

Report Q188

in the name of the United Kingdom Group
by Jane MUTIMEAR, Nicola DAGG, Denise MCFARLAND, Alexandra BRODIE,
Jonathan TURNER, Daniel BROOK, Ashley ROUGHTON and Richard ABNETT

Conflicts between trademark protection and free speech

Questions

1) Analysis of current legislation and case law

1.1) a) *What instrument of your law (eg. Constitution) guarantees the right to freedom of speech?*

The right to freedom of speech has been a recognised legal principle within the UK justice system for well over a hundred years. This right has been more recently recognised by the UK enactment of the European Convention on Human Rights ("ECHR") in The Human Rights Act 1998 ("HRA"). The HRA recognises the ECHR right to freedom of expression set out in Article 10:

Freedom of expression

- 1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The HRA requires courts to construe and give effect to domestic legislation so far as possible in conformity with the Convention, and obliges public authorities to act consistently with Convention rights.

b) *What does the right to freedom of speech include? Is both artistic and commercial speech protected? If so, does commercial speech have a different degree of protection?*

Under Article 10 ECHR, quoted above, everyone has the right to freedom of expression, including freedom to hold opinions and receive and impart information and ideas without interference by public authority, and regardless of frontiers. Various limited restrictions, such as those which are 'are necessary in a democratic society' are allowed.

In principle, all forms of expression, including political, artistic and commercial expression, are protected. However, in practice, political speech and artistic speech are protected more vigorously than commercial speech. Political speech and artistic speech are generally viewed as essential components of a democratic and pluralist society,

whilst commercial expression is seen as less fundamental to the functioning of a democratic society and so less deserving of protection. This is reflected in s12(4) HRA which provides:

4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to

a) the extent to which –

i) the material has, or is about to, become available to the public; or

ii) it is, or would be, in the public interest for the material to be published;

b) any relevant privacy code.

c) *Are also corporations or only individuals entitled to invoke freedom-of-speech arguments?*

Both are entitled. The test of standing (*locus standi*) is enshrined in Article 34 ECHR, which permits claims by “any person, non-governmental organisation or group of individuals claiming to be the victim of a violation” of the Convention. It is accepted that where the interests of a company have been affected, it is in principle the company which is the victim and which must bring a claim.

d) *Is free speech only protected from unwarranted governmental interference, or is it also implicated when a private party calls upon a court to enforce rules of law whose effect would be to restrict or penalise expression?*

The right to free speech can be raised in disputes involving government and in disputes between private parties.

The HRA does not, however, generally envisage horizontal claims, *i.e.* claims by one private person or body against another, since individuals do not, *prima facie*, owe any duty to other individuals to respect their ECHR rights. That said, the HRA obliges the UK courts to interpret and give effect to legislation, so far as is possible, in a way which is compatible with ECHR rights, including those in Article 10 ECHR.

1.2) a) *How are free speech interests invoked in trademark litigation?*

The Convention could be used in the following ways. A party to trade mark litigation could, for example:

i) require the court to interpret and give effect to provisions of the UK Trade Marks Act (“TMA”) in a way that is compatible with Article 10 ECHR;

ii) challenge the acts or omissions of the Trade Mark Registrar on the grounds that these infringe that party’s rights under Article 10 ECHR;

iii) challenge by way of judicial review the validity of subordinate or delegated legislation made under the TMA on the basis that it infringes Article 10 ECHR.

There has been no attempt (or accepted need) to do either of options ii) or iii). There is not a very developed body of case law where free-speech interests have been explicitly invoked in trade mark litigation (options i)). Courts are in any event required to interpret statute so as to give effect to Convention rights.

Section 12 HRA places specific obligations on the court to consider the importance of freedom of expression (see above), where it is considering whether to grant any relief in a case which might affect the exercise of that right (e.g. an injunction restraining-

publication). In particular, no such relief will be granted to restrain publication before trial unless the court is satisfied that the applicant is likely to establish at trial that publication should not be allowed.

b) *Is there a provision in your trademark law which specifically concerns the admissibility of e.g.:*

– *criticism of another’s mark or derogatory reference to another’s mark;*

No specific provision. However, the UK TMA has a provision (section 10(6), which is not derived from the Trade Marks Directive) which permits use of a trade mark “for the purpose of identifying goods or services as those of the proprietor or a licensee”. It is therefore conceivable, for example, that a comparative advertisement could refer to another’s mark in a critical way; however the comparative advertiser would only benefit from the exception under section 10(6) TMA if the reference is “in accordance with honest practices in industrial or commercial matters” and is made with “due cause” without taking unfair advantage of, or being detrimental to, the distinctive character or repute of the mark.

