

Nontraditional Areas of Intellectual Property Protection: Colour, Sound, Taste, Smell, Shape, Slogan and Trade Dress

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In the recent years, the industry is registering more and more trademarks in unconventional areas like colour, sound and smell. Specially, sounds and colours are commonly trademarked today. Smell, shape and slogan are also gaining grounds slowly and gradually. Besides unconventional trademarks, copyright protection in areas like smell has also been reported. This paper reviews the developments in such nontraditional areas of intellectual property protection.

Keywords: Nontraditional marks, unconventional trademarks, colour marks, sound marks, scent marks, smell trademarks, olfactory trademarks, shape marks, slogans, trade dress

Since the late 1990s unconventional trademark forms such as sounds, signs, tastes, touch and smells are gaining more importance. In France, notably, music and sounds have been eligible for trademark for the last few years¹. Furthermore, there is also another form of protection called trade dress, which can be further divided into product packaging trade dress and product design trade dress. Though most of the activity has been noticed in trademarks, copyright is also being used for protection of unconventional fields, and strong possibilities of such developments in the future are being predicted in the area of patents as well.

Unconventional Trademarks

In the recent years, industry is seeking to use new forms of protection with sensory appeal especially in the area of consumer goods. These developments are enabling traders to rely on less traditional forms of trademarks that appeal to the senses in a different way, namely, through colour, scent and sound, the adoption of which warrants special consideration. Although these possible trademarks have not yet reached a high acceptance among lawyers, jurists and the courts, they are of common use in marketing and practitioners are familiar with the sensory signs as an essential part of an innovative trademark and product strategy. Thus, all sensory signs such as audible, visual, gustatory, tactile and olfactory have become part of such developments. These nontraditional

trademarks go beyond the simple words and designs that businesses have long used to distinguish their goods from those of other companies. For example, trademark registration has been obtained for the floral scent of thread, the colour pink has been registered for insulating material, and a pattern of chimes has been registered for the broadcasting of television programmes².

A broad universe of potential for nontraditional marks is envisioned, but trademark owners have not yet taken full advantage of the availability of registration. Such new trademarks bear a high potential of economic assets and of innovative creations. Specially, sounds and colours are commonly trademarked today because of the commercial impression they leave on consumers with smells also catching up.

Member states of the World Intellectual Property Organization (WIPO) have committed themselves to work towards further simplifying and streamlining the procedures concerning formal requirements for the registration of trademarks. Further harmonization of substantive trademark law addressing questions such as the definition of a mark, non traditional marks (smell marks, sound marks, holograms and three-dimensional marks), grounds for refusal of trademark rights, and rights conferred by registration³, is also in the offing.

International standards that determine which signs qualify as distinctive and enforceable trademarks have been progressively relaxed. However, though colour, sound and scent marks should be capable of

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trademark registration and protection, significant obstacles to effective international protection remain⁴. The openness to recognizing the existence and registrability of nontraditional trademarks is not universal. Although numerous jurisdictions have passed legislations or reinterpreted existing statutes to make nontraditional marks registrable, many other jurisdictions have not followed suit.

The issues in most countries have largely focused on the definition of nontraditional marks. In contrast, current debate in the United States related to nontraditional marks appears to be focusing on reconciling trademarks with other intellectual property rights.

Requirement of Graphical Representation

Although the European Community trademark harmonization directive (EEC Directive) and the amended State laws already took into consideration the new trademark forms such as sounds, signs and smells, the major problem is the requirement of 'graphical representation' of the mark, which can be found in each one of those statutes. Thus, the most important requirements that need to be fulfilled in order to register a trademark is the capability of "being represented graphically" [Article 2 Directive 89/104/EEC; Article 4 of Community Trade Marks Regulation (CTMR); Section 1 (1) Trade Marks Act 1994 and Article 8 (1) German MarkenG] and the fact that a sign shall not be registered if it "consists exclusively of the shape which results from the nature of the goods themselves" [Article 3 (1.e.) Directive 89/104/EEC; Article 7 (1.e.) CTMR; Section 3 (2.a.) Trade Marks Act 1994 and Article 3 (2.1.) German MarkenG]⁴. The latter condition concerns, e.g., products such as, perfumes, where the smell cannot be registered as a trademark, because the perfume's fragrance results from the nature of the good itself.

