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The legal protection of scent marks: Lesson for Vietnam from other countries

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Abstract
In recent years, the protection of scent marks has become a mandatory requirement in many free trade agreements (FTA), including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). This poses a challenge for some members of this agreement because only a few countries currently accept scent marks, excluding Malaysia and Vietnam. Therefore, in the process of admending the current intellectual property legal system in order to be consistent with the CPTPP, Vietnam has to establish a mechanism for protecting scent marks. Through studying the legal protection of scent marks in some countries such as USA, EU, Australia, Canada, the article will propose solutions for protecting scent marks in Vietnam in the future.

Keywords: Scent marks, CPTPP, non – traditional trademarks, intellectual property rights

Introduction

In the world, according to survey results from 1996 to 2016, within only 20 years there were a total of 22,321 applications for the protection of non-traditional trademarks. In Australia, the number of applications for sound trademark protection accounts for 2.51%, and in the EU it is 2.35%. Therefore, the protection of scent marks is gradually being recognized and regulated in many national legal systems around the world. Many scent marks have already been protected, such as the scent of "freshly cut grass" for tennis balls of the Vennootschap company [1] in the EU. In the United States, many scent marks have been approved, including the raspberry scent for motor fuel [2], the minty odor of Hisamitsu's pain-relieving patches, the gummy smell of Grendene S.A.'s footwear, and the cherry, grape, and strawberry scents for DBA Manhattan Oil Company's car lubricants. In the UK, the rose scent has been registered for the tires of the Sumitomo Rubber Company. Obviously, the need to protect scent marks has been increasing in recent years and has become a new trend in many FTAs.

For instance, according to Article 18.18 of the CPTPP, scent marks are required to be protected. Therefore, many CPTPP members (including Vietnam) have to amend their current Intellectual Property Law (IP Law) to ensure consistency with the CPTPP. This raises many questions that must be addressed when developing a mechanism for protecting scent marks, such as: What is a scent mark? Is it the same as a traditional trademark or does it have special characteristics? Under what conditions will a scent sign be protected under IP law? Therefore, research on establishing legal protection for scent marks is very necessary in Vietnam today.

Materials and Methods

To evaluate the practical protection of scent marks in several jurisdictions around the world, the authors rely on secondary data obtained from official trademark databases and reports published by intellectual property offices in countries such as the United States, the European Union, Australia, and Canada. The study also employs a comparative legal method to analyze the differences in legal recognition, registration requirements, and enforcement mechanisms for scent marks across these jurisdictions. Furthermore, analytical and evaluative methods are used to examine the current status, challenges, and practical issues related to the protection of scent marks in Vietnam.

Results and Discussion

1. Some theoretical issues concerning scent trademarks

The definition of scent marks

Although scent marks have just appeared in recent years, there is still no universally definition of scent marks in the legal system of countries around the world. Therefore, we should use the general concept of trademark to explain scent marks.

In general, a trademark is a sign that represents an entity with distinctiveness or certain characteristics. According to the World Intellectual Property Organization (WIPO), "a trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises". Based on this definition, a scent mark can be understood as any scent sign used to distinguish the owner's goods from those of competitors.

The characteristics of scent marks

Different from traditional marks, scent marks have very specific characteristics

Firstly, scent marks are perceived subjectively,

Unlike other trademarks that can be seen or heard, scent marks can only be detected through the sense of smell. Because scents directly affect the brain, they tend to be remembered for a long time. However, the perception of a particular scent varies among individuals due to subjective factors such as age, gender, living environment, and health status. For instance, older individuals may perceive more complex scents due to richer life experiences, while a person with an illness may not smell a scent as clearly as when they are healthy [3]. Therefore, it is difficult to objectively assess how a scent mark affects individuals.

Secondly, scent marks are very difficult to describe,

While words and images can easily be written or drawn, a scent cannot be represented in a visible manner [4]. A scent

does not have an inherent name; it is usually identified only through association with the object that emits it. If words or images are used to describe a scent, consumers may mistakenly perceive the branding as a word or image mark rather than a scent mark.

Thirdly, scent marks are difficult to preserve,

Over time, a scent may not retain its original state and properties because fragrances tend to diffuse into the air. Consequently, storing and preserving scent samples requires conditions that minimize such changes and maintain the scent as close as possible to its original form. Some scents even require strict preservation conditions such as controlled temperature, humidity, and specialized storage devices. This poses challenges for trademark authorities when examining applications for scent mark registration, as the scent sample submitted may not accurately represent the original scent intended for protection.

