assets.

As seen above, investments in intangible assets are, contrary to investments in tangible assets, generally characterised by large fixed (sunk) costs during the initial phase of the project and little marginal cost at later stages.[93] Little of the initial investment can be recouped in case the project turns out to be unsuccessful. This risk of total loss is also due to the general nontradability of intangibles and is very rare for financial or physical assets. In the case of bankruptcy, for example, it is rather unlikely that creditors would be compensated at all (and if so, it is highly improbable that they would be compensated sufficiently) through sale or other exploitation of the intangible asset.[94]

Furthermore, a number of patent-related studies have proven the relatively high risk particularly associated with innovation-focussed intangibles.[95] For instance, *Scherer*, *Harhoff* and *Kukies* have found that merely the top ten per cent of examined patents account for between 81 and 93% of total patent value.[96] It follows that the majority of patents are valueless. Hence, return on investment is highly skewed. Similarly, a current German study has shown that almost half of all businesses pursuing a multi-brand strategy with on average eight brands in a portfolio realise 80% of their total turnover with solely three of their brands. In the case of almost 30% of all surveyed companies, the strongest brand alone generates more than 60% of total turnover.[97]

Not only does this pose unique challenges to management; it also entails substantial ramifications with respect to the financing and investment communities. As a direct consequence of the risk inherent in intangible assets, financiers such as venture capitalists demand relatively high risk premia. Managers need to create joint ventures, engage in R&D outsourcing and alliances and diversification of asset portfolios in order to mitigate the risk inherent in intangibles.

It is important to realise that, in general, the level of overall risk concerning

93 Above at 2.1.1.3.3.

94 Cf. below at 2.3.2.3.

95 *Schankerman/Pakes*, 96 Econ. J., 1052 (Dec. 1986); *Scherer/Harhoff/Kukies*, 10 Journal of Evolutionary Economics, 175 (2000); *Harhoff/Scherer/Vopel*, Exploring the tail of patented invention value distributions.

96 *Scherer/Harhoff/Kukies*, 10 Journal of Evolutionary Economics, 175 (2000).

97 *MP Marketing Partner AG*, Studie: Rentabilität von Marken oft fraglich – Unternehmen im Zugzwang.

future return on investment continually decreases along the value chain. The intensity of use of intellectual assets is highest at the beginning, for example at basic research or brand innovation stage. This phase entails the highest risk regarding technological and commercial success.[98] Less and less intangibles need to be deployed in subsequent value chain stages such as product development, manufacturing and marketing.[99] These phases increasingly involve tangible assets and are therefore less exposed to risk.

2.1.1.3.7 Legal Scarcity

Intangible assets are by definition free. Since they cannot be physically controlled and are based on ideas and abstract concepts, they can in theory be simultaneously used by an infinite number of persons.[100] For example, a sign could be used by anyone at any time if it was not for the trade mark owners' rights to control its use. Similarly, the same invention could be used by competitors in trade or commerce if there was no legal protection – subject to the condition that the proprietor has not chosen to keep the invention a business secret.

As a general rule of supply and demand, if something is available freely everywhere, it has no or at best minimal value. If something is scarce, however, it generally becomes valuable due to comparatively increased demand.[101]

Unlike physical assets, intangibles are not characterised by factual scarcity. Apart from secrecy, it is only the various legal protection regimes which make these assets scarce.[102] Only the granting of intellectual property rights[103] makes sure that a controlled number of persons are allowed to use the re-

98 *Lev*, Intangibles – Management, Measurement, and Reporting, p. 40.

99 *Flignor/Orozco*, Intangible Asset & Intellectual Property Valuation: A Multidisciplinary Perspective, p. 8.

100 This is due to their partial excludability and spillover effects, see above, 2.1.1.3.5.

101 Cf. above at 1.3.1.

102 The option of keeping an intellectual achievement secret is being used in practice with respect to technical inventions yet is not applicable to all types of intellectual assets. For example, a brand can by definition not be kept secret since its intrinsic and main function is to constitute a means of communication between proprietor and target audience.

103 Apart from intellectual property law, there are other legal frameworks which are applicable to intangible assets, such as labour law (with respect to human resources) or competition law. However, these regimes do not provide for legal scarcity as they do not particularly regulate proprietors' private rights to grant access to the respective assets in terms of a property right.

spective intellectual achievement. This legal protection is what gives certain intangibles a potential to develop a value.

To sum up, one can say that IP rights (and not intangible assets, to which the respective property rights do not apply) have an intrinsic potential to be valuable, caused by their legal scarcity.

2.1.1.4 Intermediate Findings

Due to a changed global business environment in developed economies and increased utilisation and awareness of intangible assets, these assets have come to play a major role in today's corporate world. They are claims to future benefits without a physical or financial embodiment and therefore entail specific characteristics different to those of tangible assets. These include – amongst others – nonrivalry, nontradability and inherent risk and can considerably affect the respective asset's value, positively or negatively.

For a comprehensive intellectual property valuation tool it is decisive to operationalise these characteristics, as intellectual property comprises all those intangible assets which are legally protected through a specific regime and is therefore part of the group of intangible assets.

Furthermore, partial excludability and spillovers, which are value detractors, can be mitigated to a considerable extent by intellectual property regimes which provide for legal scarcity (unless secrecy has been chosen). Therefore, legal protection ensures the potential of intellectual property rights to become valuable as assets.

2.1.2 The Term 'Trade Mark' as Opposed to 'Brand'

The importance of certain intangible and intellectual property assets varies by industry sector. In the non-generics pharmaceutical industry, for example, patents constitute the central source of value creation.[104] For companies in the luxury goods and fast moving consumer goods (FMCG) industries, for

104 However, trade marks play an important complementing role for purposes of marketing the respective patented product. They even are of critical importance during the final phase of patent protection and beyond as manufacturers of generic products prepare and put into action their market entry during these periods.

instance, brands make up a substantial portion of overall value and may well represent their most important IP assets.[105]

This prominent role of brands is to be ascribed to the fact that they influence enterprise value as a central determinant. Against the background of globalisation, rising intensity of competition, increased product quality similitude and information overload,[106] brands today are more than ever crucial due to their ability to create a psychological connection and a communication channel between the brand (and thereby the originator) and the audience. This contributes considerably to successful product or service marketing and even to other stages in the value chain such as research and production[107] and therefore to the success and survival of the company as a whole.

