

Report Q181

in the name of the Hungarian Group
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Conditions for registration and scope of protection of non-conventional trademarks

Questions

1. *How is the scope of what constitutes a registrable trademark defined? Does that definition list specific examples of permissible types of trademark?*

According to the Act XI of 1997 on the Protection of Trade Marks and Geographical Indications (hereinafter: "Trade Mark Act" or "TMA"), trade mark protection shall be granted for any sign capable of being represented graphically provided that these are capable of distinguishing goods or services from those of other undertakings [TMA Article 1(1)].

Thus, the basic conditions, set by law, for a mark to be protected are distinctive capacity and the capability of being graphically represented. The requirement of distinctiveness is only demanded in relation to third party's goods and services, one owner may be granted trade mark protection for several (practically identical) marks, creating a "trade mark family".

2. *What categories of signs are capable of registration as a trademark? Are any categories of signs excluded from registrability as a trademark?*

According to current trade mark law, words, combination of words (including personal names and slogans), letters, numerals, figures, pictures, two- or three-dimensional forms, including the shape of goods or the packaging thereof, colours, combination of colours, light signals, holograms, sound signals and the combination of the above signs may be granted trade mark protection [TMA Article 1(2)].

Signs shall not be granted trade mark protection if it is not capable of being graphically represented.

As the above list of registrable signs is exhaustive, any other sign is excluded from trade mark protection.

An amendment of the Trade Mark Act to enter into force upon Hungary's accession to the EU, however, will make the list of the signs capable of trade mark protection non-exhaustive, thereby enabling signs not explicitly mentioned in the Act to be subject of trade mark protection.

3. *Where applications to register a colour per se or a combination of colours per se may be accepted for registration:*

In accordance with the above presentation, a colour or combination of colours may be in itself granted trade mark protection [TMA Article 1(2)].

On the other hand, practice shows that trade mark protection for a “single colour” application is only granted if acquired distinctiveness regarding the goods and services indicated in the specification is confirmed.

Examples where protection was granted:

- International Trade Mark Reg. No. 644 464 (MILKA lilac), class 30.
- Hungarian Trade Mark Reg. No. 165 225 (pink), class 17.

It is not general practice but in case of a combination of primary colours or common shades of colours (two colours) protection may be objected by virtue of lack of distinctiveness [TMA Article 2(2)(a)].

Examples:

a) Refusal for lack of distinctiveness.

In the case of international Trade Mark Reg. No. 667 827 (orange-white, classes 29, 30 and 32), a provisional refusal of protection was issued [TMA Article 2(2)(a)]. No final refusal was reached as the applicant withdrew the application.

b) Trade mark protection was granted for rare combinations of colours in the following Hungarian classes:

- Trade Mark Reg. No. 163 852 (dirty white - turquoise), class 5.
- Trade Mark Reg. No. 163 849 (blue-lilac - bright lilac), class 5.
- Trade Mark Reg. No. 163 847 (bright turquoise - dark turquoise), class 5.
- Trade Mark Reg. No. 163 156 (pink - blue), class 5.

It is worth mentioning that the Metropolitan Court of Budapest in its decision No. 1.Pk.24.972/2001/2 during the examination of the protectability of the colour “magenta” applied for established that “colours are generally used for decorative purposes, therefore, as consumers cannot in this case associate the given colour sign with the origin of the goods and services, it cannot serve its purpose of distinction in trade”.

Further, the Metropolitan Court established that “a single colour mark shall meet stricter requirements as regards protectability in order that the exclusive right acquired therewith should not give unfair advantage or unduly violate third party rights. A given colour used on special goods or services can easier be granted trade mark protection, as it prohibits a smaller group of market participants from the use thereof, similarly, a combination of colours containing several colours, because of possible variety, may also be more capable of identification, distinction in respect of the goods or services concerned.”

3.1 *In relation to goods, is such an application acceptable if it does not specify the outline, contours or proportions in which or the shape or object to which the colour is to be applied?*

If the acquired distinctiveness of the colour has been verified, yes. Naturally, a special contour, shape or outline may provide additional distinctiveness for the sign.