Section 10(6) of the TMA is construed in accordance with the Comparative Advertising Directive and Misleading Advertising Directive.

– *parody, satire or irony;*

No specific provision. There has been a passing-off case involving a parody (*Clark v Associated Newspapers* [1998] 1 WLR 1558), but no cases involving registered trade marks. Where the parody, satire or irony confuses a significant proportion of the public into believing that the parody, satire or irony is from or authorised by the trade mark owner, it is likely to constitute infringement, either under section 10(2) (in the event that the mark in question is registered in relation to some form of entertainment service which could be considered similar to the parody, satire, or irony) or section 10(3) which provides: “(3) A person infringes a registered trade mark if he uses in the course of trade in relation to goods or services a sign which –

a) is identical with or similar to the trade mark

b) –

where the trade mark has a reputation in the United Kingdom and the use of the sign, being *without due cause*, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.”

Provided the parody, satire or irony is perceived by the public as it was intended, it is very unlikely that the use of the trade mark would be found to constitute an infringement.

– *artist’s use of another’s mark;*

No specific provision.

– *using another’s mark as a badge of loyalty or allegiance;*

No specific provision. However, a trade mark proprietor has rights to prevent use of their mark in the course of trade in defined circumstances. There has been case law as to what constitutes infringing use. Under ECJ case law (*Arsenal v Reed C-206/01*), once it has been found that the use of the sign in question by the third party is *liable to affect the guarantee of origin of the goods* and that the trade mark proprietor must be able to prevent this, it is immaterial that in the context of that use the sign is perceived as a badge of support for or loyalty or affiliation to the proprietor of the mark. As such, no special considerations apply to use of another’s mark as a badge of loyalty or allegiance. Trade mark owners are protected from use by a third party that is liable to affect their trade mark as a guarantee of origin.

- *using another’s mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant’s own product*

Yes, there is specific provision. Section 11(2) of the UK TMA states:

“(2) A registered trade mark is not infringed by –

- a) the use by a person of his own name or address,
- b) the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services, or
- c) the use of the trade mark where it is necessary to indicate the intended purpose of a product or service (in particular, as accessories or spare parts), *provided the use is in accordance with honest practices in industrial or commercial matters.*”

Note also the applicability of section 10(6) TMA (see above) to comparative advertising cases.

to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use is understood as involving a non-trade-mark use in which case the question of freedom of speech does not arise).

The uses set out above would not necessarily found to constitute trade mark use. Under the TMA, to be an infringement a use must be “in the course of trade”. The authorities for whether such use must be “trade mark use” are conflicting.

- c) *If no such provisions exist, how are free speech interests invoked in trademark litigation?*

See comments above under 1.2 a) and b).

- Is there an “open end clause” or “fair use clause” in your trademark law which permits taking into account freedom-of-speech-arguments?*

No such clause is explicitly included in TMA. However, note the comments above under 1.1 and 1.2 a), whereby courts are obliged to interpret TMA in such a way as to give effect to Convention rights.

- If not, are there any other gateways in your trademark law to permeate free speech concerns?*

See the previous comment above.

- Or do courts apply freedom-of-speech arguments directly with reference to the constitution?*

Courts may refer directly to Article 10 ECHR although there is, as yet, very little case law in this area.

- d) *How much discretion do the courts have in applying free speech concerns?*

They have a duty to interpret the statute so as to give effect to Convention rights. They must perform a balancing act between all competing interests, including the right to free speech and the right to property (see 1.4 below regarding *Cream Holdings*).

- 1.3) *If there are trademark infringement cases in your country where defendant primarily sought to attack a company’s ecological or employment policy, commercial practices and the like, do these cases also address the application of rules prohibiting defamation such as libel and slander or do they focus on the tarnishment of plaintiff’s trademarks only? (The National Groups are not expected to elaborate on their country’s laws prohibiting defamation.)*

Whilst there are UK cases where the defendant primarily sought to attack a company's ecological or employment policies, the Group is not aware of any UK trade mark infringement cases where such issues were raised.

