easily provided, yet proprietors of well-known marks often encounter factual difficulties to prove the priority of the mark in question, as they are forced to rely upon not merely sales and advertising figures but also, for instance, market surveys with past-related questions or reverse projection of current empirical data.[759]

5.7.3 Trade Marks Acquired Through Use

According to § 4 Nr. 2 MarkenG, a sign can attain protection as a trade mark in case it is used in trade or commerce and this use has led to a recognition by the relevant public that the sign is a mark of the claimant (*Verkehrsgeltung*).[760] As this definition suggests, a trade mark acquired through use[761] does not accrue by merely initialising use of a sign in trade or commerce. Rather, trade mark protection must be 'acquired', i.e. such use must lead to connection of the respective signage with a certain meaning by the target audience, enabled by continued usage of the sign in trade or commerce. Hence, use marks are, like well-known marks, the result of a communication process between proprietor (or licencee/franchisee) and target audience in which the audience has learned to perceive the respective signage as an indication of origin of the marked goods and/or services.[762]

Whereas the object of protection in case of a registered trade mark is the sign as shown in the register, the use mark is protected as it is in fact being used in trade or commerce. Also, it needs to be precisely determined for which goods and/or services the sign at issue can claim protection as a use mark. Contrary to a trade mark registered with the German Patent and Trade Mark Office, a use mark's protection does not automatically acccrue for the whole German territory. Rather, one must identify the region in which the respective sign is used – this can be Germany at large or merely a certain region, for instance one or several *Bundesländer* (federal states).[763]

758 For instance, § 4 Nr. 3 MarkenG refers to Art. 6^{bis} Paris Convention as laying down one of three possibilities for trade mark protection to accrue (next to registration and secondary meaning).

759 *Marx*, Deutsches, europäisches und internationales Markenrecht, at no. 384.

760 This possibility of origination of trade mark protection is equally listed next to the two other possibilities, registration (§ 4 Nr. 1 MarkenG) and notoriety/well-known marks (§ 4 Nr. 3 MarkenG).

761 In German: *Benutzungsmarke*.

762 *Marx*, Deutsches, europäisches und internationales Markenrecht, at no. 584.

763 *Hasselblatt/Raab*, § 36 no. 71.

There exists no fixed threshold determining when a sign has reached enough high profile to achieve protection as a use mark. Rather, this depends on the facts of each case. To that effect, the BGH constantly accepts sufficient recognition in case a non-irrelevant part of the involved audiences perceives the sign as an indication of origin.[764] In general, however, sufficient high profile of signs with average distinctive power can be accepted at a degree of 20-25%.[765] This percentage will have to rise with declining distinctive power of the sign at issue.

A trade mark acquired through use may not be confused with distinctiveness acquired through use. Even though both terms deal with origin of trade mark protection as a result of increased publicity, distinctiveness through use only plays a role in the course of prosecution of trade mark registrations, where missing distinctiveness can be overcome in case the respective sign has acquired a distinctive character over time by means of its use in trade or commerce.

5.7.4 Relation to Brand Value

In analogy to registered trade marks, the value-related factor here is whether the respective sign has accrued trade mark protection as a use mark or as a well-known mark respectively. The effort to determine this will, in general, be considerably higher than with respect to registered marks, as no official trade mark office document proving trade mark protection can be relied upon. Building a trade mark without registration is generally considerably more costly than obtaining a registration, as substantial assets need to be invested into marketing, communication, distribution etc. Such cost, as well as the cost for determining whether the sign in question has developed sufficient high profile, e.g. by means of market research, will have to enter the value computation as value detractors.

Hence, protection as a registered trade mark is usually preferable (even though cost for marketing, distribution etc. also accrue regarding goods and services marked with a registered trade mark). Proprietors tend to only rely on protection outside of the trade mark register in case they have missed to apply for a registration or in case there exists use leading to protection as a

764 BGH, decision of September 4, 2003 – I ZR 23/01 – *Farbmarkenverletzung I.*
765 *Ströbele/Hacker*, Markengesetz, § 4 no. 37.