

Basis for the legal registration of non-traditional trademarks in North Macedonia

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Abstract

Trademark law is one of the most interesting legal disciplines, not only in the field of intellectual property rights but generally within the general development of modern law. The essential function of a trademark is to distinguish goods and services offered by one undertaking from other undertakings. Therefore, trademarks can be considered as a tool for companies to communicate with consumers through various goods and services. With the registration of a mark, a trademark owner receives a right to prevent unauthorized use of a mark and a right to use a trademark to distinguish goods and services from competitors. In North Macedonia, most of the trademarks registered consist of 'traditional' marks (such as words, letters, pictures, numerals, etc.) With time passing, many companies in different countries but also in North Macedonia started to seek trademark protection of colours, the shape of products, sounds, holograms, etc. known as non-traditional trademarks. The efficient protection of such signs for public and business benefit is an important part of contemporary international and national legislation. This paper will provide how North Macedonian Industrial Property Law treats such trademarks, and by examining the law and the practice of the National Office for Industrial Property of North Macedonia will be concluded whether such non-traditional trademarks are registrable in North Macedonia. Moreover, this paper will also comment on the possibilities to have changes in the National Law for Industrial Property of North Macedonia in order to allow a more flexible approach towards the registration of non-traditional trademarks.

Keywords: Basis, legal registration, non-traditional trademarks, North Macedonia.

Introduction

The protection of a trademark is generally regulated on international level. The determination of what exactly is capable of being described as a trademark is still left mainly to the national authorities. Traditionally trademark protection includes words, letters, numerals, picture, drawings and a combination of all mentioned. In the modern business world, companies have to be more creative than their competitors and started to seek the protection of different types of trademarks such as colours marks, the shape of a product, sounds, smell, holograms, multimedia etc. known as non-traditional trademarks. However, companies need to be careful, as educating

consumers to associate non-traditional trademarks with a trade origin demand huge investment in marketing and communication, where “cleverness alone does not ensure legal protection”.¹

The legislation of North Macedonia concerning the protection of non-traditional trademarks is quite conservative. Only ‘words, letters, numerals, pictures, drawings, a combination of colours, three-dimensional forms, including shapes of goods or their packaging, as well as a combination of all mentioned signs’ can be registered as trademarks.² Also, non-traditional marks can hardly have the function of a trademark as they are not recognizable or more precisely cannot be “graphically represented”, a condition that is mentioned in the National IP Law, Article 175 (1) provides that ‘a trademark shall protect a sign which may be represented graphically and which is capable for distinguishing goods or services of one undertaking from those of other undertakings’.³

In the following sections, this paper will examine the two most common types of non-traditional trademarks applications at the State Office of Industrial Property of North Macedonia, in particular single colour marks and the shape of products, and how the proposal changes in the National IP Law can possible attract companies to apply for the protection of other types of non-traditional trademarks in North Macedonia.

Definition of trademark on International level

With the protection of non-traditional trademarks among different jurisdiction, a question has raised whether non-traditional trademarks can constitute a trademark from an international perspective. During the establishing of the Paris Convention, member states could not reach an agreement on the definition of a trademark. The issue on definition of a trademark under Paris Convention still remains even after the general definition of the trademark was discussed on the Agenda of Vienna Meeting in 1952 and Brussel Meeting in 1954. Furthermore, the Convention does not answer to the protection process of trademark, leaving the answers to member states in their national laws.⁴

The scope of trademark protection also is not specified in the Madrid Agreement concerning the International registration of marks nor in the Madrid Protocol Relating to the Madrid Agreement concerning the International Registration of Marks. However, the Madrid System includes non-traditional trademark types such as shape or sound marks with clear graphical representation.⁵

¹ Anne Gilson LaLonde and Jerome Gilson INTA, *Getting real with nontraditional trademarks: what's next after red oven knobs, the sound of burning methamphetamine, and goats on a grass roof?* p. 187

² Law on Industrial Property of North Macedonia No. 07-1006/1, 12 February 2009, Article 175 (2) (hereinafter National IP Law).

³ Ibid, Article 175 (1).

⁴ Paris Convention for the protection of Industrial Property of 20 March, 1883 as revised at Brussels on 14 December 1900, at Washington 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958 and at Stockholm on 14 July 1967, amended on 28 September 1979 (hereinafter Paris Convention) see Article 6.

