

Comparative legal analysis of protectability of olfactory trademarks

Сравнительно-правовой анализ охраноспособности «обонятельных» товарных знаков

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Abstract

In the current growing global commercial turnover of goods and services, there are increasing demands on the ways of their individualization. This applies both to traditional methods of individualization (corporate name, trademark, commercial designation, name of origin, etc.) and non-traditional (olfactory trademarks). The purpose of this study is to study and analyze doctrinal concepts, norms of the current legislation, and law enforcement practice concerning the protection of rights of olfactory trademarks. In order to achieve this objective, the study used a comparative legal method, which analyzed the legal and regulatory framework, as well as the grounds for refusing to register non-traditional trademarks in various legal systems and national jurisdictions. The task of the authors was to conduct a comprehensive study of legislative regulation and practice of legal protection of olfactory trademarks in various jurisdictions. The result of the research is the formulation of a general trend in different jurisdictions toward the legislation on registration of exclusive rights to non-traditional trademarks, which with the help of aromas (smells) allow individualizing the owners of goods produced by them and/or commercial services provided.

Key Words: Exclusive rights, trademark registration, non-traditional means of individualization, olfactory trademark, patent law.

Аннотация

В современных условиях роста глобального коммерческого оборота товаров и услуг возрастают требования к способам их индивидуализации. Это относится как к традиционным способам индивидуализации (фирменное наименование, товарный знак, коммерческое обозначение, наименование места происхождения товара и пр.), так и к нетрадиционным («обонятельные» товарные знаки). Целью данного исследования является изучение и анализ доктринальных концепций, норм действующего законодательства, правоприменительной практики касательно охраноспособности прав на «обонятельные» товарные знаки. Для достижения указанной цели исследования использовался сравнительно-правовой метод, с помощью которого был проведен анализ нормативно-правового регулирования, а также оснований для отказа в регистрации в различных правовых системах и отдельных национальных юрисдикциях нетрадиционных товарных знаков. Задачей авторов послужило проведение комплексного исследования законодательного регулирования и практики правовой охраны «обонятельных» товарных знаков в различных юрисдикциях. Результатом исследования является формулирование общей тенденции в различных юрисдикциях к законодательству о регистрации исключительных прав на нетрадиционные товарные знаки, которые с помощью ароматов (запахов) позволяют индивидуализировать владельцам производимые ими товары и/или оказываемые услуги в коммерческом обороте.

Ключевые слова: исключительные права, регистрация товарных знаков, нетрадиционные средства индивидуализации, обонятельный товарный знак, патентное законодательство.

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Introduction

Trademarks are means of individualization in commercial circulation that allow a potential consumer to identify and distinguish an attractive (acceptable, necessary) product or service. Psychologists and physiologists note that among human senses, the most significant impact on human memory is exerted by the chemical-biological senses through the smell, which is far ahead of sight and hearing (Engen, 1991). Since an olfactory trademark may have the properties of hyper-attractiveness as an effective mechanism to attract consumers, the so-called aroma-marketing is entirely developed in most countries around the world, smells (aromas) quite often accompany goods and services during advertising campaigns. Although certain odors may be associated with certain goods or services, not all of them are protected as trademarks because they are functional (Tandon, 2015).

Recently, experts have identified two types of innovation, with ever-increasing capitalization, associated with the sense of smell or odors (Hawes, 1989). The first type of innovation is aromatic or odors, perfumes, and their combinations, which are acquired because of their direct attractiveness to the sense of smell, such as perfumery, all kinds of perfume oils, aromatic essential oils, room and air fresheners. The second type is secondary aromatic products, perfumes for a product, or secondary smells. They include additional smells to add to the main products, for which the possibility of smell is optional, for example, such as scented wipes, disinfectants and detergents, cosmetics and various children's games, as well as most plastic products and other products, which are odorless or with not suitable odors for concealing specific chemical components (Hammersley, 1998).

It should be assumed that the principal purpose of intellectual property law is to encourage technological innovation (Bartholomew and McArdle, 2011). Taking into account the possibility of individualization and objectification of smells, it is possible to use them fully as trademarks and, accordingly, there is a need for their legal protection as a result of intellectual activity in a substantive form.

