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Conditions & Mechanisms for Representing Color Trademarks (A Comparative Study)

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Abstract: The conditions for registering a color trademark do not exceed the conditions required for registering all traditional trademarks, except with regard to the extent to which each of these conditions is met for the color trademark to be accepted for registration as a trademark. This mark may face a major legal challenge in testing the applicability of the conditions to it due to the nature of the colours, especially since it is necessary for it to remain available for use by everyone, considering that it is nothing more than a decorative aesthetic element and not an identifying tool capable of performing the function of a trademark in determining the origin of the product. Also, not every color is considered suitable for use as a trademark, especially when the color is a natural property of the product or if it is necessary for its use or affects competition.

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1. Introduction

Access There is no dispute that trademarks have become one of the most important tools of economic activity in the commercial environment, due to the legal and economic value they represent, as their role is no longer limited to merely distinguishing goods and services, but rather a means of commercial identity and a source of enhancing trust between the consumer public and commercial companies that compete to attract the consumer. By innovating unconventional means and methods capable of influencing consumer choices and in line with the rapid economic and technological development in various fields, including commercial marketing tools, where the brand is an effective marketing tool in building and consolidating the commercial reputation and achieving distinction and uniqueness in the markets within the commercial environment [1].

In light of the increasing importance of the brand, the commercial environment has produced the emergence of unconventional innovations in the field of brands, as they are no longer limited to traditional signs that have been familiar for a long time, such as names, words, letters or symbols. Rather, new signs have emerged that were not previously familiar, which are known as unconventional brands, imposed by the need of the commercial environment to find competitive means capable of performing the same function that traditional brands perform in identifying and distinguishing goods and products. Compared to others, non-traditional brands are distinguished by their ability to influence consumer choices more firmly established and effective in achieving the basic commercial function.

The color brand is one of the most important unconventional brands produced by the commercial environment, as the color that forms the essence of the brand is no longer just an aesthetic or decorative element that adds attractiveness to products or goods, but has become a means of marketing communication with a psychological impact on the consumer by creating direct impressions about the goods and products and their quality level and establishing them in the mind of the consumer. In many fields, color is the important and decisive factor in forming the first visual impression that is generated in the consumer's mind to recognize goods and products and distinguish them from other competing products. Color is able to create a direct mental link between the consumer and the producer, so that the latter is known and distinctive to the consumer, even without the need in many cases to read the brand name, which makes color go beyond its traditional function as a decorative element that gives the product an aesthetic character to be an influential marketing tool in the purchase decision and a place for competition between companies in investing in color to adopt it as a special brand to distinguish its services and products from others in commercial markets. Which contributes to developing and creating modern innovations and signals, and the brand is one of these innovations in the brand field [2].

The importance of the study stems from shedding light on the legal framework of one of the most important non-traditional trademarks, which is the color mark, which has become one of the most important forms of development in the field of trademarks. The color that forms the essence of this mark is no longer just an aesthetic element according to its usual nature, but has become an element of moral and material value. Which makes commercial companies seek to monopolize a specific color or colors that are mentally related to their products and services by devoting the actual use of these colors as a trademark [3]. This has prompted most national legislation and international agreements concerned with trademarks to explicitly or implicitly recognize colors as a trademark among the marks that can be registered and granted legal protection. However, despite this recognition, this mark still faces many challenges and difficulties. Which highlights the importance of studying with the aim of finding solutions to the many problems raised by this sign, especially in light of the lack of a specialized legal study on the subject of study at the level of Iraqi jurisprudence and its scarcity at the level of Arab jurisprudence.

The basic problem of the subject of the study lies in the nature of this mark, of which color constitutes the essence, and then how to achieve a balance between the right to register color and protect it as a trademark, and the freedom of legitimate competition and not restricting it through the monopoly of colors, and several questions arise, the most important of which are:

1. To what extent are colors, especially single colors, able to achieve the required discrimination condition in the trademark?
2. Are all colors monopolizable as a trademark, or are there colors that should remain available for public use in the commercial environment?
3. Does the functional role of color in the product affect the validity of registering color as a trademark?

