

Confused about confusion: is there still a distinction between primary and extended trade mark infringement?

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Abstract

The Trade Marks Act 194 of 1993 created three new forms of infringement commonly known as primary infringement, extended infringement, and finally, infringement by dilution. Here, I consider whether the distinction between the first two forms of infringement still exists.

LEGISLATIVE BACKGROUND

Section 34(1) of the Trade Marks Act 194 of 1993 reads as follows:

- The rights acquired by registration of a trade marks shall be infringed by—
- (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;
 - (b) the unauthorized use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion;
 - (c) ...

Both paragraphs (a) and (b) refer to confusion.¹ But there is a notable difference. In paragraph (a), the confusion relates to the similarity of the two marks: if the allegedly infringing mark is not identical, it must be confusingly similar. Paragraph (b) refers to confusing use: the similarity between the marks, coupled with the similarity between the goods must cause confusion when the allegedly infringing mark is used.

When the Act was introduced, and until very recently, it was accepted that for primary infringement a plaintiff had to prove the following:

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¹ For clarity and simplicity, I limit the discussion that follows to a consideration of 'confusion' and do not refer to 'deception'. I will also limit the discussion to goods, and not also refer to services. I submit that the principles remain unchanged.

- (i) use of the registered trade mark or a confusingly similar mark;
- (ii) use in relation to the goods in respect of which the mark is registered;
- (iii) use in the course of trade; and
- (iv) unauthorised use.²

These requirements will not be canvassed here as they have been analysed extensively by other writers. I merely provide a brief summary of the interpretation placed by our courts on the concept of ‘likely to deceive or cause confusion’, which, in the context of this subsection, refers to confusing similarity between the registered mark and the allegedly infringing mark. The classic formulation is found in the *Plascon-Evans* decision, which, although decided under the previous Act,³ has continued to be accepted by subsequent courts. The then Appellate Division held that ‘it is enough for the plaintiff to show that a substantial number of persons will probably be confused as to the origin of the goods or the existence or non-existence of such a connection’ (a material connection between the defendant’s goods and the proprietor of the registered mark).⁴ The Supreme Court of Appeal has pertinently adopted this formulation when considering the same phrase as used in the current Act.⁵ To this has been added the concept of ‘global appreciation’ of the visual, aural or conceptual similarity of the marks in question.⁶ The onus rests on a plaintiff to show that the two marks are sufficiently similar that consumers may confuse the one for the other, and so be confused about the origin of the defendant’s goods.

For extended infringement, a plaintiff must prove:

- (i) use of the registered mark or of a similar mark;
- (ii) use in relation to goods which are similar to the goods in respect of which the mark is registered;
- (iii) a likelihood of deception or confusion because of such use;
- (iv) use in the course of trade;
- (v) unauthorised use.⁷

Here, the plaintiff must show not only that the marks are confusingly similar, but that, when applied to similar goods, the use of the allegedly

² Charles Webster and Gavin Morley, *Webster & Page South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles* (4 edn Butterworths service issue 19 November 2015) para 12.7.

³ Trade Marks Act 62 of 1963, considering s 44(1)(a) which uses the same term.

⁴ *Plascon-Evans Paints v Van Riebeeck Paints* [1984] 3 SA 623 (A) 640.

⁵ *PPI Makelaars v Professional Provident Society* [1998] 1 SA 595 (SCA) 602; *National Brands v Blue Lion Manufacturing* [2001] 3 SA 563 (SCA) 567; *Adidas AG v Pepkor Retail* [2013] BIP 203 (SCA) para 9.

⁶ *Bata Ltd v Face Fashions CC* [2001] 1 SA 844 (SCA) 850 quoting from *Sabel BV v Puma AG, Rudolph Dassler Sport* (Case C-251/95) (*Sabel*) [1998] RPC 199 at 244.

⁷ Webster (n 2) at para 12.22.

infringing mark may cause confusion. As formulated by the Supreme Court of Appeal, '[t]he deception and confusion we are talking about, of course, must relate to the origin of the respective goods. So, is it likely that the notional purchaser may be confused to think that these goods have the same origin?'

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While there does not appear to be any great distinction between the formulation of the test used in these two instances – both require confusion as to origin – the common assumption was that section 34(1)(a) provided so-called 'absolute' protection – provided that it could be shown that the two marks were confusingly similar (if they were not identical), infringement occurred. In contrast, for extended infringement in terms of section 34(1)(b), confusing similarity and confusion as a result of use had to be shown before a court would make a finding of infringement. United Kingdom (UK) and European Union (EU) legislation are similarly worded.

The UK Trade Marks Act provides as follows:

- (i) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical to those for which the trade mark is registered;⁹
- (ii) A person infringes a registered trade mark if he uses in the course of trade a sign where because –
 - (a) The sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or
 - (b) The sign is similar to the trade mark and is used in relation to goods or services identical or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes a likelihood of association.¹⁰

The wording of these sections differs slightly from the South African equivalents. Section 10(1) requires identity of marks and goods – the issue of confusingly similar marks does not arise when the goods are identical. In the UK, the general assumption was that if the marks were identical and the allegedly infringing sign has been used on goods for which the trade mark was registered, there would be infringement and 'no proof of any likelihood of confusion is required'.¹¹

⁸ *Mettenheimer v Zonquasdrif Vineyards CC* [2014] 2 SA 204 (SCA) para 12.

⁹ S 10(1) of the Trade Marks Act, 1994.

¹⁰ S 10(2).

¹¹ Christopher Morcom, Ashley Roughton and Thomas St Quentin, *The Modern Law of Trade Marks* (LexisNexis 2012) para 12.30(b). See also David Kitchin and others, *Kerly's Law of Trade Marks and Trade Names* (Sweet & Maxwell 2005) para 14–056.

The EU Directive differs slightly from both the above. It provides that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign where:

- (a) the sign is identical with the trade mark and is used in relation to goods or services which are identical with those for which the trade mark is registered;
- (b) the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark.¹²

Here, as in the UK, when the marks and the goods are identical, no requirement of confusion is included. Article 10.2(b) is a combination of the United Kingdom section 10(2)(a) and (b) but otherwise contains the same terms.

