

**Die rechtserhaltende Benutzung nach ONEL**  
**Pieter Veeze, Munich, October 21, 2010**

Sehr geehrte Damen und Herren,

I hope you will forgive me for doing this speech in English. I know that when it comes to one of the main Dutch export products – tv show hosts – the German public are so open minded that they enjoy – and even seem to appreciate – to listen to them trying to speak German. However, I am a bit ashamed to admit that when I prepared this presentation, it made me realize that my knowledge of the beautiful German language is by far not good enough to be able to discuss the subject I want to share with you today in all precision and nuance it deserves. This does not preclude that, like most Dutch people, I can understand the German language rather well. So in case of any questions afterwards, please do not hesitate to use the language you feel most comfortable with.

It is a great honour to have been invited to speak here today, in such a beautiful venue, amongst such an impressive “line-up” of eminent and learned co-speakers, and most of all for such a large audience of – as I have understood – the “crème de la crème” of the German trademark circles. I consider it a privilege to be able to discuss with you today a subject for which I have really developed a passion: genuine use of Community trademarks or *ernsthafte Benutzung von Gemeinschaftsmarken*. I would like to thank the organisation for giving me this opportunity.

As a true lawyer, I always start where normal people end, or don't even bother to: the exoneration clause or, so to speak, the small letters on the back. I admit my name is Pieter Veeze. I also admit that I am employed by the Benelux Office for Intellectual Property. I even admit being *rapporteur* of the opposition decision in the matter of ONEL vs. OMEL<sup>1</sup>. However, I am here today as Pieter Veeze, the person, and not in my capacity of staff member of the Benelux Office. So anything I will say here is attributable to myself and to me alone, and if my personal opinion happens to correspond with the opinion of my Office, this is no more than a coincidence.

To give you an idea about the programme, so you will more or less know what to expect: I'll start with a short general introduction about use in trademark law. Then I will discuss the contents of the ONEL decision – first the facts, then the arguments. After that, I will say a few words about the discussion that has literally rushed over us after we issued the decision. And finally, I will take my “crystal ball” and try to predict the future. As you could perhaps imagine, my previous remark about the “small letters” is especially true for that last part.

**Use in trademark law – some general remarks**

As we all know being IP practitioners, in trademark law, it's all about use. A trademark right does not only give the possibility to prohibit use made by third parties (infringing use), but use is also a very important matter for the trademark proprietor himself. The first three sessions of this morning focus on three forms of use that affect the rights connected by a trademark right:

1. Mr. Bornkamm discussed marks with a reputation (*Bekanntheit*), or the amount of use that justifies the broader scope of protection they enjoy.

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<sup>1</sup> BOIP, 2004448, 15.01.2010.

2. Mr. Maier discussed acquired distinctiveness (*Verkehrsdurchsetzung*), or the amount of use that justifies a sign to be registered as a trademark which it could not be *ab initio*.
3. I will focus on genuine use (*ernsthafte Benutzung*), or the amount of use that justifies a trademark right to keep existing (*rechtserhaltende Benutzung*).

On all these three forms of use (famous marks, acquired distinctiveness and genuine use), the European Court of Justice (ECJ) has had the opportunity to provide some guidance. As far as genuine use is concerned, this guidance can be found in three cases: ANSUL<sup>2</sup>, LA MER<sup>3</sup> and VITAFRUIT<sup>4</sup>. The criteria depicted in these three cases are more or less clear. There is, however, an aspect which has not yet been decided on – and I now come to the subject of my speech today: the territorial requirements for genuine use.

When discussing the matters in detail – and I believe we will this morning – I think it is important to clearly distinguish between these three different forms of use and their underlying *ratio legis*. Discussions tend to get very mixed up if we don't. I can vividly remember the almost Babylonical confusion of terms we've had a couple of years ago with some critics of our EUROPOLIS<sup>5</sup> decision. They were furious that in case of a descriptive or otherwise non distinctive mark, our Office demanded proof of acquired distinctiveness for the whole concerned territory, and they asked whether these morons at the Benelux Office did not read the CHEVY<sup>6</sup> case. We then explained that CHEVY was about a totally different matter, namely about reputation and not about acquired distinctiveness. But the critics replied that it would in their view be illogic if the bar for reputation would be lower than the bar for acquired distinctiveness. Today, of course, we all know the outcome of the EUROPOLIS case and we also know the BOUNTY<sup>7</sup> case, which has been discussed by Mr. Maier.