The importance of the former requirement has in fact practical reasons. The only way a trademark can be recorded in the register office is by means of a piece of paper that is visible and can be read by everybody. Therefore, the sign must be expressed by writing, drawing or by a graph – that is, by a diagram representing a mathematical or chemical relationship. The representation must be clear and precise and also intelligible to those who consult the register. This consultation right includes of course every manufacturer - who may seek to register a similar sign – but also every consumer and the general public. An infringement of a trademark can result in legal

proceedings and sanctions and therefore it is necessary for others to be informed about existing trademarks.⁵

Colour Marks

Colours and colour combinations play an important role in distinguishing products in the marketplace, and are particularly useful where consumers do not easily understand traditional marks. Colour has long been considered registrable as a feature of a mark. Many jurisdictions now also recognize the registrability of a single colour *per se*. Unfortunately, there is no global uniformity in statutory definitions or relevant case law concerning whether a single colour, or a combination of colours, can function as a trademark. The Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) states:

'Combinations of colors...shall be eligible for registration as trademarks [although] members may make registrability depend on distinctiveness acquired through use [and] members may require, as a condition of registration, that signs be visually perceptible.'

The Agreement is, however, silent on the issue of single colour marks⁴.

The current United States trademark law does not prohibit the registration or protection of colours *per se*. Historically, however, United States courts were reluctant to recognize trademarks comprised solely of colours or colour combinations. In one case a court denied relief to the plaintiffs against confusing usage of red and white labels on food product containers. These courts considered that a colour *per se* could not function as a trademark, even though colour may be an important feature of a distinctive design or word mark, and they feared that the colours available to traders within a particular field would be exhausted if they protected colours *per se* as trademarks, the so-called 'colour depletion' rule⁴.

However, until recently, United States courts were still divided over the issue of single colour marks. Finally, in 1995 the United States Supreme Court resolved unanimously that, 'sometimes, a colour will meet ordinary legal trademark requirements. And, when it does so, no special rule prevents colour alone from serving as a trademark.' However, the Court held implicitly that single colours may not be inherently distinctive and may only be protected when they have acquired a secondary meaning through use, similar to descriptive marks or words. The Court also

found that the green-gold colour in issue served no function other than as an identifier and the Court dismissed the 'color depletion' problem raised by the plaintiffs⁴. The case in question was the *Qualitex Co v Jacobson Prods Co*. The petitioner Qualitex Company's used a special shade of green-gold colour on the pads made and sold to dry cleaning firms for use on dry cleaning presses. The respondent, Jacobson Products began to sell its own press pads to dry cleaning firms; and it colored those pads a similar green-gold. Later, Qualitex registered the special green-gold colour on press pads as a trademark. Qualitex subsequently added a trademark infringement count; to an unfair competition claim in a lawsuit it had already filed challenging Jacobson's use of the green-gold colour⁶. Qualitex won the lawsuit in the District Court (CD Cal.1991). But, the Court of Appeals for the Ninth Circuit set aside the judgment in Qualitex's favour on the trademark infringement claim because, in that Circuit's view, the Lanham Act of 1946 did not permit registration of 'colour alone' as a trademark. This decision was however, reversed by the US Supreme Court.

