

THE DISTINCTIVENESS OF COLOUR TRADEMARK: A EUROPEAN AND RUSSIAN EXPERIENCE

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ABSTRACT

The legal status of non-traditional trademarks stirs up enormous controversy owing to the specific nature of these kinds of trademarks and the uncertainty of juridical regulation. The need to agree to a united approach of regulation is dictated by the existing imbalance between the interests of business society and government authorities. The author seeks to reveal similarities and differences with respect to the approach of judicial and administrative bodies as to the registration of non-traditional trademarks - colour trademarks in two different jurisdictions (EU and Russia). The relatively recent case law in both jurisdictions illustrate an apparent reluctance to grant the status of colour trademark. Further, the concept of acquired distinctiveness is still a stumbling block in the way of successful registration of colour trademarks due to complexity in proving the same. For the resolution of the situation at hand, legislative and judicial bodies have to adhere to one-for-all approaches concerning non-traditional trademarks, with any other approach leading to legal uncertainty, thereby negatively impacting intellectual property as a whole.

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INTRODUCTION

Beyond a reasonable doubt, the 21st century is a time when the legal protection of intellectual property rights has, for many reasons, become increasingly relevant.¹ The range of the objects of intellectual property, which should be subject to legal protection has extended. Thus, the business community makes all possible efforts to protect their rights by means of registration and subsequently, obtaining monopoly rights on these objects.² The technological development and speedy progress of particular areas of science like the perfumery industry (chemistry),³ engineering⁴ and information technology⁵, will undoubtedly lead to the creation of new non-conventional trademarks. Hence, the legal regulation of this issue should be clear and consistent.

The legislative and judicial bodies of different countries throughout the world demonstrate quite a controversial approach in relation to this matter. On the one hand, the burning need of protection of non-traditional trademarks is emphasised by authorities.⁶ While on the other, throughout the years, the courts of different jurisdictions as well as the regulatory bodies responsible for the registration of trademarks, have expressed reluctance in their decisions for registration of new non-conventional trademarks because of the non-fulfillment of the stated legal requirements for registration.⁷ Obviously, such an approach should be deemed inappropriate because this unwillingness would lead to the inability of the business society to secure their rights from illegal actions of third parties. For the same reason, the requirements for the registration must be feasible and the grounds for the rejection of registration have to be unified. Otherwise, the legal uncertainty will be a cause of economic collapse.

¹ Shahid Alikhan & Raghunath Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century* (4th ed. 2009).

² Andrew Griffiths, *Trade Mark Monopolies in the Digital Age*, 2 IPQ 123-151 (2017).

³ Agnieszka Machnicka, *The Perfume Industry and Intellectual Property Law in the Jurisprudence of the Court of Justice of the European Union and of National Courts*, 43(2) IIC 123, 123-158 (2012).

⁴ INNOVATION, COMMUNICATION AND ENGINEERING 731 (Teen-Hang Meen et al. eds., 1st ed. 2014).

⁵ Vakul Sharma, *Information Technology Law and Practice* 505 (3 ed. 2011).

⁶ Qian Zhan, *The International Registration of Non-Traditional Trademarks: Compliance with the TRIPS Agreement and the Paris Convention*, 16(1) WORLD TRADE REV. 111, 111-140 (2017).

⁷ Case C-218/01, *Henkel KGaA v Deutsches Patent- und Markenamt*, 2004 E.C.R. I-1725; Case C-173/04, *P Deutsche SiSi-Werke v OHIM*, 2006 E.C.R. I-551; *Case C-49/02, Heidelberger Bauchemie GmbH*, 2004 ECR I-6129.

The present article presents a brief outline of the current practice concerning the registration of colour trademarks by the regulatory bodies in two different jurisdictions: Europe and Russia.

EUROPE

I. LEGISLATIVE FRAMEWORK

The legislative framework for trademark regulation was established at the international level. This included: Paris Convention for the Protection of Industrial Property 1883⁸, Madrid Agreement Concerning the International Registration of Marks 1891⁹ and Madrid Protocol 1989¹⁰ thereto, Trademark Law Treaty 1994¹¹, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹², and Singapore Treaty on the Law of Trademarks 2006.¹³

As far as concerns surrounding the legal regulations of the European Union go, there are a few essential legislation which provide the basis for the regulation of legal relations in connection to the trademarks: the Directive (EU) 2015/2436¹⁴ (repealing the Directive 2008/95/EC¹⁵) and the amended Community Trademark Regulation (EU) 2015/2424¹⁶ (amending the Council Regulation (EC) no 207/2009¹⁷ on the Community trademark, and the Commission Regulation (EC) no 2868/95¹⁸ implementing the Council Regulation (EC) no 40/94¹⁹ on the Community trademark) and the Regulation (EU) 2018/626²⁰.