Unfortunately, we see the same kind of mixing up of arguments by some critics of our ONEL decision: didn't these moron's at the Benelux Office read PAGO<sup>8</sup>? And today, I think the answer is the same as it was a couple of years ago: both cases are on totally different matters, and it is important to make a sharp distinction between the different forms of use that are relevant in trademark law.

So, to stay with my subject, what is the *ratio legis* of genuine use? The requirement of genuine use is, in my belief, one of the cornerstones of any trademark system that is based on registration, rather than on first use. That is why the opinions on this subject from a European perspective are often quite different from those from a US perspective. If I am properly informed, the German trademark system combines to a certain extent the advantages of both systems – as a right can be based on either a registration at the Deutsches Patent- und Markenamt (DPMA) or on use (so called "*Verkehrsgeltung*"). So I must admit that I am curious to find out whether this particularity of German trademark law influences your point of view on this matter.

A registration-based system has the advantage of being clear, but the disadvantage of potentially causing unjust situations. One should not forget that a trademark right grants a monopoly. I think the *ratio legis* behind the requirement of genuine use is

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<sup>2</sup> ECJ, C-40/01, 11.03.2003.

<sup>3</sup> ECJ, C-259/02, 16.10.2003.

<sup>4</sup> ECJ, C-416/04, 11.05.2006.

<sup>5</sup> ECJ, C-108/05, 07.09.2006.

<sup>6</sup> ECJ, C-375/97, 14.09.1999.

<sup>7</sup> CFI, T-28/08, 08.07.2009.

<sup>8</sup> ECJ, C-301/07, 06.10.2009.

that this monopoly is only justified if the mark is actually being used, at least within a reasonable period of time. This is in my view clearly a matter of public interest; competitors should not to be hindered by registered “dead wood”. And further, I think it logically follows from the essential function of a trademark – a trademark serves, in fact, as a “badge of origin”, which “enables the public, without any possibility of confusion, to distinguish the product or service from others which have another origin”; only a mark which is actually used can serve that purpose<sup>9</sup>.

To conclude these general remarks about use in trademark law, I do think that the three forms of use which are being discussed this morning are clearly separate subjects and their underlying legal purposes are clearly different. So if one would ask me whether I think if EUROPOLIS or PAGO is more comparable to ONEL, I would probably say they both are not.

On the other hand, if I were to be forced to make a choice, I would probably say that in my opinion and from a logical point of view, there is a closer similarity between ONEL and EUROPOLIS than between ONEL and PAGO. Although EUROPOLIS concerns what I would call the *conception* or *birth* of the right and ONEL its *continuation*, both cases have in common that they deal with the *existence* or *validity* of a trademark. PAGO, on the other hand, deals with something totally different, namely with the (*possibly enhanced*) *scope of protection*.

### **ONEL: the facts**

But now, let's go to the ONEL case. As I already mentioned, I will start with the facts, and then go to the arguments.

In July 2009, Hagelkruis Beheer BV (further: the defendant) has filed a Benelux trademark application for the word mark OMEL for, mainly, legal services.

Leno Merken BV (further: the opponent) filed an opposition against the registration of this application, based on its earlier Community Trademark (CTM) ONEL for, mainly, legal services in the field of IP protection.

The earlier mark has been registered for more than five years and the defendant demanded proof of use. He specifically added that he was aware of the use of the ONEL mark in the Netherlands – which is not surprising because ONEL is active in the IP consulting business for more than 40 years. Genuine use in the Netherlands was, therefore, *in confesso* between the parties, and the request for proof of use only concerned other EU countries. Defendant also stated that he himself was not planning to use the OMEL mark in the Netherlands or in the Benelux but that he wanted to develop activities in Norway, Sweden and perhaps a few other Scandinavian countries. The defendant claimed to have filed the opposed Benelux application exclusively to serve as the basis for an international application under the Madrid Protocol.

The opponent replied that, since both parties agreed that the ONEL mark has been genuinely used in the Netherlands, the condition laid down in the Community Trademark Regulation<sup>10</sup> (CTMR) has been fulfilled. In his opinion, which he mainly

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<sup>9</sup> ANSUL, point 37; 8th recital in the preamble to Directive 2008/95/EC.

