

SCENT AS AN ELEMENT OF INTELLECTUAL PROPERTY RIGHTS MANAGEMENT IN MODERN ENTERPRISES

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Abstract: Nowadays, implementing effective management strategies is a key condition for the functioning of enterprises on the market. The strategies themselves include many activities that are diverse and multidirectional. One of them is the effective management of intellectual property rights, which may also be reflected in the company's marketing activities. An example of such action is the concept of so-called sensory marketing affecting customer senses such as smell and taste. The aim of the article is to analyze the legal possibilities of protecting scents used in enterprise marketing strategies. The article is of a theoretical nature and contains a review of the literature on the subject in addition to court decisions in the discussed area. Due to the diversity of legal systems and difficulties in interpretation, criteria for the interpretation of unclear regulations have been indicated. Conclusions: currently, there are different systems for protecting intellectual property rights in the world, which are not uniform. Entrepreneurs can choose more advantageous system.

Keywords: sensory marketing, intellectual property, scent trademark

JEL Classification: K29, M31

Introduction

The observed growth in the importance of the global market combined with the simultaneous depreciation of regional and local markets is a challenge for contemporary enterprises. These entities are struggling with various challenges, among which competition is at the forefront. In connection with the above, enterprises are forced to implement actions resulting in raising the level of competitiveness in all areas of their activity from effective human resources management through the implementation of innovation strategies in marketing activities. While the marketing

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strategy itself, aimed at convincing consumers to the products or services offered by the enterprise, has been known and used for many years, the actions that make up this strategy are subject to change. In the 1970s, the appropriate location of the retail outlet and pricing policy were considered of key importance. In the 1980s, actions promoting a modern design and customer service were added to the aforementioned location. In the 1990s, loyalty programs came to the fore (Sullivan & Adcock, 2003, p. 100). Currently, new methods and actions are being sought, among which the concept of sensory marketing, understood as actions involving the engagement of consumers' senses and influencing their behavior, is becoming increasingly popular (Krishna, 2010, p. 2). Sensory marketing has garnered significant attention from researchers due to its ability to effectively influence consumer behavior at a subconscious level (Pandey & Tripathi, 2025). Sensory marketing uses external stimuli that are received by consumers through their senses: smell, sight, touch, taste, hearing.

Due to the fact that, until recently, it was not legally possible to register individual tastes and scents as separate trademarks, the issue under analysis represents a novelty in the intellectual property rights management strategies of modern enterprises. Consequently, it has not been widely described in the literature as thoroughly as traditional forms of trademark representation. This topic is also interesting because of the lack of uniformity in the legal regulations and procedures applied by different patent offices. The legal registration of scents represents a new element in intellectual property management strategies and may serve as a foundation for sensory branding. In practice, there is a lack of Polish literature in this field, and most of the available knowledge is based on American publications. The current customs policy of the United States and the reactions of individual countries do not contribute to reaching an agreement on matters related to intellectual property protection either. This may result in a deepening divergence in the systems of rights protection.

The article presents the legal possibilities of protecting and managing scent as an element of intellectual property rights of modern enterprises. The aim of the article is to analyze the legal possibilities of protecting scents used in the marketing strategies of enterprises. Owing to the diversity of legal systems and interpretation difficulties, the criteria for interpreting unclear regulations are indicated.

Methods

Scientific problem: can scent be an element of intellectual property law in the light of current legal regulations? In connection with the above, is it possible to protect scent as an element of intellectual property law under the current legal regulations?

The article is theoretical in nature, containing a review of the literature on the subject and court decisions in the analyzed scope. The legal analysis included national regulations, including the Polish Act of 30 June 2000 – Industrial Property Law (Ustawa z dnia 30 czerwca 2000 r.) and acts of Community and international law. Because of the fact that selected areas of economic life were regulated by the provisions of Community and international law, interpretational doubts arose on the basis of the application of these provisions and national regulations. The above

doubts are very often resolved as a result of court proceedings, the case law of which is also not uniform. As a result, the protection and effective management of intellectual property rights is hindered, and in consequence, the competitiveness of enterprises on the market decreases.

Literature review on the legal possibilities of protecting scent as an element of intellectual property rights

Innovative marketing strategies allow an increase in the sales results of products and services only until competitive companies implement similar marketing activities. Therefore, the issue of protecting one's own strategies from unauthorized imitation is crucial. In the case of the idea of sensory marketing, including aroma marketing, it is possible to use the tools provided by legal regulations on trademarks.

Scent marketing, also known as aroma marketing, is based on the use of smell as the most reliable human sense and using it in the consumer's decision-making process. An abundance of research, observations and studies around the world have shown that various smells have an impact on people's changing moods, preferences, and emotions (Berčík et al., 2021). As indicated by Michalska-Dudek (2009), "aroma marketing helps to create an atmosphere of freedom and trust, make a lasting impression on the customer (marking the existence of a given company in their consciousness), encourage the customer to stay longer, and even influence an increase in the willingness to buy, and thus increase the company's revenues". In turn, Rudzewicz (2010) points out the fact that "smell affects the customer's emotions often without their conscious participation. This is so important, because according to specialists' estimates, up to 75% of purchasing decisions are made under the influence of emotions. Companies that use scent marketing are perceived as more prestigious and exclusive". Hultén et al. (2011, p. 17) speak in a similar vein, claiming that sensory marketing enables the creation of a company image associated with the identity, lifestyle or personality of the customer.