⁵ WIPO, *Guide to the International registration of Marks under the Madrid Agreement and the Madrid Protocol* 2019, p. 14. Madrid Agreement concerning the International registration of marks, April 14, 1891, amended on September on September 28, 1979. Madrid Protocol relating to the Madrid Agreement concerning the International registration of Marks adopted at Madrid 27 June, 1989.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in Article 15 provide a non-exhaustive and broad list of signs that can constitute a trademark.⁶ From the TRIPs definition of the trademark can be concluded that TRIPs does not exclude non-traditional trademarks from its definition. Also, in Article 15 TRIPs agreement leaves member states to decide whether to limit the scope of protection only on marks that are visually perceptible, meaning that member states are free to decide protection of non-visual trademarks. Considering the definition for a trademark in TRIPs agreement, non-traditional marks can be protected as long as they are capable to distinguish goods and services. The Singapore Treaty on the Law of Trademarks focuses more on the administrative procedural trademark registration rather than substantive law.⁷ Article 2 of the Singapore Treaty provides protection of non-traditional trademarks such as sound, holograms, smell and others. However, member states are not obliged to protect such marks under said Article 2. As can be seen, International agreements are not prescriptive in the definition and scope of trademarks and it is up to the member states on how to implement the definition of a trademark. North Macedonia is a member state in all above-mentioned International agreements.

Common types of non-traditional trademarks applications in North Macedonia

I. Colour marks

Before starting answering, if colours have a place in the National Law of North Macedonia, we should question ourselves if colours convey a message? Obviously, a colour sends a message to the consumers.⁸ Colour psychology is a research area that examines how colour affects our behaviour and decision making, meaning that colour can be crucial to how consumers perceive a trademark.⁹ Below are some examples of how different colours affect us in everyday life and above all in how consumers perceive trademark colours.

You may have heard that the green colour associate to a feeling such as relaxation, calmness and nature.¹⁰ The colour is also very effective in raising awareness about environmental issues. A clear example of this is when *McDonald's* chooses to change the colour of the mark from red and yellow to green colour in Europe with the purpose to appear more environmentally conscious for an environmentally conscious target group of consumers.¹¹ The yellow colour is often associate with optimism and happiness. Using yellow colour in marketing can give a trademark a sense of playfulness and liveliness.¹² However, companies should be aware of using the right

⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1197 (1994) (hereinafter TRIPs Agreement) see Article 15.

⁷ Singapore Treaty adopted in Singapore 27 March 2006 entered in force on 16 March 2006 intend to simplify and harmonize the trademark registration procedures of national trademark offices.

⁸ J Suresh Kumar' *The Psychology of Colour influences Consumer's Buying Behavior – A Diagnostic Study* p.6

⁹ Ibid page p.7-8.

¹⁰ Ibid page p.8.

¹¹ Karen Haller *Branding-Why red and yellow is used by the fast food industry* 30 March 2011.

¹² J Suresh Kumar' *The Psychology of Colour influences Consumer's Buying Behavior – A Diagnostic Study* p.6

shade and tone of yellow because otherwise, it can be associated with aggression or danger.¹³ Orange colour same as yellow is considered warm and joyful. It is eye-catching and therefore works perfectly as a primary colour. Orange is also a colour most people associate with “low cost”, which can be effective or risky depending on the companies’ approach in the market.¹⁴ Red is a powerful and strong colour that triggers strong emotions, both positive and negative. It is a stimulating colour, which it is believed the reason why so many fast-food restaurants use the red colour, is that it triggers a feeling of hunger.¹⁵ Also, red is an effective colour in marketing for immediate sale or call to actions message. Blue gives a sense of security and can stimulate productivity. The colour is widely used in health, finance and technology, it is by far the most used colour in the business world because it symbolizes trust, calm and knowledge.¹⁶ However, colours maybe will not be perceived with the same message depending on the consumer side. Perception of colours depends on ‘personality, gender and cultural background of consumers’.¹⁷ For example, red colour in India is associated with fear and fire, in China with good luck, celebration while in Thailand red colour symbolize Sunday.¹⁸

From the above analyses can be said that colours convey a message. The question is whether the colour conveys a trademark message? Another question that arises even if colours convey a trademark message can colour works as a trademark and what actually single colour protection with a trademark means?

Protection of single colour *per se* as a trademark means that the colour as such without contour i.e., without connection to a shape, letter, design, etc., would be protected in favour of the trademark owner. Colours, as mentioned earlier are an important element of a trademark and is therefore suitable for imitation by competitors. By protecting a single colour with a trademark, that means that competitors would be excluded from using that particular colour at all since possible variations of use will be covered by the registration of trademark owner.

Earlier was mentioned in the introduction that the National Law of Industrial Property of North Macedonia provides the following trademark definition: ‘Trademark shall protect signs capable for distinguishing, in particular: words, letters, numerals, pictures, drawings, a combination of colours...’.¹⁹ Conditions that a trademark must fulfil in order to obtain protection in North Macedonia are found in Article 175 (1) by national IP law²⁰, and namely they are split in three parts, marks must be a: a sign, have graphical representation and distinguish the goods and services.

