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## The Expansion of Trademark Rights in Europe

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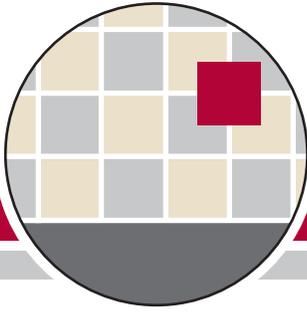
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## The Expansion of Trademark Rights in Europe

Irina Pak\*

### INTRODUCTION

It is an unequivocal truth that, in a free market economy, visualizing a world in which there are no trademarks is an unworthy task because the contemporary consumer identifies goods and services by their trademarks in the same manner as he identifies people by their names. That trademarks are necessary is beyond any doubt.<sup>1</sup> Yet, unlike persons' names, trademarks are not meant to be copied and applied to similar or identical products; therefore, there may be several men named "John Smith" harmoniously living in the same neighborhood, but there shall only be one "Nike" mark used to designate sportswear. The law, since time immemorial, has sought to ensure that no one takes another's mark.<sup>2</sup> This requires addressing the justifications of trademarks, which determines the scope of their legal protection.

In the case of *Arsenal Football Club plc v. Reed* (the *Arsenal* case), Advocate-General Colomer stated in his opinion that the function of trademarks should not be limited only to the indication of origin.<sup>3</sup> A question thus arose as to whether the legal protection of trademarks should be expanded, and, if so, on what grounds such expansion would be justified.

This Essay will argue that trademarks in the European Union (EU) presently enjoy sufficient protection and that further expansion of the proprietor's rights may adversely affect the consumer. The European Court of Justice (ECJ) has played a major role in expanding trademark protection: it gave a wide interpretation to the meaning of 'use' under Article 5(1)(a) of the EU Trademarks Directive<sup>4</sup> and accepted that the mark's owner is entitled to protection of the investment per se in *L'Oréal SA v. Bellure NV* (the *L'Oréal* case).<sup>5</sup> Hence, recognizing other functions of marks and granting them legal protection creates the danger of shifting protection away from consumers.

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1. W.C. Howarth, *Are Trademarks Necessary?*, 60 TRADEMARK REP. 228 (1970).

2. *Id.* at 230.

3. Case C-206/01, *Arsenal Football Club plc v. Reed*, 2002 E.T.M.R. 82 (Colomer, R.).

4. Council Directive 89/104/EC, art. 5(1)(a), 1988 O.J. (L 40) [hereinafter *TMD*] (current version at Council Directive 2008/95/EC, 2008 O.J. (L 299)).

5. Case C-487/07, *L'Oréal SA v. Bellure NV*, 2009 E.T.M.R. 55.

## I. JUSTIFICATIONS FOR TRADEMARKS PROTECTION

The question of justifications for intellectual property rights is frequently discussed among legal scholars and commentators.<sup>6</sup> In particular, the discussion of justifications for trademarks, although based on abstract theories and presumptions, is of practical relevance. To ascertain the ambit of a mark's legal protection, it is important to clarify why trademarks should be protected in the first place.<sup>7</sup> Two points should be made at this stage: first, there is no single and clear-cut rationale for trademarks protection, and no argument advanced in this respect is conclusive; second, the difficulty of agreeing on which justification is principal mirrors the problem of defining the scope of legal protection and its further development.<sup>8</sup>

### 1) Trademark functions

It is believed that trademarks perform at least three functions: the identifying or origin function, the quality function, and the advertising or investment function.<sup>9</sup> Of the three, the *identifying function* has been recognized as the “essential function,” which serves to inform the consumer of the source of goods: the ECJ has stated that “regard must be had to the *essential function* of the trademark, which is to guarantee the origin of the trademarked product to the consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin.”<sup>10</sup> This function has been included in the tenth recital of the Trade Marks Directive (TMD), which “afforded protection to a registered trademark the function of which is to guarantee the indication of origin.”<sup>11</sup> Trademarks indicate that a particular product comes from a particular producer—this way, the consumer distinguishes the products of one producer from those of another.<sup>12</sup> Hence, the definition of a trademark includes the requirement of it being distinctive.<sup>13</sup>

Once the consumer has identified a trademark, the mark communicates further information. Indeed, when choosing the product bearing his or her favorite mark, the consumer often associates it with the quality of the product.<sup>14</sup> The *quality function* of the mark provides assurance to the consumer that the owner of the mark followed the

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6. LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 3–5 (3d ed. 2008).

