

Modern Functions and the Trademark Prerequisite in European Trademark Law

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There has been a rapid functional change in the notion of trademark for the last three decades. Today, a trademark signifies not only the commercial origin or quality characteristics of the products bearing it but also a brand image that consumers might wish to be associated with. Some trademark owners have been investing in the creation and development of a brand image through advertising and other marketing techniques in order to attract consumers to their trademarked products. In order to safeguard the investment that trademark owners have made, the protection given to trademark owners under Article 5 (1) (a) of the Trade Mark Directive has been expanded to cover the communication, investment and advertising functions (so-called "modern" functions) through the judgments of the Court of Justice of the European Union. The expansion of trade mark protection to cover the modern functions arose an issue as to the interpretation of the trade mark use prerequisite within the meaning of Article 5 (1) (a) of the Trade Mark Directive. The notion of the trade mark use prerequisite needs to be revisited to include trade mark uses other than identifying the commercial origin of products bearing the mark. The unauthorized use of a trade mark by third parties which affects or liable to affect any functions of trade mark including the modern functions, regardless of whether such use made for distinguishing the commercial origin of products or not, should be enough to be considered as trade mark use within the meaning of Article 5 (1) (a) of the Trade Mark Directive.

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