<sup>10</sup> Council Regulation (EC) No. 207/2009 dated 26 February 2009 on the Community Trade Mark.

bases on the so-called “Joint statements”<sup>11</sup> and on the opposition guidelines of the OHIM, genuine use in one single member state by definition implies genuine use of a CTM. The opponent therefore refused to furnish proof of use, stating that given the circumstances of the case, this was superfluous. Opponent added that defendant’s intention not to use the disputed mark in the Benelux was not relevant, and stated that anyway, based on his CTM, he could and would take legal action against defendant’s mark anywhere in Europe.

Finally, defendant stated that he disagreed with the presumption that use in one single country would be sufficient to maintain a CTM. He mentioned that the relevant provision in the CTMR states use “in the Community”, which is quite different from use “in one of the community member states”. According to defendant, if the latter really had been the legislator’s intent, he would have used other words. Defendant added that such an interpretation of the provision would have highly undesirable consequences. A trademark holder would in that case block the entire European market with a mark that he only uses in a very small part thereof and could frustrate other parties, even in areas where he himself is not active at all. According to defendant, this is extremely unjust.

So in short, the legal issue that essentially divided parties in this case is the interpretation of the words “in the Community” in article 15 CTMR, and more precisely the question on whether the explanation in the Joint Statements – that genuine use in one country constitutes genuine use in the Community – is legally valid. As you will probably all know or otherwise would have guessed by now, our Office answered this question in the negative, and I will now explain to you on which grounds our decision is based.

### **ONEL: the arguments**

Again, as a lawyer, I always read backwards, so I will start with the conclusion (points 37 and 38 of the decision). I will fully quote them for you, since I have experienced that there is sometimes a misunderstanding about them:

37. Taking everything into consideration, the Office is of the opinion that the view contained in the Joint Statements stating that genuine use in one single country by definition results in genuine use in the Community, cannot be maintained.

38. The invoked right is a Community Trade Mark right and parties have admitted that it has only been used in the Netherlands. The services for which the invoked right is registered are destined at a large public located throughout the entire Community. Use in only the Netherlands can, given these facts, not be classified as normal use of the invoked right.

As you can see, I have underlined the words “by definition”. Many people seem not to have read those words very carefully. Our decision does not state that use in one member state is by definition not enough. It simply states that it is not by definition enough. This is, of course, something quite different.

In this case, the mark has been registered for legal services in the field of IP. The target public for those services can be found throughout the entire Community. The

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<sup>11</sup> Joint statements by the Council and the Commission of the European Communities entered into the minutes of the Council meeting at which the Regulation on the Community Trade Mark is adopted on 20 December 1993, OJ OHIM 1996, p. 615.

trademark has, however, only been used in the Netherlands, which represents (compared by population) less than 3,5% of the Community. Given these facts, we felt that the use was not enough to constitute genuine use (ernsthafte Benutzung) in the Community.

So, what are the arguments for this decision? First of all, it recalls that the Joint Statements are not legally binding. In the decision, reference has been made to two ECJ cases, Antonissen<sup>12</sup> and Praktiker Bau- und Heimwerkermärkte<sup>13</sup>. Reference could also be made to the LIBERTEL<sup>14</sup> case:

24. The Council of the European Union and the Commission made a joint declaration, entered in the minutes of the Council meeting on the adoption of the Directive, that they 'consider that Article 2 does not exclude the possibility ... of registering as a trade mark a combination of colours or a single colour ... provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings' (OHIM OJ No 5/96, p. 607).

25. However, that declaration cannot be used to interpret a provision of secondary legislation where, as in this case, no reference is made to the content thereof in the wording of the provision in question and it therefore has no legal significance (...). The Council and the Commission also explicitly recognised that limitation in the preamble to their declaration, which states as follows: 'Since the following statements of the Council and the Commission are not part of the legal text they are without prejudice to the interpretation of that text by the Court of Justice of the European Communities'.

26. Accordingly, it is for the Court to determine whether Article 2 of the Directive is to be interpreted as meaning that a colour per se is capable of constituting a trade mark.

It is, therefore, clear that the Joint Statements have no legal value. In article 15 CTMR, there is no indication whatsoever that the words "in the Community" actually mean "in one single member state", so it is (in the end) for the Court to decide on how these words must be interpreted.