To recap – in all three jurisdictions, legislation provides that if the mark and the sign are identical and are used on goods for which the mark is registered, confusion is not a requirement. If the mark and sign are similar and the goods are similar, a likelihood of confusion is required in all three jurisdictions – on the part of the public in the EU and UK, and in South Africa, confusion in use. It is only when the mark and sign are similar but the goods are identical that the South African provision is slightly more lenient and confusing similarity of marks suffices.

The previous South African Trade Marks Act (1963), had distinguished two types of infringement – use ‘as a trade mark’¹³ and use ‘otherwise than as a trade mark’.¹⁴ This first type of infringement dealt with instances where the offending mark was used to indicate the origin of the goods, while the second was generally viewed as referring to instances where the offending mark was used for other purposes, for example, comparative advertising. For the latter type of infringement, the trade mark proprietor had to show that such use would cause him or her injury or prejudice.¹⁵

The new South African Trade Marks Act (1993) did away with this distinction. In the memorandum accompanying the draft bill it was stated that the proposed Act would create new forms of infringement which would

¹² Art 10.2 Directive (EU) 2015/2436 (2015 Directive). In terms of the previous Directive 2008/95/EC (2008 Directive), under which the cases discussed here were decided, the equivalent article was 5.1. I use the numbering of the 2008 Directive in this discussion.

¹³ S 44(1)(a) Act 62 of 1963 of the Trade Marks.

¹⁴ S 44(1)(b).

¹⁵ BR Rutherford, ‘Limiting the trade mark monopoly: The nature of infringing use’ (2007) 3 XL CILSA 449 at 453.

correspond to those in the then EU Directive. At a seminar to discuss the impact of the new Act, one of the drafters pertinently assured the audience that, in the new Act ‘there is no distinction drawn between use of an offending mark “as a trade mark” and “otherwise than as a trade mark”’.¹⁶ He also pertinently stated that ‘even innocuous, unprejudicial brand advertising is now prohibited.’¹⁷

In the UK too, the White Paper on the reform of trade mark law stated that ‘the need to show likelihood of confusion does not of course arise where – in the situation covered in paragraph 3.15 [double identity] – both the marks and the goods or services concerned are identical’.¹⁸ Early textbooks on the new Act also held that ‘[I]ability is strict in the case of an identical sign for identical goods or services: there is no need for the plaintiff to show a likelihood of confusion’.¹⁹

CHANGING REQUIREMENTS FOR PRIMARY INFRINGEMENT

For a number of years it was assumed that when there was identity of mark and goods (double identity), a trade mark proprietor need not provide evidence of confusion.²⁰ But did that mean that any use of the trade mark by third parties was prohibited, and that protection in instances of double identity was absolute, or was ‘use as a trade mark’ still required?

In 2001 a UK court made a reference to the Court of Justice of the European Union (CJEU). One of the questions was as follows: Where a trade mark is validly registered, and a third party uses in the course of trade a sign identical with that trade mark in relation to goods which are identical with those for which the trade mark is registered, does the third party have a defence to infringement on the ground that the use complained of does not indicate trade origin (ie a connection in the course of trade between the goods and the trade mark proprietor)?²¹ The CJEU did not answer the question directly – it rephrased it to state:

To answer the High Court’s questions, it must be determined whether Article 5(1)(a) of the Directive entitles the trade mark proprietor to prohibit any use by a third party in the course of trade of a sign identical to the trade mark for goods identical to those for which the mark is registered, or whether

¹⁶ CK Job, ‘The Infringement of Trade-mark Rights’ para 7.2 in Coenraad Visser, (ed) *The New Law of Trade Marks and Designs* (Juta & Co 1995).

¹⁷ *Ibid.*

¹⁸ Reform of Trade Mark Law Cmd 1203 para 3.16.

¹⁹ Ruth Annand and Helen Norman, *Blackstone’s Guide to the Trade Marks Act 1994* (Blackstone Press 1994) 153.

²⁰ See Annette Kur, ‘Trademarks Function, Don’t They? CJEU Jurisprudence and Unfair Competition Principles’ (Max Planck Institute for Innovation and Competition Research Paper No 14-05 10 Feb 2014) 3 for the absence of a common understanding in different EU jurisdictions of the interpretation of ‘absolute’.

²¹ *Arsenal Football Club plc v Reed (Arsenal 2001)* [2001] EWHC Ch 429 para 1.

that right of prohibition presupposes the existence of a specific interest of the proprietor as trade mark proprietor, in that use of the sign in question by a third party must affect or be liable to affect one of the functions of the mark.²²

It continued:

In that context, the essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. [I]t must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality.²³

It then concluded that, to ensure the guarantee of origin which constitutes its essential function:

[T]he 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 its functions. The exercise of that right must therefore be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods.²⁴

So, in essence, the CJEU held that what was relevant for infringement purposes was not 'use as a trade mark', but use 'affecting the function of the trade mark'. It held that a proprietor may not prohibit use in instances of double identity 'if that use cannot affect his own interests as proprietor of the mark, having regard to its functions'.²⁵

This decision was upheld by the UK Court of Appeal, where that court emphasised that the CJEU had decided that 'trade mark use' as indicating the origin of the goods concerned, was not relevant – what was important was whether the use affected 'the guarantee of origin which constitutes the essential function of the mark'.²⁶ As the court explained, where the third party's use of the mark is likely to affect the functions of the mark, for example, by selling products illegally bearing the mark, infringement

²² Ibid para 42.

²³ Ibid para 48.

²⁴ Ibid para 51.

²⁵ Ibid para 54.