The purpose of this study is to study and analyze doctrinal concepts, norms of the current legislation, and law enforcement practice concerning the protection of rights to olfactory trademarks.

Methodology

A comprehensive review of trends and analysis of the current problems of legal doctrinal concepts of the protection of non-traditional means of identification and trademark registration practices in national patent offices is exceptionally possible only through a comparative legal research method. At the same time, it is important to pay attention not only to the main continental and Anglo-Saxon systems of law by the example of specific jurisdictions, but also to focus on the regional peculiarities of the Arab states, which, on the one hand, are leaders of specific innovations in the economy, and, on the other hand, are traditionally influenced by the norms of Muslim law (Sharia). The study examined the legal norms of the continental and Anglo-Saxon legal systems, including several jurisdictions within the European Union, as well as the features of the legal order of individual Muslim countries.

The national legislation of most states provides that a trademark may be any designation that can be represented graphically, and that can distinguish the goods and services of one manufacturer from those of another. This raises the question of the formalities of the legal protection of olfactory trademarks and, above all, how to reproduce in a graphic form or to express (describe) in writing what cannot be visualized or to what extent this requirement is necessary for the registration of exclusive rights to means of individualization, which are also the result of intellectual activity.

The question of whether there is a unique feature of a potential object of legal protection should be based primarily on whether the smell is an exceptional characteristic of the object. At the same time, it is also quite debatable whether a particular misrepresentation is acceptable since the smell does not correspond to the object itself, i.e., if a particular smell is usually associated with other material objects, which can lead to misrepresentation as to the properties (composition) of the object.

Results and discussion

Practical law enforcement issues related to legal protection of the results of intellectual activity arise when applying to the national patent office concerning the smell of perfumes: to register the rights to a patent (i.e., legal protection of technology, formulation), or still register the rights to smell as a trademark (i.e., legal protection of the means of individualization in a

material form). In the latter case, there is a question whether only a verbal description of a specific smell is required, or whether the corresponding samples of the smell in question must also be submitted for registration.

According to individual experts, the strength and quality of smells are assessed differently by representatives of different nationalities. Another possible practical problem in the process of legal protection and defense of exclusive rights is not only the subjective perception of a specific smell by each subject separately, due to the variety of olfactory receptors of individuals, but also the fixation of other smells, similar to the degree of confusion with the smell declared for registration as a means of individualization of the object (trademark).

There is another way to legally protect the exclusive rights to the smell, namely through copyright. As an example, the legal position of the Supreme Court of the Kingdom of the Netherlands should be mentioned, which assumes that the originality and perceptibility of the smell (aroma) is subject to copyright protection, since the legislation of the Kingdom of the Netherlands does not contain an exhaustive list of objects of copyright, "and the smell (not the recipe or substance) itself is accessible to human organs of perception, capable of having its original character and can be used for expression of the author" (Decision of the Supreme Court of the Netherlands, 2006).

A controversial situation arose between the French manufacturer L'Oréal S.A., which holds the rights to the Lancôme Trésor trademark, and the small Dutch company Kecofa B.V., which owns the Female Treasure trademark and is forced to use dumping prices in order to win the market for its products. At the same time, the smells (aromas) were repeated, but each manufacturer had its own original recipe and production technology, although the physicochemical examination presented by the French right holder claimed the similarity of 24 components in the formulation of aromas (Koelman, 2006).

It should be noted that the initial claims for violation of exclusive rights to the trademark were not satisfied by all courts with the justification that these means of individualization are not similar to the degree of confusion, and, accordingly, do not mislead consumers. That is why the lawsuits have been transferred to the field of copyright. The copyright of the Kingdom of the Netherlands is characterized by the fact

that only direct imitation is inadmissible, and if there is a rather high degree of similarity, the burden of proof lies with the alleged infringer of exclusive rights in terms of the originality of the work. Accordingly, the position of Kecofa B.V. was based on the lack of exclusive uniqueness of the smell (aroma) of Lancôme Trésor since their composition of Female Treasure is based on centuries-old traditional canons of perfumery, which as a consequence can reproduce smells (aromas) that ever existed but with the addition of their developments and components.