In order to be able to identify, manage and control this brand-intrinsic potential of successfully generating revenue and profit, the respective brand needs to be comprehensively valued or evaluated respectively as part of an overall holistic brand management strategy. Every such (e)valuation necessarily presupposes a thorough understanding of its object, in other words, the 'what' of valuation. One can only value something which has been clearly defined. It is therefore essential to clarify the nature of the IP right trade mark, of the intangible asset brand and to illuminate how these assets are interrelated.

2.1.2.1 Trade Marks – Definition and Functions

2.1.2.1.1 Trade Marks as Legal Phenomena

A trade mark is a legal construct which can be defined as any sign or combination of signs, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of another.[108] A trade mark

105 *Haigh*, Brands in the boardroom (2004), p. 19.

106 Cf. fn. 242.

107 The reason being that e.g. external suppliers are subject to less risk of failure of the transaction in case of dealing with a strongly branded business than in situations in which their customer is a business with no or weak brands. Similarly, a brand which is well communicated and lived internally contributes substantially to value creation by all internal stakeholders. This will be explained in more detail below at 2.1.2.2.

108 In dependence on Art. 4 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 011, January 14, 1994, p. 1 (hereinafter: CTMR), Art. 2 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 040, February 11, 1989, p. 1 (hereinafter: CTMD) and Art. 15 (1) TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights).

is the only government-granted exclusive right which is renewable in perpetuity.[109] [110]

Even though merchants have distinguished their goods from those of their competitors by marking them with a unique symbol or device since very early times,[111] it is not until relatively recent years that trade marks are recognised as subjective exclusive rights which form part of the proprietor's property. Even trade mark applications are regarded as property rights, as they give rise to a set of proprietary rights such as entitlement to expect that the application will be examined subject to satisfaction of procedural and substantive requirements.[112]

In the early days of trade mark protection, there existed no body of law specifically focussed on trade marks. As trade marks were seen as the central symbolic representation of commercial reputation, trade mark law was, for example in common law countries, developed based on the tort of passing off, which is an action used against the abuse of another's commercial reputation.[113]

As of today, however, there are a number of different national and international legal regimes which particularly govern trade marks.[114] A multitude

109 A service mark relates to services only, as the name implies. Since there are no legal differences between trade and service marks, the discussion will hereafter only mention trade marks as a synonym for trade and service marks.

110 There are special subcategories of trade marks such as collective marks (cf. Art. 7bis (1) Paris Convention, Art. 1 CTMD, Artt. 64 et seq. CTMR and §§ 97 et seq. German Tademark Act) and certification marks. A collective mark is protected in the name of an association of business enterprises which are all entitled to use the mark in connection with their products or services supplied. A certification mark serves to distinguish goods or services which are certified from those which are not. A producer can for example have his goods certified in terms of quality, origin or material. However, this producer does not own the certification mark – that mark is usually owned by third party agencies which monitor certain quality standards and approve goods or services to comply with these standards by allowing the marking of the relevant product or service with the certification mark. An example for a certification mark is the *VDE* sign issued by the German *VDE* (Verband der Elektrotechnik Elektronik Informationstechnik e.V. – Association for Electrical, Electronic & Information Technologies) Testing and Certification Institute. Since collective marks and certification marks are both categories of trade marks, they will not be mentioned separately hereafter.

111 *Fezer*, GRUR 2003, 457, 458/459.

112 European Court of Human Rights (ECHR) [GC], judgment of January 11, 2007, Case 73049/01, Anheuser-Busch Inc. v Portugal – *Budweiser*, para.s 75 and 78.

113 *IPR Helpdesk*, Trade Mark Agents Manual, p. 4; *Morcom/Roughton/Graham*, The Modern Law of Trade Marks, p. 5.

114 Yet trade mark law can still be seen as part of the wider concept of protection against unfair competition, cf. for many *Kane*, Trademark Law - A Practitioner's Guide, §

of countries throughout the world have enacted national trade mark laws. As these laws may differ considerably yet trade marks often aim at an international audience and therefore need an internationally uniform system of protection, there are several supranational and international trade mark law and registration[115] regimes, offering a certain degree of minimum standards and harmonisation in the field. The most important ones are the Paris Convention,[116] the TRIPs agreement,[117] the Trademark Law Treaty,[118] the Madrid Agreement and the related Protocol,[119] the European Community Trade Mark Directive[120] and the European Community Trade Mark Regulation.[121] Details of trade mark law will be dealt with in chapter five. For the purposes of this part of the study, it is important to recognise the nature and characteristics of trade marks and their legal protection framework.

2.1.2.1.2 Trade Mark Types

A trade mark can take a variety of forms, such as word, picture, combination (word-picture), three-dimensional form, sound, or smell. Even though the legal definition of trade mark has generally been unaltered in recent years, the nature of trade marks is constantly evolving and changing as the scope of protection gradually broadens. Traditionally, a trade mark has always been a visual representation. Today, there are a number of sounds and other non-traditional signs registered as trade marks.[122] With global

1:1.5.

115 Registration is not necessarily a conditio sine qua non for trade mark protection. Details will be given in chapter five.

116 Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised and amended. As of January 15, 2008, there were 172 Member States to the Convention.

117 Cf above, fn. 108.

118 Trademark Law Treaty (TLT), done at Geneva on October 27, 1994. As of January 22, 2008, there were 40 Contracting Parties, including Germany. On March 27, 2006, 147 WIPO Member States adopted the Singapore Treaty on the Law of Trademarks (Singapore TLT), the result of four years of work on revision of the TLT.

119 Madrid Agreement Concerning the International Registration of Marks of 1891, as revised and amended and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1989.

