

Carl Dominik J. Niedersüß

I Don't Even Recognize You Anymore

The Limits of the Protection of Alteration and Modernisation
of Fictitious Characters



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Dedicated to the loving memory of Emil Dominik Neidenbach.

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Abstract

This paper addresses the legal issues that arise in the registration and use of advertising characters. The notion of “advertising characters” in this context is to be distinguished from the traditional “mascot”, as it includes human or anthropomorphic fictional characters that appear in advertising and marketing materials for a given product or service, or are being used for merchandising purposes. They are not limited to a mere graphical depiction, but moreover exhibit additional features such as character traits, voices and behaviour.

In recent years, the advertisement industry has been increasingly relying on the use of this type of characters for creating brand images. Reasons for this development are not only to be found in the availability of more sophisticated graphical representations following great advancements in the creation of CGI (and their popularity in the general audience), but also in the stronger incorporation of psychological theory in advertisement. In addition to that, they have come to generate considerable merchandising revenues.

While seldom operated independently of traditional trade marks, advertisement characters have become an important complement to them, adding substantial value to the overall brand image. Advertising characters have enormous recognition and identification value, and bear higher integrability in interactive marketing measures, and more importantly in modern social media, than conventional marks. Needless to say, their creation is connected with substantial investments.

This paper aspires to thoroughly analyse the eligibility for protection under traditional trade mark law, paying special attention to their intangible properties such as character traits, voices and behaviour. Furthermore, it will address the scope of their protection. Departing from trade mark law, this paper will also cover adjacent matters especially copyright law and unfair competition. While focussing on the legal situations in the U.S. and in Germany, it also mentions noteworthy European decisions and the Community Trade Mark regime.

Table of Contents

Acronyms and Abbreviations	11
I. Introduction	13
II. General considerations	15
A. Character advertisement	15
1. Definition of the notion “character”	15
2. Reasons for character marketing	17
3. The need to adapt	19
B. Legal considerations on character advertisement	20
C. Economic considerations on character advertisement	22
III. Germany and the European Union	26
A. Trade mark protection	26
1. Protection in the national German framework	26
2. Protection in the Community Trade Mark framework	32
B. Copyright	34
Germany	34
C. Unfair Competition Law	37
Germany	37
D. Other forms of protection	39
Protection via personality rights?	39
IV. United States of America	41
A. The federal trade mark system	41
1. Protection of characters	41
2. Adaptation of trade marks	52

Table of Contents

B. Copyright	53
D. Other forms of protection	58
V. Synthesis, conclusion and policy recommendations	60
List of works cited	63

Acronyms and Abbreviations

AIPPI	International Association for the Protection of Industrial Property
BIRP	United International Bureaux for Protection of Intellectual Property
CGI	Computer Generated Imagery
CJEU	Court of Justice of the European Union
CTM	Community Trade Mark
CTMR	Community Trade Mark Regulation
GC	General Court of the European Union
GCA	German Copyright Act
IPR	Intellectual Property Rights
OHIM	Office for the Harmonization of the Internal Market
UCA	German Unfair Competition Act
USPTO	United States Patent and Trademark Office
WIPO	World Intellectual Property Organisation