²⁶ *Arsenal v Reed* [2003] 3 All ER 865 [2003] EWCA Civ 696 para 33.

would take place irrespective of whether there was trade mark use or there was confusion.²⁷

However, at the same time the House of Lords, dealing with a criminal prosecution for unauthorised trade mark use, also considered the ambit of section 10(1). Lord Nicholls of Birkenhead pointed out that section 10, while specifying the acts that constitute infringement, contains no express statement that the offending use must be use as a trade mark. But, he argued, the purpose of the statute was to implement the EEC Council Directive to harmonise trade mark laws of the member states, and so authoritative guidance now came from the CJEU.²⁸ He stated that that court had finally dealt with the question of whether non-trade mark use could constitute infringement in *Arsenal v Reed* and ‘re-affirmed its characterisation of the purpose of a trade mark in terms which accord with the approach of English law’ and then quoted paragraph 48 of *Arsenal v Reed*²⁹ with approval.³⁰ Then, despite pertinently quoting the CJEU requirement that use must affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods, he held that non-trade mark use does not fall within the scope of section 10.³¹

Subsequent to *Arsenal*, the CJEU extended the protection afforded in cases of double identity and further defined and discussed the trade mark functions which could be protected by Article 5(1)(a). In *L’Oreal v Bellure* the CJEU referred to other functions, ‘in particular, that of guaranteeing the quality of the goods or services in question, and those of communication, investment and advertising’.³² (As noted by commentators, these functions are more properly reserved for protection only in respect of marks with a reputation, where stricter criteria for proof of infringement are imposed.³³) In *Interflora*, dealing with keyword advertising, the court held that the advertising function was not affected by use of the mark as a keyword, but that the investment function would be affected if such use interfered with the trade mark owner’s ability to acquire or preserve a reputation capable of attracting customers and retaining their loyalty.³⁴

Some of these decisions concerned keyword advertising and the CJEU was asked to decide whether use by either a service provider or a purchaser of a keyword could constitute infringement. In *Google France*, the CJEU

²⁷ Ibid para 37.

²⁸ *R v Johnstone* [2003] UKHL 28 para 15.

²⁹ See (n 28) above for the text of this paragraph.

³⁰ *R v Johnstone* (n 28) at para 16.

³¹ Ibid paras 17, 27.

³² *L’Oreal SA v Bellure NV* (C-487/07) (CJEU) para 58.

³³ See, for example, Martin Senftleben, ‘Bringing EU Trademark Protection Back Into Shape – Lessons to Learn From Keyword Advertising’ (Senftleben Keyword 2011) *6th Annual Conference of the EPIP Association: Fine-Tuning IPR Debates*. Brussels, Belgium: European Policy for Intellectual Property Association (EPIP) 12.

³⁴ *Interflora Inc v Marks & Spencer* (Interflora CJEU) (C-323/09) (CJEU) para 1 ruling.

held that the proprietor of a trade mark is entitled to prohibit use of a keyword identical to his trade mark, only ‘where that advertisement does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark...’.³⁵ In *Interflora*, the CJEU held that Article 5(1)(a) of the 2008 Directive must be interpreted as meaning that the proprietor of a trade mark is entitled to prevent a competitor from using an identical keyword to advertise identical goods where the use is liable to have an adverse effect on one of the functions of the mark. It continued, when discussing the origin function, that it would be adversely affected if the advertising ‘does not enable reasonably well informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods ... originate from the proprietor of the trade mark...’.³⁶

The CJEU made it clear in *Arsenal* that infringement protection was not absolute, in the sense that no one else was ever free to use the same mark, irrespective of how it was used, but that it was limited to ensuring that the mark could fulfil its functions. Trade mark use was not required, and in both *Arsenal* and *L’Oreal*, it appeared that any use that affected any function was a basis for infringement proceedings, and it appeared that the CJEU had granted substantially wider protection than the mere prohibition of trade mark use.³⁷ But the keyword decisions then appeared to reintroduce a substantial limitation on use affecting the essential function, by requiring that such use must enable consumers to ascertain the origin of the goods.³⁸

These decisions were followed by the UK courts, with the Court of Appeal decision in *Interflora* confirming the CJEU view that use that affected any of the functions of a trade mark would constitute infringing use.³⁹ The court also confirmed that the origin function would only be affected if internet users were not able to determine whether the goods originated from the proprietor or a third party.⁴⁰ Despite this, it did not interpret *Google France* as creating ‘any conventional formulation of a likelihood of confusion test;

³⁵ *Google France SARL v Centre National de Recherche en Relations Humaines* (C-238/08) CJEU para 84.

³⁶ *Interflora* CJEU (n 35) para 44.

³⁷ See for example Jeremy Phillips, *Trade mark law – a practical anatomy* (OUP 2003) para 7.51 who states that the position post-*Arsenal* in the UK was that all use by third parties other than descriptive use will be prohibited in instances of double identity because any other use will impair the ability of the trade mark to communicate the fact that it is a guarantee of origin.

³⁸ See Martin Senftleben, ‘Function Theory and International Exhaustion – Why it is Wise to Confine the Double Identity Rule to Cases Affecting the Origin Function’ (Senftleben Function November 2013) <<http://ssrn.com/abstract=2356772>> accessed 5 July 2016, who discusses the ‘very selective, inconsistent and unpredictable use of the function theory’ and criticises the CJEU for feeling free to ignore certain functions in certain cases and refusing to define the protected functions more clearly.

³⁹ *Interflora v Marks & Spenser (Interflora CA)* [2014] EWCA Civ 1403 paras 80, 92.

⁴⁰ *Ibid* paras 83–84

nor do we detect any suggestion, still less a finding, that it imposes a burden of proof upon the third party'.⁴¹

So, in the EU and the UK primary infringement occurs when any of the functions of a trade mark are affected, but the essential function will only be affected if consumers are not able to determine the origin of the goods.