State Office of Industrial Property of North Macedonia when examining the suitability of single colour marks for its graphical display, the Office determined whether the colour that is graphically displayed is identical with the colour listed in the application

¹³ Drew Coffin *Colour Psychology and Ecommerce* 6 February 2013.

¹⁴ David Roberge *What does your package colour means to consumers?* 27 March 2019.

¹⁵ Taylor Rock *The reason most fast-food restaurants are red* 7 October 2019.

¹⁶ J Suresh Kumar’ *The Psychology of Colour influences Consumer’s Buying Behavior – A Diagnostic Study* p.6.

¹⁷ *Ibid* p. 9.

¹⁸ *Ibid* p.11.

¹⁹ National IP Law see Article 175 (2).

²⁰ National IP Law see Article 175 (1).

form, whereby from the applicant is not required to precise the shade of the colour by international colour code.²¹ Protection can be sought for colour mark separately, as a specific or an abstract colour mark. A specific colour means that the colour is limited to a certain shape, for example, protection can be sought for a specific colour that is applied to a specific product. An abstract colour mark means that it is the colour itself that is protected, and it does not have to be linked to a specific shape or product. As can be seen from the definition of trademark in the National IP Law, protection can be given to combination of colours, but obtaining registration for a single colour mark has proved difficulties in practice.

Example that can mention from the State Office for Industrial Property of North Macedonia practice with single colour marks is *Cadbury* violet colour in respect for Class 30 of *Nice Classification*: cocoa, chocolate, chocolate- based beverages.²² The application was refused on absolute grounds for refusal because the sign is eligible to distinguish the goods in the market. The applicant indicated that the mark has been used for a long time, having already registration in several countries. The Office responded to the claims of the applicant that the protection in certain countries it is irrelevant in this case for the reason that the gained protection is under their legislation. The fact does not have any legal consequences in the Republic of North Macedonia, where it is relevant only to the National Law on Industrial Property rights. The Office accepted that a different conclusion could have been reached if there was evidence of acquired distinctiveness for the colour in North Macedonia with the meaning of Article 177 (2) of national IP Law.²³

To prove acquired distinctiveness, the applicant must provide evidence like price lists, invoices, statements from trade associations or consumer associations, surveys, newspaper articles, brochures or advertising materials. Eventually, the most adequate and precise method is to conduct a consumer survey,²⁴ whose outcomes a link in the consumer's spirit between the trademark and the producer. For example, magenta colour of *Deutsche Telekom*²⁵ demonstrated acquired distinctiveness by using the same colour in its get up and marketing campaign for nearly a decade in North Macedonia. The main point of the trademark protection is to guarantee that it operates as an indication of origin, which in case of a single colour mark is difficult to attain. The test of distinctiveness will always be more difficult for colour mark than other traditional marks, due to the limited number of colours. In North Macedonia legislation eligibility for trademark protection hinges upon whether the colour has acquired secondary meaning. One question that arises when examining whether single colour marks has acquired secondary meaning is that does the same criteria applies when it comes

²¹ WIPO - *New Types of Marks Law on Industrial property of the Republic of Macedonia* p..2 https://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct17/mk_1.pdf Last visit: 14/12/2021.

²² WIPO, *Standing Committee on the law of trademarks, industrial designs and geographical indication – Grounds for Refusal of all types of marks*, February 2010 p.5. International Classification of Goods and Services also known as the Nice Classification was established by Nice Agreement (1957) is a system of classifying goods and services for the purpose of registering trademarks.

²³ National IP Law see Article 177 (2).

²⁴ The *Qualitex Quandary*, *Was trademark protection for colour per se clearly resolved* (1996).

²⁵ North Macedonia IP Trademark Database (Application number 2000/361) Source: TM View <https://www.tmdn.org/tmview/#/tmview/detail/MK500000200000361> Last visit: 16/12/2021.

to the protection of colour of well-known trademarks and the colour of less known trademarks?

When registering a single colour marks, another questions arise about its impact on free competition as to the holder of a colour mark is given exclusive rights to the colour. If protection is provided for single colour marks, the competition will be hampered as a few companies will gain a monopoly on the market, which means that other companies cannot use that particular colour. Therefore, there is a general interest in not allowing a few companies to restrict the availability of colours to other competitors in the market. How this interest should be taken into account, there is no clear answer to in practice.

