

Informative Note

Possible impact on the agri-food sector of the imprint of non-traditional brands

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Arising from the transposition of the Community Trademark Directive 2015/EU/2436, the Spanish Trademark Law 17/2001, hereinafter Law 17/2001, had to modify some of its articles. Among them, the article referring to the opening of the concept of trademarks, to include non-traditional trademarks, which have been imposed on the market, mainly due to the advance of new technologies. Before the aforementioned amendment, Law 17/2001 established as a concept of trademark (Article 4.1) "*... any sign capable of being represented graphically which serves to distinguish the goods or services of one undertaking from those of other undertakings in the marketplace*". However, when the development of new technologies makes the emergence of new media possible, the need to recognize non-traditional trademarks is strengthened, going beyond the limit of graphic representation, which even limited the registration of sound trademarks, since only those that could be represented by scores could be applied for. In addition, other types of signs have emerged as a result of human creativity in using certain attributes to differentiate products and their trademarks in the marketplace. However, in addition to the mandatory requirement that signs must be capable of distinguishing the goods or services of one undertaking from those of other undertakings, the new wording of Article 4 includes the condition that signs may "*be represented in the Trademark Register in such a way as to enable the competent authorities and the general public to determine the clear and precise subject matter of the protection granted to the owner.*"

With the elimination of graphic representation, the Spanish Patent and Trademark Office (SPTO) has recognized new types of trademarks, which join the traditional ones: (i) Figurative trademarks, composed exclusively of words, letters or numbers in standard characters; obviously, without being accompanied by graphic elements or colours. (ii) Figurative trademarks, which, in addition to including only graphic elements, may incorporate the words, letters or numbers, but with non-standard stylization or arrangement, with or without graphic elements or colour. (iii) Three-dimensional trademarks, consisting of or including a three-dimensional shape, including the shape of the product, its presentation, or the packaging. A container, primary packaging or packing with differentiating characteristics could constitute a very necessary resource for protection as a trademark in the agri-food sector, in order to prevent it from being copied by unauthorized third parties. Among the new types of non-traditional trademarks recognized by the SPTO are Position, Pattern, Colour, Movement, Multimedia, Holographic, Touch and Sound trademarks. In the case of the latter, they can now be represented by an audio file (JPEG and MP3) containing a reproduction of the sound.

The Positional Trademark is the one that identifies the specific way in which the trademark is placed or appears on the product. They can be composed of graphic signs or by joining them to words, letters, or numbers, such as, for example, the way a figurative trademark is placed on a shoe, either on its heel or on its side. The trademark must be represented by a reproduction that properly identifies the position of the sign, as well as its size or proportion in relation to the corresponding goods. In relation to the other elements appearing in the picture, it must be indicated that no protection is claimed. In the case of the wine industry, for example, the way in which a certain attribute or type of label is placed on a bottle could be protected, if it meets the requirement of distinctiveness.



Pattern trademarks are signs exclusively made up of a set of elements that are periodically repeated in a two-dimensional way, such as the repetition of a logo or any graphic symbol to be included in an oil bottle or its packaging. The way to represent this type of trademarks is by means of a reproduction in which the repeated pattern is included.

In relation to Colour trademarks, there has long been a debate over if a colour *per se* could be protected as a trademark, as it meant granting a single owner the exclusive right to use it and *ius prohibendi*. However, since 1999, OHIM, now the European Intellectual Property Office (EUIPO), granted registration of the colour violet associated with the Milka trademark, in favour of Kraft Foods Schweiz Holding GmbH, to identify goods in class 30 (chocolate) of the International Classification of Goods and Services. They classify within this type of trademarks, those composed exclusively of a single colour without contours, or by a combination of colours without contours. In the analysis for its granting, it will necessarily be necessary to take into account what is called "*Secondary Meaning*", that is, that the repeated use of the colour together with the trademark has given rise to the recognition of its distinctive character. It should be mentioned in this connection that colour trademarks must be represented graphically by means of an internationally recognised identification code, as is the case with Pantone.

Movement trademarks are distinguished by the fact that they are composed of a movement or a change in the position of the elements of the trademark; they are trademarks used in audio-visual media of all kinds, from the cinema, television, social networks or a screen in a shopping centre. These types of trademarks can be represented by JPEG and MP4 files, or by a sequence of still images. An example would be the instantaneous way in which the Vodafone logo appears.

Like the Movement trademark, the Multimedia brand has also increased its presence on the market as a result of technological advances and reaches the consumer through audio-visual media. It consists of a combination of images and sounds, which are represented by MP4 files.

The Hologram brand, on the other hand, is composed of holographic features, and is represented by video files (JPEG or MP4) or a graphic or photographic reproduction that contains the necessary views to sufficiently identify the holographic effect in its entirety. This type of trademark is becoming increasingly important, especially in the fight against counterfeiting, and can be incorporated into agro-industrial products.

Finally, it should be mentioned that the SPTO also recognizes the Tactile trademark, which consists of the texture of a product, which of course has a distinctive character. In this type of trademarks, the "*Secondary Meaning*" mentioned for the Colour trademark may also be considered. The Tactile trademark can be represented in any form, based on the use of generally available technology, if it is possible to reproduce it in the registration in a clear, precise, autonomous, intelligible, durable, and objective manner. This type of trademark could also be of interest to the agri-food industry, in order to differentiate in the market, for example, bottles of oil or wine, with characteristic textures.

As can be seen, non-traditional trademarks arise with the aim of providing companies with new resources to protect their distinctive signs in the marketplace. Therefore, many of these types of new brands can support the work of the agri-food sector in enhancing its products in an increasingly competitive market. To that end, not only is the creativity of each producer or businessperson sufficient; due protection of the sign is also required for it to enjoy exclusive exploitation and, in turn, the ability to prohibit third parties from attempting to use it without their consent.

For more information please contact:

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