Interestingly, the courts of appeal and cassation of France in another case, but also a lawsuit concerning the Lancôme trademark pointed out that the smell (aroma) of perfumery itself is not the result of intellectual activity, that is, it is not subject to copyright protection, but subject to the registration of exclusive patent rights, protected as an object of industrial property ("know-how"). As French copyright law provides that legal protection extends to works expressed in a tangible form, to the extent that they can be defined with sufficient precision to ensure their distribution, it has thus been concluded that the smell (aroma) is not in itself the result of the creative work of the human mind, i.e., is not a work that meets the requirements of French copyright law (Lebed, 2011).

Das Deutsche Patent- und Markenamt (DPMA) has rejected the application of Dr. Scheikmann for an olfactory trademark (with a verbal description (designation): "soothing tender fruit with a slight tint reminiscent of the smell of cinnamon") on the following grounds: first, the claimed designation does not carry the function of a trademark, second, it cannot be represented graphically, and third, the claimed designation does not have a distinctive ability. In addition to this verbal description, the application consisted of a chemical formula, a substance that determines the odor, and a sample odor (aroma) (Mezulanik, 2012).

The German Federal Patent Court (Das Bundespatentgericht), when considering an appeal against the refusal to register the claimed mark, first of all, concluded that the smell might be decisive for the difference between one product and another, but it is doubtful whether an olfactory trademark can be depicted graphically. However, the German Patent Court also formulated two conditions for the protection of non-visual trademarks, which are equally applicable to non-traditional trademarks: the possibility of representing the trademark in a graphic form employing such symbols as letters,

lines, images, as well as the form of representation of the mark (designation) shall be definite, easily reproduced, self-sufficient, and the representation itself shall be sufficiently clear and objective.

Based on these conditions, the following conclusions have been drawn concerning the olfactory trademarks in the present case:

the representation of smell using a chemical formula does not mean that it is graphically represented and is undefined because the average consumer cannot identify the smell (aroma) by the chemical formula, primarily since the chemical formula does not determine the smell itself, but its substance;

- The verbal description of the smell, although it is consistent with the European Union smell classification system, as well as the chemical formula, does not clearly describe the nature of the specific smell;
- the representation of the smell sample can in no way be evaluated as a graphical representation, and the smell sample is not a constant parameter in the storage process at the office, due to the volatility of the components; furthermore, the substance may change the smell emitted by it depending on external factors and conditions, such as air temperature, humidity, etc.;
- the combination of the above methods of smell representation (chemical formula, verbal description, and sample) also does not meet the requirements for the presentation of the designations claimed as trademarks in a graphical form, since it is characterized by even broader possibilities of different interpretations of the claimed mark, which cause a nonuniform identification of the smell (aroma).

This position was also confirmed in 2001 by the European Court of Justice, which held in the case that the graphic design must meet two conditions (Opinion of Advocate General Ruiz-Jarabo Colomer, 2001). First, the image must be clear and precise so that the consumer can know exactly what exclusive rights belong to the rights holder, and second, it must be clear to the professionals to whom the consumer can apply. Thus, the position of the European Court of Justice is that a trademark cannot be displayed so clearly and concisely that it is understandable to all.

In this case, the European Court of Justice rejected all four acceptable forms of graphic representations (designations) of an olfactory trademark proposed by the Patent Court of Germany: the chemical formula, the written description, the smell sample, and their various combinations. From the perspective of the European Court of Justice in the case of Ralf Sieckmann vs. Deutsches Patent-und Markenamt, the chemical formula does not reflect the smell of the substance, but the substance itself, thus presenting the trademark as a chemical formula, the applicant "only gives a chemical composition that does not say anything about the smell to most consumers" (Judgment of the Court, 2002). Besides, products made from the same components may differ in smell due to concentration, temperature, and other factors.

Thus, in the opinion of the European Court of Justice, it is impossible to display and evaluate such categories as "tender fruit" or "slight tint" applied for trademark registration with utmost clarity verbally (graphically) declared for trademark registration. Samples of smell (aroma) are not graphical in themselves since it is technically impossible to register and publish a sample. Also, the smell (aroma) of the samples cannot be constant because it evaporates or disappears over time.

