-245/02 *Anheuser-Busch* [2004] ECR I-10989.

16 — Paragraph 60 of the judgment cited in the previous footnote, which raises the assessments made by the Court of Justice in paragraphs 56 and 57 of the *Arsenal Football Club* case to the level of a general statement.

17 — Paragraph 61.

31. The exceptions provided by Article 6, in particular those in Article 6(1)(b), apply when the registered emblem fulfils the function typical of the trade mark, but, for reasons of public interest, third parties are authorised, in certain circumstances, to enjoy their advantages.

32. According to the case-law, references made to trade marks for purely descriptive purposes do not constitute use as a trade mark since, in such situations, there is no infringement of any of the interests which Article 5(1) is intended to protect. [18]

33. In my Opinion in the *Arsenal Football Club* case, I opted for an approach which included non-commercial uses, amongst which I listed private uses, the use of symbols which do not meet the conditions for registration, and uses for educational purposes. [19] Previously, however, when I stated that it was for the national court to specify the moment at which a trade mark is used as such, I pointed out the need to consider other factors, particularly the nature of the goods in question, the structure of the market and the position in the market of the proprietor of the trade mark. [20]

34. To sum up, the uses unrelated to the functions proper to trade marks constitute an open category, which must be filled casuistically and gradually, so that, unlike the situation under Article 6(1) of Directive 89/104, they do not require a restrictive interpretation because they are not exceptions to but limits on the enjoyment of the *ius prohibendi*.

3. Connection with the facts in the main proceedings

35. Once the relevant case-law has been outlined, the task of providing the referring court with a helpful reply must focus on the search for uniform guidelines appropriate to the factual circumstances surrounding the questions referred for a preliminary ruling.

36. In the present case, the application of the 'Opel blitz' logo on the toys is the kind of use which is unrelated to the function of the trade mark for two sets of reasons:

18 — Judgment in Case C-2/00 *Hölterhoff* [2002] ECR I-4187, paragraph 16. The case related to a commercial transaction in which Mr Hölterhoff offered to sell a customer some semiprecious and ornamental stones, with cuts which he called 'Spirit Sun' and 'Context Cut', trade marks registered in the name of Mr Freiesleben. The customer ordered two garnets with the Spirit Sun cut from Mr Hölterhoff and, although on the delivery note and the invoice there was no reference to those trade marks, their proprietor brought proceedings against Mr Hölterhoff.

19 — Points 55 to 64 of the Opinion in the *Arsenal Football Club* case.

20 — Point 53 of the Opinion in the *Arsenal Football Club* case.

a) The nature of the product at issue

37. Since 1898, it has been usual in the toy industry to manufacture and market small-scale models of real cars, which also happens with other means of locomotion (trains, planes and ships). The little cars have become the 'Proust's madeleine' of adults reliving their childhood experiences in short trousers, [21] by indulging their fantasies.

38. Although in the beginning it was sought to reproduce reality in miniature for the benefit of a very specific public, children, to bring the adult world closer to them, in a form adapted to their size, [22] as time went by, the circle of persons for whom they were intended widened to include the adult collector. This latter sector was probably more demanding as regards the quality of the copy, requiring it to be closer to the original. Nowadays, therefore, this type of article is not designed without copying not only the most significant characteristics but also the most trivial.

39. The Commission rightly asserts that the manufacturer of these replicas satisfies the customer's wishes regarding a faithful imitation of the original only if he is allowed to copy it in every detail, including the indications which appear on the real car, as, for example, in its catalogues.

40. However, the motor industry only recently became aware of the economic potential of those objects through merchandising, using them as an advertising ploy to win customer loyalty, as Opel AG acknowledges and as may be inferred, in the case of this undertaking, from the fact that its logo was not extended to toys until 1990, as is stated in its own observations. It is therefore hard to imagine that the public automatically associates the cars' emblem with the manufacturer.

41. Similarly, as the Commission points out, there is the risk of a monopoly in the miniatures market, the consequence of an excessively strict interpretation of the scope of the *ius prohibendi,* insofar as licensees would have an exclusive right to imitate the real cars in minute detail, and the freedom of establishment of their competitors would be unjustifiably restricted.

21 — Defraudat, S., *Majorette, ma voiture miniature préférée*, ed. Du May, Boulogne-Villancourt, p. 8.

