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Defining Non-Traditional Marks: An EU–US Framework for Georgia and Similar Jurisdictions

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ABSTRACT

In 2024, Georgia abolished the graphic-representation requirement for trademarks, opening the way for registering non-traditional signs but leaving open how far such protection should extend and on what conditions. This article places that reform within the evolution of trademark law and asks how Georgia and similar jurisdictions can recognise non-traditional marks without undermining consumer interests, fair competition, or the coherence of IP law.

The study employs a doctrinal methodology combining historical and comparative analysis. It examines TRIPS, EU legislation and case-law, and key U.S. decisions on non-traditional marks, with emphasis on acquired distinctiveness and functionality. It then evaluates Georgia's 2024 amendments and develops a normative model for further reform.

The article first defines the non-traditional trademark as any sign that departs from the classical typographical and two-dimensional graphic paradigm yet is capable of indicating commercial origin and can be represented with sufficient clarity and precision. Second, it identifies three key doctrinal pillars for Georgia: (a) clarity and precision of representation, read in light of the Sieckmann criteria; (b) a robust doctrine of acquired distinctiveness (secondary meaning), anchored in evidence from the relevant public; and (c) a dual concept of utilitarian and aesthetic functionality that prevents trademark law from displacing design, patent and competition law. Third, the article contributes a systematic classification of non-traditional marks into three categories: visually perceptible signs, invisible organoleptic signs, and hybrid signs, providing indicative filing standards for each. It recommends clarifying the statutory definition of a trademark, transforming the closed list of signs into an open illustrative catalogue, and refining the wording of aesthetic functionality to focus on aesthetic value.

The article argues that the EU model offers the most appropriate regulatory template for Georgia, while U.S. practice provides a valuable analytical laboratory. It further calls for

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detailed examination guidelines and consumer surveys as standard evidence of secondary meaning, and proposes a framework that can be adapted by other small jurisdictions facing similar choices.

არატრადიციული სასაქონლო ნიშნების განსაზღვრა: ევროკავშირისა და აშშ-ის ჩარჩო საქართველოსა და მსგავსი იურისდიქციებისთვის

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სტატიის შესახებ	აბსტრაქტი
<p><i>საკვანძო სიტყვები:</i></p> <p>არატრადიციული სასაქონლო ნიშნები შემდენილი განმასხვავებელუნარიანობა (მეორადი მნიშვნელობა) ესთეტიკური ფუნქციურობა ზიკმანის კრიტერიუმები ევროკავშირისა და აშშ-ის სასაქონლო ნიშნების შედარებითი სამართალი</p>	<p>2024 წელს საქართველომ გააუქმა სასაქონლო ნიშნების გრაფიკული გამოსახვის მოთხოვნა, რითაც გზა გაუხსნა არატრადიციული ნიშნების რეგისტრაციას, თუმცა ღიად რჩება საკითხი, რამდენად შორს უნდა ვრცელდებოდეს ასეთი დაცვა და რა პირობებით. ეს სტატია განიხილავს ამ რეფორმას სასაქონლო ნიშნების სამართლის ევოლუციის კონტექსტში და სვამს კითხვას, თუ როგორ შეუძლიათ საქართველოსა და მსგავსი იურისდიქციებს აღიარონ არატრადიციული ნიშნები ისე, რომ ზიანი არ მიაყენონ მომხმარებელთა ინტერესებს, კეთილსინდისიერ კონკურენციას ან ინტელექტუალური საკუთრების სამართლის ერთიანობას.</p> <p>კვლევა იყენებს დოქტრინალურ მეთოდოლოგიას, რომელიც აერთიანებს ისტორიულ და შედარებით ანალიზს. ის იკვლევს TRIPS-ის შეთანხმებას, ევროკავშირის კანონმდებლობასა და სასამართლო პრაქტიკას, ასევე აშშ-ის სასამართლოების უმთავრეს გადაწყვეტილებებს არატრადიციულ ნიშნებთან დაკავშირებით, აქცენტი შედენილ განმასხვავებელ უნარსა და ფუნქციურობაზე. შემდეგ, სტატია აფასებს საქართველოს 2024 წლის ცვლილებებს და შეიმუშავებს ნორმატიულ მოდელს შემდგომი რეფორმისთვის.</p> <p>პირველ რიგში, სტატია განმარტავს არატრადიციულ სასაქონლო ნიშანს, როგორც ნებისმიერ ნიშანს, რომელიც სცდება კლასიკურ ტიპოგრაფიულ და ორგანოზომილებიან გრაფიკულ პარადიგმას, მაგრამ შეუძლია მიუთითოს კომერციულ წარმომავლობაზე და შესაძლებელია მისი საკმარისი სიცხადითა და სიზუსტით წარმოდგენა. მეორე, ის გამოყოფს სამ ძირითად დოქტრინალურ საყრდენს საქართველოსთვის: (ა) გამოსახვის სიგზადე და სიზუსტე, ზიკმანის კრიტერიუმების გათვალისწინებით; (ბ) შემდენილი განმასხვავებელი უნარის (მეორადი მნიშვნელობის) მტკიცე დოქტრინა, რომელიც გამყარებულია შესაბამისი საზოგადოებისგან მიღებული მტკიცებულებებით; და (გ) უტილიტარული და</p>

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ესთეტიკური ფუნქციურობის ორმაგი კონცეფცია, რომელიც ხელს უშლის სასაქონლო ნიშნების სამართლისა და დიზაინის, საპატენტო და კონკურენციის სამართლის კოლიზიას. მესამე, სტატიას შემოაქვს არატრადიციული ნიშნების სისტემური კლასიფიკაცია სამ კატეგორიად: ვიზუალურად აღქმადი ნიშნები, უხილავი ორგანოლექტიკური ნიშნები და ჰიბრიდული ნიშნები, და თითოეული მათგანისთვის გვთავაზობს რეგისტრაციის სარეკომენდაციო სტანდარტებს. იგი რეკომენდაციას უწევს სასაქონლო ნიშნის საკანონმდებლო დეფინიციის დაზუსტებას, ნიშნების დახურული სიის ღია საილუსტრაციო კატალოგად გარდაქმნას და ესთეტიკური ფუნქციონალურობის ფორმულირების დახვეწას, რათა აქცენტი ესთეტიკურ ღირებულებაზე გაკეთდეს.

სტატიის ავტორი ამტკიცებს, რომ ევროკავშირის მოდელი საქართველოსთვის ყველაზე შესაფერის მარეგულირებელ შაბლონს წარმოადგენს, ხოლო აშშ-ის პრაქტიკა ღირებულ ანალიტიკურ ინფორმაციას გვთავაზობს შემდომი განვითარებისთვის. გარდა ამისა, სტატია მოითხოვს დეტალური საექსპერტო სახელმძღვანელო მითითებებისა და მომხმარებელთა გამოკითხვების დანერგვას, როგორც მეორადი მნიშვნელობის სტანდარტულ მტკიცებულებას, და გვთავაზობს ჩარჩო-მოდელს, რომელიც შეიძლება მოირგონ სხვა მცირე იურისდიქციებმა, რომლებიც მსგავსი არჩევანის წინაშე დგანან.