⁸ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 305.

⁹ Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389.

¹⁰ Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, *adopted* June 27, 1989, [2001] A.T.S. 7.

¹¹ Trademark Law Treaty, Oct. 27, 1994, 2037 U.N.T.S. 35.

¹² Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹³ Singapore Treaty on the Law of Trademarks, Mar. 27, 2006, [2009] A.T.S. 9.

¹⁴ Directive 2015/2436, 2015 O.J. (L 336) 1 (EU).

¹⁵ Directive 2008/95/EC, 2008 O.J. (L 299) 25.

¹⁶ Regulation 2015/2424, 2015 O.J. (L 341) 21 (EU).

¹⁷ Council Regulation 207/2009, 2009 O.J. (L 78) 1 (EC).

¹⁸ Commission Regulation 2865/95, 1995 O.J. (L 303) 1 (EC).

¹⁹ Council Regulation 40/94, 1994 O.J. (L 11) 1 (EC).

²⁰ Commission Implementing Regulation 2018/626, 2018 O.J. (L 104) 37 (EU).

Additionally, in 2002, the CJEU handed down its landmark decision in *Sieckmann*²¹, and established seven compulsory criteria which must be fulfilled for the registration of trademarks (legal doctrine terms these requirements, ‘*Sieckmann* criteria’)²².

II. INHERENT DISTINCTIVENESS

As it is stipulated in Article 15(1) of TRIPS, there are two types of distinctiveness which can be indicated: inherent and acquired. Starting with inherent distinctiveness, the cases decided by the CJEU demonstrate that colour can have inherent distinctiveness, but simultaneously, the circumstances for the recognition of inherence should be exceptional.²³ In *Libertel*, the Court clarified that a colour in pure form may be inherently distinctive in the case of the goods being very rare, and the market where the goods are realised is very peculiar.²⁴

The same position was established by the EU IPO (OHIM) in *Orange Personal Communications Services*, where the Court pointed out that an exclusive shade of colour could have an inherent distinctiveness only in the event of representation of unique kinds of products or services.²⁵ A good example of this statement is the *Christian Louboutin*²⁶ case, where the regulatory authorities admitted that the red colour was inherently distinctive for the outsole of womens’ shoes. However, it was highlighted that the colour had become an integral part of this line of shoes, and the applicant sought the protection of the red colour as a design characteristic rather than the colour in itself.

It is important to note that, in *Linde AG*²⁷, the CJEU gave an affirmative statement that there is no differentiation between any kind of trademarks in connection with their distinctiveness.²⁸ Nevertheless, an applicant who is going to register a colour trademark usually tries to prove the acquired distinctiveness because the process of proving an inherent distinctiveness is quite complicated and a successful result is hardly probable.

²¹ Case C-273/00, *Sieckmann v Deutsches Patent- und Markenamt*, [2002] ECR I-11737.

²² *Id.*

²³ Jekaterina Kudrjavceva, *Issues Surrounding Registration of Colour Trademarks*, 9 R.G.S.L. RESEARCH PAPERS, 2-62 (2012).

²⁴ Case C-104/01, *Libertel Groep BV v Benelux-Merkenbureau*, [2003] ECR I-3793.

²⁵ Case R 7/97-3, *In Re Orange Personal Communication Service Ltd.*, [1998] ETMR 337.

²⁶ Case C-163/16, *Louboutin v Van Haren Schoenen BV*, *ECLI:EU:C:2018:423*.

²⁷ Joined Cases C-53/01 to 55/01, *Linde AG (C-53/01)*, *Winward Industries Inc (C-54/01)* and *Rado Uhren AG (C-55/01)*, [2003] ETMR 78.