7. MICHAEL SPENCE, *INTELLECTUAL PROPERTY* 60–73 (2007).

8. WILLIAM CORNISH, *INTELLECTUAL PROPERTY: OMNIPRESENT, DISTRACTING, IRRELEVANT?* 87–89 (2004).

9. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 *HARV. L. REV.* 813, 814–16 (1926).

10. Case 102/77, *Hoffmann-La Roche & Co. AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, 1978 E.C.R. 1139, ¶ 7.

11. *TMD 89/104/EC*, Recital 10; *TMD 2008/95/EC*, Recital 11.

12. Schechter, *supra* note 9, at 813–14.

13. UK Trade Marks Act 1994 §1(1) (defining “trade mark” as “any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.”).

14. CORNISH, *supra* note 8, at 89.

necessary quality control standards when producing the product bearing that mark.<sup>15</sup> When the consumer finds a product whose qualities he has not yet tested, a trademark will trigger certain expectations.<sup>16</sup> Thus, Hanak argued that “in the world of modern marketing, the primary function of the mark is to indicate a degree of quality, and only the secondary function is to indicate origin or source.”<sup>17</sup> Furthermore, trademarks perform the *advertising* function, which serves to both inform and persuade the public.<sup>18</sup> Advertising is instrumental for the producer, as using marks as a means of advertising is the best way for a producer to reach the consumer.<sup>19</sup> Trademarks are brief and easily retained in memory, and they are a “species of advertising” that can “serve as a bridge between advertising and purchase, and that they may themselves be the vehicle of persuasion . . . .”<sup>20</sup> Often, consumers are induced to buy a particular product because of a smart and influential advertising campaign and a well-promoted brand.<sup>21</sup>

## 2) *Economic Justifications*

It is one thing to recognize that the mark is capable of performing three functions, but it is a different matter to suggest that each function merits legal protection. Some valid reasons can be invoked to explain why *origin* and *quality* functions should be protected. The same, however, cannot be said of the *advertising* function.

The *identifying* and *quality* functions are complementary and are often analyzed together from the law-and-economics perspective. Neoclassical economists argue that trademarks encourage the production of quality goods, as well as reduce consumer search costs, because trademarks convey information about the quality of the product;<sup>22</sup> therefore, a consumer satisfied with that product will return to it and thus spend more, enabling the producer to receive returns on his investment in the mark.<sup>23</sup> By the same token, because the consumer is familiar with the product and its qualities through its mark, he or she does not need to research further on other products.<sup>24</sup> His search costs are thus reduced. Legal protection of

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15. Schechter, *supra* note 9, at 824.

16. CORNISH, *supra* note 8, at 89. For example, Cornish suggested that the origin function is inextricably intertwined with the quality function of the trademark.

17. Elmer William Hanak, III, *The Quality Assurance Function of Trademarks*, 65 TRADEMARK REP. 318, 319 (1978).

18. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1189 (1948).

19. *Id.*

20. *Id.*

21. Schechter, *supra* note 9, at 814–16: “...today the trademark is not merely the symbol of good will but often the most effective agent for the creation of good will, imprinting upon the public mind an anonymous and impersonal guaranty of satisfaction, creating a desire for further satisfactions. The mark actually sells the goods. And, self-evidently, the more distinctive the mark, the more effective is its selling power.”

22. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW: THE ECONOMICS OF TRADEMARKS* 168–9 (2003).

23. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269 (1987).

24. LANDES & POSNER, *supra* note 22, at 167.

trademarks, therefore, is necessary, because it encourages firms to produce quality goods, bringing about consumer satisfaction and further reliance on the mark as the identifier of the goods the consumer liked.<sup>25</sup> Likewise, if marks are not protected against copying, consumers will be confused and incur greater costs in identifying the authentic mark.<sup>26</sup> The *origin* function is thus the *raison d'être* of the rights conferred by Article 5(1)(a)(b) of the TMD, which seeks to ensure that consumers are not confused or misled by the existence of identical or similar marks for identical or similar products.