1. Introduction

In 2024, amendments to Georgia’s Law on Trademarks abolished the mandatory criterion of “graphic representability,” aligning domestic law with European Union and United States practice, and instead prioritized the requirement that a mark be “clearly and precisely” representable (Law of Georgia on Trademarks, 1999, Article 3, Paragraph 1). Although modest at first glance, this reform—consistent with global legal trends—opened the door at the national level to the registration of entirely new categories of trademarks (for example, single colours and sound marks).

These changes set an agenda for legal scholars: to undertake a comprehensive study of the foundations for protecting non-traditional trademarks so that a balanced and coherent practice may emerge. That agenda cannot be realised without situating these objects in their historical context and without providing their precise definition and classification—tasks that this article undertakes.

The practical implications of this doctrinal shift are significant for the Georgian marketplace. For Georgian businesses, the recognition of non-traditional marks offers new avenues for branding and building goodwill. However, as these protections primarily benefit large multinational corporations, there is a risk that they may stifle local competition or confuse consumers in a small, developing economy. Therefore, this analysis aims to strike a 'golden mean' that safeguards consumer interests and maintains a level playing field for all market participants.

By its nature, the study is of interest not only for Georgia but also for jurisdictions with comparable legal traditions in which the protectability of non-traditional marks is, or soon may be, at issue. The article consists of an introduction, three inner chapters, a conclusion, and recommendations.

Chapter 2 presents a historical analysis of non-traditional trademarks that helps to map the relationship between a given historical era and the demands of contemporary commerce; by extrapolation, it then identifies principal orienting lines for the future development of non-traditional trademark law. In this connection, the chapter examines the motives, aims, and consequences of fundamental changes in the relevant regulatory instruments.

Chapter 3 proposes, at the national level, a definition of the non-traditional trademark together with a companion doctrinal model. Its formulation draws on an in-depth analysis of the United States—whose practice is the most extensive in this area—and of the European Union—the principal harmonisation frame for national legislation (Sinnreich, 2022).

Chapter 4 provides an exhaustive account of the types of non-traditional trademarks, proposes a method for their systematic grouping, and clarifies the distinctions among visible marks, invisible organoleptic marks, and hybrid marks.

1.1. Methodology

Methodologically, the article is grounded in the doctrine of the rule of law and employs normative, dogmatic, comparative-law, teleological, historical, and case-study methods. Starting from the rule of law as a constitutional benchmark, the analysis assumes that trademark regulation – particularly in relation to non-traditional signs – must be foreseeable, transparent, and resistant to arbitrary decision-making. This yardstick informs the evaluation of registration criteria, evidentiary standards and exclusions from protection: proposed reforms are assessed according to whether they make it easier for

applicants and third parties to anticipate outcomes and for courts and offices to justify decisions in a reasoned and controllable way.

The core of the study is dogmatic (doctrinal) and normative. On the dogmatic level, it undertakes a close reading of the relevant legal instruments – including TRIPS, EU secondary legislation and case-law, the Lanham Act and leading U.S. decisions, as well as Georgia’s Law on Trademarks – in order to reconstruct the internal structure of the concepts of “trademark,” “acquired distinctiveness” and “functionality” as they apply to non-traditional indicia. On that basis, the article advances normative claims about how these concepts ought to be framed in Georgia and comparable jurisdictions. The proposed definition of the non-traditional mark, the tripartite doctrinal model (representation, acquired distinctiveness, functionality), and the recommended statutory amendments are therefore not merely descriptive but explicitly prescriptive, derived from an evaluation of how different doctrinal configurations affect consumer protection, fair competition, and the coherence of intellectual property law.

The comparative-law and teleological methods are used in tandem. Comparatively, the article juxtaposes the European Union and United States regimes as the two most developed laboratories for non-traditional mark protection, supplemented where relevant by brief references to other jurisdictions that have begun to recognise such signs. Rather than engaging in a purely formalistic comparison, the analysis focuses on functional equivalents – in particular the treatment of secondary meaning and the dual concept of utilitarian and aesthetic functionality – and on how each system allocates risks between traders and the public. Teleologically, the interpretation of these regimes is guided by their underlying objectives: ensuring that trademarks serve as reliable indicators of origin, preserving undistorted competition, avoiding over-extension of monopolies into the domain of product features and aesthetics, and maintaining a workable division of labour between trademark, design, patent, and unfair-competition law. These aims provide the criteria for selecting which elements of EU and U.S. practice should be transplanted or adapted to the Georgian context.

Finally, the study combines historical and case-study methods. Historically, it traces the evolution from the classical era of visually represented word-and-device marks to the contemporary expansion of protectable signs into the sensory and technological sphere. This historical trajectory is not presented for its own sake but to show how changes in economic organisation, technology, and communication have successively reshaped the legitimate scope of trademark law and the dangers of both under- and over-protection. As a case-study, the article takes Georgia’s 2024 abolition of the graphic-representation

requirement – and, by extension, the situation of small, integration-oriented jurisdictions with analogous reforms – as a concrete setting in which to test the proposed EU–US framework. Georgia functions as an exemplar through which the interaction between global norms and local legal and economic constraints can be examined, allowing the methodological insights of doctrinal, comparative, and teleological analysis to crystallise into a context-sensitive but exportable model.

2. From the Traditional to the Non-Traditional Trademark

The invention of the printing press in Europe played a formative role in the continent’s transition out of the medieval order by making information broadly accessible³. That development catalysed scientific progress and the emergence of technologies that upended established modes of production. In parallel, the so-called Great Geographical Discoveries drastically expanded the sphere of action of European states, while technological superiority enabled rapid colonisation of the “New World.” These processes simultaneously created new markets for goods and vast reserves of raw materials for continued reproduction. They carried Europe into the era of the Industrial Revolution—precisely when the law of trademarks, as a distinct field, began to take shape in a meaningful way.

From the mid-nineteenth to the mid-twentieth century, we can speak of the “traditional” or “classical” period of trademark law. During this phase, national laws increasingly recognised trademarks as a form of property (Duguid, 2009); the first international instruments were concluded to organise the field (Dzamukashvili, 2014); core transnational principles were articulated, and international administrative bodies were founded⁴; and a divergence crystallised between civil-law jurisdictions (where rights in a mark are traditionally tied to registration) and common-law jurisdictions (which ground priority in commercial use) (McKenna, 2007).