To what extent does the actual use of color contribute to gaining distinction? How is this acquired distinction proven?

2. Methodology

To In order to find an integrated legal regulation for color trademarks, we will follow the comparative approach in this study by comparing Iraqi law with American, English and French law.

One of the most important requirements for registering a color trademark is that this mark be represented in a manner that meets its conditions. These conditions are not separate from the means or method by which this mark is represented. Therefore, we will divide this requirement into two branches. In the first branch, we will discuss the

conditions for representing a color trademark, while in the second branch; we will discuss the means of representing a color trademark.

Although most trademark laws have stipulated that the mark must be represented due to its previously stated importance, this representation does not achieve its goal unless it meets a set of conditions that judicial efforts have contributed to establishing with the aim of ensuring the acceptance of registering non-traditional marks, including the color mark, especially the famous case known as the (Sieckman) case, although it is not directly related to the color trademark, it is the conditions that must be met in representing non-traditional trademarks, including the color trademark, have been established, which can be summarized as follows:-

One of the basic conditions for representing a color mark is that this representation be clear and accurate. What is meant by this is that the representation be sufficient in itself to understand the nature of the color to be registered as a trademark without ambiguity or mystery. For the entity responsible for registration or for others, so that the content of the mark can be perceived and understood by everyone who reads the trademark register. Also, the clarity and accuracy of the representation of the color mark requires that it not be sufficient to mention the color, but rather all the details must be stated in the application for registration of the mark in terms of the location of the color, its shade, the method of display, the method of distribution, and the composition of the colors. If the mark consists of a mixture of several colors, all of this will make from an accurate and clear representation, which allows for its registration and determines the scope of its protection. Therefore, the condition of clarity and accuracy of the representation of the color mark aims to ensure the validity of the registration of the mark and to enable the authority responsible for registering marks to conduct the required examination of the mark with the aim of making the decision to accept the registration of the mark or stating the reasons for rejection in the event of abstention from registration, so that it is easy for the owner of the color mark to know these reasons so that the one to which the registrant is concerned can, including the decision to reject or abstain About registering a period of (30) days from the date of notification.

Therefore, the accuracy and clarity of the representation of the color mark is a justification for refusing to register it, and this was confirmed by the European Court of Justice in its ruling issued in 2004 in the case known as the case of the company (Heidelberger Bauchemi CmbH), which is one of the well-known German companies in the field of manufacturing and production of chemicals used in construction, where it filed a lawsuit against the authority responsible for registering trademarks, which is the German Patent and Trademark Office ((Deutsches patent- und marken amt (DPMA))) which rejected the company's request to register the color mark of its products consisting of two colors, blue and light yellow, justifying this rejection by saying that the representation of the mark to be registered lacks clarity and accuracy, as it only included a description that these two colors are used side by side at a rate of 50% each.

For each color without stating the composition, distribution and arrangement of these colors, and therefore this representation is considered dark and does not achieve the desired importance of representation, so the office issued its decision to reject it. After appealing the decision and presenting the dispute before the European Court of Justice, the court issued its decision on June 24, 2004 to uphold the decision of the German Patent and Trademark Office and the reasons on which it based its decision to reject the application to register this color mark.

3. Results and Discussion

A It is not enough for the representation of the color mark to be clear and accurate. Rather, this representation must be characterized by stability, i.e. not subject to change over time or use. This means that its visual representation represents the final form of the mark, which does not accept multiple possibilities in terms of its shape or the distribution of the colors it is composed of In other words, the mark must be represented in accordance with

what was deposited in the trademark register without modification in shape, color or color combination throughout the period of its registration and enjoyment of legal protection [4]. A representation that allows for the possibility of changes in the visual identity of the color mark does not meet the condition of stability and is a justification for not accepting its registration. Therefore, the stability of the representation assumes that this representation is permanent because the monopoly is attributed to it, i.e. the representation of the color mark It should be permanent and not go away or change over time.