120 Cf. fn. 108.

121 *Ibid.*

122 More on this below at 5.2.3 and 5.2.5. The jingle of *Deutsche Telekom AG* may serve as an example of a sound mark at this point. It has been registered with the German Patent and Trade Mark Office under the number 39940591.7 since 1999 and is also registered in other countries, e.g. Australia (no. 818174, since 2004).

media and advertising landscapes evolving as they do, it is not surprising that we nowadays encounter holograms and 'moving' pictures as trade marks.[123]¡textarea¿¡textarea¿¡/textarea¿/textarea¿

2.1.2.1.3 Trade Mark Functions

Trade mark functions affect both single persons, proprietor entities and society at large. Like all other intellectual property, trade marks are rights of exclusivity granted in public interest.[124] The quid pro quo trade mark proprietors are giving in return for this support is signalling product origin and hereby differentiation, which increases and facilitates consumers' choices.

The denotation of the trade source, or origin, of the respective goods or services is not the sole but the core function.[125] It is central to any legal definition of a trade mark as set forth above ("... capable of distinguishing the goods or services of *one undertaking* from those of another."). The origin function runs like a central theme through important points of assessment of registrability and trade mark infringement. It is essential for the examination not merely of distinctiveness and infringing trade mark use but also of whether a trade mark is being duly used by the proprietor.[126]

As *Merriam-Webster OnLine* defines, a trade mark is "a device [...] pointing distinctly to the origin or ownership of merchandise to which it is applied and legally reserved to the exclusive use of the owner as maker or seller".[127]

123 Cf. e.g. CTM no. 255914434, registered since 2004, consisting of holographic paper for use as packaging surface, and the German mark no. 30157686.6, consisting of a set of six pictures to be animated, registered since 2002. The latter mark is, however, registered as a simple figurative mark.

124 This is widely recognised with respect to patents yet there seems to be no logical reason to negate this in the case of trade marks, cf. *Greenhalgh/Rogers*, Trade Marks and Market Value in UK Firms, p. 3.

125 Cf. Recital 10 CTMD. Furthermore, this is settled ECJ case law, cf. e.g. judgment of 29 September 1998, Case C-39/97, [1998] ECR I-5507, Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc. – *CANON*, para. 15; judgment of 18 June 2002, Case C-299/99, [2002] ECR I-5475, Koninklijke Philips Electronics NV v Remington Consumer Products Ltd – *Philips*, para.s 29-34; judgment of 21 October 2004, Case C-64/02 P, [2004] ECR I-10031, Office for Harmonisation in the Internal Market (Trade Marks and Designs) v Erpo Möbelwerk GmbH – *DAS PRINZIP DER BEQUEMLICHKEIT*, para. 33. German case law has developed its argumentation along the same lines, cf. e.g. BGH, judgment of 2 November 2000, Case I ZB 28/98 – *Montres*; judgment of 19 September 2001, Case I ZB 6/99 – *grün eingefärbte Prozessorengehäuse*.

126 *Ströbele/Hacker*, Markengesetz, § 14 no. 58 and § 26 no. 3.

127 Merriam-Webster Online Dictionary, entry for 'trade mark'; http://www.m-w.com/cgi-bin/dictionary/trademark (last accessed June 20, 2007).

Hence, the origin function is not only core to the understanding of the term trade mark by the legal profession but also by (the English-speaking, that is) society at large.

Source identification means that the addressee of the respective sign knows that there is a certain trade source the information a trade mark conveys can be associated with. However, it is not necessary that consumers are aware of the specific identity of the source. It is not essential that the trade mark belongs to the manufacturer of the marked product. Rather, the origin function in its modern interpretation refers to the entity which takes responsibility for the marked product or service.[128] The product origin may be a merchant whose goods are specifically manufactured for the trade mark owner.[129]

By designating a commercial source, trade marks necessarily distinguish the goods or services they relate to from goods or services of different commercial origin. Hence, this function of differentiation is closely related to and a direct consequence of the origin function. This can already be recognised considering the legal definition of a trade mark as described above. The importance of the differentiation function, essentially linked to the origin function, is reflected in the fact that it too plays a vital role in the course of assessment of distinctiveness of a mark.[130]

As well as the issues how exactly a trade mark can and should be marked off against a brand, the matter of trade mark functions is, in detail, controversial. In addition to the origin and differentiation functions, other – economic – functions are often allocated to trade marks as well.[131] This can be, to a considerable extent, ascribed to the circumstance that what constitutes a trade mark and a brand respectively is often not clearly enough defined. Furthermore, the concepts of brand and trade mark are sometimes not kept apart at all, even though – as will be explained shortly – they are constructs which differ significantly despite the fact that they overlap to some degree.

128 Hence, the ECJ has defined the origin which a trade mark is supposed to guarantee as the place from which the manufacturing is controlled (i.e. not necessarily carried out), cf. e.g. judgment of 22 June 1994, Case C-9/93, [1994] ECR I-2789, Internationale Heiztechnik GmbH v. Ideal Standard GmbH – *Ideal Standard II*.

129 For instance, the German retailer *Aldi* sells certain fast moving consumer goods under the trade mark and brand Cien, which are produced by a company which also manufactures for other brands. Brands such as Cien are called 'private labels' or 'store brands', or in German 'Handelsmarken', and will be further introduced *infra* at 2.1.2.2.2.

130 See below at 5.2.3.

131 Cf. e.g. *Ströbele/Hacker*, Markengesetz, § 8 no. 39.

In view of the fact that a trade mark is a legal concept as described above, trade mark functions should, accordingly, be restricted to those which relate to these legal aspects. In consequence, economic functions such as advertising, warranty and risk reduction functions rather denote characteristics relating to a concept going beyond the legal realm of trade marks. Contrary to the origin and product or service differentiation functions, they are of no importance for purposes of due registration of a trade mark[132] and other trade mark law issues. By contrast, they allude to aspects which are characteristic for the brand as a whole, especially as a marketing means, and will therefore be dealt with in the following.