These developments track the needs of the age—both from the perspective of protecting the interests of undertakings and, crucially, of consumers. Legal tradition also mattered. Civil-law countries tended from

³ Until the mid-fifteenth century (that is, before the invention of the printing press), there were only a few tens of thousands of manuscripts in Europe, mostly religious literature. By the end of the century, the total number of printed books is estimated to have reached about 20 million copies, and by the end of the sixteenth century as many as 200 million (Buringh and van Zanden, 2009).

⁴ This organization was the predecessor of the modern World Intellectual Property Organization (WIPO) and is generally referred to by the abbreviation of its French name - BIRPI. See: WIPO — A Brief History <https://www.wipo.int/about-wipo/en/history.html>

the outset to prioritise consumer protection, whereas common-law countries initially emphasised the ordering of relations among traders (McKenna, 2007).

In this classical period, non-traditional signs were not yet objects of proprietary protection. The field was largely confined to signs graphically depictable as letters, words, symbols, or their combinations (Carapeto, 2016). Nor did there exist either a significant stakeholder constituency to advocate for change or the technological means needed for effective protection.

The subsequent expansion of trademark law—and the emergence of protection for non-traditional signs—are qualitatively linked to the economic, technological, and marketing shifts of the twentieth century. In the decades after the Second World War, trade among capitalist economies intensified at an unprecedented scale, facilitating the rise of modern transnational corporations⁵. Technological achievements further increased production volumes,⁶ while communication with millions of consumers became easier than ever—first by radio, then by television, and by the century’s end through digital technologies. On the supply side, influential producers thus had a growing interest in highlighting the distinctiveness of their goods and services; on the means side, increasingly powerful tools existed to do so.

The re-thinking of the field and the extension of legal protection began in the United States. Initially in scholarship⁷ and then in case-law, greater weight was accorded to the trademark as an element of the producer’s goodwill—that is, as the aspect of reputation that attracts consumers (Gugeshashvili, 2010). American theorists drew on contemporary German scholarship (Strasser, 2011), yet whereas continental Europe’s tradition kept consumer protection at the fore, a series of U.S. doctrines—framed as measures to spare consumers confusion—enabled businesses to expand both the quantitative and qualitative scope of protectable symbols (McKenna, 2007).

⁵ For comparison, while at the beginning of the twentieth century there were only two or three companies in the world with assets of 500 million US dollars, by the 1970s their number had grown to 333, and, outside the planned-economy countries, the financial assets under their control accounted for 70–80% of all assets (Clairmonte and Cavanagh, 1981).

⁶ For example, the “Green Revolution” in the agricultural sector in the 1960s, which took the form of systemic improvements in production, made it possible to produce enough food to save up to two billion people from starvation (Andrews, 2009).

⁷ For example, the dilution doctrine was developed, which prohibits the use of a trademark that sufficiently resembles a well-known mark so that, by association, it may confuse consumers or diminish the public perception of the famous mark (Goyal, 2011).

The 1946 Lanham Act comprehensively organised the federal registration system and provided nationwide protection against confusingly similar uses⁸. Consistent with common-law tradition, marketplace use and distinctiveness remained central to registrability (Lanham Act, 1947, 15 U.S.C. §§ 1051–1127). For non-traditional signs, the Act is especially important because it allows marks to acquire protectability through secondary meaning: even if a sign is not inherently distinctive at creation, sustained use can educate consumers to perceive it as an indicator of source⁹.

From the 1960s through the 1990s, U.S. authorities and courts successively accepted three-dimensional shapes¹⁰, sounds¹¹, single colours¹², scents¹³, and other non-traditional indicia as trademarks. A recurrent pattern is visible: typically, large firms, through aggressive marketing, established recognition among consumers and then invoked that recognition to obtain legal protection.

A doctrinal high-water mark came with the Supreme Court’s decision in *Qualitex Co. v. Jacobson Products Co.* (1995), which construed “trademark” capaciously—essentially as “anything capable of carrying meaning” (Brinks Hofer Gilson & Lione, 2007, p. 94). that functions as a source-identifier. In the same period, federal legislation on dilution (FTDA, 1995) reinforced a broad conception of source designations by protecting famous marks against uses that blur or tarnish their distinctiveness even absent confusion.

U.S. leadership from the 1990s onward found an echo internationally. In 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)—a landmark in the expansion and harmonisation of IP—was concluded. Although academic critics (Sell, 2011) have underscored the disproportionate role of multinational corporate interests and the burdens TRIPS can impose on developing economies, there is broad consensus on its benefits for reducing legislative barriers to trade and for the circulation of information and technology (Sell, 2011).

⁸ The text of the law is available at: <https://www.bitlaw.com/source/15usc/index.html> [accessed: 13.11.2025]

⁹ “Nothing prevents the registration of a mark used by the applicant that has become distinctive of the applicant’s goods through use in commerce.” – Lanham Act, § 2(f).

¹⁰ In 1960, the Coca-Cola bottle was registered as a trademark (Lukose, 2015, 199).

¹¹ In 1978, the introductory music to the NBC television network’s news program was granted legal protection (Gupta, 2017, 22).

¹² In 1985, the color pink was granted trademark protection for the thermal insulation material produced by Owens-Corning (Lukose, 2015, 200).

¹³ In 1990, the scent of plumeria flowers used for the embroidery threads of Clarkes O Sew EZ was granted legal protection. Source: Scent trademark registration. Available electronically at: <https://cutt.ly/Gw1a1tzx> [accessed: 13.11.2025]

Article 15 of TRIPS defines trademarks broadly as “any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings” (TRIPS, Article 15). Members undertake to recognise visually perceptible non-traditional signs (Dzamukashvili, 2014) (e.g., three-dimensional signs and trade dress), while leaving protection for non-visual signs to national discretion (Lukose, 2015).

Also in the 1990s, the European Union created a unitary system for trademarks. Regulation 40/94, alongside the existing directive (Council of the European Communities, 1988, Directive 89/104/EEC), defined a mark as any sign capable of being represented graphically and of distinguishing goods or services—explicitly including shapes and packaging.

In the 2000s, the requirement of graphic representability became central to EU litigation. In *Sieckmann* (CJEU, 2002, Case C-273/00), the Court of Justice clarified that a sign cannot be excluded from protection merely because it is not directly perceived graphically, but its representation must satisfy specific criteria (clarity, precision, self-containment, etc.)¹⁴ so that the Office can discharge its tasks. In *Shield Mark*, the Court further held that sound marks, absent a representation in musical notation or an equivalent, were not registrable (CJEU, 2007, Case C-371/06).

The graphic-representation rule was ultimately abandoned: Directive 2015/2436 removed it (European Parliament & Council of the European Union, 2015, Directive (EU) 2015/2436) thereby making colour per se registrable in principle, and European Parliament & Council of the European Union, 2017, Regulation (EU) 2017/1001 now requires that a sign be fixed by any technology generally available, provided the *Sieckmann* criteria are met. These reforms were followed by a wave of registrations of non-traditional marks across the EU.

