

matopoeia or a sequence of musical notes without further clarification, as these lack sufficient precision and clarity, which makes it impossible to determine the scope of protection sought.⁷⁰¹ However, what is sufficient is a stave divided into bars and providing a clef, musical notes and rests with exact notation of their relative value, duration and pitch.⁷⁰² Sonograms have initially been declined but are now accepted by OHIM if they are accompanied by an MP3 file.⁷⁰³

5.2.5.4 Abstract Colour Marks

Even though ECJ case law constantly approves of abstract (and sometimes of concrete) distinctiveness of abstract colour marks per se,⁷⁰⁴ the problematic issue with respect to registrability of abstract colours rests with graphical representation. In case of single abstract colours, the requirement of graphical representability can be met by a description in words coupled with a sample. In case sample and description do not constitute a clear, precise, self-contained, easily accessible, intelligible, durable and objective representation, this can be remedied by designating the colour on the basis of an internationally recognised code such as the Pantone code.⁷⁰⁵ With respect to marks consisting of two or more abstract colours, proper graphical representation can only be approved if, in addition to the above requirements, the application contains a systematic arrangement of the colours specifying how they are joined “in a predetermined and uniform way”.⁷⁰⁶ Only in this case is the necessary degree of certainty for others in what they need to avoid in order not to infringe achieved.

701 ECJ, judgment of 27 November 2003, Case C-283/01, [2003] ECR I-14313, *Shield Mark BV v. Joost Kist h.o.d.n. Memex – Shield Mark/Kist*, para.s 59-61.

702 *Ibid.*, para. 62.

703 *Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Tarzans berühmter Schrei.

704 See above at 5.2.3.3; ECJ, above fn. 636 – *Libertel* and above fn. 661 – *Heidelberger Bauchemie*.

705 ECJ, above fn. 636 – *Libertel*, para.s 36-38.

706 ECJ, above fn. 661 – *Heidelberger Bauchemie*, para. 33. The German Federal Supreme Court (BGH) decided accordingly in *Farbmarke gelb/grün II*, judgment of 5 October 2006, Case I ZB 86/05, being concerned with the undelienated colour combination green/yellow and accordingly denying sufficient graphical representation.

5.2.5.5 Value Implications

Unlike non-descriptiveness and distinctiveness, graphical representation is a “yes or no” issue – it either can be fully approved of or not at all. The same must apply, accordingly, for the influence on brand value of this issue.

Hence, existing graphical representability should be awarded a five point score whereas failing graphical representability, i.e. failing trade mark protection, would result in a one or zero point score, depending on whether or not the issue would be decisive enough to be a deal breaker.⁷⁰⁷

5.2.6 Findings – Relation to Brand Value

In case any one of the absolute grounds for refusal of trade mark protection discussed previously is non-existent, protection as a registered trade mark must fail (save in the event of acquired distinctiveness), with the implication that the respective brand needs to obtain and defend its market position without the strong means of trade mark protection – a means both marking out an area in which the proprietor enjoys exclusive freedom to operate the sign(s) at hand and of defending this area by means of developed legal mechanisms.

This proves to be particularly negative for young brands. They have not yet had the chance to gain appreciable internal and external market share and recognition or identity and image respectively – a process which takes time and effort. Hence, they consist of little more than the devices, i.e. the signage, themselves, which would be, in case of failing trade mark protection, free for the public to use (that is according to trade mark law).

In case distinctiveness, non-descriptiveness and graphical representation are approved, their relation to brand value depends on whether they are simply “yes or no” issues, such as the latter, or whether there exists a scale, e.g. from low via average to high distinctiveness. As a general rule, the higher

707 For more information about the meaning of these scores cf. above at 4.1.2.1. Existing graphical representability is very likely to not be worth the maximum score of six points, as this score would mean that the respective issue is so important that the valuation client would do anything to acquire/licence in etc. the asset. Graphical representation is, however, merely one of several requirements for trade mark protection the failure of which has more intense negative effects than its existence has positive ones.