Indeed, some believe that the condition of stability of representation is closely related to the condition of distinction, whether the distinction is subjective or acquired by use An unstable representation of color does not enable the examiner to study and examine the color registration application and evaluate the evidence that proves discrimination or not. Therefore, a fixed and permanent representation is an important part of the color's ability to be registered as a trademark because it protects the consumer from confusion, as the trademark will not be able to perform its function in distinguishing goods or services [5].

The importance of meeting the condition of stability of representation to ensure the registration of the color mark has been demonstrated in many judicial decisions, the most prominent of which is the case known as the (Libertel) case, the facts of which are summarized as follows: (Libertel), The Dutch company working in the field of communications, submitted a request to register the color orange devoid of any form or design as a trademark for its services in the field of communications, but the request was rejected for several reasons, including that the representation of a specific color is a color with A verbal description in which the condition of stability and permanence is not met because the sample can permeate or change over time affected by many physical or technical factors when printing, such as the type of ink used, its brightness, etc.

As a result, the company filed an appeal against the rejection decision issued by the Marks Office before the Dutch Supreme Court, which in turn asked the Court European Justice to clarify and inquire about a set of questions for the purpose of resolving the dispute, and among those questions was whether A sample of the colour to be registered as a trademark was submitted and met the requirements and conditions for representing the mark, particularly the condition of stability and permanence. The European Court of Justice ruled that this was not sufficient and that the appropriate means of registering the colour in this case was to use a colour coding system. The Dutch Supreme Court adhered to this interpretation and issued its ruling in 2003 dismissing the company's appeal and not registering the colour orange as a brand in itself .

It is worth noting that adherence to the requirement of stability in representing a color mark is not limited to a single-color color mark, which often faces difficulties and challenges in accepting its registration, as the requirement of stability and permanence must be met even if the mark to be registered consists of a color combination or a color combination and its colors are defined by international color codes .

As is the case in the case of (Red Bull), an Austrian company with a world-famous reputation for producing drinks, which submitted an application to register a color combination of blue and silver as a trademark for its famous energy drink products, and the description attached to the application stated that the mark consists of the color (pantone 2747c).

The silver color (877c) is applied in equal and adjacent proportions. The European Union Intellectual Property Office (EUIPO) issued a decision to accept the application and register the color combination as a trademark in 2010. However, one of the competing companies, ((optimum mark), appealed the registration and demanded its cancellation. Among the reasons it relied on was that the representation of the mark does not have clarity, accuracy and stability, as it allows an unlimited number of color combinations Indeed, a decision was issued to cancel the registration before the European Court of Justice, but the latter issued a decision to reject the appeal and uphold the decision to cancel the registration. Among the reasons for the rejection in the grounds for the decision issued

in 2019 was that although the company used color coding for colors, which fulfills the condition of accurate representation in determining the two colors, the lack of spatial arrangement of the colors creates many possibilities in which the mark can appear to the consumer, as the representation did not specify the location of each color on the beverage package at the top of the package, at the bottom, or in the middle of the package, then the description is sufficient that the two colors are adjacent and in equal proportions only, which makes the representation lack the condition of clarity, stability, and permanence .

Representing non-traditional trademarks in general, including color trademarks, poses a challenge to registering these marks, as the means or method by which the mark is represented is one of the most prominent of these challenges. The special nature of these marks requires methods and means of representation that are compatible with this nature and ensure their registration and determine the scope of their protection. Therefore, there have been many reforms aimed at making amendments to the provisions of trademark laws, including the provisions related to the representation of marks.

This includes the European Trademark Reform Project, which was adopted by the European Union Commission and submitted a report that included many proposals and recommendations. As for representation, the report stressed the need to reconsider the means of representation and not limit it to written representation, which is no longer compatible with the requirements for registering non-traditional marks. The principle is that the representation of a mark is achieved as long as it is able to identify and define the mark benefiting from protection without limiting the methods and means of representing it.