Although thousands of registrations in the United States include colour as a feature, few registrations exist for a single colour *per se*. Several national trademark offices, such as those in Germany, Norway, Sweden and the United Kingdom, require showing of secondary meaning or acquired distinctiveness before registering a colour *per se* because they do not consider single colours inherently distinctive. The Office for the Harmonization of the Internal Market (OHIM), the authority that administers the Community Trademark, a supplement to national marks for European Union countries, also follows this rule. France, however, does not require a showing of secondary meaning. Some countries, including Argentina, Canada, Mexico and Spain, do not consider colour *per se* eligible for trademark registration at all. The Benelux Trademarks Office--which administers the unified trademark system of Belgium, the Netherlands and Luxembourg--previously registered marks consisting of colour *per se* upon a showing of secondary meaning. Recent litigation in the Belgian and Dutch courts has called this practice into question². The Mexican Industrial Property Law prohibits registration of 'isolated colors, unless combined or accompanied by elements such as signs, designs or designations that make them distinctive'⁴.

Although the European Community trademark harmonization directive sought to harmonize the

definition of a trademark, it remained silent on the issue of colour marks. Thus, each member state may determine whether a colour or combination of colours complies with this definition. For example, the French Trademark Law of 1991, based on the Directive, defines a trademark as including 'arrangements, combinations or shades of colors' and permits registration of single colours and combinations of colours. However, since the trademark office does not apply strict standards in its registrability examination, the discretion to enforce registered rights remains with the courts⁴.

The United Kingdom has also recognized and registered colours as trademarks, e.g., the colour silver in connection with anthracite briquettes, the colour red applied to the pin of a shackle, three red bands on the handle of tennis, badminton, and squash rackets, and the colour green applied to the exterior surface of a building. However, registrants may be required to prove that the colours had acquired distinctiveness through prior use or, if the colour to be registered is the colour of the goods themselves, proof or assurance that the colour serves no function other than as a trademark may be requested. Unregistered colour marks have also been protected in the United Kingdom under the theory of passing off, a type of unfair competition, albeit inconsistently. Green and black pharmaceutical tablets were considered sufficiently distinctive of a manufacturer so as to prevent use of the same colour scheme by another trader. However, a pharmaceutical manufacturer was unable to prevent use of its yellow and white colour coding system for tablets of different dosages. Although seemingly inconsistent, success in passing off actions depends much on the specific facts and the extent to which the colours at issue have become distinctive of a particular party⁴.

The new German Marks Act specifically includes colours and combinations of colours as registrable marks. However, recently issued internal guidelines of the German Patent Office appear to exclude registration for such marks, unless combined with other distinctive features. The position is even less consistent in other countries where colours may or may not be registered as marks or protected like trademarks under other legal theories.

The new Trade Marks Act of Australia includes 'any colour' as a registrable sign. Also, more recent cases in Australia and New Zealand have protected colours under the theory of passing off⁴.

Since the Brazilian Industrial Property Code specifically prohibits the registration of 'colours and the names thereof unless combined in an original manner', single colours are not registrable although combinations of colours combined in some distinctive manner may be registrable. The South Korean trademark law was amended on 1 January 1996, to include colour or combinations of colours as part of a registrable mark, although colour alone is still not protected⁴.

Although Chinese law does not permit the registration of single colours, a combination of colours may be registered where the combination has acquired distinctiveness through use. The courts have not addressed colour mark protection. Similarly, Taiwan does not allow registration of single colour marks, although a combination of colours that has acquired distinctiveness through substantial use may be registrable. Japan does not permit registration of single colour or colour combination trademarks, without other identifying or distinctive features, and there are no judicial decisions, which have addressed such issues⁴.

Sound Marks

Sound marks can function as trademark or service mark, as source identifiers for goods and/or services in commerce⁶. Even though trademarks consisting of sounds have existed for many years, there is no uniformity regarding protection for such marks in the global marketplace or on the international level. The TRIPS Agreement, the EU Directive and the Community Trade Marks Regulation are all silent on sound marks⁴.

The United States has long recognized sound marks, such as the familiar chimes of the National Broadcasting Corporation (NBC). Although certain sound marks may not be considered inherently distinctive, they may be registrable upon proof of secondary meaning. Nonetheless, fewer than 50 sound marks are registered with the US Patent and Trademark Office (USPTO); among them are the Intel tones and ESPN's six-tone jingle².

Musical compositions have also been registered as trademarks in USA.