Scent as an element of a company's identity is increasingly used in various industries, initially in establishments offering cosmetic products, then in restaurants, and currently even on board airlines. It is associated and remembered by consumers, evoking positive emotions and satisfaction with the service provided (Wan Yun & Yazdanifard, 2013).

According to art. 120 section 1 of the Industrial Property Law, "a trademark may be any marking that allows the goods of one company to be distinguished from the goods of another company and that can be presented in the register of trademarks in a way that allows for the determination of an unambiguous and precise subject of the granted protection". It is known that trademarks play an important role in the process of creating a positive image of a company and building its own brand. The most popular forms of trademarks are verbal, graphic, verbal-graphic, spatial, verbal-graphic-spatial and sound markings. However, increasingly more often all over the world, the subject of applications to patent offices are unconventional trademarks occurring in the form of scents, tastes or gestures (Konopka, 2016). This gives rise to interpretative and procedural disputes, the resolution of which is of significant

importance for businesses and the amendment of the aforementioned regulations. Unconventional trademarks have not been specified in any normative act, hence it can be assumed that there is no closed catalogue of these marks. This means that there is a legal possibility of filing a trademark that does not belong to the above categories. Furthermore, it is worth noting the existence of certain marks in economic turnover that have distinctiveness, but cannot necessarily be presented graphically. Wojcieszko-Głuszko (2013) even indicates a classification of the above-mentioned marks. According to the aforementioned author, based on the criterion of the way the mark is perceived, visible and invisible marks can be distinguished. Among the former, the following can be distinguished: holograms, moving marks, positional marks and gestures. Invisible marks, on the other hand, can occur in the form of scent marks, taste marks and tactile marks.

Scent marks are indicated in the literature on the subject as unconventional invisible marks (Wojcieszko-Głuszko, 2013). As a rule, they are perceived by the sense of smell and can be registered, provided they are presented in graphic form. In practice, however, this is difficult to achieve, because current court decisions do not recognize the recording of the chemical composition of a specific compound or a verbal description or sample of the scent. The so-called 7 Sieckmann criteria stand in the way. In case no. C-273/00 Ralph Sieckmann vs. Deutsches Patent – und Markenamt, the European Court of Justice (ECJ) ruled that every trademark must be capable of being presented graphically, taking into account 7 requirements, i.e. it must be: clear, precise, complete, easily accessible, understandable, durable and objective. In the case of scent marks, in practice the greatest problem occurs in relation to the criterion of scent durability. This is therefore an obstacle to the registration of scent marks in European patent offices.

The President of the Patent Office of the Republic of Poland expressed a similar opinion, citing the aforementioned ECJ ruling no. C-273/00, stating that it is currently not possible to register olfactory marks “because it is not possible to define their subject of protection in a clear and precise manner using generally available technology” (UPRP, 2023). Examples of olfactory trademark applications are presented in Table 1.

Table 1. Sample applications for fragrance marks

The scent of lily of the valley flower	Z. 220307 proceedings discontinued by the Patent Office of the Republic of Poland
The smell of freshly cut grass	EUTM 000428870 application registered (currently the registration right has expired)
Graphic representation of a special fragrance: grassy green note, citrus (bergamot, lemon), floral rose (orange, hyacinth scent), musk	EUTM 000521914 application rejected

Source: (UPRP, 2023)

In practice, the Office for Harmonization in the Internal Market (OHIM) has registered only one olfactory trademark. It is the scent of freshly cut grass for a manufacturer of tennis balls, interestingly – the protection period has already expired and has not been extended by the manufacturer (UPRP, 2015).

While in Europe there is no legal possibility of registering olfactory marks, it is possible in the United States or China (Fu, 2021). In the United States, there is no requirement for a graphic representation of the trademark, which is why an olfactory trademark was registered in 1990 – the scent of the Plumeria flower for Celi Clarke embroidery thread (US 758429) (Przytuła & Basałaj, 2019).

In 1995, Manhattan Oil obtained protection for three fragrance trademarks: “Super Charged Strawberry”, “Cherry Bomb”, and “Groovy Grape” for automotive engine lubricants (US Trademark Registration 2568512, 2596156, 2463044). When mixed with fuel during combustion, the product produces the scent of strawberries, cherries, and grapes, respectively (Burton Ong, 2008). The above-mentioned products are presented in Figure 1.



Figure 1. Manhattan Oil Scented Fuel Additives

Source: (Manhattan Oil, 2023)

Another well-known example of a fragrance mark registration is the fragrance of Hasbro's “Play-Doh” mixture obtained on May 15, 2018 in the United States. The registration certificate for this mark is shown in Figure 2.