3.2 *Is such an application registrable in relation to services and, if so, under what conditions?*

As to services, the conditions of registrability are identical with those in respect of goods, i.e. the acquired distinctiveness of the single colour needs to be confirmed. In case of a combination of colours, taking into consideration the above detailed examination practice, it falls within the discretion of the examiner whether or not the acquired distinctiveness shall be confirmed.

The decision of the Metropolitan Court cited under point 3 sets forth that “the examination of the relation between the goods and services of the specification and the colour applied for

revealed, that the applicant intended to acquire exclusive rights for a wide range of products and services within classes 9, 16, 36, 37, 38, 41 and 42, with which he would unduly exclude third parties from the use of a given colour in their trade activity. If the sign was granted trade mark protection, third parties would be prohibited to use it in any form, i.e. as the colour of the product or on the packaging thereof, in any text, picture, in the background or with any other decorative purpose. Under such circumstances the expropriation of the colour at issue by an exclusive right would in itself seriously violate the competitors' interest, regardless of it being used more or less frequently."

3.3 *Is an applicant required to file a sample of the colour(s) applied for and/or a colorimetric reference or other colour code?*

On the basis of Article 3(1)(c) of the Decree 19/1997 (VII.1.) of the Minister of Justice on the Detailed Formality Requirements of Applications for Trade Marks and Geographical Indications (hereinafter: Decree), the trade mark application for a colour sign shall be submitted in a device or picture, with the ordinary **reproduction** of the colour(s). The current law and practice do not know the application for colour shades with reference to a colour table or colour code.

3.4 *Can the mark be considered inherently distinctive in relation to certain goods or services?*

According to current practice, no. For a single colour sign to be granted protection, distinctive capacity shall be confirmed in each case, regardless of the specification.

3.5 *Will the mark only be accepted for registration after de facto distinctiveness acquired through use has been shown?*

According to the TMA a sign shall not be excluded from trade mark protection if, either before or after the date of priority, it has acquired a distinctive character [TMA Article 2(3)]. In case of single-colour applications, the prerequisite of protectability is the confirmation of acquired distinctive capacity. Distinctive character may be acquired before or during the application procedure.

3.6 *Are certain colours denied registration on the basis that there is a need to keep them free for general use?*

Generally speaking, trade mark protection shall not be granted for primary colours, for the colours of the material of the product ("material colours") and generally and frequently used colours.

3.7 *To what extent do other visual aspects of the way the mark is used affect the assessment of the distinctiveness of the mark?*

Practice shows that these aspects have a significant effect.

4. *Where applications to register three-dimensional signs may be accepted for registration:*

4.1 *What form of representation of the three-dimensional sign is accepted as part of the application for registration?*

Under the current regulation on formalities of a trademark application any signs other than word marks shall be graphically presented by its depiction of a maximum size of 8x8 cm on a separate sheet and in addition, geometrical (stereoscopic) forms shall be represented in a form of plane delineation. According to the practice of the Hungarian Patent Office a series of photos or drawings of the three-dimensional signs are accepted as proper graphical representation.

4.2 *What are the criteria for assessing whether the three-dimensional sign can be considered capable of distinguishing the goods or services of one undertaking from those of another?*

The criteria for assessing whether the three-dimensional sign can be considered capable of distinguishing the goods or services of an undertaking from those of another are the same as for other conventional signs: both absolute and relative grounds for refusal are examined in the course of the registration procedure. Article 2, paragraph 2, letter b of the Trade Mark Act provides particularly that a sign is excluded from trademark protection if it exclusively consists of a form/shape that is determined by technical function or by the nature of the goods themselves or which represents the substantial value of the respective goods.

Furthermore, the Trade Mark Act provides that a sign being incapable of distinguishing due to its descriptive character may not be excluded from the trademark protection provided that - either before or after the date of priority - it acquired distinctiveness.