The justification for granting the *advertising* function legal protection is controversial, because it presumes the recognition of legal protection of the mark itself. In this respect, trademarks take on a more tangible form and are viewed as property, which can be safeguarded against trespass by third parties.<sup>27</sup> To perceive the mark as property implies a broader scope of protection for the proprietor beyond the *origin* and *quality* functions. Indeed, the protection of the mark itself does not require proof of the likelihood of confusion on the part of the public.<sup>28</sup> Hence, Article 5(2) of the TMD entitles the proprietor of a trademark to prevent the use, by a third party, of a mark when such use is detrimental to the distinctive character or to the repute of his trademark.<sup>29</sup> The UK adopted similar antidilution provisions (sections 5(3) and 10(3) of the UK Trade Marks Act 1994) even though their origin is not entirely clear.<sup>30</sup> This is an interesting fact given that traditional English trademark law was based on the *law of deceit*, which sought to protect consumers from fraud as to origin of the goods.<sup>31</sup> What is clear, however, is that while antidilution may accrue additional value to the mark's owner, it adds no benefits to the consumer. Indeed, advertising itself is not necessarily beneficial to the consumer, and persuasive advertising can even be detrimental because products are often presented as falsely appealing.<sup>32</sup> In fact, antidilution shifts legal protection away from the consumer.<sup>33</sup>

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25. Landes & Posner, *supra* note 23, at 269.

26. *Id.*

27. See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 97 TRADEMARK REP. 1126, 1126 (2007).

28. Case C-408/01, Adidas-Salomon AG v. Fitnessworld Trading Ltd., 2004 E.T.M.R. 10, 29–31.

29. Article 5(2) reads as follows: "Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark. TMD, art. 5(2).

30. J. Thomas McCarthy, *Dilution of a Trademark: European and United States Law Compared*, 94 TRADEMARK REP. 1163, 1165–66 (2004).

31. FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* (1925), at 143.

32. Brown, *supra* note 18, at 1169. For example, L'Oréal featured Penelope Cruz in its advertisement of mascara that said, "Up to 60% longer lashes." It also did not provide a disclaimer that the actress was, in fact, wearing individual false lashes inserted in her natural lashes. *ASA Adjudication on LOreal (UK) Ltd*, THE ADVERTISING STANDARDS AUTHORITY (Jan. 13, 2011), [http://www.asa.org.uk/ASA-action/Adjudications/2007/7/LOreal-\(UK\)-Ltd/TF\\_ADJ\\_42910.aspx](http://www.asa.org.uk/ASA-action/Adjudications/2007/7/LOreal-(UK)-Ltd/TF_ADJ_42910.aspx).

33. See Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999).

## II. EXPANSION OF TRADEMARK RIGHTS

The ECJ has clearly recognized the *origin* function of the trademark as the “essential function.”<sup>34</sup> Yet, in the *Arsenal* case, AG Colomer advocated for the recognition of other functions of trademarks and hence their legal protection.<sup>35</sup> AG Colomer stated inter alia that the mark’s function should not be limited to an indication of origin because “in most cases, the user is unaware of who produces the goods he consumes.”<sup>36</sup> As an obiter comment, it should be noted that the underlying idea of the *origin* function of a trademark lies in the consumer’s perception of the mark as having the *same* source or reaching him through the *same* channels, which he has tested and found satisfactory.<sup>37</sup> In other words, the *origin* function of the mark cannot be easily discarded on the ground that the consumer does not know the producer of the goods; as long as the consumer knows that the goods come from the *same* source, the *origin* function is fulfilled.