In this light, what *Kapferer* means by saying that the legal approach or definition of a brand is "most useful for defending the company against copies of its products" but "should not become the basis of brand management"[133] is in essence that the legal definition, which in fact refers to the trade mark, is not able to capture all those elements of a brand which go beyond the trade mark itself.[134]

It follows from the aforementioned that, considering the legal nature of trade marks, trade marks and their functions can be relatively clearly defined.[135]

However, even though the concept of trade mark is purely legal and as such self-contained, a trade mark never travels alone in a vacuum. It is, provided that it is not merely registered but also put to use, always accompanied by marketing components combined with which it constitutes a brand. Hence, a trade mark is a brand inasmuch as it is protected by trade mark law. In other words, a brand consists of at least one trade mark as well as other elements

132 BGH, judgment of 13 November 1997, Case I ZB 22/95 – *GARIBALDI*. Functions other than source identification and differentiation do not belong to the legally specified nature of trade marks but describe possible uses of such marks for marketing purposes, cf. *Sambuc*, WRP 2000, 985, 988.

133 *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, p. 11.

134 This citation also shows that a number of writers, most of whom are no legal experts, do not use terminology distinguishing trade marks and brands but rather refer to a trade mark as the legal definition of brand. This is per se not wrong, especially from a practical brand management point of view. However, since trade marks do exist within a self-contained legal concept which raises the issue of how their relationship to brands shall be defined, this work has taken a different approach.

135 The distinction of trade marks and brands would probably be easier for German-speaking persons if it was not for the fact that both are called 'Marken'. In practice, a number of German-speaking persons have therefore started utilising the term 'brand' for clarity purposes. Conversely, this does not mean that the distinction between the two terms is clear and undisputed in the English-speaking area.

which are not protectable as trade marks.

As a consequence, trade mark law – as protecting the so-called brand device[136] – is, *de jure*, neither able to fully capture all brand characteristics and issues nor suitable for doing so.[137] This trade mark–brand dichotomy also means that a trade mark has to be seen, managed and valued, in terms of forecasting valuation, in the context of all factors and signals accompanying it. One would ignore crucial elements if the focus of valuation was merely on the trade mark but not on the brand as a whole. This is why this study focuses on and speaks of brand and not merely of trade mark (e)valuation.[138]

2.1.2.2 Brands – Definition and Functions

Compared to trade marks, brands are more complex and multifaceted phenomena. Therefore, they are more difficult to describe and define. There is no universally recognised definition of 'brand'.[139] Although it is accepted that a brand is more than merely one or several signs which may be trademarkable,[140] it has been and remains disputed in what respect and with which

136 Brand devices, also called brand icons, denote the signage of a brand such as name, logo, brand specific melodies (i.e. 'jingles') and others, cf. *Burmann/Blinda/Nitschke*, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, p. 43.

137 However, even though trade mark law *de jure* only protects the trade mark or, in other words, the device, it *de facto* aims at protecting the whole brand itself (this is to some extent done by complementary areas such as competition law, antitrust law and trade name law). The fact that only those functions which have a direct link to the legal definition of trade mark should be recognised as trade mark functions does not mean that functions going beyond, or economic ones, are insignificant for legal trade mark issues. They do not have direct but indirect bearing (similarly *Vanzetti*, GRUR Ausl. 1965, 128, 129.). For example, an attorney trying to protect his client's trade mark against a potentially confusing other mark will always do this in view of protecting the whole commercial appearance and all involved financial interests of the client. Since there is no 'brand law', he has to resort to the instrument of trade mark and e.g. unfair competition law.

138 *Smith*, for example, deals with the trade mark–brand dichotomy by assuming that "a trademark carries with it the other elements ascribed to a brand" without exactly saying what these elements are but giving a few examples (*Smith*, Trademark Valuation, p. 44). However, in the subsequent sentence, he warns the reader that this is not always the case. This study, in order to prevent having to work with more fictions than necessary, aims at denoting the difference between a trade mark and a brand more clearly. This will particularly benefit the analysis of value creating factors to a brand.

139 Cf. e.g. *Günther/Kriegbaum-Kling*, Schmalenbach Business Review 2001, 263, 268.

140 Cf. e.g. *Aaker*, Building strong brands, p. 25; *Esch/Wicke/Rempel*, Herausforderungen und Aufgaben des Markenmanagements, p. 10; *Gaiser*, Brennpunkt Markenführung – Aufgabenbereiche und aktuelle Problemfelder der Markenführung, pp.8-10; *Günther/Kriegbaum-Kling*, Schmalenbach Business Review 2001, 263, 270;

implications a brand goes beyond the legal concept of a trade mark. In fact, the definition of 'brand' is, as *Kapferer* puts it, "one of the hottest points of disagreement between experts".[141] This uncertainty and lack of clarity with respect to the term 'brand' have been in existence since the beginning of systematic debate about brands and their management. They are not only based on the intrinsic complexity of brands themselves. Also, they are attributed to both the different scientific backgrounds of involved scholars as well as practitioners and developments which took place over time,[142] leading to a changed perception of brands.[143]

What seems to have won recognition by now is the finding that the intellectual property right (whether it is referred to as 'trade mark' or as something like 'legal definition of brand'), the marked product and the brand are three distinct matters.[144]

2.1.2.2.1 Brands as Personality-like Phenomena

The term 'brand' has experienced numerous developments and changes since the beginning of its systematic scientific scrutiny. According to the 'classical', formally oriented approach, a brand is understood as merely a physical sign of origin of a branded finished product.[145]

Homburg/Krohmer, Grundlagen des Marketingmanagements. Einführung in Strategie, Instrumente, Umsetzung und Unternehmensführung, p. 181 and *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, p. 11.

141 *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, p. 9.

142 Regarding the modern era, one can distinguish five phases during which the understanding of brands developed in line with profound factual changes and gradually broadened. They range from industrialisation and mass production (mid-19th century until the beginning of the 20th century), when brands were merely perceived as owner's signs and proof of origin, to the information society (1990s until today), with a much broader and diverse perception of brands prevailing. For a comprehensive overview of these historical developments and their implications on brands and brand management, cf. *Meffert/Burmann*, Wandel in der Markenführung – vom instrumentellen zum identitätsorientierten Markenverständnis. Similarly *Bamert*, Markenwert, p. 32 et seq.

143 *Baumgarth*, Markenpolitik. Markenwirkungen – Markenführung – Markencontrolling, p. 2.