Secondly, the decision states that the concerned Joint Statement is legally disputable, and that it is, at least, at odds with the second, third and sixth recitals in the preamble to the CTMR. I will quote the second and sixth recital for you:

"(2) It is desirable to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion by completing an internal market which functions properly and offers conditions which are similar to those obtaining in a national market. In order to create a market of this kind and make it increasingly a single market, not only must barriers to free movement of goods and services be removed and arrangements be instituted which ensure that competition is not distorted, but, in addition, legal conditions must be created which enable undertakings to adapt their activities to the scale of the Community, whether in manufacturing and distributing goods or in providing services. For those purposes, trade marks enabling the products and services of undertakings to be distinguished by identical means throughout the entire Community,

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<sup>12</sup> ECJ, C-292/89, 26.02.1991.

<sup>13</sup> ECJ, C-418/02, 07.07.2005.

<sup>14</sup> ECJ, C-104/01, 06.05.2003.

regardless of frontiers, should feature amongst the legal instruments which undertakings have at their disposal.”

“(6) The Community law relating to trade marks nevertheless does not replace the laws of the Member States on trade marks. It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as Community trade marks. National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level.”

(underlining added)

In short, we understand from these recitals that CTM's are meant for companies which adapt their activities to the scale of the Community, whereas national trademarks are meant for companies which have their activities on a smaller level. These different needs for protection are, I think, the basis for coexistence of the various systems.

Thirdly, the decision states that the Joint Statement contradicts with (the system of) the CTMR itself, more precisely with article 112 relating to conversion of a CTM into national marks. Paragraph 2, subsection a of this article provides that conversion shall not take place:

“where the rights of the proprietor of the Community trade mark have been revoked on the grounds of non-use, unless in the Member State for which conversion is requested the Community trade mark has been put to use which would be considered to be genuine use under the laws of that Member State”

This provision would simply be pointless if genuine use in one member state would indeed by definition be sufficient in order to maintain a Community Trade Mark, the more so as the concept of genuine use has been harmonized by the Trademark Directive<sup>15</sup>.

Fourthly, the decision recalls that, since the establishment of the CTMR, the factual and economic situation has changed dramatically. The EU has grown to 27 member states and further expansion is imminent. In a territory (currently) covering more than four million square kilometres and a (current) population of almost 500 million people, use in one member state only essentially boils down to local use. In our opinion, such use is not enough to justify such an extensive exclusive right.

Fifthly, the decision states that the Joint Statement could, in the end, even undermine the most important objectives of both the Directive (second recital in the preamble) and the Regulation (fourth recital in the preamble):

“The trade mark laws applicable in the Member States before the entry into force of Directive 89/104/EEC contained disparities which may have impeded the free movement of goods and freedom to provide services and may have distorted competition within the common market. It was therefore necessary to approximate the laws of the Member States in order to ensure the proper functioning of the internal market.” (second recital in the preamble to the Directive, underlining added)

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<sup>15</sup> Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks.

“The barrier of territoriality of the rights conferred on proprietors of trade marks by the laws of the Member States cannot be removed by approximation of laws. In order to open up unrestricted economic activity in the whole of the internal market for the benefit of undertakings, trade marks should be created which are governed by a uniform Community law directly applicable in all Member States.” (fourth recital in the preamble to the Community Trademark Regulation, underlining added)

After all, a trademark right offers a monopoly. In order to justify that monopoly and to fulfil its essential function, the mark must be used. A monopoly that goes (much) further than the territory in which the mark is used, does form an obstacle for the free movement of goods and the freedom to provide services within the internal market. This is, in my view, obviously not what the legislator had in mind.

Sixthly and lastly, the decision contains what I would call an economic or “common sense” argument. It would simply be unfair if a company that only uses its mark on a local scale could block the entire EU market. It would be unfair if a locally active company would have to defend itself against another locally active company on the other side of the EU, simply because one of the parties “has chosen a coat which is much too large for him”. Let’s not forget that not all companies are multinationals. It is, on the contrary, an economic fact that most companies aren’t. Small and medium sized companies (SME’s) are often referred to as “the engine of the European economy” and represent a substantial part thereof. If all these companies were to choose such a broad protection, there would pretty soon not be much left for others.