Finally, if none of the forms presented is acceptable as a graphic representation of a trademark, then the combination of these forms is also unacceptable. In this case, for example, the combination of all three forms of the claimed olfactory trademark (chemical formula, description, sample) can give rise to many different interpretations of the consumer. This decision of the European Court of Justice has specified as much as possible one of the main problems regarding the possibility of the legal protection of olfactory trademarks, which, regardless of their type, should have an unambiguous graphic image (designation).

Initially, the European Court of Justice had a rather conservative view on the possibility of the legal protection of exclusive rights to olfactory trademarks. For example, a November 2001 regulation established that olfactory trademarks were not subject to registration until a graphic representation of these means of individualization was found (Opinion of Advocate General Ruiz-Jarabo Colomer, 2001). At the moment, it can be stated that there is no uniform approach at the level of national legislation of European countries in the legal

regulation of the legal protection of exclusive rights to a smell (aroma), and above all, the European Court of Justice (ECJ) is assigned a role in the harmonization of the law of the members of the European Union and the formation of a uniform judicial practice.

Although the European Union Intellectual Property Office (EUIPO), until March 2016 called The Office for Harmonization in the Internal Market (OHIM), which is engaged in the EU trademarks registration, also admits that the smell means of individualization can be registered, but in practice, the problem of the main obstacle to the possibility of registration of exclusive rights has not been finally solved, and the main difficulty is the graphical description (designation) of an olfactory trademark (Karapapa, 2010).

It should be recalled that the first step toward the harmonization of the European Union market for trademarks was taken as early as December 21, 1988, following the first Council Directive 89/104/EEC for the approximation of the laws of Member States relating to trademarks (First Council Directive, 1988), followed by the Community Trade Marks Regulation (CTMR) EC/40/94 of December 20, 1993 (Council Regulation, 1993), which announced the establishment of the above-mentioned OHIM European patent office for trademarks. Thus, in 1999, OHIM solved the issue of registration of the trademark "smell of freshly cut grass" for tennis balls. Initially, the application was rejected because there was no graphic representation of the trademark (Karapapa, 2010). Under the European Union Trademark Application Rules, a trademark may consist of any marks (Council Regulation, 1993) that may be expressed in a graphical form, in particular, words, including proper names, figures, numbers, the shape of the goods or their packaging, if such a form distinguishes one product or service from another. The rules also define a graphic image: "if the applicant does not wish to indicate in the application the color and/or other special graphic properties, the trademark may be in a handwritten form, for example, consisting of letters, numbers and signs." Recognizing the above arguments of the applicant as a whole justified, but insignificant, the patent office had to decide to refuse the registration of the claimed mark because the verbal presentation of the olfactory trademark does not mean its presentation in a graphic form.

In addition, according to the experts of the European Patent Office, the verbal description of an olfactory trademark is rather vague, making it

impossible to establish clear boundaries of the scope of legal protection of exclusive rights, including, for example, the non-possibility to make a judgment on the following issue: would the rights of the applicant in the case of recognition of the mark as protected extend to the use of smells characterized only by the words "a smell of the mown grass," or also "a smell of just mown grass," "recently mown grass."

In his objection to the Court of Appeal to the refusal to register the olfactory trademark, the applicant stated that the olfactory trademark must be registered, since such registration does not contradict the established rules, as the trademark designation was presented graphically (in a verbal description), and therefore, in accordance with the above rules, the registration of olfactory trademarks is not excluded, and the stated designation as a means of individualization meets the established requirements, declared as trademarks. In addition, this trademark has already been registered in the Benelux countries, and the United Kingdom Patent Office, the practice of which is characterized by a strict approach to assessing the protection of the claimed designations, has already made several decisions on the registration of olfactory trademarks, which are represented by combinations of words describing smells (aromas).

In the opinion of the Appeals Chamber, the current rules for the examination of trademark applications, which contain requirements for the graphical presentation of the means of individualization to be applied for, presuppose the submission of the necessary description, which should clearly reflect the essence of the trademark. From this point of view, the semantic analysis of the olfactory trademark in question characterizes the ability to cause pleasant memories of being on spring or summer lawns (or herbal tennis courts), with a distinct smell of freshly mown grass, which every person easily recognizes.