Recognition has expanded globally as well. Beyond TRIPS, the 2006 Singapore Treaty on the Law of Trademarks facilitated the modernisation of filing and representation. Since 2014 Japan has protected a broader set of non-traditional indicia (including motion, colour, and sound, alongside formats prevalent in local commercial practice)¹⁵. China (from 2013)¹⁶ and India from 2017 (Aggarwal and Jaganath,

¹⁴ “Clear, precise, self-contained, easily accessible, intelligible, durable and objective. (CJEU, 2002, Case C-273/00)

¹⁵ <https://cutt.ly/KwI2ZE9a> [accessed: 13.11.2025]

¹⁶ China Trademark Registration, Available at: <https://cutt.ly/jwI29tMy> [accessed: 13.11.2025]

2020) permit protection for a range of non-traditional marks—including certain non-visual signs—and similar processes are underway in parts of Latin America¹⁷.

The historical analysis in this chapter shows that, throughout its existence, trademark law has been tightly coupled to the interests of economic actors. If the classical period maintained a rough balance with consumer interests, the centre of gravity in the contemporary era has shifted perceptibly toward producers. That shift increases the responsibility of states and supranational unions to prioritise consumer interests when assessing each non-traditional sign.

Georgia restored its independence at a time when fundamental principles of intellectual property were already consolidated (Dzamukashvili, 2014) and, to a significant extent, harmonised globally. It was therefore in the national interest to reflect those principles in domestic legislation, including the 1999 Law of Georgia on Trademarks. Amendments adopted in 2024 removed the mandatory requirement of graphic representability, and the new statutory definition substantially tracks the EU directive's content.

At the same time, it must be remembered that the protection of non-traditional marks primarily benefits large multinational corporations, which creates risks for the interests of businesses and consumers in small, developing economies such as Georgia's. Accordingly, alongside legislative convergence, it is essential to strike a golden mean—one that safeguards other legally protected interests that deserve weight.

3. Definition of the Non-Traditional Trademark

Traditionally, trademarks consisted of typographic matter—letters and numerals arranged as words (with or without semantic content), phrases, and slogans—and two-dimensional graphic symbols (stylised figures, drawings, logos) and their combinations (Carapeto, 2016). Such signs were straightforward to fix and reproduce on paper; the classical trademark registers were, in substance, ordered collections of these depictions.

Any sign (or combination of signs) that departs from this classical description yet is capable of identifying the commercial origin of goods or services should be treated as a non-traditional trademark. The quantitative and qualitative range of such signs is broad: they may be perceived by any of the five senses—individually or in concert (Kapoor and Gupta, 2018).

¹⁷ 'Non-traditional' Trade Marks in Latin America <https://cutt.ly/LwI2JtwR> [accessed: 13.11.2025]

Although the European Union abolished the graphic-representation requirement, it emphasised—in contrastive terminology to U.S. practice (Lanham Act, 1947, 15 U.S.C. §§ 1051–1127)—the obligation that the sign’s representation be clear and precise (European Parliament & Council of the European Union, 2017, Regulation (EU) 2017/1001). Georgian legislation now reflects that requirement (Law of Georgia on Trademarks, 1999). It is desirable to make the purpose of that obligation explicit: the representation must enable third parties and the competent authorities to determine, objectively and with certainty, the subject matter of protection. Stating this telos in the statute itself would hedge against misinterpretation in future adjudication and examination.

A further point of doctrinal architecture concerns the *numerus clausus* approach. Article 3(2) of Georgia’s Law on Trademarks currently enumerates potential signs—“word(s), name(s), letter(s), numeral(s), sound(s), image, colour(s), the shape of the goods or of their packaging.” In a post-reform environment, this list should serve only an illustrative function; protectability ought to turn on the doctrinal attributes of the sign rather than on a closed taxonomy. Accordingly, the provision should be revised to abandon a *numerus clausus* model and to systematise the examples it nonetheless offers so that they better perform an orienting role.

Given the modern, capacious understanding of what may constitute a trademark, the EU and the United States have both adjusted certain absolute exclusions so as to safeguard the stable development of markets, protect consumer information interests, and ensure that the protected sign remains amenable to objective assessment by registries and courts (rather than devolving into purely subjective perception). Two doctrinal pillars are pivotal in this recalibration—acquired distinctiveness and functionality—which we examine in turn to build a framework suitable for Georgia and similar jurisdictions.

3.1. Acquired Distinctiveness (Secondary Meaning)

A trademark’s fundamental function is to distinguish: it must enable consumers to identify the producer and to avoid confusion with others. Traditionally, many signs are designed *ab initio* to achieve this function and thus possess inherent distinctiveness. Over time, however, commercial use may educate consumers to recognise a sign as an indicator of origin even though the sign lacked inherent distinctiveness at creation. In such circumstances, the sign is said to have acquired secondary meaning¹⁸.

¹⁸ Acquired distinctiveness is also referred to as “secondary meaning”, which, in the context of non-traditional marks, is not an entirely accurate term, since non-verbal signs rarely possess a clearly defined primary meaning.

Establishing acquired distinctiveness is therefore essential to the protection of many non-traditional signs and must be integrated into any modern legal definition and assessment protocol.

United States. As a general matter, a sign acquires distinctiveness when, in the minds of the relevant public, it identifies the source rather than the product itself (U.S. Supreme Court, 2000, 529 U.S. 205). The federal circuits articulate overlapping, but not identical, multi-factor tests¹⁹. In the Second Circuit, for example, courts often weigh proxies for marketplace recognition that also police unfair competition—such as direct advertising expenditures, unsolicited media coverage, sales success, and instances of copying (U.S. Court of Appeals for the Second Circuit, 1997, 124 F.3d 137)—whereas on the West Coast courts have tended to place relatively greater weight on consumer-survey evidence (U.S. Court of Appeals for the Ninth Circuit, 2009, 581 F.3d 1138). The divide is nevertheless porous; across jurisdictions, U.S. courts display a comparatively permissive stance toward recognising secondary meaning, a tendency visible in cases such as *Cartier, Inc. v. Four Star Jewelry Creations, Inc.* (U.S. District Court for the Southern District of New York, 2004, 348 F. Supp. 2d 217), where survey evidence drawn from a narrowed subset of the purchasing public (high-end watch consumers surveyed in venues featuring the brand’s presence) was accepted as probative of source association. As to quantitative thresholds, U.S. case-law resists a rigid minimum; courts speak of a “substantial” proportion of the relevant public (U.S. Court of Appeals for the Second Circuit, 1991, 933 F.2d 162), and while some decisions have accepted figures near 50% (Beebe, 2022, 62), the touchstone is qualitative persuasiveness rather than a universal numeric floor.