22 — The psychology of children does not always take the same path; there are many examples of children who follow their imagination rather than emulate their elders; Ana María Matute, in her tale 'La rama seca' (The withered branch), Historias de la Artámila, Ediciones Destino, Barcelona, 1993, pp. 123 et seq., gives a touching account of how a little girl plays with her 'doll' whom she calls 'Pipa', which is only a 'little withered branch' wrapped in a piece of calico tied with a cord (p. 125). The child falls ill and has to stay in bed without her doll, which has been irremediably lost. When her neighbour Doña Clementina brings her 'a doll with curly hair and round eyes' she cries in disappointment, 'But it isn't Pipa! It isn't Pipa!' (p. 129).

b) The perception of the consumer

42. It has already been shown that, according to the judgment in *Anheuser-Busch,* a finding that harm may have been caused by the use allegedly made by the third party depends on whether that use is such as to create the impression that there is a material link in trade between the third party's goods and the undertaking which is the proprietor of the trade mark. It must be established whether the consumers targeted interpret the sign as designating the undertaking which has registered it.

43. The referring court has examined the connection between the Opel emblem placed on the models and the original trade mark, taking the view that the public recognises the toy as a model of a real Opel car. That is to say, it connects the scale prototype with the real vehicle, not with the models manufactured for Opel AG by its licensees.

44. I agree with the Commission that it cannot be inferred from the above that, in the main proceedings, the trade mark is infringed, which would happen only if the consumer were to associate the Opel logo on the miniatures manufactured by third parties with the logo applied to the models marketed by Opel AG. In any event, the fact that the user connects the trade mark of the toy with the trade mark of the original is the inevitable result of the accurate reproduction which it is sought to achieve in order to win over the public, by fulfilling its wishes. [23]

45. Moreover, I consider that the model and its original do not belong to the same category of goods; therefore, they are not identical products for the purposes of Article 5(1)(a) of Directive 89/104.

46. In the light of the reasons stated above, I propose that the Court of Justice give the following reply to the first question referred for a preliminary ruling:

'The use for toys of a registered sign does not constitute use as a trade mark within the meaning of Article 5(1)(a) of Directive 89/104, where the manufacturer of a toy model car copies a real car in a reduced scale, including the proprietor's trade mark, and markets it.'

23 — In his tale 'The Little Tin Soldier', Hans-Christian Andersen describes the consumer's expectations of replicas and his disappointment when they are not perfect, when he writes: 'When [...] he finally had the box in his hands, he ran excitedly up to his room and, closing the door behind him, opened it almost reverently. His heart leaped! Lying in green tissue-paper were little soldiers in smart, shiny uniforms, their rifles on their shoulders. But, oh what a pity! Among those spruce and smiling soldiers there was one — just one — with only one leg' (free translation).

B — *Questions 2 and 3*

47. Questions 2 and 3 have been raised only in the event of an affirmative reply to Question 1, so that, in the light of what I have suggested, it would not be necessary to consider them. However, I shall make a few observations on them, in the alternative and merely hypothetically.

48. I therefore start from the assumption that, in the main proceedings, Opel AG's trade mark right has been infringed and that consideration is being given as to whether that infringement might fall within the derogation under Article 6(1)(b) of Directive 89/04.

49. The Landgericht Nürnberg-Fürth seems to agree that the use of the trade mark in question should be regarded as an indication concerning only kind or quality, not of 'other characteristics', as referred to in the aforementioned article.

50. This provision seeks a balance between the monopolistic interests of the holder of the industrial property rights and the interests of trade, by protecting the freedom to use concepts to describe goods and services. [24] However, as the Commission rightly points out, its nature as an exception to Article 5 requires that it be interpreted restrictively, so it is difficult to allow the reproduction of the Opel sign on the bodywork of the miniature cars to be described as an indication concerning kind or quality.

51. However, since the activity of creating models consists basically in making an accurate and detailed copy of reality, it may be considered that the emblem of the trade mark is an inherent part of the original which, in order for the consumer to be better informed and for all operators in the sector to compete on the same terms, [25] is one of those other characteristics to which Article 6(1)(b) of Directive 89/104 refers.

