

Smelly Trademarks: Requirements for Registering Nontraditional Marks

Amundsen Davis Intellectual Property Alert
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On February 14, 2017, Hasbro filed a U.S. trademark application for its “non-visual Play-Doh scent” trademark for use with toy modeling compounds (U.S. Application Serial Number 87/335,817). Hasbro describes its signature scent as “a unique scent formed through the combination of a sweet, slightly musky, vanilla-like fragrance, with slight overtones of cherry, and the natural smell of a salted, wheat-based dough.” This serves as a fun reminder that trademark rights can attach to identifiers of source that fall outside of the more pedestrian for words and logos.

Non-conventional or nontraditional trademarks can include the visible, such as colors, shapes (including 3-D shapes), moving images, and holograms, or the invisible, such as sounds and scents. Critically, for one of these items to constitute a trademark, it must serve as a source identifier that distinguishes the goods or services of one provider from those of others. Further requirements apply based on the type of nontraditional mark.

Scent marks can be especially difficult to register. As with most nontraditional marks, the scent must have acquired distinctiveness. This generally means that, through widespread use, the scent has become distinctive of the source of the goods in the eyes (or nose) of consumers. Additionally, the scent cannot serve a functional or utilitarian purpose, such as perfumes, and the scent cannot simply arise as a result of the manufacturing process, since granting the exclusive use of such scents to a single party would unfairly limit others in the marketplace from competing.

In support of the Play-Doh scent, Hasbro claims the scent has been applied to its toy putty since 1955 and is one of the most recognizable scent marks in the world. Unsurprisingly, Hasbro submitted a container of its Play-Doh putty to the U.S. Patent and Trademark Office to serve as the requisite specimen of the scent mark as it is used.

By one count, there are only around a dozen active U.S. registrations for scent trademarks. So Hasbro would join an exclusive club if it succeeds in registering the mark. Examples of other registered scent trademarks include the “minty scent” of pain-relief patches; cherry/grape/strawberry scented lubricants for

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vehicles; and toothbrushes infused with the scent of strawberries.

If you are a frequent reader of our alerts you will know that we encourage clients to consider protecting their trademark rights outside of the United States in those jurisdictions where they are currently doing business or have business development plans. The same holds true for nontraditional marks. However, the requirements for registering such marks vary widely from country to country. In the case of scent marks, they may not be allowed in some jurisdictions but have been registered, for example, in Argentina, Australia and the United Kingdom in addition to the United States. We hope this provides you with some in-scent-ive to consider registering your nontraditional marks!

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