European Union. The Court of Justice’s judgment in *Windsurfing Chiemsee* (CJEU, 1999, Joined Cases C-108/97 & C-109/97) laid down the canonical framework. A sign has acquired distinctiveness if a significant proportion of the relevant class of persons identifies goods bearing the sign as originating from a particular undertaking. In assessing this, authorities may consider market share; the intensity, geographic spread, and duration of use; the scale of promotional investment; the proportion of the relevant class making the association; and statements by chambers of commerce or professional associations. Properly designed surveys are not only admissible but often desirable, with methodological standards to be set at the Member-State level (U.S. Court of Appeals for the Second Circuit, 1991, 933 F.2d 162).

¹⁹ The United States has 13 courts of appeals, each covering a different region of the country. See: About the U.S. Courts of Appeals, Available at: <https://cutt.ly/hwGDFj6J> [accessed: 13.11.2025]

Subsequent case-law has raised the bar for non-traditional signs. To secure EU-wide protection on the basis of acquired distinctiveness, the applicant must demonstrate it in each Member State (Porangaba, 2019, 622); extrapolation from one state to another is exceptional and requires a robust basis (shared language, close geographic, historical, or customary links) (CJEU, 2015, Case C-215/14). Given the EU's diversity, this translates into a demanding evidentiary burden²⁰. Furthermore, while the default benchmark remains the average consumer of the relevant goods or services, the “relevant public” may, where justified by product characteristics, be delimited to a specialist subset whose perceptions are decisive in the market segment concerned²¹—thereby allowing a workable balance between public and private interests.

In contrast to the U.S., the EU adopts a stricter approach to recognising acquired distinctiveness—especially for non-traditional indicia—both in geographic coverage and in evidentiary expectations. For Georgia, hewing to the European model is advantageous: it harmonises domestic practice while leaving sufficient room to tailor standards to particular categories of non-traditional marks. In operational terms, this suggests that the relevant public standard used for assessing the likelihood of confusion should also govern proof of secondary meaning; applicants should ordinarily be expected to submit methodologically sound, representative surveys demonstrating that a significant share of that public perceives the sign as a source identifier.

3.2. Functionality

The rule that excludes functional signs from registration as trademarks operates as a key safeguard in the registration of many non-traditional marks (Calboli and Senftleben, 2018)²². Its primary goal is to protect consumers, ensuring that they are not deprived of the ability to associate a sign genuinely with a particular undertaking (Dzamukashvili, 2019); at the same time, it protects traders by preventing the use of trademark law to suppress legitimate competition (Dzamukashvili, 2019). In legal scholarship—especially in the United States—signs that express the natural characteristics of goods are typically

²⁰ For example, for decades Nestlé sought to maintain the registration of the characteristic “four-finger” shape of its KitKat chocolate bar as a three-dimensional trademark. Ultimately, the mark was removed from the register, *inter alia*, because the company failed to produce evidence of acquired distinctiveness in several EU Member States (Belgium, Ireland, Greece and Portugal), which together accounted for around 10% of the Union's population (Calboli and Ginsburg, 2020, 220)

²¹ For example, in one of the more recent cases, *Novartis v AstraZeneca*, the court held that purchasers of medicinal products are better informed about the product, which in turn reduces the likelihood of confusion.

Source: (General Court of the European Union, 2023, Case T-175/22)

²² Primarily, the doctrine is relevant in the context of product shapes, colours, trade dress and scents. This issue requires further examination in relation to each type of sign and will be discussed in the corresponding subsections of this study.

classed as either utilitarian or aesthetic in their functionality (Calboli and Senftleben, 2018). That bifurcation is also analytically convenient for the purposes of this article.

Utilitarian functionality concerns signs whose very nature is dictated by the characteristics of the product and/or is necessary to achieve a specific technical result²³. Such features affect the quality of the product or the financial efficiency of its manufacture and distribution (Calboli and Senftleben, 2018). The exclusion of utilitarian features from trademark protection is reflected in the United States, European Union (European Parliament & Council of the European Union, 2017, Regulation (EU) 2017/1001), and Georgian law alike.

In the United States, the Supreme Court articulated the modern working definition of utilitarian functionality in *Qualitex Co. v. Jacobson Products Co.* (U.S. Supreme Court, 1995, 514 U.S. 159). In substance, courts are directed to consider whether: (a) the feature is essential to the use or purpose of the product; (b) the feature has a significant effect on the cost or quality of the product; or (c) granting the trademark owner an exclusive right in the feature would place competitors at a significant non-reputation-related disadvantage. Read together with subsequent case-law, this definition has been interpreted broadly and has become one of the central “gatekeeping” mechanisms in determining which symbols may be recognised and protected as trademarks²⁴.

A broadly similar approach is visible in the European Union. Regulation 2017/1001 provides that a sign may not be registered as a trademark where: (a) it consists exclusively of the shape, or another characteristic, which results from the nature of the goods themselves; or (b) it consists exclusively of the shape, or another characteristic, of goods which is necessary to obtain a technical result. Historically, comparable protection in the EU was applied primarily to shapes (or outlines) of products²⁵, and the Court of Justice developed case-law along those lines. The 2017 reform, however, extended the exclusion

²³ For example, if a ribbed texture gives strength to the thin walls of plastic packaging and ensures the stability of the product, the ribs will be regarded as functional.

Source: (U.S. Court of Appeals for the Fifth Circuit, 2002, 289 F.3d 351).

²⁴ For example, the registration of a single colour as a trademark was refused to a confectionery manufacturer, since the court considered that the specific colours served the function of enabling consumers easily to recognize the flavour of the sweets (red – cherry, orange – orange, etc.). For the same reason, Harley-Davidson was unsuccessful in its attempt to obtain trademark protection for the sound of its famous motorcycle engines.

Sources: 1. U.S. Court of Appeals for the Third Circuit, 2007, 511 F.3d 350; 2. (Trademark Trial and Appeal Board (TTAB), 1997, 43 U.S.P.Q.2d 1521).

²⁵ Of particular note is the case *Philips v Remington* (2002), in which the court held that, if a shape essentially represents nothing more than a design intended to achieve a technical result, it cannot be registered as a trademark even if the same technical result can be achieved by other means (Dzamukashvili, 2019, 58-59).

beyond shapes to encompass any non-traditional characteristic capable, in principle, of being presented as a trademark.

The Court of Justice has also clarified (CJEU, 2015, Case C-215/14) that the term “technical result” in this context is to be interpreted broadly and from the consumer’s perspective. The assessment must focus on how the product functions in use, not narrowly on how it is manufactured—a matter of lesser concern to consumers.