Most members of the European Union-Austria, Denmark, France, Germany, Ireland, Italy, the OHIM, Spain, Sweden, and the United Kingdom-recognize registrability of sound marks, as do Norway and Switzerland. In fact, the new United Kingdom Trade Marks Act neither includes nor excludes protection

for sound marks, presumably permitting registration of sound marks that are capable of graphic representation and capable of distinguishing goods or services of one undertaking from another. Sound marks are registrable and enforceable in France since the legal definition of a trademark expressly includes 'sound, musical phrases, arrangements, combinations'⁴.

Sound marks are protected under the new German Marks Act provided they are capable of graphic representation. Both Mexico and Canada require that trademarks be visually perceptible and therefore refuse to recognize sound marks.

Although sound mark registration is not available globally, international branding for companies such as Deutsch Telekom, Nokia, Yahoo! and Intel include registration of sound marks in multiple jurisdictions⁷.

The sound mark application process is the same as for traditional trademarks and service marks. In the United States, sound mark applications must undergo the usual substantive examination process. The drawing requirement, however, is waived and a description of the mark is required in its place. Applications to register sound marks may be filed on an intent-to-use basis, and office actions will be issued during the examination phase. The applications are published for opposition and specimens must be reviewed and accepted prior to the issuance of a registration certificate. When searching sound marks it is important to interpret the terminology that the registry uses to label its unconventional marks. Terms such as 'sound' 'spoken' or 'notes' would uncover these marks. The Intellectual Property Office of New Zealand uniformly labels sound marks 'representation only' and the Australia Intellectual Property Office labels marks by type, indicating sound. In the Australian trademark registry, sound marks are titled, and the terms 'sproing', 'Yahoo!' 'yodeled' or 'tune' appear with the indication that the mark is a 'sound'⁷.

Sound mark registration is problematic in two areas. First, reduction of a sensory mark to a written description may lead to an impression of the mark. While famous sound marks or spoken word marks will overcome this difficulty, the simple listing of names of musical notes does not provide enough sensory information to experience the mark. Second, some registries accept a musical score of the mark and provide an image of the score in the database in addition to, or instead of, a written description of the mark. If a sound mark has been registered by music

notation without a listing of the note pattern, the mark lacks meaning, particularly, if the mark is not famous. In addition, those who do not read music will be at a loss. Fortunately, obtaining a file wrapper for the mark that includes specimens of use is one way to verify the mark⁷.

Growth of new technology is providing increased opportunities for trademark owners to use sound marks. Cell phones are powered on and off with logos, and sounds to provide consumers with the brand name, service provider and equipment model. Newer cell phones are equipped with game software, turning wireless units into hand-held computer devices complete with sound effects. Banner ads, which have quickly become an Internet staple, may some day infiltrate wireless technology in the form of sound marks. Perhaps the expanded use of unconventional sound marks in wireless technology and the Internet will increase the demand for global registration of sound marks as intellectual property⁷.

Scent Marks

Olfactory trademarks or scent marks bear a high potential of innovative goods and services⁵. However, marks consisting of scents are the most problematic. In addition to the practical difficulties of describing such marks sufficiently to determine where conflicts may exist, there is little legislation or jurisprudence on the subject. The international marketplace does not appear as welcoming. Neither the TRIPS Agreement, the EU Directive nor the Community Trade Marks Regulation address protection for scent marks. Although several jurisdictions have recognized the registrability of sound marks, protection of fragrances is controversial.

A scent mark was first recognized in 1990 in the United States, where a scent, described as a high impact, fresh, floral fragrance reminiscent of plumeria blossoms, applied to sewing thread, was deemed a registrable trademark⁴. There are a few registrations of scents as trademarks currently in force, including 'a scent mark having the scent of bubble gum' for use with oil based metal cutting fluid and oil based metal removing fluid for industrial metal working⁸. In 2001, a 'cherry scent' was registered for synthetic lubricants for vehicles. However, scent marks are still not common and very few applications for registration of scent marks have been filed in US.