4.3 *What are the criteria for assessing whether the three-dimensional sign can be considered inherently distinctive in relation to certain goods or services?*

There are no separate criteria specific to three-dimensional signs for assessing whether these can be considered as inherently distinctive under in the Trade Mark Act. In a case decided by the Metropolitan Court of Budapest, where a registration of a three-dimensional sign had been rejected by the Hungarian Patent Office, the Court stated that a three-dimensional sign, namely a very flat, long-shaped rhombus box (with a label on one edge of the box) that is not commonly used in business for cosmetic and hygienic products can be considered as an inherently distinctive form. These two characteristics (flat, long-shaped rhombus box, label on the edge of the box) endow an individual appearance according to the Court; therefore, it was held to be capable of distinguishing the referred goods from those of other undertakings and being so it was eligible to be registered as a three-dimensional mark. The Court changed the decision of the Hungarian Patent Office and ordered to register the said mark in Hungary.

4.4 *Will the mark only be accepted for registration after de facto distinctiveness acquired through use has been shown?*

A mark may be also accepted for registration without de facto distinctiveness acquired through use provided that it fulfils the general requirements of registrability, i.e. it is capable of distinguishing the goods or services of an undertaking from those of another, could be graphically represented and is not excluded from trademark protection on the basis of any absolute or relative grounds for refusal.

4.5 *Are certain shapes denied registration on the basis that there is a need to keep them free for general use?*

There are not any provisions listing any shapes that cannot be registered on the basis that there is a need to keep them free for general use. However, the general provisions concerning the absolute grounds for refusal can be considered as such. Accordingly, no exclusive right can be obtained e.g. for shapes determined only by technical function or for a shape, which is exclusively given by the character of the concerned goods. Both of them shall be regarded then as non-distinctive.

4.6 *To what extent do other visual aspects of the way the mark is used affect the assessment of the distinctiveness of the mark?*

Other visual aspects (i.e. colours, labels, figures etc.) do affect the assessment of the distinctiveness of the mark, since according to general practice of both the Hungarian Patent Office and the competent Courts the overall impression of a mark could strengthen the distinctive capacity of a mark.

4.7 *To what extent do technical or functional considerations prevent registration?*

Technical or functional considerations prevent registration to such an extent that a sign is excluded from trademark protection if it exclusively consists of a shape that derives from the function/nature of a respective product, or that is necessary to reach the aimed technical result.

5. *Where applications to register smells may be accepted for registration:*

With regard to the fact that the current Trade Mark Act enumerates the types of signs that may be granted trade mark protection in a comprehensive and exhaustive manner and smell signs are not included, smell marks, regardless of their possible graphical representation, cannot be currently granted trade mark protection in Hungary.

Reference should be made to point 2, i.e. that according to the amended Trade Mark Act to enter into force on 1 May 2004, smell marks will be not excluded from protection.

5.1 *What form of representation or description of the smell is accepted as part of the application for registration?*

Considering point 5 and the lack of relevant practice, this question is not applicable.

5.2 *How is the capacity of the smell to function as a trademark and/or its distinctiveness assessed?*

Considering point 5 and the lack of relevant practice, this question is not applicable.

5.3 *How is the mark made available to the public on publication of the trademark application and thereafter?*

Considering point 5 and the lack of relevant practice, this question is not applicable.

6. *Where applications to register a sound mark may be accepted for registration:*

6.1 *What form of graphical representation of the mark applied for is required as part of the application for registration?*

On the basis of the TMA, sound marks may be registered in Hungary. The Hungarian Patent Office requires musical notation in the application. The musical notation constitutes a graphical representation in the trade mark application.

6.2 *Can audio recordings of a sound mark be filed as part of the application for registration?*

A tape or recording may also be attached to the application for sound marks before the Hungarian Patent Office, however, this does not substitute the musical notation constituting the graphical representation of the sound mark applied for.