As a result, the Appeals Chamber decided that the application for trademark registration was still submitted in the required form and, besides, the Appeals Chamber noted that "the smell of freshly mown grass is a special smell that is easily recognizable by experience." Thus, it should be assumed that the term "graphic image" can, in some cases, be interpreted broadly enough. In view of the above, the Appeals Chamber decided that the decision of the European Patent Office was unlawful and

referred the case for further consideration (Decision of the Second Board of Appeal, 1999). The main obstacles to the registration of olfactory trademarks belonging to the category of non-visual means of individualization are, on the one hand, the formal difficulties related to the satisfaction of the requirements of Article 2 of the European Union Trademark Directive No. 2008/95/EC of October 22, 2008 (Directive, 2008) and Article 4 of the European Union Trademark Regulation No. 207/2009 of February 26, 2009 (Council Regulation, 2009) on the presentation of the declared designation in a graphic form, and, on the other hand, the practical problems of the development of methods to inform consumers that the particular smells (aromas) act as a trademark.

The European Trademark Directive allows for the registration of trademarks, beyond words and graphics, if they can be "graphically represented" and "capable of distinguishing the goods or services of one entity from those of others" (Directive, 2015).

In 2001, the European Union Patent Office revised the meaning of the concept of "graphic representation" in the course of the trademark registration procedure for the "raspberry smell" claimed for motor fuels (Davies, 2005). Initially, registration was refused because the application did not contain a graphic image or a written description of the smell. Although the initial refusal of registration was based on the fact that the application lacked the necessary graphic description characteristic of this group of goods (services), the European Patent Office in its refusal determined that as the "smell of freshly mown grass," the "raspberry smell" is unique and clearly recognizable. Therefore, for successful registration with the European Union Patent Office, it would be necessary and sufficient for the applicant to provide a corresponding verbal description of the trademark.

Later, another applicant attempted to register the exclusive rights to the olfactory trademark, also with the raspberry smell in respect of yarn. The Appeals Chamber of the European Union Patent Office, in a case concerning an application for trademark registration with the "smell of raspberries," found that the smell of raspberries was not perceived by consumers as a means of individualization (Davies, 2005). It is worth noting that in the U.S., the copyright holder declared a designation for the yarns and described in the application materials as "the smell of flowers of the tropical shrub plumeria blossoms." This application to the patent office

was accompanied by a properly sealed vessel with this odorous yarn. However, the Office decided not to register such a designation because consumers cannot and should not perceive the smell of yarn as a trademark.

In the course of the appeal consideration of the refusal to register the rights to the olfactory trademark, the applicant submitted the materials proving that he was the only producer of the fragrant yarn, and consumers considered him to be the exclusive producer of such products. While acknowledging the arguments of the applicant in the appeal, the Appeals Chamber of the European Union Patent Office recognized the legal capacity of the claimed designation.

The Trade Marks Act 1994 provides for the possibility of registering a large number of marks that could not previously have been registered (UK). These include, among other things, olfactory trademarks. In order to obtain registration, the applicant must convince the registering authority (or, when appealing against its actions, the court) that the object he wants to protect is, in fact, a trademark. Within the framework of registration of exclusive rights, neither statutory legislation nor case law imposes any special requirements to "non-traditional" means of individualization (designations).

As an illustration of law enforcement practice in the United Kingdom, the following examples can be given. The applicant has listed the smells that make up the perfume: an aroma of the aldehyde floral aromatic product, with an aldehyde top note of aldehydes, bergamot, lemon, and neroli; an elegant floral middle note of jasmine, rose, lily of the valley, orri and ylang-ylang; and a sensual feminine note of sandalwood, cedar, vanilla, amber, civet and musk, and added that the smell is known and recognizable from the brand name "No. 5" (Schaal, 2003). However, this application was rejected because the smell (aroma) must distinguish between the two products, and the perfume, i.e., the smell carrier, in this case, is a product in itself so that the trademark indicates the type of product. In this case, the absence of a graphic image was not an obstacle to successful registration. However, later in the United Kingdom, two more applications for registration of olfactory trademarks were considered positively. The second application was filed by Sumitomo Rubber Co., which is used to register the "floral smell (aroma) reminiscent of roses in relation to car tires (tire casing)." This application was successfully satisfied and the olfactory trademark was registered (Trademark 2001416, 1996).