These reforms led to the abolition of the term linear representation (repremention graphique) from the definition of a trademark, pursuant to the European Regulation on Trademarks in the European Union No. 3463/2015, which entered into force as of 10/1/2017, where Article (3/b) The regulations stipulate (that any reference that can be taken as a trademark must be representable in the register by any means through which the competent authorities and the public can clearly and precisely identify and determine the subject of the protection granted to its owner) [6].

The Standing Committee of the World Intellectual Property Organization (EUIPO) also reviewed the provisions related to trademark laws, including the provisions on methods and means of representing non-traditional trademarks and areas of agreement regarding the representation of these marks. It confirmed an appendix entitled (Imaging Non-Traditional Trademarks Areas of Agreement), which included the provisions and procedures subject to agreement between countries regarding this representation. As for the color mark, it indicated the possibility of its representation through a sample of the color or colors and accuracy or in an electronic format. The representation can also be through symbols or through written verbal description [7].

First, it must be stated that the color sample is not intended to place the color material preserved in a specific box or container and present it to the registration office, as is the case with the olfactory mark, in which depositing part of the scent is one of the means of representing it. Rather, what is meant by the color sample is a direct visual model of the color, often presented in the form of a square or rectangle printed on paper or in an electronic file that can be easily perceived by the examiner in Registration offices and the public. This method is one of the first, oldest and most common methods for representing a color mark, the use of which coincided with the appearance of the rest of these marks in the commercial environment. It is still used as one of the means of representation due to its advantages. It is easy to understand as soon as it is seen, whether by the examiner, others or even the judicial authorities when a dispute arises. The color sample shows the color as the eye sees it and does not require expertise or techniques especially to know the color that needs to be registered and protected as a trademark because the color sample is more like a visual identification identity.

On the other hand, this method is not without disadvantages, the most prominent of which is that it does not have the broadcast and permanence of the possibility of change when printing on paper according to the thickness of the paper or ink used in printing. Rather, the sample itself may be affected over time, so the color becomes dull and does not express the real color, especially in similar colors. Therefore, the sample alone makes the process of determining the degree of color required to be recorded extremely difficult, which may raise many disputes in the future regarding the limits, range and degree of the protected colour. Although the colour sample presented in the form of an electronic file, which is known as the digital colour sample (Digital Colour sample), reduces the disadvantages of the printed sample, it is also affected by other factors, including the type of technical devices through which the file is known. These devices vary in terms of their time in displaying colours [8].

Therefore, it can be said that although the digital color sample is better than the paper color sample in representing the color mark, the sample, whether digital or paper, is not sufficient on its own for this representation unless it is reinforced by another means in order to ensure the acceptance of the mark's registration, whether the additional means is the verbal description of the mark or the international color symbol. This was confirmed by the International Court of Justice in its previously mentioned ruling.

A verbal description is a written description of a color mark and is one of the common and common means of representing a color trademark, as most registration requests for this mark usually include a verbal description, whether this description is general and is limited to mentioning the name of the color only without any explanation or clarification. For example, it was mentioned in the description that the color requested to be registered is blue without specifying any shade of this color [9]. This description Although it is accurate in terms of determining the color of a sample and not another, it lacks the clarity that must be available in the representation due to the possibility of differences in understanding and interpreting the degree of color to record and protect it The description may be qualitative, and it is a description that does not limit itself to mentioning the color only, but rather its characteristics are described in terms of the color gradation, the brightness of the color, and the degree or strength of its shine, in addition to mentioning the proportion, location, or place of each color if it is related to a color composition or combination [10].

Comparing the verbal description and the color sample, the verbal description has advantages, the most important of which is that it is stable and permanent and does not change with the passage of time or other circumstances, unlike the color sample, because the verbal description is a fixed verbal formulation that does not change. It is also clearer and simpler to understand because it includes an explanation of the specifications of the color mark. Describing this mark with words would reflect a clear and unchanging image [11].

Not to mention that the verbal description is not affected by the physical medium on which it is written, whether paper or electronic, because when it is displayed for reading or viewed by any party, it remains as fixed as it is when deposited with the registration application [12].