There are trade mark infringement cases where a defendant has sought to attack a company's commercial practices, for example, its pricing or claims to superiority, and in doing so has used the claimant's trade mark, resulting in a claim for trade mark infringement. Such cases do also address claims in defamation and malicious falsehood (trade libel). However the focus of these cases is usually an allegation of comparative or misleading advertising and so the majority of such disputes tend to be adjudicated by the Advertising Standards Authority ("ASA") rather than the courts. The reasons for adjudicating such cases before the ASA rather than the UK courts are numerous, but include issues of speed of adjudication, cost, and, if you are the claimant, a more favourable result before the ASA because the UK courts tend to take a robust approach towards complaints regarding advertising. The key UK court case in this area is *BA v Ryanair* [2001] F.S.R. 32, where the claimant unsuccessfully sued for malicious falsehood (trade libel) and trade mark infringement. In that judgment the UK court laid down various principles to be applied in comparative advertising cases.

There are no Trade Marks Registry cases of the "X Company sucks" variety, as sometimes found in domain name cases. The closest Trade Marks Registry cases are those where a famous trade mark is incorporated into another mark as part of a pun or joke, which the famous mark owner would rather not be the subject of. There are no instances where a defendant has used a trade mark in a defamatory or critical way and attempted to rely on a freedom of speech defence. The Group considers that in any such case, it is likely that the trade mark owner makes a commercial and legal decision to ignore the defamation, or relies on other causes of action such as malicious falsehood or trade libel, or uses other channels of complaint where appropriate, such as the Advertising Standards Authority as referred to above.

- 1.4) a) *If you consider the trademark infringement cases in your country in which freedom of speech-arguments were invoked what are the criteria applied by courts for determining whether a freedom-of-speech argument is justified? How important is the reputation of the trademark in question? Does it matter whether the use of the trademark in question is non-commercial or may free speech-arguments also be invoked if the trademark use is mainly commercial in nature? Does it matter whether the use of the trademark involves an expression or social discourse of objective/considerable value or a contribution to the public debate? Is the defendant allowed to express his views in a trenchant way? Or is the defendant required to report in a balanced way or even sparingly?*

The main criterion applied by the court is whether the Defendant's statement is substantially true. The applicability of arguments which rely on the concept of free speech can be applied irrespective of the reputation or the non-commerciality of a trade mark. However, the degree to which the trade mark has been used, and the extent to which it might be in general public usage or include expressions of social discourse or public interest, may affect the extent to which such arguments will find favour with the court. There is no strict rule as to the manner in which a Defendant is allowed to express his views, provided that in so doing it is understood that he may contravene the civil or criminal laws applicable in the territory. The greater the extent of balanced reportage and justified commentary by a Defendant, then the greater the likelihood of successful defence of his statement.

In *Cream Holdings v Banerjee* [2003] EWCA Civ 103, the Court of Appeal held that where there are several competing rights enshrined in the ECHR, then no one right should be ranked higher than another. Since Article 1 of the First Protocol to the Convention preserves the right to peaceful enjoyment of possessions (*i.e.* property), and Article 14 of

the ECHR prohibits discrimination on the ground of property, then it could be argued that intellectual property, being property, deserves to be respected on a par with freedom of speech, neither ranking above the other. This argument has not been tested in the Courts.

If necessary, please differentiate between:

- *criticism of another’s mark or derogatory reference to another’s mark;*

There are no particular provisions of law which apply, and therefore general principles applicable to freedom of speech apply. Where the criticism or derogatory reference is untrue, it is likely that the trade mark owner will also rely on the law of trade libel. A trade mark infringement case adds little to the trade libel case, save for the fact that ambiguous meaning can give rise to confusion or detriment (which would suffice for trade mark infringement) but would prevent there being a single meaning required under the law of trade libel.

- *parody, satire or irony;*

There is a well established history in the UK of the use of parody and satire as a form of humour and/or light-hearted comment, especially in relation to political or other well-known figures. It is therefore not uncommon for artists, journalists or other commentators to argue that such comments are within the public interest, and are arguably a form of fair dealing or fair comment. Freedom of expression defences will only succeed where the parody, satire or irony is perceived as exactly that. In the case of *Clark v Associated Newspapers* (cited at 1.2 b) above) a parody diary of an Member of Parliament (Alan Clark) was published in a London evening newspaper. The newspaper’s reliance on freedom of expression to prevent an injunction failed, as the parody misled readers as to the authorship of the diary. The case was based on passing-off and copyright (false attribution of authorship) but the same principles would apply to registered trade marks.