Also, Unicorn Products Ltd application for a "strong smell of bitter beer" for dart arrows was satisfied and an olfactory trademark was approved (Trademark 0437933, 1948).

Nevertheless, at the same time, it should be taken into account that in most cases, in practice, patent examinations establish that if the form of graphical representation of the designation is such that it is possible to interpret its essence in a wide range, the scope of the exclusive rights granted cannot be unambiguously determined, which leads to the conclusion that it is impossible to register such a trademark. The graphical representation of the trademark determines its identification and at the same time, allows avoiding the storage of samples of non-traditional trademarks (sounds, smells (aromas), models). Non-traditional trademarks must be presented in a graphical form that is suitable for entry in a trademark registry based only on paper and electronic media. This approach is directly related to the expertise of olfactory trademarks.

Thus, the National Patent Office of the United Kingdom has made a preliminary decision to refuse to register a designation in the name of John Lewis of Hungerford plc, expressed in the following verbal form: The "trademark represents the smell, aroma, and essence of cinnamon" (Schaal, 2003). The decision was motivated by the fact that the marking of furniture does not meet the requirements to present the markings in such a graphical form that they can be identified. Motivating the refusal, it was pointed out that the essence of the smell trademark could be conveyed in individual cases by words, but its protection depends on the question of whether the words "smell, aroma and essence of cinnamon" clearly describe the essence of the trademark. The weakness of the applicant's position is that he considers the claimed smell to be well known, but this statement is not valid. The ambiguous interpretation of the expression "smell, aroma and essence of cinnamon" in the case of registration of the claimed trademark and subsequent filing of an application for registration of another trademark presenting a cinnamon-like smell (e.g., carnation or cassia) will not allow the mark examination with a later priority on relative grounds (in order to compare smells that may conflict, the Office must possess their samples). As from the analysis of the applicant's advertisements, which characterize the claimed trademark as "the smell (aroma) of delicious spices, reminiscent of the amazing country cuisine," it is clear that other furniture manufacturers would like to use cinnamon-like

smells to mark and promote their products. As a result, a final decision was made to refuse registration of the applied designation.

In the United States, two main federal legal acts provide for the legal regulation of the exclusive rights of trademark holders. This is the so-called Lanham Act (Trademark) (15 U.S.C.) INDEX (USA) – the Federal Trademark Act, adopted in 1946, which regulates the procedure of registration of trademarks, and the Federal Trademark Dilution Act 1996 (USA), which came into force on January 16, 1996.

U.S. federal law and court practice, which is the source of the law, provides ample opportunity to select the objects that can be registered as trademarks. Although olfactory trademarks are not explicitly listed in the statutory law, if it is the smell (aroma) that is a unique source of a difference, it can be registered as a trademark (Bartholomew, 2014).

The United States Patent and Trademark Office (USPTO) experts distinguish between cases where the smell (aroma) is of secondary importance or a major source of difference. In the absence of evidence that an olfactory trademark is of secondary importance, the Rules for the Examination of the Individualization Means provide that an olfactory trademark may be registered, provided that the criteria such as "wide publicity" and "recognizability" are met by the majority of consumers by conducting appropriate tests on these characteristics.

A successful example of registration of exclusive rights to an olfactory trademark in the United States is the pharmaceutical company Hisamitsu Pharmaceutical Co., which is the owner of the means of initialization of the "mint aroma consisting of a mixture of concentrated methyl salicylate and menthol" (Trademark 77420841, 2009).

A review of practice shows that the Anglo-Saxon legal system has considerable experience in registering smells (aromas) as a trademark, not only in the United States and the United Kingdom but also in New Zealand and the Commonwealth of Australia.

Thus, following the Trademark Act of New Zealand No. 49 of December 4, 2002, which defines the interpretation of basic terms, registration of olfactory trademarks is allowed, but in practice, of course, there may be difficulties due to the requirement of graphic

representation of the appropriate designation (Trade Marks Act 2002 (New Zealand)).