### 1) Article 5(1)(a)

In the *Arsenal* case, Arsenal FC, owner of the trademarks “Arsenal” and “Arsenal Gunners” registered for sportswear and footwear, started proceedings against Mr. Reed for passing off and trademark infringement based on sections 10(1) and 2(b) of the TMA 1994. Mr. Reed had been engaged in the trade of merchandise with signs referring to Arsenal FC outside the stadium. His stalls provided a notice stating that there was no relationship or affiliation with the Arsenal Football Club.<sup>38</sup> The High Court found that the public understood the words and symbols attached to Mr. Reed’s goods to be badges of support and loyalty for the Club, rather than badges of origin, which meant that the use was not a trademark use and could not be infringed.<sup>39</sup> However, when the question was referred to the ECJ for a preliminary ruling, the Court held that it was immaterial that Mr. Reed’s sign was perceived as a badge of support for or loyalty to the Arsenal Football Club, and the proprietor was entitled to rely on Article 5(1)(a), even if the use did not indicate trade origin.<sup>40</sup>

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34. Case 102/77, Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH. 1978 E.C.R. 1139, ¶ 7.

35. Case C-206/01, Arsenal Football Club v Reed, 2002 E.T.M.R. 82, per AG Colomer.

36. *Id.*

37. Schechter, *supra* note 9, at 814–16.

38. Arsenal Football Club Plc v Reed [2001] EWHC 440 (Ch), ¶ 40.

39. *Id.* at ¶¶ 56–58.

40. Arsenal Football Club, *supra* note 35, the ECJ stated: “The Court, in answer to the questions referred to it by the High Court of Justice of England and Wales, Chancery Division, by order of 4 May 2001, hereby rules: In a situation which is not covered by Article 6(1) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, where a third party uses in the course of trade a sign which is identical to a validly registered trade mark on goods which are identical to those for which it is registered, the trade mark proprietor of the mark is entitled, in circumstances such as those in the present case, to rely on Article 5(1)(a) of that Directive to prevent that use. 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 trade mark proprietor.”

It is interesting to note the analysis of the ECJ in reaching their conclusion. First, the Court stated that the guarantee of origin constituted the essential function of a trademark and that the aim of the protection was to guarantee the trademark as an indication of origin.<sup>41</sup> It then proceeded to state: “[i]t follows that the exclusive right under Article 5(1)(a) of the Directive 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 [sic] its *functions*.”<sup>42</sup> It appears that the ECJ implicitly endorsed AG Colomer’s view that other functions apart from the origin function should be protected. It has been argued that the ECJ’s approach in interpreting Article 5(1)(a) in the *Arsenal* case has numerous implications: first, the Court did not limit the meaning of “use” to the origin function of the mark, which impliedly extends the protection under Article 5(1)(a) beyond its original purpose—to combat counterfeit products; second, such expansion creates monopoly rights for the trademark owner over commercial use and exploitation of the signs they have registered as trademarks.<sup>43</sup> Indeed, it is not for Article 5(1)(a) to protect the mark’s reputation from unfair exploitation; instead, Article 5(2) should be the appropriate tool for these purposes, specifically because it does not require proof of likelihood of confusion.<sup>44</sup> However, in light of the decision in the *L’Oréal* case, it appears that the Court has gone even further in interpreting Article 5(2).

## 2) *L’Oréal v. Bellure*

Prior to the *Arsenal* case, the ECJ had attempted to expand trademark rights. In *Parfums Christian Dior SA & Parfums Christian Dior BV v. Evora BV*, the ECJ decided that, in principle, serious damage done to the reputation of the mark could entitle its owner to prohibit further commercialization of the goods already put on the European Community market.<sup>45</sup> It has thus been argued that the Court recognized the right of the trademark owner to protect the advertising function of his mark.<sup>46</sup> In the *L’Oréal* case, the Court expressly stated that the proprietor is entitled to protect functions of his mark, which include “not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services, but also its other functions, in particular . . . those of communication, investment or advertising.”<sup>47</sup> In this case, *L’Oréal*, the owner of perfume marks “Trésor,” “Miracle,” and “Anais-Anais,” argued that the defendants, who were producing and distributing under the “Creation Lamis”

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41. *Id.* at ¶ 50.

42. *Id.* at ¶ 51 (emphasis added).