II. Shape marks

Many companies today have the interest to protect the shape of their goods or their packaging not only by design protection but also by trademarks. Protecting the shape of the goods with a trademark can provide a monopoly and a huge competitive advantage in the market.²⁶ That is why, for the owners' trademark protection is preferable, providing an unlimited time scale in comparison to design, which gives protection of 25 years.²⁷

In the National Industrial Property Law of North Macedonia shape of goods or their packaging are listed in Article 175 (2) 'Trademark shall protect signs capable for distinguishing, in particular: words, letters, numerals, pictures, drawings, a combination of colours, three-dimensional forms, including shapes of the goods or their packaging...'.²⁸ Based on the law, many companies have applied for the shape protection of a large variety of goods, in particular the shape of goods in Classes 3, 32, 30 and 33 of *Nice Classification*. Shape marks protection mainly include the shape of a product or packaging without containing any graphical, figure or word element. Compared with other non-traditional marks, shape marks can without problem satisfy the requirement on graphical representation by design or a photograph. However, demonstrating distinctiveness is particularly difficult for shape marks under North Macedonian law, especially for those shape marks without containing words or other graphical elements.

At State Office for Industrial Property, the trademark application for Oil Bottle was refused on lack of distinctiveness.²⁹ Although the three-dimensional sign filled combined with horizontal types of wave grooves and vertical ribs in the middle of the external shape of the bottle is not sufficient to give it a distinctive character. The shape helps to make the bottle more rigid and enable it to be compacted after use. Numerous bottles show such characteristics. The average consumer is used to seeing the goods in question in supermarket shelves packaged in bottles more or less the same as the bottle in question that the minor details presented by it individually wavy ribs spaced at a greater or lesser distance apart are not sufficient to enable him to identify it as originating from a specific company.³⁰

²⁶ Fox Williams, *Shape trade marks: Are they shaping up?* July 4, 2017.

²⁷ Law on Industrial Property Right - North Macedonia Art 127 (1).

²⁸ National IP Law see Article 175 (2).

²⁹ North Macedonian IP Trademark Database (application number 2001/371) source TM View.

³⁰ North Macedonian National Office of Industrial Property right, Decision number 10-728/4.

The level of awareness of the consumer concern has been found to differ in connection with different types of goods or goods with a different price range. Consumers usually are more prone to notice a difference in the shape of more expensive goods.³¹ For example, affordable bottle shape of such as washing liquids usually have low distinctive character, since different shapes are not perceived as identifying the brand, in compares to expensive perfumes bottles usually have a distinct shape that is important as a word or figurative element.³²

In the National Law, shape marks are not only subject to an examination of distinctiveness like all other type of marks but also to a special test under national law Article 177 (6) 'which exclusively consists of shape defined by the kind of goods, shape of goods necessary to obtain a specific technical result or shape giving a substantial value to the goods'.³³

These expectations or limits on the registration of shape are not applicable to other types of marks, meaning that is explicit only to three-dimensional marks. The presumed perception of the average consumer is not a decisive element when applying these grounds for refusal but may, at most, be a relevant criterion of assessment for the competent authority in identifying the essential features of that shape mark.³⁴ The purpose is to keep the shapes of the products freely available to all undertakings in the market.

The first special ground for refusal of shape marks excludes from registration are the shapes that follow from the nature of the goods. The purpose is to preclude from trademark protection ordinary and normal shapes of the goods. For example, it would not be possible to register the shape of a chocolate cake in a grid pattern because this shape has become generic and generally accepted for chocolate cakes. The ground of refusal for shapes that follow from the nature of the goods is not entirely clear and guiding practice in this matter is quite rare at the National Office. However, the purpose of preventing registration is uncomplicated. Normally, most shapes that only follow from the nature of the goods should also be denied registration due to the lack of distinctiveness.

Grounds of refusal for shapes necessary to achieve technical results are perhaps most important grounds. This ground for refusal draw the line with Patent Law, due to the economic interests that may be involved. It should not be possible to extend the protection afforded by the patent law with trademark law for the shape of the goods after the validity of the patent expired. The interest in technology that is no longer protected by patents can increase competition in the market and thereby put pressure on prices. Preventing these effects through trademark protection is of course not desirable on the part of the legislature.

The most common grounds for refusal of shape marks is the lack of distinctiveness and the ground for shapes necessary to achieve a technical result. However, there is an additional ground for refusal of shapes that give substantial value to the goods. In practice, the purpose has been specified to prevent trademark protection from being

³¹ European Court of Justice 12 January 2006, Case-361/04 para 41-42.

³² EUIPO Third Board of Appeal 7 August 2001, Case R 476/2001 para 23.

³³ National IP Law see Article 177 (6).