- *artist’s use of another’s mark*

There have been no trade mark infringement cases in the UK which have involved use of a mark by an artist.

- *using another’s mark as a badge of loyalty or allegiance;*

N/A

- *using another’s mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant’s own product*

Specific provisions apply, see above (section 11(2) of the UK Trade Marks Act).

to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech (please specify in case use is understood as involving a non-trademark use in which case the question of freedom of speech does not arise).

N/A

- b) *Specifically, please describe how joke articles are assessed.*

As explained with reference to the *Clark* case, above, the question is whether the joke nature of the article is understood. If a substantial proportion of the population believe the article to originate from, or be approved by, the trade mark owner, and do not appreciate that it is meant as a joke, then likelihood of confusion will be established, or at least there is likely to be detriment to a distinctive mark. There are no specific provisions which seek to determine what may or may not be termed a “joke”. This is due to the broad-ranging nature of that which may, depending on all the circumstances, be considered humour.

- c) *May using another's mark as a badge of loyalty or allegiance be considered as an exercise of the constitutional right of freedom of speech? Does it matter whether the scarves and other goods are sold to consumers? Does it matter whether the manufacturer indicates that the goods are not original?*

It may be open to argument that use of a badge of loyalty, such as a scarf, could be an exercise of a freedom of speech or, more accurately, freedom of behaviour. If a scarf or other good is made by a member of the public which includes the trade mark of e.g. the football club or band they support, this would not constitute trade mark infringement as it would not be "use in the course of trade". However, the application of a trade mark to merchandising for commercial sale would constitute trade mark infringement, provided the trade mark is registered in relation to the relevant goods. An indication by the manufacturer that the goods are not original will not prevent registered trade mark infringement, although it may have an effect on passing-off.

- d) *To the extent that such use may be considered as an exercise of the constitutional right of freedom of speech please specify the cases in which the defendant is entitled to use another's mark for the purposes of comparison, point of reference, description, identification or to convey information about the characteristics of defendant's own product.*

Such use is justified where and when it is in accordance with honest practices and does not (without due cause) take unfair advantage of or be detrimental to the distinctive character and reputation of the mark in question, see 1.2 b) above.

2) Proposals for adoption of uniform rules

- 2.1) a) *Should free speech interests be invoked in trademark litigation?*

Yes, where appropriate. However, trade marks should not be permitted to suppress freedom of expression, where the expression concerned is justified in the interests of society.

- b) *If so, should there be provisions in trademark law which specifically concern the admissibility of e.g.:*

- criticism of another's mark or derogatory reference to another's mark;*
- parody, satire or irony;*
- artist's use of another's mark;*
- using another's mark as a badge of loyalty or allegiance;*
- using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product*

to the extent that such use should be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use should be understood as involving a non-trademark use in which case the question of freedom of speech does not arise).

We favour a general provision, although it could refer to some of the above as examples (see below). We agree that the issue does not arise in relation to use which does not infringe because either it is not in the course of trade or does not affect the function of the trade mark (cf. *Arsenal v Reed*, above). We consider that these limitations on infringement provide the appropriate balance in relation to use as a badge of loyalty or allegiance. We also consider that the last example mentioned in the question is appropriately covered by Article 6(1)(b) and (c) of EC Directive 89/104 and corresponding national provisions. On the other hand, we are concerned that the first three examples mentioned in the question, and probably others, could give rise to infringement in certain circumstances, in particular in the case of a mark with a reputation, in the absence of a freedom-of-speech defence.

- c) *Or should there be an “open end clause” or “fair use clause” or any other gateway in trademark law which permits taking into account freedom-of-speech-arguments? Or should the courts apply freedom-of-speech arguments directly with reference to the Constitution? How much discretion should the courts have in applying free speech concerns?*

We favour a fair-use clause in the trade mark legislation, requiring freedom of speech to be taken into account. In the absence of such a clause, other provisions of the trade mark legislation have to be given a strained interpretation to accommodate freedom of speech and/or the trade mark legislation is liable to challenge by reference to provisions of international or constitutional law protecting human rights. We regard this situation as unsatisfactory.

At the present time, we consider that the provision should be of a general nature, which will enable the Courts to develop a body of case-law which might be codified in the future. We suggest a provision along the following lines (conforming to Article 10 of the European Convention on Human Rights and the drafting style of EC Directive 89/104):

- 1) The trade mark shall not entitle the proprietor to prohibit its use in exercise of the right of freedom of expression, for example, in criticism, parody, satire, irony or works of art.
- 2) Paragraph 1 shall not apply to the extent that the prohibition is necessary in a democratic society for the protection of the proprietor’s reputation or rights.