In South Africa too, a further requirement for primary infringement, in line with developments in EU and the UK, was introduced by the Supreme Court of Appeal in the *Verimark* decision.⁴² This was a comparative advertising matter where BMW had alleged infringement because, inter alia, the identical mark was used for identical goods. Verimark's defence was that 'use' in terms of section 34(1)(a) must be trade-mark use, meaning 'use of a registered trade mark for its proper purpose (that is, identifying and guaranteeing the trade origin of the goods to which it is applied)'.⁴³ Harms DP held that a trade mark serves as a badge of origin and trade-mark law does not give copyright-like protection. He continued '[s]ection 34(1)(a), which deals with primary infringement and gives in a sense absolute protection, can, therefore, not be interpreted to give greater protection than that which is necessary for attaining the purpose of a trade mark registration, namely protecting the mark as a badge of origin'.⁴⁴ Referring to *R v Johnstone* with approval, he held that 'what is accordingly required is an interpretation of the mark through the eyes of the consumer as used by the alleged infringer. If the use creates the impression of a material link between the product and the owner of the mark there is infringement; otherwise there is not. The use of a mark for purely descriptive purposes will not create that impression but it is also clear that this is not necessarily the definitive test'.⁴⁵ Harms DP reiterated this view in a subsequent decision, *Commercial Auto Glass (Pty) Ltd v Bayerische Motorenwerke AG*, where he held that, for section 34(1)(a) infringement, the defendant's use must be 'trade mark use', and that this was an additional requirement to the original four listed earlier in this article.⁴⁶ Again, in 2010 Harms DP found primary infringement because the third party's use of the name Century City as a brand, corporate, or domain name was nothing other than trade mark use.⁴⁷ In the *Nestlé* decision, the defence of descriptive use was rejected by the Supreme Court of Appeal which held that what was important was whether the mark was capable of distinguishing the product of the owner from that of competitors. Nestlé had to show that the mark was used as a badge of origin, not merely in

⁴¹ Ibid para 192.

⁴² *Verimark v Bayerische Motorenwerke AG (Verimark)* [2007] 6 SA 263 (SCA).

⁴³ Ibid para 4.

⁴⁴ Ibid para 5.

⁴⁵ Ibid para 7.

⁴⁶ [2007] 6 SA 637 (SCA) para 3. See list at (n 2).

⁴⁷ *Century City Apartments v Century City Property Owners' Association* [2010] 2 All SA 409 (SCA) para 10.

a descriptive manner. So, the court continued, the issue was whether the public would perceive the Kit Kat shape to perform the function of a source identifier.⁴⁸ ‘If the public perceives that shape of the product [the mark] depicted on the packaging as a badge of origin this would not count as descriptive use’.⁴⁹

In South Africa, the concepts ‘trade mark use’ and ‘use affecting the essential function’ were blurred in the first decision where they were pertinently considered. Currently, it is accepted that the plaintiff must show trade mark use by the defendant for a finding of primary infringement.⁵⁰ The trade mark proprietor must prove ‘trade mark use’ but not a likelihood of confusion for primary infringement.

TRADE MARK USE VERSUS USE AFFECTING THE FUNCTION OF THE MARK

What is trade mark use and does it differ from ‘use that affects the essential function of the mark’? Prior to *Arsenal*, the CJEU described trade mark use as ‘whether the trade mark is used for the purpose of distinguishing the goods or services in question as originating from a particular undertaking, that is to say, as a trade mark as such’.⁵¹ This was not addressed in *Arsenal*, although the Advocate-General stated in his opinion that ‘in cases of identity of signs and of goods or services, there is a presumption *ius tantum* that the use by the third party of the trade mark is use thereof as such’.⁵² The Court of Appeal, when applying the CJEU ruling, noted that this required a consideration of whether the use complained of was likely to ‘affect or jeopardise the guarantee of origin which constitutes the essential function of the mark. That did not depend on whether the use complained of was trade mark use’.⁵³ Aldous LJ then explained that the CJEU considered whether the interest in the proprietor’s trade mark right was liable to be affected, while the defendant’s submission looked at whether use was of a particular type, namely connoting a connection in the course of trade between the goods and the proprietor.⁵⁴ Aldous LJ found that the use of the marks affected their ability to guarantee the origin of the goods, which was the material consideration, and so infringement had taken place.⁵⁵ Although *obiter*, he then proceeded to consider whether the defendant’s use had been ‘trade mark use’. He held that, although the defendant might

⁴⁸ *Société des Produits Nestlé SA v International Foodstuffs* [2015] 1 All SA 492 (SCA) paras 39–40.

⁴⁹ *Ibid* para 45.

⁵⁰ Not all courts are clear on what this requirement encompasses: see for example *Car Find v The Car Trader* (case no 02713/2016) para 6, where ‘use’ is accorded the dictionary definition, not that of ‘trade mark use’.

⁵¹ *Bayerische Motorenwerke AG v Deenik* (C-63/97) para 38.

⁵² *Arsenal ECJ* (n 21) para A88 (2).

⁵³ *Arsenal CA* (n 26) para 33.

⁵⁴ *Ibid* para 34.

⁵⁵ *Ibid* para 48.

have been using the goods as a ‘badge of allegiance’, the evidence showed that the trade marks also designated the origin of the goods to a substantial number of customers. While not pertinently concluding that this was ‘trade mark use’, he then continues that ‘[i]n my view the evidence is all one way, namely that use of the trade mark on goods such as scarves and hats, whether by Arsenal or others does denote origin’.⁵⁶ So it appears that, in the interpretation placed by the Court of Appeal on the CJEU *Arsenal* judgment, to determine whether use affecting the functions of the mark has occurred, the proprietor’s interests are considered, while when determining whether trade mark use has taken place, the actions of the defendant are scrutinised. This makes sense – the functions of a trade mark are of importance to the proprietor, while whether trade mark use occurs depends on the actions of the defendant. What also appears to be an issue is whether the public is limited to customers who deal with the defendant, or includes persons who encounter the goods concerned at a later stage.