52. This solution means that each scale model of a vehicle is a kind of product, within which there are several offers.

53. Once it is accepted that the facts in the main action fall within the scope of Article 6(1)(b) of Directive 89/104, it is necessary to find the unknown quantity in Question 3, which is whether the Opel trade mark has

24 — On Article 12(1)(a) of Regulation (EC) No 40/94 on the Community trade mark, Von Mühlendahl, A. and Ohlgart, D.C., op cit., p. 54.

25 — Fernández-Nóvoa, C., op. cit., p. 459, draws attention to the fact that the aim of the provision referred to is to protect these interests.

been used in accordance with honest practices in industrial or commercial matters, the second prerequisite for application of that provision.

54. In this regard, the recent case-law of the Court of Justice gives clear guidelines, and I need therefore refer to them only briefly.

55. The Court has reiterated, first, that the condition that the trade mark be used in accordance with prevailing market practices constitutes the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner. [26]

56. Secondly, the judgment in *Gillette Company and Gillette Group Finland* [27] provided the interpretation of those words, stating that use of the mark does not comply with honest practices in industrial or commercial matters in particular where it gives the impression that there is a commercial connection between the third party and the trade mark proprietor; where it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute; where it discredits or denigrates that mark; or where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner.

57. This last situation does not include miniature toys, since they do not copy the models made by Opel's licensees but the actual vehicle manufactured by that automobile company, the Opel Astra V8 Coupe.

58. In the judgment in *Anheuser-Busch*, the Court of Justice pointed out that, in assessing whether the condition of honest practice is satisfied, account must be taken first of the extent to which the use of the third party's trade name is understood by the relevant public, or at least a significant section of that public, as indicating a link between the third party's goods and the trademark proprietor or a person authorised to use the trade mark, and secondly of the extent to which the third party ought to have been aware of that. Another factor to be taken into account is whether the trade mark concerned enjoys a certain reputation in the Member State in which it is registered and its protection is sought, from which the third party might profit in selling his goods. [28]

59. Those criteria are available to the national court to apply to the case pending before it. Indeed, the last judgment cited added that it is for the national court to carry out an overall assessment of all the relevant circumstances in order to determine whether the use has been made in accordance with the honest practices referred to. [29]

26 — Judgment in *BMW*, paragraph 61; and the judgment in Case C-100/02 *Gerolsteiner Brunnen* [2004] ECR I-691, paragraph 24.

27 — Case C-228/03 *Gillette Company and Gillette Group Finland* [2005] ECR I-2337.

28 — Paragraph 83 of the judgment in *Anheuser-Busch*.

29 — Paragraph 84 of the judgment cited in the previous footnote.

60. I therefore venture to suggest that the manner in which AUTEC presents its products, clearly displaying its sign 'Cartronic®' and the indications 'AUTEC® AG' and 'Autec AG Daimler Strasse 61 D-90441 Nürnberg', even on the transmitter, shows that it has behaved properly, in complete accordance with commercial practice. It is therefore impossible to discern in this conduct any unlawful use of the Opel trade mark, which is placed where any consumer would expect to find it: on the radiator grille of the vehicle.

61. In the light of the arguments put forward, I suggest that the Court of Justice examine, if appropriate, the second and third questions in accordance with what has been stated above.

VI — Conclusion

62. In the light of the above considerations, I propose that the Court of Justice give the following reply to the Landericht Nürnberg-Fürth:

'(1) The use of a registered sign on toys does not constitute use as a trade mark, within the meaning of Article 5(1)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where the manufacturer of a toy model car copies a real car in a reduced scale, including the trade mark, and markets it.'

63. If the Court of Justice does not share this view in respect of Question 1, I suggest that it give the following replies to Questions 2 and 3:

'(2) The use of the trade mark described in Question 1 is an indication concerning other characteristics of the model car within the meaning of Article 6(1)(b) of Directive 89/104.

(3) In situations such as the one in this case, the decisive criteria for determining whether the trade mark is used in accordance with honest practice in industrial or commercial matters are those laid down by the Court of Justice in the judgments in *Anheuser-Busch* and *Gillette Company and Gillette Group Finland*.

If the manufacturer of a model car applies to the packaging, and to an accessory required in order to use the toy, a mark recognisable to the trade as its own trade mark together with its company name and the address of its seat, it is acting in accordance with honest practices in industrial or commercial matters, subject to an overall consideration of all the relevant circumstances, which is a matter for the national court.'