The situation in Europe is not consistent and conflicting decisions have been observed. A 'smell of freshly cut grass' trademark for tennis balls was

validated, considering that the simple description was enough to identify it definitively. On the other hand, the ECJ refused a similar protection to a German manufacturer. The proposed chemical formula and verbal description (fruity balsamic with a light note of cinnamon) as well as a sample were not considered sufficient by the Court to describe the odour. Eli Lilly was also disappointed in its attempt to register the strawberry flavour specific to several medicines which was refused by the Paris Court of Appeals¹.

Further, the new United Kingdom Trade Marks Act neither provides for nor prohibits protection for scent marks, thereby presumably allowing registration of scents⁴. The broad definition in Section 1 (1) of the UK Trade Marks Act was with a view to strengthen the possibility of registering trademarks other than visual such as tastes and smells.

Likewise, registration of fragrance marks in France and Germany is not expressly excluded, although such marks require graphical representation, which may make them difficult to register under current practice⁴. Even in jurisdictions that provide protection, scents of perfumes and other goods for which smell plays a functional role are not protected. Scents are excluded from protection in many jurisdictions².

Canada and Mexico do not register scent marks because of requirements that trademarks be visually perceptible². The South Korean Trademark Act does not provide for the registration of scent marks. In Brazil, Japan, China and Taiwan, scent marks are not registrable⁴.

Prior to the case of *Re Celia Clarke's Application*, it was not clear whether a fragrance claiming use in the manner of a trademark could be registered. A mark described as 'a high impact, fresh, floral fragrance reminiscent of plumeria blossoms' for use with yarn and thread was rejected by the examiner. On appeal, the Board reversed the decision, holding that 'fragrance can be capable of serving as a trademark to identify and distinguish' goods. However, the Board drew a clear distinction between a fragrance used in the identifying manner of a trademark that is not an inherent attribute of the product, which may be registered, and the 'fragrances of products which are noted for those features, such as perfumes, colognes, or scented household products,' which may not be registered⁸. Apart from the 'perfume' cases that cannot be registered because of the requirement that the smell shall not result from the

nature of the good itself, the graphical representation of the smell still provides the most difficulties.

This is facilitated by several sophisticated methods of chemical identification like chromatography, spectrometry, etc. A detailed structural formula of pure substances is considered sufficient for the requirement of graphical representation under Article 2 of the Directive.

The judgment of the ECJ, ruling that a chemical formula is not sufficiently precise and clear, is therefore contradictory since the preceding methods fulfil the requirement of graphical representation. The question, whether as to a normal person would understand the formula and have an idea of the smell, has nothing to do with the general possibility of a depiction by means of a graph⁵.

Shape Marks

Shapes were specifically included within the definition of trademarks after the implementation of the Trade Marks Act 1994 (TMA) in UK. Broadening of the definition of trademarks has resulted in much debate over the issue of what exactly may be registered. However, over the years both OHIM and the ECJ have offered valuable guidance on how to assess inherent distinctiveness of three-dimensional trademarks including shapes of products. It is noteworthy that most of the decisions in respect of product shape trademark applications have involved rejections of shapes where the owners have not filed evidence of use to support a claim to distinctiveness and secondary meaning. In *Philips v Remington*, Philips commenced proceedings against Remington for infringement of their UK trademark consisting of a two-dimensional picture of the top portion of a three-headed rotary electric shave. Remington counterclaimed that the mark was invalid on, among other grounds, section 3(2)(b) TMA (the shape of goods which is necessary to obtain a technical result). On referral by the UK court the ECJ interpreted this to mean 'a sign consisting exclusively of the shape of a product is unregistrable by virtue of this section if it is established that the essential features of that shape are attributable only to the technical result'. On this interpretation of the law, the English Court held the mark invalid.