144 Cf. e.g. *Burmann/Meffert/Koers*, Stellenwert und Gegenstand des Markenmanagements, p. 5.

145 *Mellerowicz*, Markenartikel – Die ökonomischen Gesetze ihrer Preisbildung und Preisbindung, pp. 39/40 and *Esch/Wicke/Rempel*, Herausforderungen und Aufgaben des Markenmanagements, p. 9. The complete *Mellerowicz* definition of 'branded articles',

Kotler's definition seems to follow a similar track by specifying a brand as "a name, term, sign, symbol, or design, or combination of them, which is intended to identify the goods and services of one seller or a group of sellers and to differentiate them from those of competitors".[146] After all, he does not limit brands to being markers of finished consumer products, as the previous definition does. Such limitation is not appropriate nowadays as brands are also used for services, industrial goods and components[147] of finished products.

Both definitions, however, focus on the formal appearance of brands, the so-called devices or symbolic utility components (words, symbols etc.; those elements which can possibly be protected as one or several trade marks). By specifically mentioning the origin and differentiation functions, *Kotler* is even closely approximated to the legal definition of trade mark as introduced above.[148]

These formally oriented definitions are not wrong in their entirety since the device is a constitutive characteristic of a brand, essential for purposes of identification, differentiation and indication of origin. However, in line with what has been stated above with respect to trade marks,[149] understanding a brand as consisting of solely one or several marks or signs (with origin and differentiation function) does not do justice to the phenomenon brand. Looking at the implications brands have on internal and external audiences, it becomes evident that such approach is too narrow.[150]

Brands are developed to create long-term influence on buyer behaviour in favour of the marked products or services. Such behaviour cannot merely be influenced and explained by means of formal, symbolic elements and the origin and differentiation functions of brands. Rather, in analogy to the fact that

translated into English, is "ready-made goods for private use which are available in a greater sales area under a specific token (brand), in uniform appearance, amount and in constant or improved quality, and which have, thereby and by advertising, acquired acceptance of the respective business communities (consumers, dealers and producers)".

146 *Kotler*, Marketing management: analysis, planning, and control, p. 482.

147 Brands used with respect to such components are called ingredient brands. Intel Inside (PC processor units) and Shimano (bicycle components) are two well-known examples.

148 At 2.1.2.1.1.

149 At 2.1.2.1.3.

150 *Esch/Wicke/Rempel*, Herausforderungen und Aufgaben des Markenmanagements, p. 10; *Gaiser*, Brennpunkt Markenführung – Aufgabenbereiche und aktuelle Problemfelder der Markenführung, p. 8.

a person is only perceived by others as a differentiated personality if its name and appearance evoke concrete ideas and associations, a set of signs does not become a brand until it causes associations regarding, amongst others, product characteristics, possible uses and certain emotional experiences.[151]

Hardly any consumers would, for example, buy the energy drink Red Bull because it is manufactured in Austria or the manufacturing is controlled by a specific Austrian company. Rather, the central influencing factors are that it is perceived as young, hip and 'giving you wings'.[152] [153] A strong premium automotive brand such as BMW does benefit from its German origin as such origin is widely associated with quality products. However, the brand evokes many other associations in consumers' minds such as 'safe and reliable', 'expensive', 'Freude am Fahren'[154] and 'fast'.[155] This results in the German origin being one influencing factor of many and – in case of a brand as strong as BMW – not the most influential one.

These examples clarify that an effect-oriented view, instead of a formal one, is an essential step towards full understanding of the nature of brands and their influence. A brand is not merely a name or a symbol but a construct which is, at least to a considerable part, generated in the mind of the consumer. The existence of formal markings or devices, which can possibly be protected as trade marks, are a necessary but not a sufficient condition for the formation of a brand. The respective signs do not become a brand until they evoke and leave behind certain associations in customers' minds.

The entirety of all such associations, leading to a certain perception of the respective brand within the audience, is referred to as brand image. As humans are perceived in certain ways by others, so are brands. This is what they are designed and positioned for. Brand image can therefore be defined as "perceptions about a brand as reflected by the brand associations held in the consumer memory".[156]

Brand image steers buyer behaviour. Basic prerequisite for the formation of a

151 *Gaiser*, Brennpunkt Markenführung – Aufgabenbereiche und aktuelle Problemfelder der Markenführung, p. 9.
152 The slogan, or claim, is "Red Bull verleiht Flüüügel" – 'Red Bull gives you wiings'.
153 Similarly *Esch/Wicke/Rempel*, Herausforderungen und Aufgaben des Markenmanagements, p. 10.
154 In English: 'The fun of driving'.
155 *Franzen/Fuchs/Paninka*, Psychologie der Marken, p. 2.
156 *Keller*, 57 Journal of Marketing, issue 1, 1, 3 (1993).

brand image (and therefore no part of brand image itself) is brand awareness. It measures the strength of the brand trace in memory, as reflected by the ability of potential consumers to remember a brand device (brand recall) or to recognise it after acoustic and/or visual aid (brand recognition), and to attribute these perceptions to a product category.[157] Brand awareness is a necessary precondition for development of a brand image in the mind of the consumer, which influences buyer behaviour and thereby turnover and income generated by the brand. Understanding brand awareness and image, which together constitute brand knowledge, is therefore crucial for valuation purposes.

To facilitate insight, the components of brand image can be divided into three parts: brand attributes, the functional and the symbolic benefits of the brand.[158]

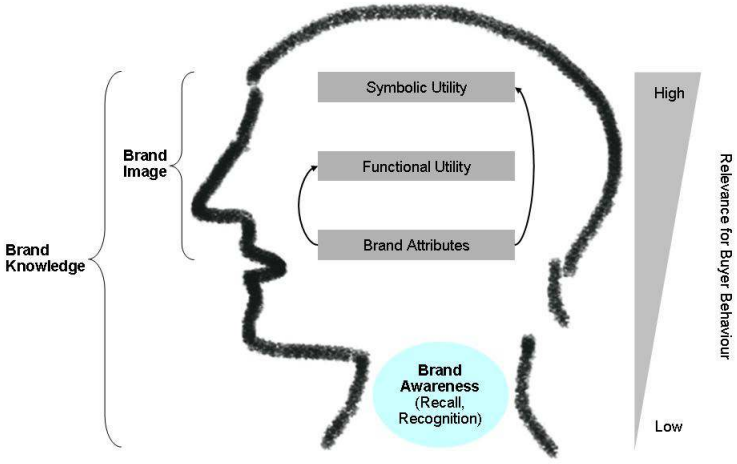

Figure 2.1: *Brand image (source: author's own on the basis of Burmann/Blinda/Nitschke, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, p. 7).*

Brand attributes are all characteristics of a brand the respective consumer is aware of, for example form and smell of the marked product or its country of origin. Every member of the brand audience consciously and unconsciously

157 *Burmann/Meffert*, Theoretisches Grundkonzept der identitätsorientierten Markenführung, pp. 53-54 and *Keller*, 57 Journal of Marketing, issue 1, 1, 3 (1993).

