

Unstandardised protection of non-conventional trademarks after TRIPS

The discussion on the protection of non-conventional trademarks continues for so many years that one may reasonably wonder, why marks perceived with senses other than sight are still called „non-conventional“. Occasionally, the discourse on the rationale of protecting non-conventional signs is louder, usually with the changes introduced to the legal definition of the term “trademark” or an attempt to register non-conventional trademark. The TRIPS Agreement also contributed to this never-ending discussion. Article 15 TRIPS indicates that the trademark is any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, and complements this definition with the possibility to make the protection of the trademark dependent on visual perceptibility of trademark. TRIPS gives its members the option of choosing two extreme possibilities of presenting the trademark - from the absence of any special form of representation, to the necessity of presenting the mark in a way that it is visually perceptible. If the State adopts the latter solution, signs perceived by other senses may be rejected regardless of whether they are capable of distinguishing goods. TRIPS is therefore not in favour of any solution to the question of the possibility of granting rights to non-conventional marks, and leaves the states with the choice whether to allow or prohibit the registration of such marks. Fortunately, many countries have not adopted a solution that makes protection dependent on visual perception of the mark. Considering the functions of trademarks and the manner of presenting various information to consumers by entrepreneurs, but also taking into account the needs of various consumer groups, including blind people, there is no justification for making the protection of trademark dependent on its visual perception. The acceptance of this condition would limit the registrability of many trademarks perceived with senses other than sight such as sound, smell or taste, which cannot be visually perceived, although their graphic representation is not excluded. The graphic representation of the trademark was for many years a prerequisite for the registration of trademarks in the EU, but it was a much broader concept than “visual perception”. The resignation from the requirement of graphic representation of trademarks did not, however, prejudice that protection of non-conventional trademarks can and should be granted.

This paper will present a voice in a still current discussion on the legitimacy of granting protection for non-conventional trademarks.