In another case, Henkel and Procter & Gamble applied to register the shapes of detergent tablets as trademarks. The question for the Court was whether the mark was devoid of distinctive character (section 3(1)(b) TMA). The ECJ held that the criterion for

assessing the distinctiveness of three-dimensional shape marks was no different from those for assessing the distinctiveness of other categories of mark such as words or slogans. However, the Court went on to state that the public's perception of product shape marks was different and, in particular, that the more closely the shape for which registration was sought resembled the shape most likely to be taken by the product in question, the greater the likelihood that the shape was devoid of distinctive character for the purposes of section 3(1)(b) TMA. It also pointed out that 'average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape, or the shape of their packaging'.

In the *Bongrain's Trade Mark* application, the applicant sought to register the three-dimensional shape of a cheese in flower-like form. The Court held that the mark was devoid of distinctive character. It also held that there was a public interest in preserving certain signs for other traders to use in relation to the same or similar goods to maintain freedom of action and competition. The decision further stated that the public's perception of the sign was of paramount importance and that the public was not generally accustomed to shapes conveying trademark significance. Inherent registerability is thus difficult to prove. It may, however, be easier to register a mark if it is demonstrated that a shape mark has in fact acquired distinctiveness through use.

Slogans

Advertisers have recognized the power of advertising slogans for decades. Modern advertising campaigns are often defined by a catchy slogan. Although the laws of copyright can often protect slogans, the registration of a slogan as a trademark affords them a broader scope of protection. Nevertheless, two recent decisions of the ECJ illustrate that the path to the registration of a slogan is far from straightforward.

Erpo Möbelwerk GmbH (Erpo) filed a Community Trade Mark Application for 'Das Prinzip Der Bequemlichkeit' translated into English as 'The Principle of Comfort' covering amongst other goods, furniture. The Board of Appeal upheld the Examiner's decision to refuse the application for furniture on the basis that the slogan was devoid of distinctive character under the provisions of Article 7(1)(b) of the Community Trade Mark Regulation and consisted exclusively of signs or indications which might serve

in the trade to designate the characteristics of the goods covered by the application under the provisions of Article 7(1)(c) of the Regulation, in particular the quality of the goods. Erpo appealed the decision to the CFI who overturned the Board of Appeal's decision on a number of crucial points.

The contentions of the Board that slogans must possess an element of originality or surprise were firmly rejected by the CFI. The CFI made it clear that slogans should be treated no differently from other marks. The crucial test was whether the mark in question distinguished the goods or services of one undertaking from those of other undertakings, the so-called 'essential function' of a mark. Since the Board had not established that such usage existed, the registration could not be denied on this ground.

The potential hurdles to the registration of advertising slogans are also illustrated in an opinion issued by the Advocate General (AG) of the ECJ concerning the attempt by Societe Des Produits Nestle SA to register the term 'Have a break...' which forms part of the well known slogan 'Have a break...have a Kit Kat' for chocolate products in the UK. A hearing Officer of the UK Trade Marks Registry and a first instance court refused the registration of 'Have a break...' on the basis that the mark not only lacked distinctive character but also lacked acquired distinctive character. The case was referred to the Court of Appeal, which agreed with the lower court that 'Have a break...', was not an inherently distinctive term. However, the Court of Appeal did not rule out the possibility 'Have a break...' had acquired distinctive character as result of its use within the slogan 'Have a break...have a Kit Kat' which was a registered trademark in the UK. The question of whether a term can acquire distinctive character as a result of the use of that term as part of another trademark was referred to the ECJ.

The AG found that the use of a word sequence as part of a word mark could, as a matter of principle, lead to that word sequence acquiring the requisite distinctive character in order to be registrable as a trademark. However, in order to prove that distinctive character has been acquired through use as an element of a composite mark the relevant consumer groups must be shown to understand that the element in question, if used separately, designates a product as originating from a specific undertaking, thus designating it from products of other undertakings.

Trade Dress

Trade dress refers to characteristics of the visual appearance of a product or its packaging (or even the facade of a building such as a restaurant) that may be registered and protected from being used by competitors in the manner of a trademark. These characteristics can include the three-dimensional shape, graphic design of the product and its packaging. It is one type of trademark. Under trademark law, the total commercial image of a product is known by the term trade dress. It refers to the manner in which a product or place of business is 'dressed up' to go to market.