³⁴ European Court of Justice 18 September, Case C-205/13 para 34.

used to obtain an unfair competitive advantage in the market. Characteristics of a product that do not fulfil a technical function or a function of use, but significantly increase the product's attractiveness and have a significant influence on the consumer preferences, should not be monopolized through trademark protection.³⁵

The trademark protection for shapes of goods and packaging is limited with a higher requirement for distinctiveness than other traditional marks and with the additional three absolute grounds for refusal that are explicit only to shape marks. The reason is mainly to the fact that consumers are not used to perceive the shape of a good as an indication of origin. Therefore, there is a requirement that the shape of the goods distinct significantly from the norm or what is customary in the industry for original distinctiveness to exist. Grounds for refusal of shape which result from the nature of the goods, shape which is necessary to obtain technical result and shape which give substantial value to the goods aims to preclude such shapes from trademark protection because all participant in the market must have the opportunity to use them. For that reason, acquired distinctiveness will not overcome these grounds for refusal.

Shapes that are precluded from trademark protection can still be protected with other intellectual property rights by design, patent or copyright. The shape of a product can be protected by design law if the shape has a new design not identical with previous design available to the public and if the shape has an individual character.³⁶ Secondly, the technical function of the shape can be protected with a patent if the technical function has a novelty.³⁷ Also, the shape can be protected with copyright if it shows originality as an artistic work.³⁸ However, trademark protection offers one thing that other intellectual property rights cannot, an exclusive right with unlimited time.

Issues surrounding the protection of other non-traditional trademarks in North Macedonia

While in European Union and other developed countries the number of applications for the registration of sound, hologram, multimedia marks are rising, at the North Macedonian IP Office there are almost no cases where the holders seek their protection. The main reasons behind the lack of interest for their protection are the graphical requirement, and also the legal definition in the National Law does not provide the protection of sound, hologram or multimedia marks. Although the Guideline for trademark protection in North Macedonia provides that sound marks can be protected if they are represented graphically by musical notations, in practice, this has shown difficulties for the trademark examiners when examining whether the mark is distinctive enough to have protection. Also, another issue for the protection of sound, hologram or multimedia marks is the administrative system used by the IP National Office that does not support their filing by MP3/ MP4 format, audio-visual file, video file or graphic/photographic reproduction.³⁹

³⁵ Opinion on Advocate General Szpunar, 14 May 2014 on the C-205/13 para 79-80.

³⁶ Law on Industrial Property Right - North Macedonia Art 127 (1).

³⁷ Law on Industrial Property Right - North Macedonia Art 25 (1).

³⁸ Law on Industrial Property Right- North Macedonia for industrial design provide protection for 25 years see Art 172 (2), for patents 20 years see Art 74, Law on Copyright and Related Rights-North Macedonia provide protection for 70 years after the death of the author see Art 55 (1).

³⁹ European Union Office for Intellectual Property (EUIPO) in their guidelines provide that sound

There is no doubt that the popularity for trademark protection of sound and multimedia marks is increasing worldwide. This has been shown also in the EUIPO statistic document for the European Union type of application in the last three years.⁴⁰ North Macedonia should follow the changes made by the new European Trademark Directive⁴¹ by removing the condition for graphical representation in the National Industrial Property Law and by providing protection of sound, multimedia, holograms etc. in the legal trademark definition. Also, the State Office for Industrial Property of North Macedonia should implement an administrative system that can support their filing in other formats. With these changes in the Law and in the practice of the National IP Office it is believed that North Macedonia will attract holders to file more applications for non-traditional types of trademarks. This will be beneficial for the growth of foreign investments in North Macedonia and also for the National IP Office.

Conclusion and recommendations

From the analysis of this paper, it can be concluded that colours and shape marks have a place in the area of trademark law in North Macedonia. However, in practice the test of distinctiveness is a tremendous barrier for their protection in comparison with other traditional marks.

North Macedonia as a potential candidate to join European Union should comply with the changes made by the new European Trademark Directive by removing the condition for graphical representation in the National Industrial Property law and include protection of non-traditional marks like sounds, holograms, multimedia marks etc. in the trademark legal definition. These possible changes in future will allow a more flexible approach of North Macedonia towards sound, holograms, multimedia and other of non-traditional trademarks.

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mark can be filed in audio file, multimedia marks in audio visual file, hologram in video file or graphic/photographic reproduction *EUIPO Guideline* p.104-115.

⁴⁰ *European Statics for European Union Trademarks* https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/about_euipo/the_office/statistics-of-european-union-trade-marks_en.pdf Last visit: 21/12/2021.

⁴¹ Directive (EU) 2015/2346 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (hereinafter EUTMD).

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