Authors are more willing to define the term ‘use as a trade mark’ and view it as denoting origin. *Kerly*, relying on *Anheuser-Busch* and *Johnstone*, considers that use in a trade mark sense is as ‘an indication of origin or so as to create an impression that there is a material link in the course of trade between the goods or services in issue and the trade mark proprietor.’⁵⁷ *Morcom* also views trade mark use as indicating the origin of the goods or services.⁵⁸ Equally, Phillips and Simon define trade mark use as ‘use to denote the origin of the goods or services on or in respect of which the mark is used’.⁵⁹

The CJEU has, despite further questions referred to it on trade mark use, refused to deal with this concept and reiterated its statement that use must affect the function of the mark, not necessarily be trade mark use. So, in *Adam Opel*, when the question referred to the court was whether use of the mark registered for toys constituted use as a trade mark for the purposes of Article 5(1)(a), if the manufacturer of a toy model car copied a real car on reduced scale, including the trade mark applied to the real car, the CJEU merely stated that the proprietor is entitled to prevent use if it ‘affects or is likely to affect the functions of a trade mark as a trade mark registered for toys’.⁶⁰

In the majority of instances, the distinction between trade mark use and use affecting the ‘essential function’ will probably not be of importance. If trade mark use is defined as indicating the origin of the goods or services, while the essential function is defined as guaranteeing the identity of origin

⁵⁶ *Ibid* para 69.

⁵⁷ *Kerly* (n 12) para 14–018.

⁵⁸ *Morcom* (n 12) para 12.13.

⁵⁹ Jeremy Phillips and Ilanah Simon (eds), *Trade mark use* (Oxford University Press 2005) para 1.13

⁶⁰ *Adam Opel AG v Autec AG* (C-48/05) ECJ para 37.

of the marked goods or services to the consumer, the distinction appears slight. But the two are not synonymous, as the facts in both *Arsenal* and *Johnstone* show – in neither instance was the defendant using the mark to denote origin. The defendant in the first instance made it clear that his goods did not denote origin from Arsenal, while in the second instance the mark was being used to describe the contents of the bootleg recording. So, although neither defendant was making ‘trade mark use’ of the marks concerned, their use affected a function of the trade mark and was not ‘purely descriptive’ as it was use to generate sales to customers.⁶¹

More recently, when dealing with the essential function, the series of keyword judgments by the CJEU appear to have muddied the water. In *Google France* the court held that the origin function would be adversely affected if the advertisement in question did not enable normal Internet users to determine whether the goods in issue originated from the proprietor or a third party.⁶² In the case where a third party’s advertisement suggests that there is an economic link between the third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.⁶³ This was also the position in the absence of a suggestion of an economic link, if the advertisement was sufficiently vague as to the origin of the goods in question that normal Internet users could not determine whether the advertiser was the proprietor or a third party.⁶⁴ These conclusions have been repeated in a number of subsequent keyword decisions, most recently in *Interflora*.

But what is the effect of a user being unable to determine origin? Is this not merely another way of stating that the user will be confused as to origin? And what is an economic link, if not a material link as used in the context of ‘use in the course of trade’? The reason for these questions is that the distinction between the requirements to prove primary and extended infringement appear to have been blurred.

DISTINCTION BETWEEN PRIMARY AND EXTENDED INFRINGEMENT

As discussed earlier, the traditional distinction between primary and extended infringement was that, for the latter, use that might cause confusion had to be shown, in addition to the requirements to prove primary infringement. In the UK and the EU, courts have emphasised that only use that affects a function of the mark will result in primary infringement. In South Africa, trade mark use must be shown. How have the courts interpreted the requirement of ‘confusing use’ for extended infringement, and distinguished it from either ‘use that affects function’ or ‘trade mark use’?

⁶¹ See in this regard Andreas Rahmatian, ‘Infringing use of a trade mark as a criminal offence’ para 12.21 in *Trade mark use* (n 59).

⁶² *Google France* (n 35) para 84.

⁶³ *Ibid* para 89.

⁶⁴ *Ibid* para 90.

Recital 11 of the 2008 Directive describes likelihood of confusion in the following terms:

The likelihood of confusion, the appreciation of which depends on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the trade mark and the sign and between the goods or services identified, should constitute the specific condition for such protection.

The CJEU has considered the test to prove a likelihood of confusion in a number of decisions.⁶⁵ Most of these deal with the test for determining confusing similarity of marks or goods, and are not relevant here. But in the *Canon* decision, the court held that if the association between the marks causes the public wrongly to believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of Article 5(1)(b) of the Directive.⁶⁶ Then, in *Google France*, the court pointed out that the protection afforded by Article 5(1)(a) 'is more extensive than that provided for in the respective paragraph (1)(b) of those articles, the application of which requires that there be a likelihood of confusion'.⁶⁷ So, in the same decision where the CJEU stated that the essential function would be affected if users could not determine the origin of the goods, the court emphasised the difference between primary and extended infringement, and that only in the latter instance did a likelihood of confusion need to be shown. In the *BergSpechte* decision, the CJEU held that if primary infringement was in issue, 'the function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive Internet users, or enables them only with difficulty, to ascertain whether the goods or services originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party'.⁶⁸

If extended infringement is in issue,

it will be for the national court to hold whether there is a likelihood of confusion when internet users are shown, on the basis of a keyword similar to a mark, a third party's ad which does not enable normally informed and reasonably attentive users, or enable them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the

⁶⁵ See *Interflora v Marks (Interflora Arnold)* [2013] EWHC 1291 Ch paras 183–185 for a summary of these decisions.

⁶⁶ *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer (C-39/97)* ECJ para 29.

⁶⁷ *Google France* (n 35) para 77.

⁶⁸ *Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmuller GmbH v Guni C 278/08* ECJ para 35.

proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.⁶⁹

It is difficult to see any difference between these tests other than the use of the phrase ‘likelihood of confusion’ rather than the phrase ‘function of indicating the origin’.⁷⁰

After the CJEU *Arsenal* ruling requiring use that affected the function of a mark for primary infringement, the subsequent UK Court of Appeal judgment stated that it was important to note the difference between sections 10 (1) and 10 (2).