Sources governing trademark registration in Australia, including olfactory trademarks, include The Trade Marks Act 1995 (Australian) and the Trade Marks Regulations 1995 (Australian). Also, the Australian Department of Industry, Innovation, and Science Patent Agency has developed an official manual that provides detailed information on how to register trademarks, including olfactory trademarks (Trade Marks Office Manual of Practice and Procedure (Australian)). Australian law allows the use of the smell as a trademark.

An essential requirement of the Trade Marks Act 1995 is that in order to register a trademark, it is necessary to provide a graphic designation. In case there is no graphical representation, the application for registration must be rejected. Graphic representation of the smell is possible using a verbal description, but this description should be in a form that allows an average person to distinguish the aroma as a trademark. It is unacceptable to use special high-tech equipment for fixation and graphic representation of smell (aroma), in particular, the "e-nose."

No smell (aroma) sample is required for registration of the application, but it may be required if necessary. In addition to the verbal description of the smell, it is also necessary to specify the product or service for which the fragrance will be used.

There are several restrictions on the registration of an olfactory trademark; namely, there is no registration of smells that are not able to make a product distinctive. In particular, smells that are the natural smell of a product cannot be registered, e.g., perfumes, aromatic oils, food spices, pine needles for coniferous wood products are not subject to registration. Such aromas are a natural attribute of this type of product or are derived from them. This category also includes flavors traditionally used for several products, such as chocolate or vanilla flavors for baking products.

No "masking" scents used to conceal the unpleasant smell of the product are subject to registration. For example, the lemon flavor for bleach is not subject to registration. Also, standard flavors such as lavender scent for powder or citrus for air fresheners are not registered.

Thus, in order to register an olfactory trademark in the Commonwealth of Australia, some

conditions must be met, and the presentation of a graphic representation of the olfactory mark (designation) in that country is not a fundamental difficulty, as a textual description of the smell is acceptable. An olfactory trademark is to be registered if it is a unique and unexpected feature of a particular product or service. Thus, in 2008, the Commonwealth registered an olfactory trademark for the smell of eucalyptus for Golf ball stands (Trademark 1241420, 2009).

Thus, it can be concluded that, first of all, the practice of legal protection of olfactory trademarks begins to take shape in the Anglo-Saxon legal system. In the Russian Federation, for the first time in September 2012, the Russian National Patent Office (Rospatent) granted the application and registered the exclusive rights of perfumer Natalia Kolyago to the trademark in the form of a square leather tag with a "pronounced smell of genuine leather" (Trademark. 470375, 2012).

The National Patent Office of Malaysia (the Intellectual Property Corporation of Malaysia), established and operating under the 2002 Act from the start of its operation, has decided to amend the Trademark Act of the Federation of Malaysia 1976 (as amended in 1994 and 2000) to extend the scope of legal protection of non-traditional trademarks. As a result of these novelties in Malaysian law, many non-traditional means of individualization, including smell, sound, shape, and texture, have been able to be registered as trademarks since 2002 (Mezulanik, 2012).

Separately, it would also be useful to consider the legislative approach and law enforcement practices of Arab states regarding the possibility of registering a smell (aroma) as a trademark.

For example, the Industrial Property Act of the Kingdom of Morocco No. 17-97 of 2000 provides for the registration of olfactory trademarks (Thacker, 2014).

At the same time, another principled position of the Arab Republic of Egypt, initially formulated in the Egyptian Law No. 82 of 2002 "On the Protection of Intellectual Property Rights," is indicative. This law specifies the requirements for a trademark: "Everything that distinguishes a product or service from others is always a trademark that is perceived through (a sense of) sight." Accordingly, it follows from this definition that, although the article mentions any form of trademark, non-traditional trademarks (smell and sound) are expressly excluded from

legal protection, since such designations as a means of individualizing goods or services cannot be perceived solely by sight.

At the same time, several other national jurisdictions in the Arab Gulf (Persian) countries have a different legislative trend toward recognition of legal protection for olfactory trademarks.