Despite the importance of verbal description, especially the process of overcoming the defects of the color sample, it may not meet all the conditions for representing the color mark. For example, identifying the color with light blue does not negate the ambiguity of the representation [13]. The phrase (light) includes many gradations for this description, which opens the way for a different understanding and interpretation as long as there is no specific standard by which the accuracy of the color gradation can be verified, meaning that light blue includes a wide spectrum Of color shades and not one shade, and therefore his perception will differ from one person to another according to each person's self-interpretation, which makes determining the scope of color protection not an easy matter,

especially when using a similar color by competitors, as it is difficult to determine whether the color used by the competitor falls within the scope of protection or outside it [14].

We believe that verbal description, despite its flaws, remains one of the basic means of representing a color mark. The clearer, more accurate the description is, and the more detailed it is, the closer it is to embodying the true and realistic image of the color mark to be recorded. It is an indispensable means, even if other traditional means are used, such as color sampling or modern means such as color coding.

Regarding the perception of the means of representing the color mark in some aspects, whether it is the color sample or the verbal description of the mark, this has led to the emergence of relatively modern means compared to previous means, which are color coding systems, the most important of which is the system (Pantone) is an international standard system based on encoding each color with a specific symbol. This symbol consists of letters and numbers specific to this color and its shades, with the ability to reproduce it and obtain exactly the same color at any time. It also meets the requirements for representing the color mark in terms of clarity, accuracy, and stability [15].

It is worth noting that this system (Pantone) is derived from the name of the company that invented it, which is an American company (Pantone Matching System-PMS) in the state of New Jersey, founded in 1963, working in the printing and design activity. It is the one that invented the creation of a unified system for determining colors using symbols to avoid the problem of different colors and their shades when displayed on different media [16]. Over time, this system developed globally and became used in many fields such as printing, advertising, fashion, and in the field of trademarks as one of the most important Means of representing the color brand. The work of the Pantone system is based on a set of basic steps that begin with specifying the color, then encoding this color with a specific symbol or code, then it is included in the Pantone guide for colors with this code or code, and next to it is a printed visual sample of the color. The guide also contains the specific ratios for mixing inks and the method of converting the code into color values that can be displayed on various media, and the color and its specifications, through several models and in a manner that suits. With the display method, one of the most important of these color models is the (Cmyk) model, which is used in printing through inks consisting of four colors: sky blue, purple, yellow, and black [17].

It is mixed in certain specific proportions and special equations to obtain many color shades so that it is possible to print the color or color shade on paper at any time without changing the symbol or code for the color, as well as the model known as (CMYk), which deals with light to a basic degree if it is used to display the color on devices from which light is emitted, such as screens of devices of various types, so that it is ensured that the color is displayed as it is without the effect of the emitted light. Some of them are based on special mathematical equations based on the relationship between light and the three basic colors (red, green, and blue) that make up the model [18].

It is worth noting that the Pantone system is not the only system that is based on the idea of encoding color with its own symbol or code, but there are many other color systems, but they are less famous and widespread than the Pantone system, and they are mostly related to specific industrial or research fields [19]. On the other hand, the Pantone system is a unified global color standard that is widely spread throughout the world as an international color symbol, in addition to the judiciary's recognition of it as one of the most important means of representation. The color mark has been the subject of numerous judicial decisions, as stated by the European Court of Justice in the *Libertel* case, which clearly stated in its decision that representing the mark with an internationally recognized symbol or code such as Pantone meets the requirements for representing that mark [20].

4. Conclusion

We conclude from all of the above that the color mark cannot be represented as one of the registration requirements by one means or method alone, including the color code

method, which is ambiguous in itself without any verbal description. If the color code guarantees the accuracy of determining the color and its shades without change, then it is unable, for example, to determine the location of the color in the mark and the method of using it. Therefore, we believe that the ideal method for representing this mark is to use all of the aforementioned means Together, there is nothing preventing the representation of this mark, which is the use of a method at the same time, especially non-traditional marks such as the color mark, in accordance with the principle of accumulated representation, which ensures compliance with the conditions of representation as one of the requirements for registering the color mark.

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