This case is concerned with identity of registered trade mark and sign and identity of goods. Thus infringement will occur if the alleged infringer ‘uses in the course of trade’ the sign. Subsection (2) deals with use when the goods and/or the signs are not identical. In those circumstances a likelihood of confusion must be shown. This requires the proprietor to establish that there is a risk that the public might believe that the goods in question came from the same undertaking or an economically linked undertaking.⁷¹

Arnold J was the first judge to raise questions about the relationship between the requirements for proving primary and extended infringement. In his *Interflora* judgment, after receiving the CJEU’s ruling, he stated that ‘the consequence would be to impose on the trade mark proprietor a requirement to prove something akin to a likelihood of confusion’ [for primary infringement]. He pointed out that this could not be correct, as it was plain on the face of the legislation that there is no requirement for a likelihood of confusion, in contradistinction to extended infringement, and that the CJEU had expressly acknowledged this in *Google France*.⁷² His solution was to suggest that the CJEU intended the defendant to bear the onus of proving an absence of confusion for primary infringement, while it was for the trade mark proprietor to prove confusion for extended infringement.⁷³ The Court of Appeal did not agree. It conceded that the CJEU, in *BergSpechte*, ‘appears to have drawn no distinction between the general test to be applied under Article 5(1)(a) in considering the impact of the keyword advertising upon the origin function and that to be applied under Article 5(1)(b) in considering the likelihood of confusion’.⁷⁴ But it was

⁶⁹ Ibid para 39.

⁷⁰ According to Senftleben Keyword (n 33) 18, both the origin function test under art 5(1)(a) and the likelihood of confusion test under art 5(1)(b) now include the test whether the advertising is too vague to exclude a potential risk of consumer confusion.

⁷¹ *Arsenal CA* (n 26) para 15.

⁷² *Interflora Arnold* (n 65) para 238.

⁷³ Ibid para 247. Arnold J had made this suggestion previously, in *Datacard Corp v Eagle Technologies* [2011] RPC 17 paras 266–268.

⁷⁴ *Interflora CA* (n 39) para 84.

not prepared to consider the possibility of a reverse onus of proof, merely stating that the CJEU had clearly not chosen to draw such a distinction between the test when the origin function was considered and that when the likelihood of confusion was considered.⁷⁵ It stated later:

It appears from its [CJEU] answer to the referred question in *BergSpechte* that, in this context, the essential test is the same. But in light of the foregoing we do not find this particularly surprising. What is striking, however, is that the court has chosen not to say that the test under Article 5(1)(a) (and Article 9(1)(a)) is the same as that under Article 5(1)(b) (and Article 9(1)(b)) but with a reversed onus, and we consider that if this is what it intended then it would indeed have said so.⁷⁶

Unfortunately, the Court of Appeal did not provide an alternate explanation which explains why the test is the same for both primary and extended infringement.

Morcom, writing after the CJEU *Interflora* judgment but before that of the Court of Appeal, also argues that the CJEU has introduced a ‘likelihood of confusion’ into the requirements for primary infringement.⁷⁷

In South Africa, decisions on extended infringement have focused on what constitutes confusing similarity, either of the marks or the goods, and there has been no consideration of the distinction between the requirements for primary and extended infringement. The leading textbook on trade mark law states that for extended infringement, the plaintiff bears the onus of showing both confusing use and trade mark use, but does not explain the difference between them.⁷⁸ The Supreme Court of Appeal, in *Mettenheimer*, recently confirmed that when assessing confusing similarity, the confusion ‘must relate to the origin of the respective goods’.⁷⁹ The distinction between trade mark use, where the infringer uses the mark to (erroneously) indicate that the goods originate from a particular undertaking, and confusing use, where the defendant causes confusion relating to the origin of the goods, is not apparent.

THE CURRENT REQUIREMENTS TO PROVE PRIMARY AND EXTENDED INFRINGEMENT

In the UK and the EU, a plaintiff alleging primary infringement must now show that one of the functions of the trade mark is affected before a court will make a finding of infringement. If the plaintiff alleges that the essential origin function is affected, post-*Interflora* he must show that normal

⁷⁵ Ibid.

⁷⁶ Ibid para 149.

⁷⁷ Morcom (n 11) para 12.27.

⁷⁸ Webster (n 2) para 12.21.

⁷⁹ *Mettenheimer v Zonquasdrif* [2014] 2 SA 204 (SCA) para 12.

reasonably attentive users must not be able easily to determine whether the goods originate from a third party or from the proprietor of the mark. Whether this is limited to instances of keyword advertising is not clear, but the CJEU has said nothing to indicate that its pronouncements must be limited to these instances. So, the plaintiff must show that users might be confused as to origin. As for extended infringement, a plaintiff must show that a likelihood of confusion on the part of the public exists. This confusion relates to the origin of the goods.

In South Africa, a plaintiff alleging primary infringement must show that his mark has been used as a trade mark by the defendant. Use as a trade mark is generally accepted to mean use that indicates origin. For extended infringement, a plaintiff must show that the defendant's use creates a likelihood of confusion. Once again, this confusion will relate to the origin of the goods.

If there is a distinction between these requirements, it is not easy to identify. Yet in all three jurisdictions, the intention when the legislature introduced the two different forms of infringement was to place a more onerous requirement on a plaintiff whose mark was not used on identical goods, precisely because the protection afforded to the mark was wider than the mark's registration.

TRIPS and the new EU Directive

An international instrument that requires consideration is the TRIPS.⁸⁰ Article 16(1) provides that in case of an identical sign for identical goods, a likelihood of confusion shall be presumed. The CJEU recognised that it was under an obligation to interpret trademark legislation, as far as possible, in accordance with this agreement.⁸¹ Arnold J found authority in article 16 (1) for interpreting the *Interflora* CJEU judgment as creating a reverse onus for proving that the function of a mark has been affected in instances of primary infringement.⁸² But the Court of Appeal, when reversing his judgment, held that '[s]pecifically, and notwithstanding Article 16(1) of TRIPS, the Court has now held in a long line of decisions that the right under Article 5(1) (a), though "absolute", is conferred to enable the trade mark proprietor to protect his interests as proprietor, that is to ensure the trade mark can fulfil its functions'.⁸³ The court's reasoning is that 'the starting point is the express recognition by the Court [CJEU] that a trade mark proprietor cannot oppose the use of a sign unless all of the conditions set out in Article 5 of the Directive are satisfied.' However, Article 5 makes no mention of

⁸⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, annexed to the Agreement establishing the World Trade Organisation, made in Marrakesh on 15 April 1994 (OJ 1994 L 336, 1).