43. Andrew Griffiths, *The Trade Mark Monopoly: An Analysis of the Core Zone of Absolute Protection Under Art.5.1(a)*, 3 INTELL. PROP. Q. 312, 347 (2007).

44. *Id.*

45. Case C-337/95, *Parfums Christian Dior SA v. Evora BV*, 1997 E.C.R. I. 6013, ¶ 43.

46. See Gert-Jan Van de Kamp, *Protection of Trade Marks: The New Regime—Beyond Origin?*, 1998 E.I.P.R. 364, 370.

47. Case C-487/07, *L’Oréal SA v. Bellure NV*, 2009 E.T.M.R. 55, ¶ 58.

label of replica fragrances identical to L'Oréal's perfumes, were infringing trademark rights under Article 5(2).<sup>48</sup> In particular, L'Oréal sought to restrict the use of its trademarks by Bellure in comparison lists.<sup>49</sup>

Article 5(2) is commonly known as the “dilution provision,” which is concerned with the protection of the trademark's reputation.<sup>50</sup> It aims to protect the mark's “selling power and value,” because it is presumed that if a famous mark is used for unrelated goods, it will no longer be associated with a single source and, hence, lose its identity.<sup>51</sup> One of the questions the ECJ had to decide was whether the meaning of “unfair advantage” included use that was not detrimental either to the identifying function of the mark or its reputation.<sup>52</sup> Because there was no evidence of any damage done to L'Oréal's trademarks, in effect, L'Oréal argued that investment per se should be protected under Article 5(2).<sup>53</sup> The ECJ agreed with L'Oréal and held that the trademark owner is entitled to protection against free riding without need to show any kind of damage or harm to the reputation of his mark.<sup>54</sup> This decision significantly expanded trademark protection and has been subject to criticism. It has been submitted that, in economic terms, such expansion cannot be justified, because free riding itself does not merit legal intervention; instead, legal intervention “should go no further than is required to provide the incentive to invest,” and “[g]iven the advantages that accrue to the owner of an established brand it is difficult to see that there is any danger of ‘undersupply’ that trade mark law needs to guard against.”<sup>55</sup> A free riding argument is often based on ethical considerations, which suggest that one should not reap where he has not sown;<sup>56</sup> however, this argument is hard to sustain, primarily because the concept of ethics is not always objective and, in a business context, just because something is not ethical does not necessarily mean it should merit legal protection.<sup>57</sup> Moreover, the *L'Oréal* decision has far more serious implications concerning consumer rights and freedoms.

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48. Article 5(2) provides, “[t]he proprietor [of a registered trade mark] shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes *unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.*” TMD, art. 5(2) (emphasis added).

49. *L'Oréal*, 2009 E.T.M.R. 55, at ¶¶ 21–23.

50. Case C-408/01, *Adidas-Salomon*, 2004 E.T.M.R. 10, ¶¶ 37–40.

51. Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1033–34 (2006).

52. *L'Oréal*, 2009 E.T.M.R. 55, at ¶ 30.

53. *Id.* at ¶ 24.

54. *Id.* at ¶¶ 41–43.

55. Dev Gangjee & Robert Burrell, *Because You're Worth It: L'Oréal and the Prohibition on Free Riding*, 73 MOD. L. REV. 282, 289 (2010).