To visualize what we are talking about, let’s take the example of the Grand Duchy of Luxembourg. I hope I am not offending anyone in this audience who is from that country, but our Director General, who is a Luxembourg national, explicitly authorized me to use this example. In terms of population, Luxembourg represents 0.08% of the EU and in terms of area, it represents even less: 0.005%. A use on that scale would not constitute any more than just a purely local use. Yet, according to the Joint Statement, it would be enough to block the entire (or the other 99.995% of the) EU market. In my opinion, this is really excessive.

### **ONEL: the discussion**

The discussion about genuine use of a CTM is, of course, not entirely new<sup>16</sup>. But the ONEL decision really seemed to “boost it up”.

Honestly speaking, we were a bit overwhelmed by the enormous amount of attention the ONEL decision generated, not only in the Benelux, not even only in the EU, but literally worldwide.

Within hours, discussions began on several internet fora. I really think this is a good example of how the internet has changed the information flow and especially the velocity at which information flows. Discussion did not only take place on the internet, but also in many established international IP magazines.

And not only the press were interested, almost every users organization I had ever heard of has by now expressed an opinion on this matter. And so did some other offices. OHIM issued a press statement and several national offices have also

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<sup>16</sup> Some examples: Fabio Angelini and Luis-Alfonso Duran, in: Festschrift für Alexander von Mühlendahl, p. 303-317 and 333-341, François Griesmar (ECTA conference in Warsaw, 2006, to be found at [www.ecta.org](http://www.ecta.org)).

reacted, either officially or unofficially. In the meantime there has also been a decision by the Hungarian Office, which is completely in line with the ONEL decision.

The matter has even been discussed in European Parliament, together with another interesting decision that apparently made the hearts of certain politicians run a bit faster, the LEGO<sup>17</sup> case.

I will not go into the details of each and every reaction we have seen. Partly because of a lack of time, but mainly because I think it is more interesting to stick with the arguments. And since I have already discussed most arguments in favour of the ONEL decision, I will now try to summarize the arguments I have heard from the critics of our decision. There are, mainly, four arguments that I have seen more than once used by people who criticize the ONEL decision.

The first argument is, in my opinion, rather a non-argument, so I will commence with it. Instead of questioning the legal merits of our decision, it questions its “underlying motives”, suggesting that it would be based on self-interest, to make national marks more attractive vis-a-vis the Community trademark. I must say that I deeply regret these kind of allegations, and that I consider it rather offensive that some seem to question the integrity of both my Office and the people that work there, including myself. As a matter of principle, I feel that a public service could never have an own interest. A public service, whether it is our Office, the OHIM, or any other office, is there to serve the public. For the reasons I have already explained, I sincerely think that ONEL is the right decision. So please, let’s stick to the arguments!

The second argument I have heard from some critics is, like I already mentioned “haven’t these morons at the Benelux Office read PAGO”. Since I have already discussed that argument, I will not repeat it here.

The third critical argument I have heard, is that the decision would contradict the unitary character of the internal market, where national frontiers no longer exist. There is a short answer to that argument. In fact, it is not the ONEL decision that links genuine use to national frontiers, it is the Joint Statement that does, since it links genuine use to the territory of a single member state.

The fourth and last critical argument I have heard, is that the ONEL decision would discriminate against locally active SME’s, making it impossible for them to obtain a CTM. My answer to that can likewise be short: why on earth would a locally active SME want EU wide protection? The answer to that could be that the small company has growing aspirations and will perhaps eventually “grow into the coat that was initially too big”. The CTMR, in my view, offers a unique tool for that small start-up with big ambitions; he is offered five years to realise his dream (or even more, since these five years are to be counted from the date of registration). If it works out, he has no problem. If it does not work out, from a legal point of view he still has no problem; he can then simply convert his CTM into one or more national marks for the jurisdictions where he really needs protection.

More important, I think this last argument must in fact be turned around; it is not the SME that wants a CTM who is being discriminated by ONEL, it is, on the contrary, the SME that does choose a means of protection that suits his needs who is being discriminated by the Joint Statement. At the Benelux Office, in the last years we have seen a rising number of oppositions that are based on one or more CTM’s. Currently, the number is 55%. I really find it rather sad to realize that in all these cases, the

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<sup>17</sup> ECJ, C-48/09, 14.09.2010.



Benelux applicant could risk losing his rights because of a megalomaniac competitor that's active on the other side of the EU.