⁸¹ *Anheuser-Busch Inc v Budejovicky Budvar; Narodni Podnik* Case C-245/02 ECJ para 42.

⁸² *Interflora Arnold* (n 65) para 239.

⁸³ *Interflora CA* (n 39) para 135.

such a requirement. Despite the finding of the Court of Appeal, Arnold J subsequently held that the CJEU ‘has certainly not disregarded Article 16(1), as can be seen in particular from *Anheuser-Busch v Budvar*. In my opinion the Court of Justice has not flouted Article 16(1) either. Rather, it has not yet fully engaged with it’.⁸⁴ He held that the onus of proof in respect of use affecting function lay with the defendant, not the plaintiff, in accordance with the TRIPS.⁸⁵

Some academics emphasise that the TRIPS provides important guidelines when interpreting instances of primary infringement, and that it would be more consistent to presume a likelihood of confusion and require a defendant to prove otherwise.⁸⁶

The most recent EU Trade Mark Directive, which appeared early in 2016, has some minor but important changes which might indicate what direction the future holds.

This was preceded by the Max Planck Study, which addresses some of the issues raised here. It dealt with the development of the concept of use ‘affecting the functions’ of a mark in some detail as this had been the subject of a workshop for the Study.⁸⁷ Unsurprisingly, the consensus of the workshop was ‘general agreement among participants that the current jurisprudence of the ECJ in respect of these issues is neither consistent nor satisfactory’.⁸⁸

The Study makes the point that primary infringement covers two completely disparate types of use – it may concern use made of the trade mark ‘either as an indication of origin for the infringer’s own good or services, or in order to identify or refer to the goods or services of the proprietor’. It emphasises that it is only in the first situation that the function of indicating origin will be jeopardised, while the second situation does not clash with the origin function. Despite this, the CJEU has found that use that refers to the proprietor’s own mark (usually comparative or keyword advertising) can also constitute primary infringement.⁸⁹ One of the conclusions reached by the Study is that, in the first situation, infringement should only be excluded if the function of guaranteeing origin is not affected because the public does not regard the use as a sign indicating origin.⁹⁰ Another conclusion is that the additional trade mark functions,

⁸⁴ *Supreme Petfoods v Henry Bell (Grantham)* [2015] EWHC 256 Ch para 162.

⁸⁵ *Ibid* para 163.

⁸⁶ Senfleben Functions (n 38) 10.

⁸⁷ Roland Knaak, Annette Kur and Alexander von Mühlendahl, ‘The Study on the Functioning of the European Trade Mark System’ (1 November 2012) Max Planck Institute for Intellectual Property & Competition Law Research Paper No 12–13. SSRN <<https://ssrn.com/abstract=2172217>> or <<http://dx.doi.org/10.2139/ssrn.2172217>> (Study) paras 2.163–2.172.

⁸⁸ *Ibid* para 2.178.

⁸⁹ *Ibid* para 2.180.

⁹⁰ *Ibid* para 2.181.

such as guarantee, communication, investment, and advertising, should not ‘play an autonomous role’ in defining the scope of protection, and that an adverse effect on these functions is not relevant for protection against primary infringement.⁹¹ As regards the second type of use – reference to the proprietor’s own goods – such use will usually be dealt with by the limitations on descriptive use or exhaustion.⁹² The Study recommends that in both instances, for infringement to occur the use must be made, and must be perceived by the public, as identifying and distinguishing goods in respect of their commercial origin.⁹³ Finally, the suggestion is made that it would be more straightforward to create a specific provision concerning use of identical or similar signs to refer to the proprietor’s own goods, and to reserve the double-identity primary infringement provision for instances where the sign is used to refer to goods which do not originate from the proprietor. But, ‘this would result in a profound change to the current structure of the provisions on exclusive rights, which might entail further problems and misunderstandings’.⁹⁴ Clearly an instance of ‘better the devil you know’.

When dealing with the requirement of likelihood of confusion for extended infringement, it defines this as ‘present when the public to which the marks are addressed is likely to assume that the respective goods or services have the same commercial origin or originate from economically related undertakings’.⁹⁵ The Study opines that the origin-indicating function must be affected for extended infringement, and that case law does not recognise any other functions as protectable in such instances.⁹⁶ Finally, the Study recommends that both primary and extended infringement should be defined as ‘use for the purpose of distinguishing goods or services’.⁹⁷ In instances of comparative advertising, this can constitute trade mark infringement only if the trade mark infringement requirements are met and the community rules relating to comparative advertising are not complied with.⁹⁸

These recommendations can be seen in the explanatory memorandum on the first proposal for the Directive. One suggestion was that, in the interest of legal certainty and consistency, it should be clarified that in cases of both double identity under Article 5(1)(a), and similarity under Article 5(1)(b), it is only the origin function which matters. The memorandum also pointed out that the recognition of additional trade mark functions in the context of

⁹¹ Ibid para 2.184.

⁹² Art 6 and 7 Directive 2008/95/EC.

⁹³ Ibid para 2.189.

⁹⁴ Study para 2.183.

⁹⁵ Ibid para 2.155.

⁹⁶ Ibid para 2.185.

⁹⁷ Ibid para 2.229.

⁹⁸ Ibid para 2.233.

primary and extended infringement created legal uncertainty.⁹⁹ The proposal detailed, in the recital, a number of new clauses including the following:

(18) It is appropriate to provide that an infringement of a trade mark can only be established if there is a finding that the infringing mark or sign is used in the course of trade for purposes of distinguishing goods or services as to their commercial origin. Uses for other purposes should be subject to the provisions of national law.

(19) In order to ensure legal certainty and clarity, it is necessary to clarify that not only in the case of similarity but also in case of an identical sign being used for identical goods or services, protection should be granted to a trade mark only if and to the extent that the main function of the trade mark, which is to guarantee the commercial origin of the goods or services, is adversely affected.

