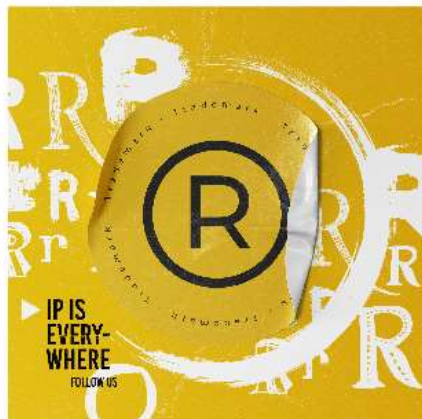
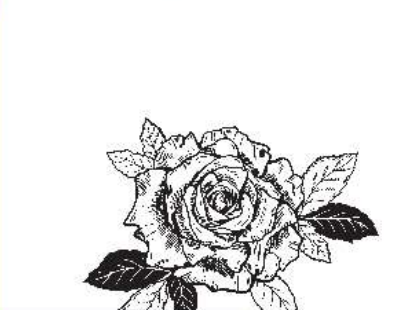
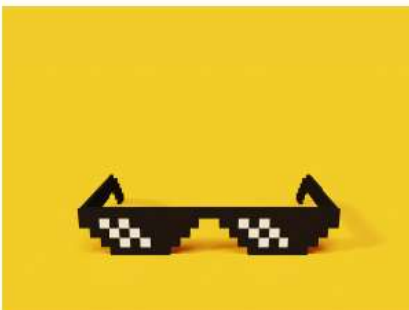


# Alicante News

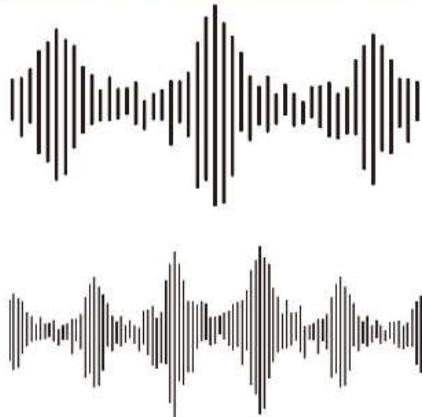
Up to date information on IP and EUIPO-related matters

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How unconventional is  
'unconventional' IP?

*First Page article by Eleonora Rosati*





## First Page



### How unconventional is 'unconventional' IP?

When we think of the different intellectual property (IP) rights and what each of them protects, we usually refer to – for example – words and logos for trade marks, books and art for copyright, a piece of furniture or a fashion creation for design rights, a pharmaceutical drug or a machine for patents.

Yet, IP can also protect 'things' or 'objects' that may be perceived as being less conventional than those above.

When we speak about the IP protection available, for example, for sounds, or colours and patterns, shapes, tattoos, memes and GIFs, or tastes and smells, we refer to 'non-traditional' or 'unconventional' IP. But how easy is it to protect these 'objects', in particular as trade marks?

#### Sounds

Starting with sounds, those that can be represented through musical notation, like a jingle, can be protected in principle under trade mark and copyright law. But how about those sounds that cannot be represented through musical notation, take for example “[the acoustic rendition of the belling of a stag](#)” or “[the yell of the fictional character TARZAN](#)”? While copyright seems unavailable to them, trade mark protection requires determining whether such sounds act as indicators of commercial origin, that is – in technical terms – whether they display the required distinctiveness.

For quite some time, especially in the aftermath of a [seminal ruling](#) of the Court of Justice of the European Union (CJEU), those seeking trade mark registration of such sounds faced difficulties complying with the requirement of graphical representation of marks. Following the [latest reform](#) of the EU trade mark system and a change in the representation requirements, the European Union Intellectual Property

Office (EUIPO) [can receive](#) trade marks applications for signs represented by the accepted formats. For sound marks, the EUIPO [only accepts](#) applications that are an audio file reproducing the sound.

#### Colours, patterns and shapes

Colours and patterns, for instance the [colours](#) of a well-known football club or the [pattern](#) used by an iconic fashion house, can be also protected – among other things – as trade marks. Today, the representation requirements of colour and pattern marks have been clarified by the case law and by the [EU trade mark reform](#).

Like shapes (for example the [shape of the bottle](#) of a soft drink or the shape of the packaging of a chocolate bar), consumers do not always perceive colours and patterns as being indicators of commercial origin in themselves. The key requirement of distinctiveness may thus not always be fulfilled at the very outset. Like for other marks, distinctiveness may be however acquired through the use made of the sign and the resulting effect on consumer perception.

In addition to the above, another aspect to take into account is that [the law prohibits the registration of certain shapes and other characteristics of goods](#), for example shapes that are exclusively technical like that of a [well-known company's toy bricks](#) or the [shape of the Rubik's Cube](#), irrespective of whether such signs are perceived by consumers as indicators of commercial origin.

#### Tattoos, memes and GIFs

Turning to tattoos, these are often artistic works (that is, drawings) that have one key characteristic: that of being attached to the human body. While tattoos are in principle protectable under copyright law (and potentially also trade mark and design law!) by the same conditions as any other

## First Page



kind of work, the peculiarity of the medium on which they are impressed may give rise to conflicts between the rights of the tattoo artist in relation to their tattoo and the rights of the person carrying such a tattoo. For example: can a tattoo artist object to the reproduction of their tattoo even if the person carrying it has already consented to the use of their own likeness?

While this question has not yet received an exhaustive answer across Europe, in the USA a court recently [ruled](#) that the rights of the person carrying the tattoo prevail over the copyright of the tattoo artist. In this particular case, a videogame developer had already received permission from some high-profile basketball players, including LeBron James, to reproduce their likeness – including their tattoos – in avatars featured in the videogame. The ruling determined that permission was not also needed to clear the tattoo artists' copyright in relation to tattoos visible on the athletes' bodies.

Similarly to tattoos, building blocks of internet culture such as memes (examples include "[Condescending Willy Wonka](#)" and "[Distracted boyfriend](#)") and GIFs also raise questions under copyright law. From the perspective of trade mark law, it is worth recalling that it is possible to register motion marks like, for example, the [moving logo](#) of a well-known telecommunications company or the [signature move](#) of a chef.

### Tastes and smells

Unlike 'objects' that are perceived through one's own mechanical senses (sight, hearing, touch), tastes and smells are perceived through chemical senses and are, as a result, highly subjective: the way something smells or tastes to a person may be different to how it smells or tastes to another person. Because of this peculiarity, can tastes and smells be protected by IP?

Insofar as trade marks and copyright are concerned, the answer is very similar: it is not possible to receive protection under either of them if the taste or smell at issue cannot be identified with sufficient precision and objectivity. The CJEU [recently confirmed](#) this in a case concerning copyright protection of the taste of a cheese spread.

### The road ahead

When we think about IP rights, the focus cannot be limited to 'traditional' or 'conventional' subject matter: what we may regard as 'non-traditional' or 'unconventional' IP is an increasingly diverse and relevant group of 'objects'.

The availability of different IP rights represents an opportunity for those seeking to protect 'objects' like those discussed in this article. Nevertheless, since IP rights grant their owners a monopoly, IP offices and courts are and should continue being mindful of the need to balance IP protection with the interests and rights of third parties and the public at large. All this requires, among other things, a thorough and careful examination of the requirements for protection under IP law.