6.3 *If such audio recordings are filed as part of the application for registration, how are these recordings made available to the public on publication of the trademark application and thereafter?*

The musical notation is published in the Hungarian Patent and Trade Mark Gazette at the time of the official publication of the application and at the time of registration.

The application and registration of the following sound marks in Hungary may be mentioned:

Trade Mark Application No. M 01 04155



Trade Mark Registration No. 126 602



Trade Mark Application No. M 02 03317



7. Where applications to register moving images or holograms may be accepted for registration:

7.1 What form of representation of the moving image or hologram is accepted as part of the application for registration?

The hologram is to be applied for registration in the form of a figure or picture [Decree, Art. 3(1)(c)].

Moving images cannot be registered as trade marks.

7.2 How is the moving image or hologram made available to the public on publication of the trademark application and thereafter?

Trade marks containing a hologram sign are made available to the public pursuant to a figure.

8. *How is the scope of protection of “non-conventional” trademarks assessed? In particular, are registrations for “non-conventional” trademarks treated any differently than registrations for “traditional” forms of trademark either in substantive or procedural terms?*
9. *To what extent is assessment of the registrability of “non-conventional” trademarks influenced by issues relating to enforcement and the scope of protection which should be afforded to those marks?*
10. *To what extent is the assessment of the registrability of “non-conventional” trademarks influenced by the fact that there may be a limited number of certain “non-conventional” marks (such as colours or shapes) available for general use?*
11. *To what extent is the assessment of the registrability of “non-conventional” trademarks influenced by the fact that consumers may be less used to understanding “non-conventional” marks as an indicator of origin?*

Answers to the Questions 8 to 11:

These questions are related to the requirements for trademark protection and the scope of the protection. Regarding the fact that these questions logically form an inseparable unit, we consider it reasonable and more appropriate to analyse those interconnected issues together instead of examining them separately.

The general provisions of the trademark law shall be applicable to non-conventional trademarks as well; however, special attention shall be paid to ensure that no market participants shall monopolize any sign which is generally used in the market.

In the case of the so-called “non-conventional” trademarks, the following two issues are worth highlighting: (i) the distinctive character of the mark, and (ii) the prohibition on the monopoly of commonly used marks on the basis of public interest purposes and in view of the possible violation of the fair competition rules.

In the following the conditions for trade mark registration of three-dimensional marks and colours *per se* will be discussed, due to the fact that these two types of marks are the most common on the basis of the current practice.

a) The distinctive character of marks

- a.1) Those marks shall be considered as marks having a distinctive character that indicate the origin of the goods or services relating to the class of goods for which the trade mark is protected. In this respect, trade marks do not need to provide exact information designating the manufacturer of the goods or provider of the services. It is sufficient that trade marks enable the relevant consumers to distinguish the products or services under trade mark protection from other goods or services having a different commercial origin and to have consumers conclude that all products or services under trade mark protection are manufactured, distributed or provided under the control of the proprietor of the trade mark and that such proprietor is also responsible for their quality.
- a.2) The above-mentioned general aspects of the assessment of the distinctive character of trade marks do not differ from those elements concerning the so-called “non-conventional” trade mark categories.

However, strict requirements should be used in the course of examining whether the given “non-conventional” trade mark has a distinctive character.

The underlying reason is that the perception of consumers differs in the cases of trade marks having the shape and color of their product from the cases involving wordmarks. While consumers are used to the fact that the purpose of word trade marks are to identify the product, this is not necessarily the case if the trade mark forms an inseparable unit with the exterior of the goods.

The current practice of the European Court of First Instance can be regarded as well-founded and to be followed, which practice provides a theoretical statement in connection with the shape of products, in that a product's shape may be registered as a Community trade mark **“provided that the shape displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking”** (Court of First Instance, Case No. T-119/00, Procter & Gamble v. OHIM, Paragraph 71). Although the judgement is related to a 3D trade mark covering shape of a product, we consider the above principle applicable with respect to all types of non-conventional trade marks.