By contrast with utilitarian functionality, the treatment of aesthetic functionality has been a subject of doctrinal controversy²⁶. Aesthetic functionality refers to the use of a sign in a way that endows a product with intrinsic visual or other sensory appeal in the eyes of consumers²⁷. In such cases, the sign essentially performs the function of product design; excluding it from trademark protection is necessary, above all, because design law offers only time-limited protection. Allowing indefinite trademark protection for features whose primary role is to make the product attractive would risk undermining the balance struck by design law. In both U.S. and European practice, aesthetic functionality operates as an absolute ground for refusing or invalidating registration, though its precise scope and intensity differ.

In the United States, the doctrine emerged in the 1950s with the Ninth Circuit’s decision in *Pagliero v. Wallace China Co.* (U.S. Court of Appeals for the Ninth Circuit, 1952, 198 F.2d 339). The court held that, from the buyer’s standpoint, the product possessed aesthetic value and that the attractiveness of the design was a reason for purchase. On that basis, it concluded that the patterns were functional and formulated what has come to be known as the “Pagliero test,” under which a product feature is aesthetically functional if it is a significant ingredient in the product’s commercial success.

Subsequent U.S. case-law shows a tendency to narrow this broad formulation (Calboli and Senftleben, 2018). Aesthetic functionality is now applied primarily to features where evidence shows that consumers wish to use them in a way that matches or coordinates the product with a given environment or with

²⁶ For example, trade mark law scholars Graeme Dinwoodie and Mark Janis question the need to distinguish this type of functionality. Mark McKenna, by contrast, takes the view that such a distinction is necessary, since if the doctrine of utilitarian functionality primarily separates trade marks from patent law, the doctrine of aesthetic functionality performs the same function in relation to designs (Dinwoodie and Janis, 2010).

²⁷ Trademark law scholar Justin Hughes argues that it would be more appropriate to use the term “cognitive” or “psychological” functionality instead of “aesthetic” functionality. This view is certainly not without merit; however, for the purposes of this study the term that is more widely established in the scholarly literature is employed (Calboli and Senftleben, 2018).

aesthetic preferences that have evolved over time or have been shaped by cultural norms (for example, certain decorative motifs or colour schemes)²⁸.

In *Qualitex Co. v. Jacobson Products Co.* (U.S. Supreme Court, 1995, 514 U.S. 159), the Supreme Court reinforced this line of thinking, famously observing—by way of literary quotation—that there is a “natural instinct in human beings to adorn the things they use²⁹” At the same time, the Court drew a firm line: even if a symbol has acquired secondary meaning, it cannot be monopolised as a trademark where its exclusive appropriation would put competitors at a significant non-reputation-related disadvantage. Later decisions, including *TraFFix Devices, Inc. v. Marketing Displays, Inc.* (U.S. Supreme Court, 2001, 532 U.S. 23), extended this analysis to trade dress and underscored that functionality—whether utilitarian or aesthetic—cannot be overcome merely by showing acquired distinctiveness.

In the European Union, the notion of aesthetic functionality took doctrinal shape in the Court of Justice’s judgment in *Benetton Group SpA v. G-Star International BV* (CJEU, 2007, Case C-371/06). The case concerned attempts to register as a trademark the decorative stitching on items of clothing. The Court held that the seams performed only an “ornamental” function, were thus properly treated as design features, and annulled the registration (Dzamukashvili, 2019).

The doctrine was subsequently codified (Council of the European Union, 2009, Regulation (EC) No 207/2009). The 2009 Community trade mark regulation excluded from registration “signs which consist exclusively of the shape which gives substantial value to the goods (Council of the European Union, 2009, Regulation (EC) No 207/2009, Article 7, 1, (e)iii).” The 2017 reform broadened this to capture “the shape, or another characteristic, which gives substantial value to the goods” (European Parliament & Council of the European Union, 2017, Regulation (EU) 2017/1001, Art. 7(1)(e)(iii)). In terms of wording and effect, this provision bears a close resemblance to the *Pagliero* test and, relative to the more recent U.S. approach, confers a comparatively wide scope on the exclusion (Calboli and Senftleben, 2018).

In *Bang & Olufsen A/S v. OHIM* (General Court of the European Union, 2011, Case T-508/08), the General Court held that, despite the fact that the distinctive form of the loudspeaker left competitors

²⁸ For example, an application to register the colour black as a trademark for outboard motors for boats was refused because the colour is compatible with a wide range of boat colours and is therefore preferred by consumers who purchase outboard motors. Moreover, objects painted black appear smaller, and consumers buying outboard motors for boats find this reduction in the perceived size of the engine aesthetically pleasing.

Source: Trademark Trial and Appeal Board (TTAB), 1993, 28 U.S.P.Q.2d 1197.

²⁹ The quotation, in turn, is taken from Gilbert Chesterton’s book *Simplicity* and Tolstoy.

ample freedom to develop their own design variants, the shape at issue substantially increased the product's appeal to consumers. On that basis, it refused registration as a trademark. The decision attracted criticism in the literature (Knaak et al 2012) for failing to take adequate account of the possibility that the sign might have acquired secondary meaning and might, for consumers, function as an indication of origin (Willemsen, 2021); in effect, it risked excluding from protection any striking or unusual symbol.

The Court of Justice sought to clarify this ambiguity in the Gömböc Case (CJEU, 2020, Case C-237/19). It held that the mere fact that a feature is, or could be, protected under design law does not automatically preclude its registration as a trademark. Moreover, where registration is refused on the ground that a feature “gives substantial value to the goods,” there must be clear, objective, and reliable evidence that consumers’ decision to purchase the product is largely based on that specific characteristic.

A comparative analysis of U.S. and EU practice on signs reflecting the natural properties of goods shows that, with respect to utilitarian functionality, their regulatory frameworks and case-law are broadly aligned. For aesthetic functionality, however, the United States has, over time, developed a relatively narrow approach that tends to favour traders, whereas in the European Union, a fully settled practice has yet to emerge, and the contours of the doctrine remain open to further refinement.

Following the 2024 amendments to the Law of Georgia on Trademarks, the doctrine of utilitarian functionality is appropriately reflected in domestic legislation (Law of Georgia on Trademarks, 1999). By contrast, the attempt to incorporate aesthetic functionality is currently limited to the formula that a sign is excluded where it “confers substantial value on the goods” (Law of Georgia on Trademarks, 1999, Subparagraph „3.8“). As drafted, this wording does not clearly articulate the core of the doctrine—namely, that the value arises from conferring aesthetic appeal—and thus risks conflating trademark and design protection. It is therefore necessary to refine the statutory language so that it expressly ties “substantial value” to the grant of aesthetic attractiveness and, in doing so, preserves the conceptual boundary between trademarks and designs.