- 2.2) *In cases where defendant primarily seeks to attack a company’s ecological or employment policy, commercial practices and the like, should these cases be addressed in the context of a potential tarnishment of the plaintiff’s trademarks or should rules prohibiting defamation such as libel and slander be applied?*

These cases should not be addressed in the context of trade mark law. Matters of this nature should be addressed under defamation law.

- 2.3) a) *Should there be limits to free speech in a trademark infringement context?*

There is inevitably a conflict between trade mark rights and free speech, where the use of the trade mark which the proprietor is seeking to prohibit constitutes some form of commentary on the proprietor’s goods or services. The mere fact that there is a free speech issue does not necessarily mean that free speech must prevail. It is a balancing act between the rights of the trade mark proprietor and the right to free speech. The most important factor is likely to be the effect on the public and whether the use impacts on the essential function of the trade mark.

- b) *If so, what should be the criteria be for determining whether a freedom-of-speech argument is justified? How important should the reputation of the trademark in question be? Should it matter whether the use of the trademark in question is non-commercial or should defendant also be entitled to invoke free speech-arguments if the trademark use is mainly commercial in nature? Should it matter whether the use of the trademark involves an expression or social discourse of objective/considerable value or a contribution to the public debate? Should the defendant be allowed to express his views in a trenchant way? Or should the defendant be required to report in a balanced way or even sparingly?*

If necessary, please differentiate between:

- *criticism of another’s mark or derogatory reference to another’s mark;*
- *parody, satire or irony;*
- *artist’s use of another’s mark;*
- *using another’s mark as a badge of loyalty or allegiance;*

- *using another’s mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant’s own product*

to the extent that such use should be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use should be understood as involving a non-trademark use in which case the question of freedom of speech does not arise).

N/A

- c) *How should joke articles be assessed?*

N/A

- d) *Should using another’s mark as a badge of loyalty or allegiance be considered as an exercise of the constitutional right of freedom of speech? Should it matter whether the scarves and other goods are sold to consumers? Should it matter whether the manufacturer indicates that the goods are not original?*

N/A

- e) *To the extent that such use should be considered as an exercise of the constitutional right of freedom of speech please specify the cases in which the defendant should be entitled to use another’s mark for the purposes of comparison, point of reference, description, identification or to convey information about the characteristics of defendant’s own product.*

In relation to all of sub-paragraphs a) to e) above, the Group considers that free speech should be open to all as an optional defence, whether the trade marks in question are used as a badge of loyalty, allegiance or otherwise, in the course of trade. Statutory provisions already exist in the UK (section 10(6) Trade Marks Act 1994, see 1.2 b) above) providing a defence to trade mark infringement on the basis that a registered trade mark may be used for the purposes of identifying goods or services as those of the proprietor or licensee, provided such use is in accordance with honest practices in industrial and commercial matters. Otherwise such use amounts to infringement if, without due cause, it takes unfair advantage of, or is detrimental to, the distinctive character or repute of the mark. These provisions would, no doubt, cover circumstances where the use of a mark was considered to be an exercise of the right of freedom of speech.

Summary

In the UK, freedom of speech is guaranteed by the European Convention on Human Rights, enacted into UK law by the Human Rights Act 1998. All forms of expression, including political, artistic and commercial expression, are in principle protected. Corporations are entitled to such protection. The right to free speech can be raised in disputes between private parties.

There is little experience of their effect in trade mark litigation, and no special provisions in trade mark law, except for using another’s mark in the course of trade where it is necessary to indicate the intended purpose of a product or service. Where a defendant has sought to attack a company’s policies, usually the tort of malicious falsehood (trade libel) is invoked. In litigation, the main criterion applied by the Court is whether the statement is true, but it will look at all the surrounding circumstances.

There is one case on parody where the defence failed, and it has also failed in cases on use as a badge of loyalty.

The UK Group believes that free speech interests should be capable of being invoked in trademark litigation, where appropriate and where the trade marks in question are used in the course of trade,

as an optional defence. However, trade marks should not be permitted to suppress freedom of expression, where the expression concerned is justified in the interests of society. The Group does not believe that there should be specific provisions dealing with criticism, parody, artist's use, use as a badge of loyalty, etc., but there could be one general provision, in the form of a fair-use clause, requiring freedom of speech to be taken into account.