²⁸ *Id.*

III. ACQUIRED DISTINCTIVENESS

The legislative rules, which are determined in Article 4(4) of the new TMD no. 2015/2436 regarding acquired distinctiveness, are similar to the rules specified in Article 3(3) of the TMD no. 2008/95/EC but for one exception. The new provisions of the TMD 2015/2436 stipulate that, in invalidity cases, the applicants will be authorised to submit evidence of acquired distinctiveness from the date after the trademark registration. In comparison, the TMD no. 2008/95/EC gave applicants the right to submit evidence which had been collected before the date of application of the trademark. From a legal perspective, it means that the chance to overcome the arguments for invalidation has significantly increased due to the ability to obtain more evidence for the applicants' benefit.²⁹

One of the most important issues in respect of acquired distinctiveness is the public evaluation. In *Windsurfing Chiemsee*,³⁰ the Court formulated the general principle which should be used as a legal basis for defining a trademark's acquired distinctiveness: the respective group of individuals or at a minimum, a substantial part of them, should recognise that the product derives from a certain enterprise due to the trademark.³¹ It is correctly stated in the jurisprudence theory that the group of individuals can be varied according to their awareness about the product, educational attainment, etc.³² As can be seen in *KUKA Roboter*,³³ the public might consist of technical staff, who are employed in factories,³⁴ or as was stated in *Procter & Gamble*,³⁵ it could be simply informed average buyers.³⁶ Moreover, the means of proving the ascertainment of a product's acquired distinctiveness can be different³⁷ and a case law³⁸ also shows that an opinion poll can be adequate evidence, despite

²⁹ *The Community Trade Mark - what changes lie ahead?*, LEXISNEXIS BLOG (Jan. 12, 2016), <http://blogs.lexisnexis.co.uk/wipit/the-community-trade-mark-what-changes-lie-ahead>.

³⁰ Joined Cases C - 108/97 & 109/97, *Windsurfing Chiemsee Produktions und Vertriebs GmbH v Boots und Segelzubehor Walter Huber*, [1999] ECR I-2779.

³¹ *Id.*

³² Martin Senftleben, *The Trademark Tower of Babel - Dilution Concepts in International US and EC Trademark Law*, 40 IIC, 45-77 (2009).

³³ Case T-97/08, *KUKA Roboter GmbH v OHIM*, [2010] ECR II-5059.

³⁴ *Id.*

³⁵ Joined Cases C-468/01 P to 472/01 P, *Procter & Gamble v OHIM*, [2004] ECR I-5141.

³⁶ *Id.*

³⁷ Kudrjavceva, *supra* note 24, at 24-26.

³⁸ Case C-353/03, *Société des produits Nestlé SA v Mars UK Ltd*, [2005] ECR I-6135.

the fact that sometimes these sociological surveys can misinform due to the incorrectness of the way a question is put.

The moderate buyer's level of attention has been noted to change in conformity with the type of products or services that the buyer considers.³⁹ While the consumer's attention towards the colour of detergent for a dishwashing machine is not likely to be very close,⁴⁰ the attention to the colour of a piece of furniture would be notably higher.⁴¹

Moreover, the process of assessment of acquired distinctiveness does not include only the opinion of the public. Hence, the regulatory and judicial bodies should consider 'other factors, such as the way the colours are arranged or applied to the goods.'⁴² The case law explained that the acquired distinctiveness can be proved by means of the popularity of a mark within a certain geographical territory, the opinion of respective business representatives, like trade associations or chamber of commerce or just the temporality of a mark's use.⁴³

RUSSIA

I. LEGISLATIVE FRAMEWORK

The legal reform of civil legislation in post-Soviet Union countries⁴⁴ entailed them to revise the approach towards private property, civil law and subsequently, intellectual property. The legal possibility to register non-traditional trademarks appeared spontaneously in the legislations of those countries. The first legal act after the fall of the Soviet Union was the Law of the Russian Federation of September 23, 1992 No. 3520-1 "On trademarks, service marks and appellations of origin of goods", which currently has no legal power. The fourth part of the Russian Civil Code, entered into force on January 1, 2008, still remains the key legal act that sets forth most of the questions on intellectual property law.

³⁹ DAVID BAINBRIDGE, *INTELLECTUAL PROPERTY* 653 (7th ed. 2009).

⁴⁰ See *Procter & Gamble*, [2004] ECR I-5141.

⁴¹ Case R 799/2004-1, *Inter-IKEA Systems v Office for Harmonisation in the Internal Market*, para 18.

⁴² Charlotte Schulze, *Registering Colour Trade Marks in the European Union*, 25(2) E.I.P.R., 55-67 (2003).

⁴³ Joined Cases C - 108/97 & 109/97, *Windsurfing Chiemsee Produktions und Vertriebs GmbH v Boots und Segelzubehor Walter Huber*, [1999] ECR I-2779.