Taken as a whole, functionality is a fundamental component in assessing the registrability and scope of protection of non-traditional trademarks. Accordingly, careful engagement with European and U.S. case-law and experience will significantly reduce the risk of uncertainty in the national legal order and help maintain an appropriate balance between consumer interests, fair competition, and the legitimate expectations of rights holders.

4. Classification of Non-Traditional Trademarks

Two starting propositions are important when attempting to classify non-traditional trademarks. First, so long as they perform their essential function – enabling consumers to identify the commercial origin of goods or services – trademarks can in principle operate through any human sense. A sign may be perceived visually, aurally, by touch, taste or smell, individually or in combination. In that sense, non-traditional marks do not expand the function of the trademark; they expand the range of sensory channels through which that function can be achieved.

Secondly, empirical practice shows a clear asymmetry. In marketing strategies undertaken by undertakings, visually perceptible symbols continue to dominate. They are used more intensively and in a greater variety of forms than signs relying on other senses³⁰. By contrast, in legal systems where registration is a precondition for protection, the most serious doctrinal and practical challenges arise in relation to invisible organoleptic and hybrid signs³¹, whose representation in a public register is inherently more complex.

Against this background, for the purposes of the present article, non-traditional trademarks are grouped into three broad categories:

1. visually perceptible signs;
2. invisible organoleptic signs;
3. hybrid signs.

In discussing each category, particular attention is paid to the practice of the European Union Intellectual Property Office (EUIPO). For those types of signs where EU experience is limited or non-existent, comparative reference is made to other international approaches that may nonetheless be instructive for Georgia.

4.1. Visually Perceptible Signs

Beyond traditional typographical symbols, contemporary technological development and creative advertising constantly bring forth new forms of visually perceptible trademark use. Precisely for this

³⁰ For example, in the United States it has been estimated how many trademarks the average American is exposed to each day. In the 1970s this figure ranged from 500 to 1,600; today it is between 4,000 and 10,000. See: How Many Ads Do We See a Day? Available: <https://cutt.ly/fwHhOwJc> [accessed: 13.11.2025]

³¹ That is, signs which, in order to be perceived, require the involvement of sense organs other than vision.

reason, it is practically impossible to determine an exact, finite number of possible non-traditional visual forms. Any attempt to exhaustively enumerate such forms in legislation would quickly become outdated.

In line with current EU practice, the main visually perceptible non-traditional signs include, inter alia, the following.

(a) Three-dimensional marks

A three-dimensional mark covers the container, packaging or shape of the product as such (European Commission, 2018, Commission Implementing Regulation (EU) 2018/626). Under EUIPO practice, it is preferable that the mark be filed as a computer-generated image or a photograph of sufficient quality to enable full spatial perception of the protected shape. Where the mark is not filed electronically, the representation should normally consist of a series of images from several different perspectives, so that the competent authority and third parties can clearly understand the contours of the shape.

(b) Shape of goods (outline)

The “shape of goods” denotes the lines and contours that determine the outline of a product (CJEU, 2018, Case C-163/16). According to the European Commission, every shape of goods is in principle a sub-category of three-dimensional marks. Nevertheless, given its practical significance and the frequency with which it raises questions of technical and aesthetic functionality, it is useful to treat it separately in doctrinal analysis.

(c) Position marks

Under EU legislation, a position mark is a trademark where protection is claimed for the specific way in which a sign is placed on the goods (European Commission Implementing Regulation (EU), 2018/626). The mark must be represented in such a manner that the position, size, and proportions of the sign in relation to the goods are clearly indicated. This ensures that protection is not extended to the goods as such, but only to the particular positioning of the sign (for example, a stripe, logo, or colour applied at a specific locus on footwear)³².

(d) Single colours and colour combinations

³² The sign may be represented in a JPEG file or on a single A4 sheet. Elements that do not form part of the subject matter of the registration must be visually separated, preferably by broken or dotted lines. Source: Guidelines for Examination of European Union Trade Marks, European Union Intellectual Property Office (EUIPO), 2023, p. 237.

In the case of single colours and colour combinations, the main difficulty lies not in defining the general concept of “colour”, but in ensuring a clear and precise identification of the specific colour claimed. EU registration authorities do not consider it sufficient to describe a colour or combination merely by words (“red”, “light blue”, etc.). They require the indication of a corresponding code in a recognised colour system (such as Pantone or RAL) (European Union Intellectual Property Office (EUIPO), 2023, p. 367). For the sake of legal certainty, it is desirable that the Georgian registration authority adopt the same standard, especially given that modern technology makes the determination of precise colour codes straightforward. In addition, the representation should make clear the context of use – for instance, whether the colour is claimed for the entire packaging, for a particular part of the product, or for another defined surface.

(e) Pattern marks

A pattern mark is a sign composed of elements which are repeated regularly (European Commission Implementing Regulation (EU), 2018/626), for example a repetitive geometric motif or a recurring logo. Before EUIPO, this type of mark must be represented by a reproduction that clearly shows the pattern of repetition, rather than only a single isolated element³³. Where necessary, the representation may be accompanied by a description explaining how the elements repeat over the surface.

(f) Hologram marks

A hologram mark is an image whose appearance changes depending on the viewing angle (European Union Intellectual Property Office (EUIPO), 2023, p. 247). It may be embodied in a physical flat structure which uses light diffraction to create the illusion of three-dimensionality, or in a digital projection generated by an appropriate light field. A hologram mark must be represented in a way that allows the differing visual aspects to be perceived, for example through a sequence of images or an appropriate electronic file.

(g) Motion marks

A motion mark consists of a movement or a change in the position of the elements of the sign (European Commission Implementing Regulation (EU), 2018/626). Ideally, such marks are filed as a video file showing the movement in time, but they may also be represented by a series of still images, provided the

³³ in a JPEG file or on a single A4 sheet.

sequence clearly conveys the dynamics of the movement or change of position. In motion marks, the movement or positional change is an objective phenomenon which is part of the sign itself, whereas in hologram marks the visual change results solely from the viewer's change of perspective.

(h) Gesture marks

Gesture marks belong to the broader category of non-verbal communication. They consist of movements of the hands, face, or other body parts which convey specific messages in place of, or alongside, spoken language (Enciclopedia Britannica). Where a gesture acquires sufficient distinctiveness in relation to certain goods or services, it is in principle possible to register it as a trademark. At the same time, cultural differences can make assessment difficult: a gesture that is neutral in one jurisdiction may carry a very different meaning in another, which calls for particular caution when defining the “average consumer.”³⁴.

As this overview indicates, even visually perceptible signs, which can ultimately be fixed in a two-dimensional graphic format, must nonetheless be represented in such a way that they are clearly and precisely understood both by the registration authority and by the public. The core issue is not the medium of fixation, but whether the sign's essential characteristics are objectively and unambiguously captured.