56. Beverly W. Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 MICH. L. REV. 967 (1952).

57. See Gangjee, *supra* note 55.

### III. IMPLICATIONS OF *L'ORÉAL*

#### 1) *Google AdWords*

Recently, the ECJ confronted the difficult issue of the use of trademarks as keywords to trigger sponsored advertisements on the Internet.<sup>58</sup> Google provides advertising services whereby one can purchase a keyword, which, when searched on the Internet, triggers a particular sponsored advertisement, along with other, non-sponsored search results. In *Google France SARL v. Louis Vuitton Malletier SA* (the *Google* case), Louis Vuitton, the proprietor of marks “Louis Vuitton,” “Vuitton,” and “LV,” discovered that the entry of its marks in the Google search engine showed sponsored links to sites offering imitation versions of Vuitton’s products.<sup>59</sup> Louis Vuitton brought infringement proceedings against Google in the French Court, which referred the case to the ECJ for a preliminary ruling. This was not the first time that Google had confronted legal proceedings for providing its advertising services in respect of registered marks. In fact, similar cases arose in the UK, Germany, and Austria, so that in the UK, the use of a trademark as a keyword for triggering sponsored advertisements did not constitute infringement because the English High Court had found that such use may not affect the identifying function of a trademark, while the German and Austrian courts gave no definite decision.<sup>60</sup> The ECJ’s ruling in the *Google* case was therefore seen as of utmost importance for Google’s policy in relation to its AdWords business. The ECJ found that AdWords’ services may infringe trademark rights, but liability falls on individual AdWords’ account holders; it refused to accept that Google was directly liable for infringing use by a keyword on the ground that Google itself did not “use” signs within the terms of Article 5 of the TMD.<sup>61</sup> The Court followed the reasoning in *Arsenal* that a trademark is infringed if the third party uses it in a way that causes an “adverse effect” to the functions of the mark: the origin and advertising functions.<sup>62</sup> It then found that AdWords did not harm the mark’s advertising function.<sup>63</sup> Nonetheless, even though the Court did not find Google infringed Louis Vuitton’s trademark rights, it did not specify what conduct would satisfy the requirements of “use.” Moreover, it must be borne in mind that the Court still held that the use of trademarks as keywords may constitute infringement.<sup>64</sup> The costs of this decision will likely be borne by consumers, as the trademark proprietor will hold a monopoly and control what can be found on the Internet. The prohibition of

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58. Cases C-236/08 to C-238/08, *Google France SARL v. Louis Vuitton Malletier SA*, 2010 E.C.R. I- 02417 (joined cases).

59. *Id.*

60. *See, e.g.,* Reed Exec. plc v. Reed Bus. Info. Ltd., [2004] E.W.C.A. (Civ) [159]; *Wilson v. Yahoo! UK Ltd.*, [2008] EWHC (Ch1) [361]; Noam Shemtov, *Searching for the Right Balance: Google, Keywords Advertising and Trade Mark Use*, 30 E.I.P.R. 470, 474 (2008).

61. *Google France*, 2010 E.C.R. I-02417 at ¶¶ 55–57.

62. *Id.* at ¶ 79.

63. *Id.* at ¶¶ 92–94.

64. *Id.* at ¶¶ 87–88.

the use of trademarked terms as AdWords keywords means that consumers are unlikely to view competitor's ads. From an economics point of view, consumers will have to incur additional search costs, such as entering a different keyword if they wish to find information about other competitors. Generally speaking, the consumer's right to information would be restricted if the mark's rights are expanded further in relation to the Internet.<sup>65</sup>

## CONCLUSION

Ever since the introduction of the TMD, the scope of legal protection for trademarks in Europe has expanded. Initially, the EU did not particularly welcome trademarks; however, trademarks have now become an "equal partner in the formation of competition policy."<sup>66</sup> The ECJ has accepted that trademarks have an "essential function" of distinguishing goods of one producer from those of another; yet, the ECJ then went further and endorsed the advertising or investment function of the mark, thereby granting proprietors broad rights and treating marks as property. This Essay argues that such expansion is not desirable nor can it be easily justified. The broad interpretation of Articles 5(1)(a) and 5(2) cannot avoid criticism that greater monopoly-like rights of trademark proprietors adversely affect consumers in that their right to information could be limited. This concern is especially relevant in relation to the Internet, the success of which presumably owes much to it being subject to lenient controls. As of yet, it is not evident what the further development of trademark law in Europe will be; however, it is submitted that trademark law should not be expanded beyond what it is meant to serve— the protection of consumers against counterfeit products and confusion as to their origin. The protection of other functions of trademarks should be left to unfair competition rules, which the EU should potentially seek to harmonize. ■

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65. Ashley Tan, *Google AdWords: Trademark Infringer or Trade Liberalizer?*, 16 MICH. TELECOMM. & TECH. L. REV. 473 (2010).

66. Jeremy Phillips, *Analysis: Pariah, Piranha or Panther? The New View of Intellectual Property in Europe*, I.P.Q. 107, 112 (1998).