⁴⁴ JURGITA MALINAUSKAITE, *MERGER CONTROL IN POST-COMMUNIST COUNTRIES: EC MERGER REGULATION IN SMALL MARKET ECONOMIES* 41 (2010).

Unfortunately, a closer examination shows that even relatively new legislation does not contain comprehensive regulation of non-traditional trademarks. The legal framework for the registration of the colour trademarks is Article 1482 of the Civil Code of the Russian Federation. It stipulates that verbal, pictorial, volumetric and other designations or combinations thereof may be registered as trademarks. Also, the trademark can be registered in any colour or colour combination.

The Russian Federal Service for Intellectual Property («Rospatent») is the national governmental body in charge of intellectual property and responsible for the registration of trademarks.⁴⁵ The chamber for patent disputes is a structural subdivision of Rospatent. The Board of the Chamber makes its expert opinion on the case, and it is attached to the final decision of Rospatent. It is the decision that is subject to challenge.

Due to the lack of case law as well as sufficient legislative regulation, the Russian practice does not clearly show the difference between acquired and inherent distinctiveness of colour trademarks. Nevertheless, the current practice can be divided into two categories: successful and unsuccessful cases.

II. INHERENT DISTINCTIVENESS

In Russia, till now, there have been no cases where a colour trademark has been granted because of the inherent distinctiveness of a sign. There can be many reasons for the same and as mentioned above, the most obvious is the difficulty to prove inherent distinctiveness. Also, relative novelty of existence of colour trademarks in Russia presumes that courts and regulatory bodies are cautious and reluctance with regard to the granting of a colour trademark status. Thus, it is to be hoped that we will be able to observe some examples of them in the near future.

III. ACQUIRED DISTINCTIVENESS

In Russia, all the rare registered colour trademarks possess an acquired distinctiveness. Generally, all cases where Rospatent considered the question whether to grant the status of trademark or to reject it, can be split into two categories: successful and unsuccessful cases.

⁴⁵ UNITED NATIONS: ECONOMIC COMMISSION FOR EUROPE, INTELLECTUAL ASSETS: VALUATION AND CAPITALIZATION 106 (2003).

There are few registered colour trademarks registered in the Russian Federation. For instance, the pink colour in relation to bleaching preparations belongs to the notorious 'Vanish'. The green colour in respect of banking services was registered in 2015 in the name of PJSC 'Sberbank'. The red colour in relation to telecommunications services was registered in 2016 in the name of PJSC 'MTS'. In 2016, PJSC 'Gazprom' registered the blue colour for a whole list of different types of goods and services while Tiffany acquired the trademark for the turquoise colour Pantone1837.

For the successful registration of a colour as a trademark, there are general requirements which must be fulfilled by the applicant. Generally speaking, they are similar to the European requirements. The corresponding colour should be firmly associated with specific products or activities of a company. The registration of colour trademarks is allowed only on the condition of providing convincing evidence of the acquisition of distinctiveness as a result of prolonged and intensive use. All evidence must be submitted to Rospatent by the applicant, and in each case, the issue of registration is resolved individually. The terms during which the applications were considered in Rospatent also testify to the difficult registration of these trademarks. Thus, the trademark of Sberbank was registered for three years and eight months and the registration of the MTS trademark was for two years.

An example of a successful case in acquiring a colour trademark status is by Sberbank, which obtained a colour trademark for green colour matching Pantone 349.⁴⁶ All branches of Sberbank are decorated in green; bank employees wear either green ties for men or headscarves for women and its website is designed in green (www.sbrf.ru). Sberbank spent a large amount of money on advertising its services. In addition, Sberbank registered a large number of verbal and visual trademarks in which the green colour is fully or partially used. For the obtaining of a colour trademark, Sberbank conducted a sociological survey on the results of which it was found that 97% of respondents replied that they knew Sberbank well by its green colour.⁴⁷

Initially, Rospatent stated that a colour could not perform the function of a trademark, since green is used by many legal entities and could not individualise the services of a particular legal entity. Simultaneously, the governmental body testified that consumers associated the

⁴⁶ *GREEN SERVICES OR "COLOR REVOLUTION"*, GORODISSKY (May 26, 2006), <https://www.gorodissky.com/publications/newsletters/green-services-or-color-revolution/>.