158 *Burmann/Meffert*, Theoretisches Grundkonzept der identitätsorientierten Markenführung, p. 54.

condenses and assesses the entirety of all brand attributes. The outcome of this process is the functional and symbolic[159] utility the respective consumer perceives the brand to have. Brand awareness is said to have the least influence on actual buyer behaviour whereas the symbolic utilities are, of brand awareness and all components of brand image, generally the most influential factors.[160]

A certain brand only influences buyer behaviour in a positive way if customers, based on associations and on experiences with the brand itself and with other members of society who are also connected to the brand, perceive it as bringing about added value for them.[161] Such added value, or added benefit, may for example result from product quality and attribute information or social affiliation with a group of status symbol owners conveyed by the brand. This perceived added benefit represents brand value as seen from the buyer's point of view, in other words, the psychographic brand value.[162]

The expediency of the approach to brands as complex personality-like constructs results from the fact that brands substitute direct personal relationships. Apart from antiquity when simple marks on handcrafted items were already utilised as owner's signs[163] and from cattle farming and other animal husbandry, where they served and still serve the same purpose, brands gained considerable momentum during early industrialisation in the mid-19th century. Mass production of many goods handcrafted to date lead to loss of the personal relationship between producer and end user.[164] In many sectors, anonymous (i.e. unbranded) products on mass markets dominated

159 *Aaker* distinguishes functional, emotional and self-expressive benefits, which means he subdivides the symbolic utilities for an even finer distinction, cf. *Aaker*, Building strong brands, p. 79.

160 *Burmann/Meffert*, Theoretisches Grundkonzept der identitätsorientierten Markenführung, pp. 54-55. Functional utility comprises all those perceived benefits which result from functional physical characteristics of the branded products (e.g. the taste of a chocolate bar) and from information, confidence and risk reduction functions of the brand (e.g. making the customer trust in product safety or sufficient spare part supply). With both quality and 'look and feel' of products and services in many sectors becoming increasingly alike, the additional, symbolic, utility brands can bring about, such as symbolising certain values and lifestyles (e.g. the so-called 'LOHAS', who live a lifestyle of health and sustainability), has become increasingly decisive in many sectors.

161 *Burmann/Meffert/Koers*, Stellenwert und Gegenstand des Markenmanagements, p. 9.

162 *Farquhar*, 30 Journal of Advertising Research, iss. 4, RC-7, RC-8 (1990). More on psychographic brand value and its measurement at 3.2.3.

163 *Fezer*, GRUR 2003, 457, 457.

164 *Leitherer*, Markenartikel 1955, 539.

the scene. It was not until the early 1900s that increasing price competition caused widespread use of brands. This development sparked the ongoing phenomenon that brands act as substitutes of persons or personal relationships respectively.[165] Thereby, they indirectly allow the proprietor to come into contact with the end consumer again.

By functionally substituting living persons, brands consequentially need to show certain features, similar to those of persons, which are necessary to perform this role. These do not only include an image but, as a logical consequence, also an identity. Brand image does not emerge of its own volition. It is always caused and shaped by interaction between the respective recipient and expressions of brand identity. An existing identity is a necessary precondition for it being reflected by associations forming an image.

For humans, identity is the core factor of authenticity and effective differentiation from others. This applies similarly to brands,[166] as they substitute humans with regard to certain functions, as just described. In analogy, brand identity is, therefore, the self-perception of the brand as seen by the internal target groups (employees, management etc.) within the proprietor institution.[167] It can be defined as those attributes of a brand which effectively shape the character of the brand from the viewpoint of internal target audiences.[168]

Its constitutive components can be identified as brand origin, core compe-

165 Similarly, from an informational economics point of view, some scholars denote brands as "information surrogates", cf. *Baumgarth*, Markenpolitik. Markenwirkungen – Markenführung – Markencontrolling, p. 25.

166 This is not without controversy. It is undisputed today that brands show more features than merely those necessary in order to serve as owner's signs and proof of origin. However, opinions diverge with respect to the quality of brand characteristics and functions going beyond such outdated understanding. Especially in the light of the reason why brands were put in place just explained, it is convincing to see brands as a complex system of communication with an internal view, or brand identity, and an outsider's perception, the so-called brand image. Furthermore, according to *Gilmore*'s theory of animism, humans generally tend to animate artefacts by awarding them human characteristics (*Gilmore*, Animism). In this light, brands do show human traits such as an identity. In addition, social science research has plausibly demonstrated that companies and brands as groups of persons consequentially show identity in the form of corporate and brand identity (*Burmann/Meffert*, Theoretisches Grundkonzept der identitätsorientierten Markenführung, p. 48).

167 *Burmann/Meffert/Koers*, Stellenwert und Gegenstand des Markenmanagements, p. 8; *Esch/Langner/Rempel*, Ansätze zur Erfassung und Entwicklung der Markenidentität, p. 106.

168 *Burmann/Blinda/Nitschke*, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, p. 16.

tences, brand achievements, brand vision, brand values and brand personality.[169]

Brand achievements determine form and configuration of products and/or services offered. The type of brand achievements chosen does not only determine the way the brand is being experienced by internal target audiences but also how the brand becomes utilisable for the end consumer. Implementation of brand identity by means of brand achievements as a central area of operative brand management comprises all decisions relating to market-driven design of branded products and/or services.[170] Brand achievements, therefore, include all those elements which can be protectable as trade marks, such as logos or packaging shapes. However, some brand achievements, which may in practice affect the brand image generated in consumers' minds, such as the smell of a certain type of leather used in a luxury car, cannot obtain such legal protection.