Résumé

Au Royaume-Uni, la liberté de parole est garantie par la Convention européenne des Droits de l'Homme, promulguée loi britannique par le Human Rights Act 1998. Toutes les formes d'expression, y compris politique, artistique et commerciale, sont en principe protégées. Les sociétés ont droit à cette protection. Le droit à la liberté de parole peut être revendiqué dans les conflits entre simples particuliers.

On connaît peu son effet dans les procès relatifs aux marques de fabrique, et il n'existe aucune disposition dans la loi sur les marques, sauf dans le cas de l'usage de la marque d'un tiers dans la vie des affaires où il est nécessaire d'indiquer la fonction voulue d'un produit ou d'un service. Lorsqu'un accusé a cherché à attaquer la politique d'une société, le tort de diffamation (commerciale) est généralement invoqué. Lors d'un procès, le Tribunal appliquera le critère principal de savoir si l'affirmation est vraie ou non mais examinera de plus le contexte général.

Ceci est un cas de parodie où la défense a échoué, et elle a également échoué dans les cas sur l'usage comme badge de loyauté.

Le Groupe britannique estime que les intérêts de la liberté de parole doivent pouvoir être invoqués dans les procès sur les marques de fabrique, quand cela est approprié et lorsque les marques en question sont utilisées dans la vie des affaires, en tant que défense facultative. Toutefois, il ne faut pas laisser les marques supprimer la liberté d'expression, lorsque l'expression concernée est justifiée dans l'intérêt public. Le Groupe ne croit pas en l'instauration de dispositions spéciales concernant la critique, la parodie, l'usage artistique, l'usage comme badge de loyauté, etc., mais en revanche en une disposition générale, ayant la forme d'une clause d'usage loyal, qui exige de tenir compte de la liberté d'expression.

Zusammenfassung

In Grossbritannien ist das Recht auf freie Meinungsäußerung durch die Europäische Menschenrechtskonvention gewährleistet, das mit dem Human Rights Act 1998 (Menschenrechtsgesetz) als britisches Gesetz verabschiedet wurde. Alle Ausdrucksformen, einschließlich politischer, künstlerischer und kommerzieller Meinungsäußerung, sind im Prinzip geschützt. Unternehmen sind zu einem solchen Schutz berechtigt. Das Recht auf freie Meinungsäußerung kann in Rechtsstreitigkeiten zwischen Privatparteien geltend gemacht werden.

Bezüglich seiner Auswirkung in Markenstreitfällen gibt es wenig Erfahrungen und im Markenrecht keine besonderen Klauseln, außer für die Benutzung einer fremden Marke im Handelsverkehr, wenn der vorgesehene Zweck eines Produkts oder einer Dienstleistung angezeigt werden muss. Wenn eine Beklagte die Politik einer Firma anzugreifen versuchte, wird gewöhnlich das *tort of malicious falsehood* (böswillige Unwahrheit) (Verleumdung einer Marke) geltend gemacht. In Rechtsstreitigkeiten wendet das Gericht als Hauptkriterium an, ob die Aussage wahr ist, es zieht aber alle Umstände in Betracht.

Es gibt einen Fall über Parodierung, in dem die Einrede erfolglos war. Auch in Fällen über die Benutzung als Ausdruck der Treue war sie erfolglos.

Die britische Gruppe glaubt, dass es möglich sein sollte, Interessen bezüglich der freien Meinungsäußerung in Markenstreitfällen als fakultative Einrede geltend zu machen, wenn dies angebracht ist und wenn die betreffenden Handelsmarken im Handelsverkehr verwendet werden. Handelsmarken sollten aber die freie Meinungsäußerung nicht unterdrücken dürfen, wenn die betreffende Meinungsäußerung im Interesse der Gesellschaft gerechtfertigt ist. Die Gruppe glaubt nicht, dass es spezifische Klauseln geben sollte, die Kritik, Parodie, Benutzung durch Künstler, Benutzung als Ausdruck der Treue usw. behandeln, dass es aber eine allgemeine Klausel in der Form einer "Fair-use"-Klausel (fair use: Benutzung einer fremden Marke zum Zwecke der Beschreibung oder Identifikation) geben sollte, die erfordert, dass die freie Meinungsäußerung berücksichtigt wird.