In particular, Law No. 68 of 1980 on the Protection of Trademarks of the State of Kuwait provides the following definition: a trademark is anything that takes the distinctive form of words, signatures, letters, numbers, figures, drawings, symbols, addresses, seals, pictograms, inscriptions, photographic elements and color configurations, any discernible image, auditory and smell signs or any other mark, any combination thereof, if used or intended to be used for the sale of goods or services, in order to indicate that they belong to the owner of the trademark, in connection with their production, selection, trade or offer for sale.

A direct reference to the legal capacity of non-traditional olfactory trademarks is also provided for in the Trademark Law No. 11 of May 28, 2006, of the Kingdom of Bahrain. This law states that a trademark means everything that has a distinctive form of names, words, signatures, letters, symbols, numbers, addresses, stamps, drawings, sounds, smells, images, engravings, packaging, or photographic elements. Alternatively, any other signal or range of colors or one color, non-functioning, or sound or odor or group of marks, if used or intended to be used or used to distinguish between products of industrial or handicraft production or cultivation. The Law of the State (Emirate) of Qatar No. 9 of 2002 "On Trademarks and Trade Data" also provides that a registered trademark is one that takes the distinctive form of any of the following features: names, signatures, words, letters, numbers, figures, pictures, images, symbols, stamps, seals, layouts and their main elements, or any other sign, set of colors or a single color, sound, smell or combination thereof, if they are used or intended to be used, or to distinguish between industrial, handicraft or agricultural products (reference). It should be noted that, on the one hand, the Qatari legislator presupposes the possibility of registering a smell as a trademark, but, on the other hand, the law specifies that a trademark is defined as "every visible mark that is perceived and capable of distinguishing between the products of a particular trader, manufacturer or service provider." Furthermore, this means some

conditional, implicit exclusion of non-traditional trademarks, as there is no required ability of their visual perception.

The following examples may be given as evidence of legal protection for non-traditional trademarks in the Middle Eastern States:

- the "Al sheik perfume" trademark was registered in 2002 in Bahrain;
- the "Beauty gallery Qatar" trademark was registered at the beginning of January 2018, and at the end of April 2018, the owner of the olfactory trademark was the Kuwaiti company Saray Perfumes Co.

Conclusions

Currently, the situation with the recognition of the possibility of the legal protection of exclusive rights to olfactory trademarks in various legal systems is quite bipolar. Also, on the one hand, there has been an increase in the number of non-traditional trademark applications in the European Union, while Australia experienced negative growth over the same period (Adams and Scardamaglia, 2018).

There is an expert opinion that the amendment to the EU Directive in 2015 significantly weakened the requirements for graphic representation of the denomination, which radically changed the practice of registration of non-traditional trademarks in the European Union (Calboli and Senftleben, 2018). At the same time, it can be stated that not only in the jurisdictions belonging to the Anglo-Saxon legal family but also in the Romano-Germanic system of law, including the countries of the European Union, as well as in many Arab states, there is a gradual tendency to establish a legislative regime for the registration of non-traditional trademarks.

It should also be noted that the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), issued as Annex 1 of the Marrakesh Final Act on the WTO establishment of 15 April 1994, which entered into force on January 1, 1995, are binding on all WTO member States. The TRIPS Agreement does not replace the provisions of the main international conventions already concluded in various areas of intellectual property legal protection, especially the Convention for the Protection of Industrial Property (1883), which is the follow-up to the TRIPS Agreement. Of course, formally, the TRIPS Agreement, which defines the criteria for designations subject to

legal protection as trademarks, does not imply the possibility of individualization of objects in non-traditional ways and forms of distinction, that is, not perceived visually. Thus, under Article 15 of the TRIPS Agreement, a trademark may be any designation or any combination of designations by which goods or services of one enterprise may be distinguished from those of another enterprise; words including own names, letters, numbers, graphic elements, and color combinations, as well as any combination of such designations, may be registered as trademarks. At the same time, however, the use by commercial entities of non-traditional trademarks to individualize their goods and services is in no way contrary to the primary objectives of the TRIPS Agreement to reduce obstacles to international trade in protected intellectual property rights and to promote sufficient and adequate intellectual property protection.

Given the above, it is likely that shortly, the possibility of using non-traditional trademarks by commercial entities will appear in the international legal framework.

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