⁴⁷ *Id.*

color green with the services of Sberbank. Protection was sought only in respect of one green colour (Pantone 349), while in practice, different shades of green were used.⁴⁸ In the light of this issue, Rospatent requested a detailed description of the potential trademark with the words characterising this green colour.

It was noted that green is one of the primary colours in the spectrum. Green refers to the colours of the spectrum with a wavelength of approximately 500 - 565 nanometers, that is, colours characterised by a very narrow range.⁴⁹ Additionally, it was also argued that the choice of colour was due to positive associations formed by this colour-green: the colour of life, it is inherent in most plants and it has a calming effect on the human psyche. According to common practice, it has a permissive character - the green colour of traffic lights. Finally, Rospatent concluded that the trademark is the green colour Pantone 349 and when this colour was shown to respondents, they associated this colour with banking services provided by Sberbank.⁵⁰ Ultimately, Sberbank won this legal battle.

MTS received the right to a trademark of red colour in the market of services of mobile communication. Rospatent registered a red colour with the trademark corresponding to Pantone 485 on the basis of the application by MTS for goods and services in the field of mobile radiotelephone communication and telematics communication services in the territory of the Russian Federation. MTS invested significant resources into the development and recognition of its own brand, which had a direct impact on the capitalisation of the company and the strengthening of its reputation. Registration of a branded red colour of a certain shade as a trademark of MTS in the field of mobile communications was a logical continuation of the strategy of protecting the MTS brand. The results of a sociological study commissioned by MTS in 2013 showed that the red colour in the sphere of mobile communication services is widely known in Russia and, by default, is associated with MTS.

In contrast, unsuccessful cases where an applicant gets a refusal from the registered body is a significantly more widespread practice. A good example is the landmark case between the famous British-Dutch oil and gas company 'Shell' and the Russian limited liability company

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

‘Petrovsknefteprodukt’.⁵¹ The latter owns a tank farm and 13 gas stations in three districts of the TRANS-Baikal territory, including the Federal highway Irkutsk-Chita. According to the British-Dutch company, the colour design of the ‘Petrovsknefteprodukt’ filling stations illegally used two yellow and one red stripe on the roof over the fuel dispensers. Moreover, the Russian company used a heart sign with a unit, similar to the symbol Shell – coquille, on the stele with information about the price of fuel.

Petrovsknefteprodukt questioned the legality of granting legal protection to these trademarks, pointing out that the combination of colours did not have a distinctive ability, since it did not bear individualising features. Also, the Russian company stated that the number of Shell filling stations located in the territory of the Russian Federation was less than 1% of all filling stations located in Russia. In the TRANS-Baikal territory, there were no Shell filling stations. In addition, Petrovsknefteprodukt indicated that such colours in the design of their gas stations were used by PJSC ‘Rosneft’ and PJSC ‘Gazprom’; therefore, Shell could not claim the uniqueness of its trademark.

Shell’s arguments were based on several crucial facts. First, paragraph 1 of Article 15 of the “Agreement on trade-related aspects of intellectual property rights” expressly provides for the possibility of registration as a trademark, a combination of colours and confirms the existence of such combinations of distinctive ability. Second, the recognisability of the Shell trademark by the consumers is associated not only with the large-scale use of the trademark in the territory of the Russian Federation, but also with the using of the disputed trademark in the other countries. The specified combination of colours of the Shell brand symbols have been known since 1915, while the first Shell gas station appeared in Russia in 1998.

Shell invested a huge amount of money in the promotion of the trademark, thereby it was possible to increase the recognition of the colour combination as the trademark. Shell represented evidence which showed that this fact was confirmed by the conducted researches, in particular, a sociological survey.⁵² According to the results of the survey, the disputed trademark was known to 65% of consumers living in the territory of the Russian Federation.

⁵¹ Shell Brands Intl’. AG v Petrovsknefteprodukt LLC., A78-6764/2017 (RUSS. CT. INTELL. PROP. RTS. Feb. 06, 2018).

⁵² *Id.*

In finality, the court rendered its decision in favour of Shell, making this precedent the first case when the violation of exclusively colour trademarks was recognised in Russia.