The ability to be protected of scent marks

Since scent marks possess many unique characteristics, their protectability remains a matter of debate. There are two opposing viewpoints on this issue

Firstly, some legislators argue that it is difficult to determine whether scent marks possess sufficient distinctiveness, particularly because they cannot be expressed in a visible form. The influence of scent on consumers' purchasing decisions is also unclear. A key question is whether consumers can access and perceive the scent before buying a product, and whether the scent is memorable enough to function as an indicator of origin. Furthermore, even if protection is granted, it remains uncertain whether the trademark owner can demonstrate that similar scents are likely to cause confusion among consumers. These concerns cause many legal scholars around the world to doubt the protectability of scent marks [5]. For this reason, numerous countries—including Vietnam—currently refuse to grant protection to scent marks.

On the other hand, some scholars argue that trademark protection should not discriminate between traditional and non-traditional forms of trademarks, including scent marks. Any type of sign should be eligible for registration as long as it is capable of distinguishing one undertaking's goods or services from those of others. Scents can still function as indicators of source because they are capable of conveying information. There is a strong connection between scent and human memory, making it possible for consumers to identify and select products based on their olfactory characteristics. Thus, even if trademarks cannot be perceived visually, they may still fulfill the essential function of distinguishing the products of different manufacturers and, therefore, should be protectable.

In the authors' opinion, the second viewpoint is more appropriate because it accurately reflects the nature of scent marks and acknowledges their potential distinctiveness. Although assessing the distinctiveness of a scent mark may be challenging due to its inherent characteristics, this difficulty should not be used to completely deny the distinctiveness of this form of mark. Some scent marks clearly possess strong distinguishing capacity, such as the rose scent for tires or the scent of freshly cut grass for tennis balls. Accordingly, under current EU intellectual property legislation, scent marks may still be regarded as distinctive and thus eligible for trademark protection.

2. The legal protection of scent marks in some countries

1. Scent marks in US

The United States is known as the country with the most flexible regulations on the protection of scent marks. In the U.S., trademarks can be distinguished either by their inherent distinctiveness or by acquired distinctiveness through use. If a scent mark possesses special characteristics that consumers can immediately recognize, it is considered inherently distinctive. However, even if consumers only become familiar with the scent through long-term use of the product, the scent may still be protected as a trademark.

The typical case concerning scent marks is In re Clarke [6]. The dispute involved Ms. Clarke, the owner of a scent used for sewing and embroidery products, and the U.S. Patent and Trademark Office (USPTO). She argued that although her scent did not clearly assist consumers in identifying her products at first, customers were able to associate the scent with her products after long-term use. She also provided evidence of advertising that used the scent, and the court accepted her arguments. Notably, the U.S. allows the registration of scent marks that can distinguish goods from different companies through use. This is important because only a few scent marks have inherent distinctiveness.

Under the Lanham Act, a mark may consist of any word, name, symbol, design, or any combination of these forms. Three-dimensional shapes, colors, sounds, and scents may be registered as trademarks if they are used in commerce to identify the source of goods and distinguish them from those of others. U.S. trademark law is widely regarded as providing broad opportunities for the registration of non-traditional trademarks, particularly sound and scent marks.

In In re Clarke, the scent used for sewing and embroidery thread was described as a "high-impact, fresh, floral fragrance reminiscent of Plumeria blossoms." Clarke's application for trademark protection was initially refused on the grounds that the fragrance served merely as a functional characteristic of the product. Clarke appealed, and the scent was later accepted for registration.

Therfore, some main facts of the case are as follows

It was the first scent trademark registered in the United States.

The fragrance was not a natural attribute of embroidery thread and therefore helped consumers distinguish Clarke's goods.

The court formulated several conditions for determining whether a scent mark can be registered, including:

Whether the scent can distinguish the applicant's goods from competitors' goods;

Whether the scent is a natural characteristic of the product;

Whether the scent is used for advertising purposes;

Whether consumers can identify the applicant's goods through the scent.

The court held that the scent qualified as a trademark because

1. Clarke was the only manufacturer selling scented embroidery thread;
2. The fragrance was not an inherent feature of the goods;
3. The scent was used in advertising to create consumer association; and
4. Evidence showed that consumers and distributors recognized the scent as identifying Clarke's products.

These conclusions have since become common standards for the protection of scent marks in the U.S. A scent mark

must be described clearly in writing, and a sample of the scent must be submitted with the application. For example, when registering a bubble-gum scent for Grendene's footwear products, a description of the scent and a pair of sandals containing the fragrance were submitted. Another scent mark was registered by Hisamitsu Pharmaceutical for its pain-relief patches in 2008, described as "a mixture of methyl salicylate and concentrated menthol."

