

The Andean Touch Trademark

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Currently, the position of the trademarks is very important inside any kind of business, to such an extent that these are the most value intangible that a business could have. The following situation cause that, from time to time, people search more ways to involve indirectly consumers with trademarks. In other words, what is wanted is that trademarks will be part of the consumer's daily life, not necessarily when they see them, but also when they heard them, smell them or touch them.

We can identify a trademark when we see it and, in base of our experience, we can also associate it to a specific quality standard or to a particular business. However, this situation will become difficult to affront when we are in front of non-traditional trademarks, since this type of trademarks are sense by the other senses like smell, taste, hearing and touch. Currently, there is the Singapore Treaty about trademark law, in which there is a list of trademarks type, including those that are not the conventional. The Andean Community is not part of the Singapore Treaty; however, inside the community law about Industrial Property – Decision 486, we can find an article that says any sign that is able to distinguish products or services in the market, can be a trademark because the nature of the sign is not an impediment for it register¹.

The above-mentioned means that, besides words or mixed words, it can be register as a trademark another type of “things” too, like, for example, a picture, sounds, smells, tags, forms, etc. This is an open door to the new modalities of type of trademarks that can appear subsequently; that is to say, many years ago nobody could imagine that currently is common to register a hologram as a holographic trademark²; sure, at Andean level this is not happening.

Particularly, the complicate part of the registering of this type of non-conventional trademarks is not that trademark itself, but the way how this type of trademarks will be published because, a requirement that the Andean Law says is that the trademark have to be susceptible of graphic representation. In other words, the non-conventional must be represented graphically (on a piece of paper) in order to be possible, its publication. In the case of some non-conventional trademarks is not so complicated its graphic representation; a sound trademark could be captured on a pentagram, a 3D trademark could be captured by pictures of different angles, and so on. However, the publication issue gets more complicated in those trademarks than can be percept without see them, like in this case, the touch trademark.

¹ **Article 134.-** For the purposes of these Provisions, any sign capable of distinguishing goods or services on the market shall constitute a mark. Signs that are susceptible of graphic representation may be registered as marks. The nature of the product or service to which a mark is to be affixed shall in no case be an obstacle to the registration thereof. (...)

² Holographic trademark GLAXO WHITENING, registered in Australia N° 759893

The touch trademark is a type of non-conventional trademark in which its surface is what gives rise to its recognition and protection, in other words, the touch trademark is a recognizable and particular surface³. One reasonable question could be the difference between the 3D trademark and the touch trademark, because they are not totally legible to the naked eye. The main difference is the sense effect, the touch trademark is appreciated with the touch and not with the eyes (it is not necessary to see the trademark to distinguish it). On the other hand, the 3D trademark or three-dimensional is appreciated by the vision because it is necessary to see their dimensions (length, width and height), so, its representation will be graphic (images of the dimensions); while in the touch trademark it is necessary to have a physical texture for its publication. Globally, there are many registered touch trademarks, especially those trademarks in the Braille system⁴; however, at the Andean level the only country that has a registered trademark is Colombia and the famous case of the "OLD PARR" bottle, whose owner is the company Diageo Brands B.V.

The "OLD PARR" case is interesting because it is the first case in the Andean Community in which a touch trademark is registered. The "OLD PARR" trademark is a bottle with a particular texture, composed by a crackle effect. But, how was the publication of this trademark? The Colombian National Authority asked the Andean Court how, in case it was possible, register a touch trademark and all its implications (the way to publish it). On May 22, 2015 the Andean Court issued the Interpretation 242-2015-IP, whereby it specified how to proceed to publish touch trademarks:

"(...)

98. The Court considers that there must be several representations of the trademark, taken in different angles and according to different methods and modalities. Likewise, while more different representations of a touch or texture trademark are published, it will communicate with more precision the claimed one and, consequently, it will avoid future disputes related to such touch trademark.

99. In respect of the touch or texture trademarks, there must highlight the advantage that gets use of the Braille code to represent and publish this type of non-visible signs. The possibility of using graphics or more sophisticated and technical 3D representations neither must be discarded. Additionally, the simple description of the sign will be always useful, but not necessary enough, as the case of the olfactory trademarks.

(...)"

In short, to publish a touch trademark, we have to consider the following elements:

1. Several representations of the trademark, taken in different angles and according to different methods and modalities
2. Different representations of the touch trademark
3. Graphics or representations in 3D
4. Simple description of the sign

Ideally will be use these four elements to do the trademark publication the most detailed possible, therefore, third parties could see the trademark publication and compare if it results similar or not to other registered signs.

³ World Intellectual Property Organization (WIPO), "New Types of Trademarks", Sixteenth session of the Permanent Committee about Trademarks, Industrial Designs and Geographical Indications, Geneva November 13 to 17, 2006, document SCT/16/2, September 1, 2006, p. 11.

⁴ Stevie Wonder has several Braille trademarks.

Currently in Peru there are not touch trademark registered; however, we can see the “Couture”, which is the name of the Coca Cola bottle, which is composed by especial elements that makes this bottle unmistakable to recognize when we touch it, like the dots of the Sprite bottle or the Cusqueña beer bottle, which has a particular engraved of the twelve angles stone (an special culture stone located in Cusco, Peru). For now, we must be content with the 3D trademarks, which are the closest type of trademark to touch trademarks; however, it does not mean that a touch trademark could not be registered in Peru.

For more information, please contact:



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