There are two basic requirements that must be met for trade dress protection. The first is that those features must be capable of functioning as a source indicator—identifying a particular product and its maker to consumers. In the United States, package design and building facades can be considered inherently distinctive—inherently capable of identifying a product. 'Inherently distinctive' in legal parlance means anything that, 'distinguishes the product's source immediately upon the first use of the trademark'. However, a product design can never be inherently distinctive, and so such trade dress or other designs that cannot satisfy the 'inherent distinctiveness' requirement may only become protectable by acquiring 'secondary meaning.' In other words, the mark may be protected if it acquires an association in the public mind with the producer of the goods. Trade dress must also be nonfunctional in order to be legally protected. What is functional depends strongly on the particular product. To be nonfunctional, it cannot affect a product's cost, quality, or a manufacturer's ability to effectively compete in a nonreputational way.

In recent years, companies have sought to use the broader concept of trade dress to protect other distinguishing features of their products. While trade dress originally referred exclusively to a product's packaging, the concept has grown to include product designs for everything from bedroom furniture to sweaters.

Trade dress rights in store and restaurant decor, product configurations, and packaging are more enforceable, and more of concern to those who enter new markets, than ever. Recent court decisions have brought new trade dress issues to efforts to create and maintain unique marketplace identities, and to efforts to enter and compete fairly in established markets.

In *Wal-Mart Stores Inc v Samara Brothers Inc*, Samara sued under the Lanham Act, alleging that the Wal-Mart line, produced and sold a cheaper line of knock-off clothes based on photographs of Samara products, which infringed on the unregistered trade dress of their clothing and its distinctive design. Samara won the jury trial, and two lower courts affirmed the jury's decision.

But the Supreme Court reversed, ruling that Samara's 'product design' had not acquired distinctiveness, and, therefore, could not be protected. The court rejected the notion that the 'trade dress' at issue 'was inherently distinctive. In reaching its decision, ruled that trade dress for product design can never be inherently distinctive. While its opinion confirmed that trade dress indeed, almost anything at all that is capable of carrying meaning may qualify for trademark protection under the Lanham Act, the Court noted that trade dress, like any mark, must be distinctive to be protected from copying⁹.

Smell Covered by Copyright

In a significant development, a Dutch appeals court ruled that perfume compositions, historically protected by patents and trade secrets, are also covered by copyright. France-based cosmetics company Lancôme was granted copyright on the smell of its Trésor perfume. This followed efforts by Kecofa BV, a Dutch maker of cheap perfumes, to sell a similar-smelling perfume called Female Treasure. Lancôme took them to court and managed to prove that the smell of Trésor was similar to a work of art. Thus, Lancôme's Trésor perfume made legal history by becoming the first scent in the world to be copyrighted^{10, 11}.

In this case, the Court distinguished between the material that gives off the scent (the material that is specially developed to produce a certain scent), and the scent itself. Considering that the scent itself is too fleeting and variable and dependent on the environment it cannot be protected by copyright laws. However, the Court held that the material that gives off the scent can be perceived through the senses and is sufficiently concrete and stable to be considered a 'work' under the Dutch Copyright Act.

Conclusion

A mark may include 'any word, name, symbol, or device, or combination thereof' used to identify and distinguish the goods or services of the owner from those of others and to indicate source. This broad definition allows for extension of the trademark protection to numerous nontraditional trademarks including colour, sound, and scent². Sounds and colours are commonly trademarked today because of the commercial impression they leave on consumers. Smells cannot be far behind. There are a few of registrations of scents as trademarks currently in force in United States. A few olfactory trademarks have also been registered in Europe since the new provisions that were implemented according to the Directive 89/104 EEC came into force. There is a possibility of extension of other forms of intellectual property protection as well in these unconventional areas. Whether and how colour, sound and scent marks are protected in certain leading jurisdictions, illustrates the challenges in protecting such marks globally.

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