An insignificant difference in itself cannot be recognised as a distinctive character. **The subject matter of a trade mark protection shall only be such sign that shows significant creativity and thus displaying an obvious dissimilarity or a mark/shape provided that it is the particularity of the given enterprise.**

It should be noted that a shape does not have a distinctive character if it is the obvious variant of the standard shapes of such products and is incapable of designating the origin of the product. A mark consisting of combinations of the obviously typical features of such products shall not enjoy trade mark protection.

The given form is required to be capable for indicating its origin and differentiating itself from other products. Based on these criteria, the question arises as to how shall the standard or common shapes found in the particular kinds of products be defined. A mere variation of forms still **using the standard shapes** would be incapable of enabling consumers to identify the product as manufactured by a specific enterprise, with the exception, if due to the use, the specific shape can exclusively be associated with a specific enterprise. Accordingly, if consumers are used to a wide range of shapes in the market of that product, a new form in itself is not sufficient to fulfill the function of trade marks, namely, to indicate the origin of the product.

The sole fact that the trade mark applicant is the first one on the market using the sign does not establish in itself a basis for trade mark protection. Naturally, also in the cases of “non-conventional” trade marks, the regulations relevant to the distinctive characteristics acquired through use are to be applied.

b) The harm to public interest and market competition with respect of the scope of the protection

b.1) Trade mark protections, which may last without time limitation, given to signs for their colours and shapes lacking distinctive character would unreasonably restrict the market competition.

If an undertaking enjoys trade mark protection for its product having an average and necessary form, for an unrestricted and extendable period of time, such a circumstance would conflict with the purpose of trade mark protection. In the case of the shape of products, such protection would be beyond the scope of protection that is granted on the basis of industrial design rights.

With regard to these, the three-dimensional trade marks should receive increased scrutiny when examining whether they possess a distinctive character, with special attention paid to the fact that this could lead to other competitors becoming prevented from using obvious, everyday forms. By establishing the distinctiveness, an adequate balance shall be met, on the one hand regarding the claim for trade mark protection, and on the other, concerning the requirement of avoiding an illegitimate monopoly of an everyday product-shape.

We refer, as an example, to the trade mark protection granted to pharmaceutical products where this aspect shall be particularly considered. Due to their small size and number, with hardly any noticeable differences, any shape of such medicine gaining a monopoly through the request of a single market participant would cause an unsubstantiated disadvantage to the other competitors, and would also harm the interest of patients and consumers. From the point of view of the public interest, it is especially relevant for the pharmaceutical products that any undertaking through trade mark protection cannot monopolize certain marks and shapes.

- b.2) If a simple, everyday form, thus without any distinctive characteristics enjoys trade mark protection, then the trade mark protection would prevent in the future other competitors from using identical or similar shapes - in any colour - without infringing the trade mark protection granted. If the mark does not have a distinctive character, it would be **easy to establish the other products' confusing similarity with this trade mark**. With regard to the above, very restricted possibilities would be left for the creation and use of different shapes.

Trade mark protection shall not be used to such an extent whereby the possibilities of the competitors would be restricted in shaping the exterior of their products. In the German legal practice this is expressed by the concept of the "*Freihaltebedürfnis*" requirement.

Regarding the necessity of maintaining the free use of shapes and colours on products, it should be noted that the reasons behind the absolute grounds for refusal of protection are in line with the purpose of the legislation, namely, not to provide any market participant with an exclusive right through which the competition within the relevant market of that product or service would be restricted.

Proposals for the further legal harmonizations

National laws are necessary to be harmonized for the purpose of: (i) unifying the scope of signs that may be subject to trade mark protection, and (ii) the technical conditions required for the application and publishing of the application.

The legal harmonization shall be regarded as completed with respect to requirements for trade mark protection (i.e., the requirement of distinctive characteristic) once these are defined in applicable legislative acts. Further, on the basis of such unified legal regulations, we find it justifiable to establish also a unified legal practice or jurisprudence according to the practice of the European Court of First Instance.