Brand identity components do not per se interrelate on a pre-defined cause and effect basis and vary in specific markedness and combination, over time and from brand to brand. This allows brand identity to be perceived and experienced as unique by customers. Like human identity, it can only develop over a certain period.[171]

Brand identity is a fundamental prerequisite for gaining trust within the target audience.[172] Trust, in turn, is the basis of any long-term customer retention and brand loyalty. Since brand identity is a concept internal to the brand proprietor which is configured in the course of strategic brand management, it needs to be communicated appropriately in order to evoke the desired associations and reactions on the customer side. This is operationalised through positioning, which is part of operative brand management

169 For a detailed explanation of these elements cf. *Burmann/Meffert*, Theoretisches Grundkonzept der identitätsorientierten Markenführung, pp. 57-65. *Kapferer's* 'brand identity prism' is similar, consisting of the six facets physique, personality, relationship, cultures, reflection and self-image, cf. *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, pp. 106-111. Ultimately, terminology and scope of the components of brand identity may vary by author, yet what all publications have in common is the quest for elements reflecting an identity similar to a human one.

170 *Burmann/Blinda/Nitschke*, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, pp. 21 and 35.

171 *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, p. 113.

172 *Burmann/Meffert*, Theoretisches Grundkonzept der identitätsorientierten Markenführung, p. 42.

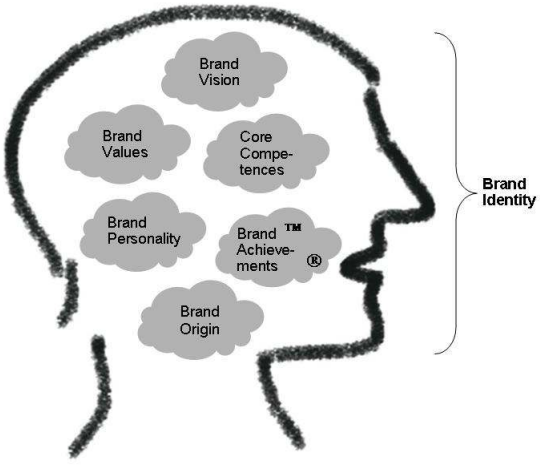

Figure 2.2: *Brand identity (source: author's own on the basis of Burmann/Meffert, Theoretisches Grundkonzept der identitätsorientierten Markenführung, p. 57).*

and determines how brand identity can be translated into core attributes being closely related to buying criteria of the relevant external target groups.[173] By means of positioning, the respective brand is aimed at taking a position in the consumers' minds which is more favourable compared to those of competitors.[174]

In conclusion, brands are much more than formal signs of communication. They are complex personality-like constructs with their own behaviour, physical characteristics, values and visions. Based on their identity, they are able to create, shape and maintain strong relationships, both with external audiences such as end consumers and with internal target groups such as employees or suppliers.[175] Brand identity, of which a brand's icons or devices are part, develops through both an internal collective process within the proprietor entity and interaction with external target audiences, who act on the basis of the image the respective brand creates in their minds.

In line with this holistic understanding, a brand can therefore be defined as "a bundle of benefits with specific characteristics which make sure that this bundle of benefits, from the point of view of relevant target audiences,

173 *Burmann/Blinda/Nitschke*, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, p. 24.
174 See *ibid.*
175 *Jansen*, Brand Prototyping: Developing meaningful brands.

strongly differentiates from other bundles of benefits meeting the same basic needs".[176] Brands are central marketing means the devices or icons of which may be protectable by trade mark law.

As brands do not exist without providing added benefit for the customer vis-à-vis a fictitious unbranded product or service, they also cannot exist without products or services to carry them. Hence, they are not only intangible but also conditional assets.[177]

2.1.2.2.2 Brand Types

An enterprise's brand architecture defines how its various brands are arranged and interrelated. In this light, three kinds of brands can be distinguished: single (also called product or service) brands, family brands[178] and corporate brands.[179] [180]

Businesses choosing a single brand strategy provide a different brand for each of their products. The corporate brand, if at all, merely plays a background role vis-à-vis the external target audience. A brand family handles several related products under one brand. This is the case for many consumer goods companies, for example *Beiersdorf* and its brands NIVEA, HANSAPLAST and others.[181] In the course of a corporate brand strategy, all products or services are combined under one brand. SONY is a good example of such a so-called 'branded house' (as opposed to a 'house of brands', which refers to a number of different single or family brands gathered under one umbrella brand, e.g. in the case of *Unilever*).

The credibility of brands for the target audience and thus their success and value depend to a considerable extent on how well the brand architecture is managed. Often, the above three strategies are combined in order to strive

176 *Burmann/Blinda/Nitschke*, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, p. 3; *Burmann/Meffert/Koers*, Stellenwert und Gegenstand des Markenmanagements, p. 7.

177 *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, pp. 10/11. Similarly *Henning-Bodewig/Kur*, Marke und Verbraucher: Funktionen der Marke in der Marktwirtschaft, p. 226.

178 These are also known as 'product line names', cf. *Bamert*, Markenwert, p. 83.

179 Corporate brands are also denoted 'umbrella brands' or 'company brands', cf. *Bamert*, Markenwert, p. 85.

180 *Böhler/Scigliano*, Marketing-Management, pp. 105 et seq.

181 Cf. http://www.beiersdorf.de/controller.aspx?n=51\&l=1 (last accessed July 4, 2007).

for clear brand positioning, to utilise possible positive image transfers between brands and to take advantage of brand strategic options[182] without overexpanding the respective brands.[183]

Next to the dimension of brand architecture just introduced, there exists a trade directed dimension, which relates to the business' positioning in vertical competition.[184] On the basis of this dimension, the respective business needs to decide whether it shall solely operate as a classical producer of branded goods and/or supply the intermediaries with goods for their private labels. Hence, one can distinguish the 'classical' brands and private labels or store brands respectively.[185]

2.1.2.2.3 Brand Functions

Just as brands consist of more elements than trade marks, they show a greater variety of functions over and above the origin and differentiation functions of the latter. Depending on whether one takes the point of view of the brand proprietor, the target audience or an intermediary, different brand functions are important.