The second case touches the situation when Rospatent refused the registration of the yellow colour trademark of LLC 'Russian Caviar' for the retail class.⁵³ There was no evidence that the manufacturers only applied yellow colour on the lid of cans with caviar and that consumers perceived yellow as a trademark and not a packaging element.⁵⁴ The arguments of the applicant's representative that the yellow colour of the lids was able to individualise the goods of the applicant due to the traditional color difference of the lids of the packages with caviar depending on the type of sturgeon, were deemed as inappropriate.⁵⁵ The reason was that it did not indicate that the applicant was the only manufacturer using yellow caps for the packaging of the caviar. Thus, the consumers did not perceive the yellow colour as a symbol of individualisation for the presented products.⁵⁶ Therefore, Rospatent made the decision on refusal in the state registration of the trademark.

According to the conclusion by results of the examination, the declared designation represents the image of yellow colour which did not possess the distinctive ability as colour is a characteristic of a certain object. Instead of an object, it is used for execution of a sign in the chosen colour combination, which is considered at the examination of a sign along with its appearance. In the conclusion, it was noted that the materials submitted by the applicant did not contain information on the declared designation and could not be the proof of long use of the designation.

The applicant did not submit information to prove the acquisition of distinctiveness, such as: no information about the duration, intensity of use designation, areas and volumes of goods marked by the declared designation, the cost of advertising, its duration and intensity. Moreover, there was evidence regarding the degree of awareness of consumers about the claimed designation and the manufacturer of the goods, including the results of sociological surveys.

⁵³ On refusal of state registration of a trademark on Application No. 2016717043, (2018).

⁵⁴ E.V. Shcherbakova, Trademark color as a trademark, 21 Mag. Ct. Intell. Prop. Rts. 88, 88-95 (2018), <http://ipcmagazine.ru/trademark-law/color-capability-as-a-trademark#21>.

⁵⁵ *Id.*

⁵⁶ *Id.*

One more example of an unsuccessful case was SARMA's precedential example, where the detergent and soap maker applied for a trademark in the form of a combination of red, white and gradient blue.⁵⁷ Rospatent made a decision on refusal of state registration of the trademark. In fact, if the packaging contains these colours, they are used in combination with other elements, such as verbal and visual (verbal element "SARMA", images of plumbing devices, clothing, etc.), and in combination with other colours (yellow, green, crimson, orange, etc.).⁵⁸ It is due to these additional elements that the individualisation of goods was carried out. The colour combinations of packaging products listed in the materials submitted by the applicant, were used in different configurations (vertically, horizontally or diagonally oriented) and proportions (more white or blue).

In analysing the circumstances of the case, the Board also analysed the argument contained in the objection that the combination of red, white and blue gradient colours was typical only for the applicant's products, while the variants of packages of various detergents present in civil circulation in the territory of the Russian Federation were investigated by the applicant himself. From the sample of detergents of other manufacturers presented in the materials of the objection, it was seen that the presence of a combination of red, white and gradient blue colours are characteristics, for example, for the design of labels and bottles of products under the designations Domestos, Glorix, Safeguard, in which these colours appear in different configurations and proportions.⁵⁹

Such a variety of packages using different verbal and visual elements of both the applicant and its competitors did not allow to come to the conclusion that the colour stripes given in the claimed designation were perceived solely as a means of individualisation of the applicant's goods.⁶⁰

No sociological studies containing the opinion of consumers about the individualising ability of the claimed designation, in the form of strips of a certain proportion and colour, were conducted. On this basis, the applicant was refused to obtain a trademark for the combination of the aforementioned colours.

⁵⁷ On refusal of state registration of a trademark on Application No. 2015742525, (2018).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

CONCLUSION

The problem of colour trademarks' registration is that the regulatory bodies in different jurisdictions have concerns as to the granting of the rights of a colour to a certain commercial entity. On the one hand, such an approach is reasonable because a trademark empowers the owner to control and to restrict the other participants of the market from using the same mark for business purposes. On the other hand, if the entity invests heavily in a particular colour as a distinguishing sign of its activities for canvassing of customers, keeping up a reputation and brand and subsequently establishing itself on the market, it would be fair to grant the entity the right to a colour trademark.

However, as it can be seen in both jurisdictions, the granting of a colour trademark is not a matter-of-course. The concerned parties are struggling to present the essential scope of evidence for justification of grant of a colour mark. While the European jurisdiction has a more entrenched tradition of registration of non-traditional trademarks, the Russian jurisdiction cannot boast of such tradition. The category of cases as to the inherent distinctness of colour trademarks is still an insurmountable obstacle for all those wishing to obtain a status of colour trademark.

Nonetheless, existing cases in Europe and Russia hold out hope of a new era of non-traditional trademarks in both jurisdictions and the successful development and protection of intellectual property in general.

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