### **Genuine use: predicting the future**

I now come to the last and hopefully most exciting part of this presentation: I will use my crystal ball and try to predict the future.

If there is one thing I am quite sure about, it is that this discussion will not simply fade away. There are conflicts between trademark owners on a daily basis and in many jurisdictions, and if there can be doubts about the amount of use made by a CTM proprietor, the other party will certainly not hesitate to invoke them. ONEL may have been the first decision on this matter, but it will absolutely not be the last one. This issue can and will occur in any jurisdiction, either before a Court, a trademark office or any other competent body, and they will then have to take a decision.

I therefore think there is an urgent need for clarity on this matter.

This clarity can, in my view, either come from Luxembourg or Brussels. The ECJ is ultimately competent to interpret the CTMR as it is, the European legislator is competent to modify it, if it deems it necessary.

We all know that the functioning of the Community trademark and its coexistence with national (or in the case of the Benelux: regional) protection regimes are being evaluated by the Commission. Professor Kur from the Max-Planck-Institut is going to tell us more about this study tomorrow morning, so perhaps this subject will also be mentioned.

I would, however, for now, place my bets on the ECJ. The ONEL decision has been appealed before the Court of Appeal in the Hague, and as I heard from the parties, they both have urged that Court to refer the question to the ECJ. If I am properly informed, the case is scheduled for decision within the next months, so it could go to Luxembourg quite quickly.

Then we come to the ultimate and most difficult question: our Office's decision in the ONEL case focuses on what degree of use is *not* enough to constitute genuine use of a CTM, the Court of Justice will probably be asked the opposite question: what *is* enough?

This is, of course, the most speculative part of this presentation.

We know from the past – a good example is the CHIEMSEE<sup>18</sup> case, but also the previously mentioned cases about genuine use, ANSUL, LA MER and VITAFFRUIT – that the ECJ is not very keen on giving percentages or *de minimis* rules. My guess would be, that they will not be tempted to do so in this case either.

Perhaps the ECJ can find inspiration in the earlier HIWATT<sup>19</sup> case from the General Court (previously known as CFI). This is, if I am not mistaking, until now the only case in which a judge in Luxembourg has considered the geographical aspects of genuine use, and I quote:

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<sup>18</sup> ECJ, C-108/97, 04.05.1999.

<sup>19</sup> CFI, T-39/01, 12.12.2002.

37. Accordingly, not only does genuine use of a trade mark exclude artificial use for the purpose of maintaining the mark on the register; genuine use means that the mark must be present in a substantial part of the territory where it is protected, inter alia exercising its essential function, which is to identify the commercial origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent purchase (Case T-79/00 Rewe-Zentral v OHIM (LITE) [2002] ECR II-705, paragraph 26).

However, I am not quite sure whether this formula would indeed totally clarify the issue, since the wordings used in PAGO are dangerously similar, and we all know where that has brought us.

I do hope that the ECJ will give a clear indication that the characteristics of *the market concerned* – whether they are geographic, economic, sociologic, demographic or whatever – are relevant for the question whether or not there is genuine use. One can hardly deny that these characteristics are quite different for the EU as a whole than for a single member state, so in my opinion, this could be a way to solve the problem.

Guidance for this view can perhaps already be found in the previous case law on genuine use from the ECJ itself. In ANSUL, the ECJ considered:

“When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark.”

In my opinion, if one would take account of all these facts and circumstances, the answer would clearly be different for a market of 500 million people than for a market that has a fraction of that population. So basically, I think the answer could lie in the case law of the ECJ itself.

Ladies and gentlemen, I think this is enough about ONEL, and it is certainly enough for my “crystal ball” so I am going to finalize my presentation. Last week, I attended a seminar on the same subject in the Netherlands, and someone in the audience – a famous and very distinguished Dutch IP lawyer – made a remark I found so funny that I would like to share it with you as a final thing. What if I would say to the 25 people in the first row: “excuse me, but could you please leave this room, these seats are occupied by me”. You would probably respond “why do you need 25 seats, you are all alone, so one place seems enough”. I believe this summarizes this discussion in two phrases. In the normal world, such behaviour would be considered unacceptable. In the trademark world, however, the same kind of behaviour is largely considered as normal, or even *genuine*.

Thank you very much for your attention!