“Sweet, slightly musky. Vanilla-like. Slight overtones of cherry. Natural smell of a salted, wheat-based dough”. This is how the globally recognized scent of Play-Doh modeling compound is described. It is recognized not only by children but also by their parents, who fondly recall the carefree days of childhood. R. Polk Wagner, an expert on intellectual property law at the University of Pennsylvania Law School, said, “Not everybody can say they have the world’s most distinctive scent” (Siegel, 2018, p. 1). Defined, protected, and used in marketing strategies, this scent undoubtedly constitutes a competitive intangible asset for the Hasbro company. It provides an advantage over the competition by offering a sense of product originality and simultaneously appeals to customer loyalty. The scent itself is an integral part of the product, which also includes the color and chemical composition of the compound.

The original Play-Doh scent has also been used in another Hasbro product – a unisex cologne (The Library of Fragrance Play-Doh, 2025). This example demonstrates the real potential of using a registered scent to promote other products.



Figure 2. Hasbro fragrance trademark registration certificate for Play-Doh mixture

Source: (Samuels, 2023)

The examples provided are clear evidence of the need to regulate scents as an element of intellectual property rights. Scents are currently used in many industries. In some cases, entrepreneurs register scent trademarks in intellectual property protection systems that allow such procedures. Other entrepreneurs use national regulations on unfair competition or, to a limited extent, copyright law to protect scents. There is no doubt that the lack of action on the part of the European Union in the field of the liberalization of regulations on the registration of scent trademarks will result in an outflow of entrepreneurs to other protection systems (the United States or China).

Conclusion

Implementing new marketing strategies is a necessity today. So-called sensory marketing, which affects human senses, in particular smell and taste, is becoming increasingly popular. As a consequence of the constantly growing level of competitiveness on the global market, it is not only the implementation of the idea of sensory marketing by modern companies that is important, but also the protection of specific

scents and flavors against unauthorized use by third parties. The condition for achieving the above goal is to obtain the right to register a specific scent or flavor in the form of a trademark in patent offices.

Unconventional trademarks, including scent trademarks, are becoming an increasingly common tool for building one's own competitive strategy. The previously unfamiliar concept of sensory branding is part of a broader approach to intellectual property management. Taking action in this area has become a necessity in an increasingly competitive environment. In this context, scent trademarks and their role in aroma marketing are of key importance. Currently, in the era of a global economy based largely on knowledge and modern technologies, the management of intellectual property rights is a necessity. Among the commonly known resources of companies, it is intellectual property rights that are slowly becoming the most valuable asset, pushing the others to the sidelines. Unconventional trademarks are increasingly the subject of applications in patent offices around the world. To date, only a few of the applications have obtained rights for registration, but there is no doubt that it is only a matter of time before the regulations are amended to allow new forms of trademarks. On the other hand, under the current regulations, it is also possible to register unconventional trademarks, but it is necessary to meet the so-called 7 Sieckmann criteria (Konopka, 2021). Therefore, there is great interest in registering scents, flavors or gestures, which until now were available to all interested parties. In this aspect, aroma marketing can be an element of managing intellectual property rights. Due to the ongoing processes of economic globalization and the growth in competitiveness not only between individual enterprises, but also between entire economies, it is important to adapt the legal order to the constantly changing reality. Currently, there is a possibility of choosing a trademark protection system. As a result, entrepreneurs will choose the more favorable protection systems and ignore the less favorable ones. Hence, the lack of amendment to the European regulations on the protection of scent trademarks will result in the outflow of enterprises to other intellectual property protection systems (Chinese or the United States). The above effects are already visible today in the sphere of production owing to the assumptions of the so-called Green Deal and the resulting very high costs of electricity in Europe. The solution to the problem is to amend the Community law in the field of trademark protection by liberalizing the regulations and enabling the registration of scent trademarks.

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ZAPACH JAKO ELEMENT ZARZĄDZANIA PRAWAMI WŁASNOŚCI INTELEKTUALNEJ WSPÓŁCZESNYCH PRZEDSIĘBIORSTW

Streszczenie: Wdrażanie efektywnych strategii zarządzania stanowi współcześnie kluczowy warunek funkcjonowania przedsiębiorstw na rynku. Same strategie obejmują wiele działań, które są zróżnicowane i wielokierunkowe. Jednym z nich jest efektywne zarządzanie prawami własności intelektualnej, które może się przejawiać także w działalności marketingowej przedsiębiorstwa. Przykładem takiego działania jest koncepcja tzw. marketingu sensorycznego oddziałującego na zmysły klientów, takie jak węch czy smak. Celem artykułu jest analiza prawnych możliwości ochrony zapachów stosowanych w strategiach marketingowych przedsiębiorstw. Artykuł ma charakter teoretyczny i zawiera przegląd literatury przedmiotu oraz orzecznictwa sądowego w omawianym zakresie. Z uwagi na różnorodność systemów prawnych i trudności interpretacyjnych wskazano kryteria interpretacji niejasnych uregulowań. Wnioski: obecnie na świecie istnieją różne systemy ochrony praw własności intelektualnej. Nie są one jednolite. Przedsiębiorcy mogą dokonywać wyboru korzystniejszych systemów.

Słowa kluczowe: marketing sensoryczny, własność intelektualna, znak zapachowy

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