Summary

According to Act XI of 1997 on the Protection of Trade Marks and Geographical Indications, any mark which can be graphically represented and is suitable for distinguishing goods and services those of other undertakings can be the subject matter of trade mark protection.

Based on the present Hungarian trade mark law, the mark eligible to trade mark protection shall be a word, a combination of words, including personal names and slogans; a letter, a number; a diagram, a picture; a two- or three-dimensional form, including the shape of the goods or packaging; a color, a combination of colors, a light signal, a hologram; a sound, as well as any combination of the individual signs listed above. Due to this exhaustive list, other types of signs are excluded from trade mark protection. However, an amendment of the Trade Mark Act, which will come into force when Hungary joins the European Union (1 May 2004), will provide a list of examples of marks that may be subject to trade mark protection, and thus ensuring the possibility of trade mark protection for those marks that are not listed specifically in the Trade Mark Act.

In the case of the so-called “non-conventional” trade marks, the following two issues are worth highlighting: (i) the distinctive character of the mark, and (ii) the prohibition on the monopoly of commonly used marks on the basis of public interest purpose and in view of the possible violation of the fair competition rules.

The general aspects of the assessment of the distinctive character of trade marks do not differ from those elements concerning the so-called “non-conventional” trade mark categories. However, strict requirements should be used in the course of examining as to whether the given “non-conventional” trade mark has a distinctive character.

The underlying reason is that the perception of consumers differs in the cases of trade marks having the shape and color of the product from the cases involving word marks. While consumers are used to the fact that the purpose of word trade marks are to identify the product, this is not necessarily the case if the trade mark forms an inseparable unit with the exterior of the goods (e.g. form and color).

The current practice of the European Court of First Instance can be regarded as well-founded and to be followed, namely, that trade mark protection can be granted to “non-conventional” signs if such sign displays certain features that are sufficiently unusual and arbitrary to enable the relevant consumers to recognise the product, purely on the basis of its appearance, as emanating from a specific undertaking.

Trade mark protections, which may last without time limitation, given to signs for their colours and shapes lacking distinctive character would unreasonably restrict the market competition.

Résumé

Selon la loi No. XI de 1997 sur la protection des marques et des indications géographiques, tout signe susceptible d'une représentation graphique peut être protégé en tant que marque à condition qu'il soit propre à distinguer les produits ou les services d'une entreprise de ceux d'autres entreprises.

Selon la loi sur les marques les signes qui peuvent être protégés en tant que marques sont: les mots, les combinaisons de mots, y compris les noms de personnes et les slogans, les lettres, les chiffres, les formes à deux ou trois dimensions, notamment la forme des produits ou de leur emballage, les couleurs, les combinaisons des couleurs, les signaux lumineux, les hologrammes, les signaux sonores, et les combinaisons des signes ci-haut mentionnés.

Considérant cette articulation d'autres signes sont exclues de la protection. La modification de loi sur les marques, qui entrerait en vigueur avec l'accession de la Hongrie à l'Union Européenne, prévoit une articulation exemplificative des signes qui sont susceptibles à la protection, en assurant la protection aux signes non mentionnés concrètement. Au cas des marques “non-conventionnelles” il est nécessaire de signaler deux questions, notamment, (i) le caractère distinctif des signes et (ii) la prohibition de la monopolisation des signes génériques, tenant compte de l'intérêt public et de l'atteint éventuel de la compétition.

Les aspects de l'appréciation du caractère distinctif ne sont pas différents par rapport aux marques “non-conventionnelles”. Mais en établissant des exigences très élevées, il est nécessaire d'examiner avec précision le caractère distinctif d'une marque “non conventionnelle”.

La raison y est que la perception des consommateurs n'est pas identique par rapport à une marque composée de la couleur ou de la forme d'un produit et par rapport à une marque composée de mots. Bien que les consommateurs sont habitués à ce qu'une marque verbale sert à l'identification du produit, ce ne peut pas être nécessairement le cas quand une marque est inséparable de la présentation du produit (par exemple une couleur ou une forme).