But the final text of the Directive did not retain much of this.¹⁰⁰ Recital clause 18 survived, although the reference to ‘commercial origin’ has been removed and it now reads as follows:

(18) It is appropriate to provide that an infringement of a trade mark can only be established if there is a finding that the infringing mark or sign is used in the course of trade for the purposes of distinguishing goods or services. Use of the sign for purposes other than for distinguishing goods or services should be subject to the provisions of national law.

Recital clause 19, which would have answered many of the questions raised above, disappeared.¹⁰¹ Equally, it was proposed that Article 10(2)(a), the new version of the 2008 Directive’s Article 5(1)(a), should read as follows:

2 [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 in relation to goods or services where:

⁹⁹ Proposal for a Directive of the European Parliament and of The Council to approximate the laws of the Member States relating to trade marks (Recast) /* COM/2013/0162 final para 5.1.2.

¹⁰⁰ One leading academic who did not agree with these proposals described them as follows: ‘What will result is rather an overall fixation of the status quo on shaky grounds, providing a new playground for professors and ambitious courts to develop diverse theories about what the origin function is and what it is not, in order to bridge the inherent inconsistencies in the legal text’. See Annette Kur, ‘Trademarks function, don’t they? CJEU jurisprudence and unfair competition principles’ (Max Planck Institute for Innovation and Competition Research Paper No 14-05 10 Feb 2014) 10.

¹⁰¹ As Senftleben Function (n 38) 7 points out, this would have resulted in a ‘transparent and clear distribution of tasks between the protection of the origin function in the subsystem of protection against confusion, and the protection of goodwill functions in the subsystem of protection against dilution’.

(a) the sign is identical with the trade mark and is used in relation to goods or services which are identical with those for which the trade mark is registered *and where such use affects or is liable to affect the function of the trade mark to guarantee to consumers the origin of the goods or services*;¹⁰²

The 2015 Directive omitted the italicised phrase. Clearly, although the problems surrounding the relationship between primary and extended infringement were recognised, it was decided not to address them in the Directive. Senftleben states that a major objection to the inclusion of the italicised phrase was that trademark owners felt that they could then not protect themselves against international exhaustion, because they could not then prevent the importation of genuine goods sold under their control outside the EU.¹⁰³ Recital clause 19 had been removed by the time the Committee for Legal Affairs considered the draft in 2013.¹⁰⁴

But the new Directive has at least emphasised, although only in the recitals and not in the text, that infringement can only be established if the court finds that the mark has been used for the purpose of distinguishing goods.¹⁰⁵ Whether this means that the CJEU will no longer protect anything other than the essential function remains to be seen.

CONCLUSION

The word ‘confusion’, or its synonyms, runs like a thread through all discussions of primary infringement. We are told that protection against this form of infringement is absolute in the sense that it does not require a likelihood of confusion. But, in *Arsenal*, the CJEU defines the origin function as enabling the public ‘without any likelihood of confusion’ to distinguish goods from those originating elsewhere. Then, in *Google France*, we learn that the origin function will only be affected if an advertisement does not enable the user to ascertain whether the goods originate from the proprietor – it seems logical that if the user cannot easily determine origin, he or she will be confused about it. Even trademark use means use that denotes origin – if a third party is doing this, then he or she is confusing the public as to the origin of the goods.

The concept of ‘trade mark use’ is not a term that was used in European legislation and is English in origin. In the 1938 UK Trade Marks Act, and in the South African Act of 1963, it constituted one form of infringement, as distinct from ‘use otherwise than as a trade mark’ where injury or prejudice to the proprietor also had to be shown. Both the UK and South Africa had to abandon these terms when promulgating their current legislation, which was intended to correspond to the then 1989 EU Trade Mark Directive.

¹⁰² Proposal, s 3 art 102 (a) (my italics).

¹⁰³ Senftleben Function (n 38) 8.

¹⁰⁴ 2013/0089 (COD).

¹⁰⁵ 2015 Directive recital 18.

But it is not surprising that it resurfaced when the UK courts had to determine the extent of protection granted by the new primary infringement provision, which was couched in terms that were foreign to their existing jurisprudence. It was for this reason that the CJEU was asked, in *Arsenal*, to consider whether ‘trade mark use’ was required for primary infringement, and that the House of Lords in *Johnstone* announced that the absence of this phrase in the 1994 Act was not ‘sufficient reason to suppose that Parliament intended to depart from such a basic principle’.¹⁰⁶ This ignores the fact that the 1994 Act was introduced to comply with the EU Directive, which had as its purpose the harmonisation of trade mark laws and was therefore not drafted as an incremental development on previous UK law.

As commentators have pointed out, when it is alleged that the EU Directive and resultant national legislation offer broader protection against infringement, it is not always emphasised that the range of defences has also been extended.¹⁰⁷ For example, descriptive use is allowed by the provisions of section 11 of the UK Act and section 34(2) of the South African Act, and it is not necessary to interpret the infringement provisions so as to exclude such use. It is unlikely that use that is not trade mark use will not fall within one of the list of defences, although a defendant will still have to show that the use was bona fide to be successful.

But the reasons for the reversal to the requirement of ‘trade mark use’ in *Johnstone* and *Verimark*, as well as the reasons for the introduction in *Google France* of an amended ‘essential function’ requirement, do not alter the result – in all jurisdictions the distinction between the test for primary and extended infringement appears to have become blurred and what a plaintiff must now prove, or at least allege, in both instances is that the defendant’s use has resulted in confusion as to origin. The net result is that the reason for creating these two distinct forms of infringement has been ignored and, depending on one’s viewpoint, it is either more difficult to prove primary infringement or easier to prove extended infringement.

¹⁰⁶ *R v Johnstone* (n 28) para 15.

¹⁰⁷ Rob Sumroy and Carina Badger, ‘Infringing “use in the course of trade”’: Trade mark use and the essential function of a trade mark’ para 10.40 in *Trade mark use* (n 59).