Many experts believe that the Lanham Act strikes a fair balance between preventing unfair competition and protecting consumer interests. The federal courts have affirmed that "the purpose of the Lanham Act is to make the trademark registration process more flexible and simpler, thereby limiting acts of trademark infringement."

In summary, U.S. law provides more favorable conditions for registering and protecting non-traditional trademarks than the law of the European Union. Therefore, experience from U.S. trademark law is valuable for improving the protection of sound and scent marks.

1.1. Scent Marks in EU Law

Before 2005, scent marks could only be registered in the EU if they met the requirement of graphical representation. Typically, a trademark is protected when it is presented in a "visible" and distinguishable form. Some countries evaluated the distinctiveness of a scent mark based on its ability to be graphically represented. However, because scents are difficult to describe and consumers' perceptions are subjective, some argued that scents could not function as trademarks. Thus, the graphical representation requirement created a major barrier to scent mark registration.

This issue was demonstrated in the Vennootschap onder Firma Senta Aromatic Marketing case involving the "freshly cut grass" scent. The European Court of Justice (ECJ) denied registration due to the inability to satisfy the graphical representation requirement under Article 4 of the Community Trademark Regulation (CTMR), despite the scent being unique [7].

In 2017, significant reforms were introduced. Article 4 of the European Union Trade Mark Regulation (EUTMR) now provides that a trademark may consist of any sign—words, names, designs, letters, numbers, colors, the shape of goods or packaging, or sounds—so long as the sign is capable of:

Distinguishing the goods or services of one entity from another; and

Being represented in the EU Trademark Register clearly and precisely enough that authorities and the public can determine the protected subject matter.

Thus, graphical representation is no longer required. Instead, scent marks must satisfy the criteria of being "clear and precise"—two of the seven "Sieckmann criteria"—established in the Sieckmann case [8]. These seven criteria are: clear, precise, self-contained, accessible, intelligible, durable, and objective.

Distinctiveness of Scent Marks in the EU

A scent mark may acquire:

Inherent distinctiveness if it conveys a message and helps consumers recognize the product, especially when attached to normally odorless goods (e.g., rose-scented tires, mint-scented shoes) [9].

Acquired distinctiveness if long-term use, sales data, marketing efforts, and consumer surveys prove that the scent is recognized as indicating commercial origin.

Scents that are functional or common in the market cannot be protected—for instance, floral fragrances in perfumes, or typical scents used widely in shampoos.

In practice, only a few scent marks have been successfully registered worldwide due to the difficulty in proving distinctiveness.

1.2. Some CPTPP member's countries law

Similar to the EU and the United States, several CPTPP member states also permit the protection of scent marks.

Australia

Australia's trademark law is highly regarded due to a series of reforms reflecting global trends toward recognizing non-traditional trademarks. Since the enactment of the Trademarks Act 1912, followed by amendments in 1948 and the adoption of the current Trademarks Act, Australia has progressively expanded protection to cover new types of marks.

The Trademarks Act 1995 was introduced to implement the TRIPS Agreement, and at that time, the definition of a trademark was revised to incorporate non-traditional signs. Although Australian lawmakers intended the amended definition to align with TRIPS and the EU Directive, in practice Australia has taken a more progressive approach—particularly in its broad interpretation of what constitutes a trademark.

Under Section 17 of the Australian Trademarks Act, "a trademark is a sign used, or intended to be used, to distinguish the goods or services dealt with or provided in the course of trade by one person from those dealt with or provided by another." Registrable signs include words, letters, names, signatures, numerals, devices, brands, labels, tickets, aspects of packaging, shape, color, sound, or scent. Thus, Australia expressly recognizes non-visual signs such as sounds and scents, as well as combinations of traditional and non-traditional elements, provided that the applicant submits a clear description of the sign.

Although Section 40 of the Act still requires marks to be capable of graphical representation, Australian practice interprets this requirement flexibly. New types of marks may be accepted if they can be represented graphically or described with sufficient clarity. For sound marks, musical notation (notes, staves, pitch, etc.) can be used, while any non-auditory elements must be described in writing. For scent marks, the Trademarks Office accepts a written description of the scent. For example, the eucalyptus scent for golf tees owned by E-Concierge Australia Pty Ltd was successfully registered in 2009.