Nous pensons bien fondé et à persister la jurisprudence du Tribunal de Première Instance des Communautés Européennes, selon laquelle la protection d'une marque “non-conventionnelle”

peut être accordée si la marque contient un élément qui est suffisamment inhabituel et arbitraire que les consommateurs peuvent identifier à la base de son apparence un produit comme celui d'une entreprise définie.

La protection accordée à la couleur ou la forme du produit, n'ayant pas de caractère distinctif limiterait pour une période quasi illimitée la compétition d'une manière qui ne semble pas être justifiée.

Zusammenfassung

Entsprechend des Gesetzes Nr. XI. von 1997 über den Schutz von Marken und geographischen Warenkennzeichen ("Markengesetz") kann jedes Zeichen einen zeichenrechtlichen Schutz genießen das sich graphisch darstellen lässt und geeignet ist, eine Ware oder Dienstleistung von den Waren oder Dienstleistungen anderer zu unterscheiden.

Gemäss der geltenden Regelung, können Zeichen Markenschutz erlangen, nämlich ein Wort bzw. eine Wortzusammensetzung, einschliesslich Personennamen und Slogans, ein Buchstabe, eine Zahl, eine Abbildung, ein Bild, eine flache oder räumliche Gestaltung, einschliesslich die Form der Ware oder derer Verpackung, eine Farbe, eine Farbzusammenstellung, ein Lichtzeichen, ein Hologram, ein Ton, sowie eine Zusammensetzung dieser aufgezählten einzelnen Zeichen sein. Hinsichtlich der obengennanten taxativen Liste sind alle anderen Kennzeichen vom Markenschutz ausgeschlossen. Laut dem novellierten Markengesetz, das gleichzeitig mit dem Beitritt zur Europäischen Union gelten wird, sind die, für zeichenrechtlichen Schutz geeignete Kennzeichen nur beispielsweise aufgeführt, damit die Möglichkeit auch für die nicht in dem Gesetz angeführten Kennzeichnungen gegeben sei, Markenschutz zu erhalten.

Bezüglich der sog. "nicht-konventionellen" Marken sollten zwei Aspekte betont werden: (i) die Unterscheidungsfähigkeit eines Kennzeichnens und (ii) das Verbot der Monopolisierung der, im allgemeinen verwendeten Kennzeichen unter dem Aspekt einer eventuellen Verletzung der öffentlichen Ordnung und Wettbewerb. Die Beurteilungsaspekte der Unterscheidungsfähigkeit sind dieselben bei den konventionellen und den nicht-konventionellen Marken. Trotzdem sollte die Unterscheidungsfähigkeit einer "nicht-konventionellen" Marken aufgrund höheren Erfordernissen beurteilt werden. Der Grund dafür ist, dass die Perzeption seitens der Konsumenten im Fall einer Marke, die aus dem Form oder Farbe der Waren besteht oder im Fall einer Wortmarke nicht identisch ist. Die Konsumenten sind daran gewöhnt, dass die Wortmarken zur Identifizierung eines Produktes dienen, das kann aber nicht unbedingt bestätigt werden, wenn die Marke wesentlicher Bestandteil des Äusseren vom Produkte ist. (z.B. Form oder Farbe). Wir finden die Spruchpraxis des Gerichtes erster Instanz der Europäischen Gemeinschaften begründet und zu befolgend, nämlich, dass der Schutz den sog. "nicht-konventionellen" Marken nur dann anerkannt werden kann, wenn die Kennzeichnung auch solche Elemente beinhaltet die ausreichend ungewöhnlich und spezifisch sind, aufgrund deren die Konsumenten ausschliesslich nach dem Äusseren des Produktes das Produkt als das von einem bestimmten Unternehmen identifizieren können.

Der, ausschliesslich für die Farbe oder Form des Produktes anerkannte Markenschutz, der zeitlich unbegrenzt sein kann, wurde sonst den Wettbewerb ohne Grund beschränken.