For the offeror, a strong brand causes preference generation and customer loyalty. Furthermore, it facilitates segment-specific market cultivation as each segment can be addressed with specifically matched messages. In consequence, a strong, well-managed brand brings about the possibility of demanding price premia other brands are not able to achieve.[186] Such higher prices imply higher profitability, unless pressure from competitors reduces profits to normal levels.[187] Customers' price elasticity of demand[188] tends to

182 Such options include line extensions, in the course of which an existing brand is extended to a new product within an existing product group, brand extensions, which are used to transfer an existing brand to a new or different product group, and others; cf. *Kaufmann/Sattler/Völckner*, Markenstrategische Optionen, pp. 2 et seq.

183 *Homburg/Krohmer*, Grundlagen des Marketingmanagements. Einführung in Strategie, Instrumente, Umsetzung und Unternehmensführung, p. 185 et seq.

184 Thirdly, there is also a horizontal dimension of brand architecture, which refers to the number of offered brands per market segment, cf. *Burmann/Blinda/Nitschke*, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, pp. 25-29.

185 As to an example for such brands cf. fn. 129.

186 *Esch/Wicke/Rempel*, Herausforderungen und Aufgaben des Markenmanagements, p. 12.

187 *Greenhalgh/Rogers*, Trade Marks and Market Value in UK Firms, p. 4.

188 This term denotes buyers' responsiveness or sensitivity to changes in price, cf. *Silbiger*, The 10-day MBA, p. 294. In premium branded segments, for example, elasticity is

be lower than regarding weak brands or store brands, which means that a possible price increase causes comparatively little abstinence or migration to other products or services. Hence, buyer behaviour becomes less volatile which lowers the proprietor's sales and earnings risks. Such lowered risks lead to lower discount rates in the course of company valuation which results in an increase in company value itself.[189]

Furthermore, strong brands contribute to lowering cost of capital for the proprietor. Each bank passes through a rating process prior to granting a loan. According to new 'Basel II' risk assessment rules, the rating depends to a large extent on balance sheet figures but also on qualitative factors such as market position.[190] Hence, the stronger and more valuable the brand, the higher the creditworthiness of the proprietor and the lower the interest rate, i.e. the cost of capital.

The abovementioned implies that strong brands protect the offeror's products or services from competitor influence. This, however, does not mean that a strong brand makes the owner immune against all negative implications. Rather, a particular problem with a brand or the branded goods or services may cause the proprietor to need a considerable amount of money to immediately rebuild and reposition the brand. Take the example of Perrier: in the year 1990, a number of Perrier water bottles were contaminated with benzene during routine maintenance. This incident required the company to spend £84 million for the repositioning of the product in addition to £125 million in price reduction when the drinks division was put off.[191] The interconnection between these risks and the trade mark's and therefore the brand's value is crucial to keep in mind for the long-term effectiveness of brand management success.

Furthermore, strong brands allow, by enabling certain sales and earnings volumes, the proprietor to negotiate relatively good deals with suppliers. The proprietor's lowered risk is being passed on to suppliers who, in turn, often accept agreements favourable for the offeror. In a similar manner, brands provide an advantageous negotiating position vis-à-vis retailers.[192]

generally lower than in low-cost segments, enabling the brand proprietor to demand higher prices without necessarily losing a considerable number of customers.

189 *Bamert*, Markenwert, p. 51.

190 *Kudraß/Schäfer*, BC 2003, 35, 36.

191 *Gream*, Trademark valuation: review in January 2004, p. 4.

192 *Baumgarth*, Markenpolitik. Markenwirkungen – Markenführung – Markencontrolling,

What is more, a strong brand may constitute an enabling platform for new products or services in the course of brand extensions, line extensions[193] and other strategic options such as new distribution channels or new geographic markets.[194]

Like for proprietors, risk reduction is one of the central brand functions from a customer's point of view. As set out above, the information a brand conveys and experiences consumers have with the brand build a specific brand image in consumers' minds. As buying decisions are generally made on the basis of incomplete information, a positive experience and therefore a favourable brand image raise the likelihood of repurchase considerably. Strong brands can therefore significantly facilitate and accelerate the decision making process and thereby lower transaction cost.[195] This reduced complexity provides orientation and lowers risk of buying something unknown or unwanted. The certitude and trust a strong brand conveys do not only reduce this functional risk (related to performance) but also economic risk (linked to price), experiential or social risk (related to customers' experience with the product or their social image respectively).[196] Due to such risk perceived by customers, the offeror needs to build trust within the target audience. The main instrument for achieving this is a strong brand.[197] Closely linked to experiential risk is the issue of quality. As every brand conveys a certain statement with respect to the quality of the marked product or service, brands can, if they are experienced positively by customers, function as a quality guarantee and orientation in this regard (so-called warranty function).

p. 22. Note that currently only the two strongest consumer goods brands are able to keep or increase their market share; others lose market share to store brands, cf. *Esch/Wicke/Rempel*, Herausforderungen und Aufgaben des Markenmanagements, p. 12.

193 For an explanation of these terms cf. fn. 182.

194 *Kaufmann/Sattler/Völckner*, Markenstrategische Optionen, pp. 2 et seq.

195 *Bamert*, Markenwert, p. 47.

196 *Kapferer*, The new strategic brand management: creating and sustaining brand equity long term, p. 11.

197 *Eva Wellendorff* of *Schmuckmanufaktur Wellendorff* in Pforzheim, Germany, in 2001: "Eine unverwechselbare Marke gibt dem Kunden Sicherheit." ('A unique brand gives the customer certainty.'), cf. http://www.gem-online.de/markendefinitionen/index.php?id=16\&keyword= (last accessed July 11, 2006). *Karl Popp*, then president of the Austrian branded goods association, similarly said in 1997: "In einer immer unsicherer werdenden Welt bietet die Marke das, was die Menschen sich wünschen: Sicherheit – Vertrauen – Qualität." ('In a world becoming increasingly insecure, the brand offers what people wish for: Certainty – trust – quality.'), cf. http://www.gem-online.de/markendefinitionen/index.php?id=12\&keyword= (last accessed July 11, 2006).