Applicants for non-traditional trademarks must also provide a detailed written description known as a West Endorsement, which is used after registration to facilitate trademark searches. Applicants must specify the type of trademark and may be required to amend or clarify descriptions during examination. For sound marks, examination may involve experts where specialized musical or artistic knowledge is required.

Canada

Canada also provides protection for non-traditional trademarks, including scent marks, following amendments to the Trademarks Act that removed the requirement of graphical representation. Under the revised framework, a trademark may consist of any sign that can be represented in

a manner that is clear and precise, including scents, tastes, textures, and other non-traditional indicators. Applicants must provide a detailed written description and, where appropriate, submit a specimen of the scent to support examination.

Japan

Japan recognizes scent marks under its expanded definition of "signs" used in trademark law. Article 2 of the Japanese Trademark Act defines a trademark as "characters, figures, signs, three-dimensional shapes, or colors, as well as sounds and other elements specified by Cabinet Order," a formulation that allows for the inclusion of scents. Although Japan accepts scent marks in principle, in practice registration is rare due to challenges in demonstrating distinctiveness.

3. Experience for Vietnam

In the process of improving the mechanism for the protection of scent marks to meet the requirements of the CPTPP, Vietnam needs to amend and supplement several provisions on trademark protection in the current legal framework, specifically as follows

First, the requirement of graphical representation for sound and scent marks should be abolished.

One of the greatest barriers to scent trademark registration in Vietnam is the statutory requirement that a trademark must be "visible." Due to the inherent characteristics of scents, they are extremely difficult to express through words or images. This requirement is no longer compatible with the current level of scientific and technological development. It is also a fundamental difference between Vietnamese law and the legal systems of many jurisdictions, such as the EU or the United States, where graphical representation is no longer required.

Therefore, Vietnam should draw on international experience and gradually eliminate the requirement of graphical representation to align with global trends and create opportunities for non-traditional trademarks to be registered. Additionally, trademark owners should be free to choose any appropriate form to describe their mark, provided that the description is sufficiently clear and precise for competent authorities and consumers to identify the sign. Accordingly, Clause 2, Article 72 of the current Intellectual Property Law should be amended to read: "expressed in an appropriate form that clearly and accurately enables competent authorities and consumers to identify the mark."

Second, the substantive definition of trademarks should be expanded.

It is necessary to expressly include scent marks within the definition of trademarks in the IP Law to affirm their protectability, rather than relying solely on the general definition in Clause 16, Article 3: "A trademark is a sign used to distinguish the goods or services of different organizations or individuals." Examples from foreign legislation illustrate modern approaches to defining trademarks:

Article 17 of the Australian Trademarks Act defines a trademark as "a sign used or intended to be used to distinguish the goods or services of one business entity from those of another," with "sign" including letters, words, signatures, numerals, packaging, shapes, colors, sounds or scents [10].

Thus, it is necessary to clearly recognize scent marks as a protectable subject matter under Vietnamese law.

Third, the criteria for assessing the distinctiveness of scent marks should be clearly defined.

The distinctiveness of scent marks must be evaluated based on their ability to enable consumers to distinguish the goods of one manufacturer from those of another. If a scent does not create such a distinction, it cannot be registered. Therefore, a scent mark should be considered distinctive only when it satisfies the following conditions:

The scent has the ability to distinguish the goods of different entities (either inherently or through use).

The scent is not a natural characteristic of the product, nor is it commonly used in the market.

Fourth, the procedures for filing applications for scent mark protection must be revised.

If the requirement for graphical representation is eliminated, other suitable forms that can be applied in the application for registration of a scent mark need to allow the combination of different forms such as words , chemical formula, sample scent or digital scent data. In particular, the method of using data by digital scent should be prioritized when filing a scent trademark registration because it is the most optimal form to fully and accurately represent the registered scent. protection. This is the result of scientific and technological progress to convert scents into electronic data for storage, decoding or even transmission over the internet. From the stored odor data, the scent is recreated and helps the authorities to accurately recognize this scent. In contrast, forms such as words representing an odor, a chemical formula of an odor or a sample scent still have certain disadvantages and are difficult to clearly and accurately represent the scent mark.

Conclusion

In summary, Vietnam can draw on the legislative experiences of countries such as the United States, Australia, and the European Union in protecting scent trademarks to develop its own protection mechanism for scent marks. By doing so, Vietnam's trademark legal system can be progressively improved and aligned with international treaties to which the country is a party, particularly the CPTPP Agreement. This alignment will help create a transparent and secure investment environment, attract foreign investors, and contribute to the country's innovation and sustainable development in the future.

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