4.2. Invisible Organoleptic and Hybrid Signs

As with visible marks, it is neither realistic nor normatively desirable to attempt a closed classification of invisible organoleptic and hybrid signs. Their forms are too diverse and too dependent on technological and commercial innovation. Nevertheless, a number of principal types can be distinguished for analytical purposes.

(a) Sound marks

A sound mark is a trademark consisting exclusively of sound – for example, a short jingle, a characteristic chime, or another distinctive acoustic sequence (European Commission Implementing Regulation (EU), 2018/626, 3.3(g)). For registration, the mark should be represented either by an audio file or by an exact notation in a musical score. Where a sound is combined with images or other elements perceptible by

³⁴ A case has been described in which, on grounds of disturbance of public order, the Rome police arrested a group of American tourists who were celebrating in the street after one of the Super Bowl games. It turned out that the tourists were making with their hands the symbol of the Texas football team, the Hook 'em Horns sign (with the index and little finger extended and the remaining fingers folded together), which Italians perceive as an offensive “putting on the horns” gesture. This curious incident, among other things, underlines the importance of the principle of territoriality in trademark law (Pease and Pease, 2014).

different senses, the sign ceases to be a pure sound mark and becomes either a multimedia mark or part of a broader trade dress (Guidelines for Examination of European Union Trade Marks, European Union Intellectual Property Office (EUIPO), 2023, p. 452).

(b) Multimedia marks

A multimedia mark is a form of trademark comprising a combination of image and sound (European Commission Implementing Regulation (EU), 2018/626, 3.3(i)). Typically, it consists of a short video or animation with accompanying audio. The sign must be filed as an audiovisual file that captures the protected sequence in its entirety. Multimedia marks are particularly relevant in digital environments—such as streaming platforms or mobile applications—where brand identity is built through dynamic audiovisual elements³⁵.

(c) Texture marks

In the context of trademarks, texture refers to a symbol embodied in the surface of a product or its packaging, where the tactile sensation experienced by the consumer contributes to identifying the commercial origin of the goods (for instance, a characteristic ridged or rough surface).

EU law, at least in principle, does not exclude the registrability of texture marks. In practice, however, they present considerable difficulties. On the one hand, it is challenging to prove that a given texture has acquired distinctiveness as an indicator of origin rather than being perceived merely as functional or decorative. On the other hand, the functionality doctrine may bar protection where the texture improves grip, prevents slipping or otherwise confers a technical advantage.

It is also important to distinguish texture marks from tactile indicators designed to help visually impaired persons navigate their environment (for example, Braille inscriptions or specific relief symbols for accessibility). The primary purpose of such indicators is public orientation, not the identification of commercial origin; consequently, they are not accepted as trademarks in EU practice (Guidelines for Examination of European Union Trade Marks, European Union Intellectual Property Office (EUIPO), 2023, p. 249).

³⁵ According to the guidelines of the European Union Intellectual Property Office, the file submitted must not exceed 20 megabits in size and a bit rate of 8,000 kilobits per second.
Source: (Guidelines for Examination of European Union Trade Marks, European Union Intellectual Property Office (EUIPO), 2023, 246).

(d) Olfactory and taste marks

Scents and tastes undoubtedly have the capacity to create strong associations and could, in theory, serve as indicators of commercial origin for certain goods (for example, a unique scent for a non-perfume product or a characteristic taste for a pharmaceutical). Under the strict standard set by the Sieckmann criteria, however, EU registration authorities currently consider that the available technology does not allow such signs to be represented in a clear, precise and self-contained manner in the register. A purely verbal description of a scent or taste is regarded as too subjective and ambiguous.

At the same time, the number of jurisdictions that, under more flexible conditions, register and protect scents and tastes as trademarks is gradually increasing³⁶. This development suggests that Georgia should follow the debate closely: future technological progress and potential reform of EU rules may reopen the question of whether olfactory and taste marks can be accommodated within a registration-based system (Geiregat, 2022).

(e) Trade dress

Trade dress is arguably the broadest concept within the family of non-traditional signs. It denotes the overall get-up or look and feel of a product or service as presented on the market: the combination of shape, packaging, colour scheme, typography, arrangement of elements, and, in some instances, even the layout of retail premises (Dzamukashvili, 2014). Trade dress may thus incorporate one or more of the signs discussed above—such as shapes, colours, textures and patterns—into a unified visual identity which consumers learn to associate with a particular undertaking.

Historically, trade dress protection emerged most prominently in the United States and was later echoed in other jurisdictions. In the Georgian context, a more detailed analysis is needed to determine whether, and under what conditions, trade dress should be classified as a trademark under the Law on Trademarks, or whether certain aspects should be protected only under the rules on unfair competition (Dzamukashvili, 2014).

As this survey illustrates, non-traditional marks are inherently eclectic. It is impossible – and would be counter-productive – to attempt to capture all their potential forms in an exhaustive legislative list.

³⁶ It is protected in the United States, Australia, Japan, South Korea, Singapore, Hong Kong, the United Kingdom (post-Brexit), and elsewhere. (Electronic resources: <https://cutt.ly/vwHi0uPx> <https://cutt.ly/hwHi0zMX>)

Nonetheless, it is important to anchor the most significant types in the normative framework, both for reasons of legal certainty and to provide guidance to administrative and judicial practice.

Accordingly, it would be appropriate to adjust Article 3(2) of the Law of Georgia on Trademarks so that, after defining the notion of a “sign”, it offers the following illustrative formulation:

“A sign may, in particular, consist of typographical symbols (a word or words, letters, numerals), a figurative element, a three-dimensional shape, including the shape of goods or of their packaging, a single colour or a combination of colours, a repetitive pattern, a position mark, a motion mark, a hologram, a sound mark or a multimedia mark.”

This formulation, on the one hand, aligns the Georgian model with the structure of current EU legislation and practice. On the other hand, by clearly presenting the list as illustrative rather than exhaustive, it preserves the necessary flexibility for future technological and commercial developments. It also signals to practitioners and courts which categories of non-traditional signs are most likely to arise in practice, without prejudging the protectability of other, novel forms that satisfy the substantive legal criteria for trademark registration.

5. Conclusion and Recommendations

The historical and comparative analysis undertaken in this article shows that non-traditional trademarks are not an eccentric add-on to the classical system but a natural outgrowth of broader technological, economic, and marketing developments. As production scales increased, global value chains deepened, and new media multiplied the points of contact between undertakings and consumers, market actors began to exploit every available sensory channel to build brand identity. Legal systems—first in the United States, then in the European Union and, more recently, in a range of other jurisdictions—reacted by cautiously extending trademark protection to non-traditional signs while attempting to preserve the structural balance between private rights, fair competition, and consumer interests. For a small, open economy such as Georgia’s, which aspires to deeper integration into European legal and economic space, the challenge is not whether to engage with non-traditional marks, but how to do so in a way that maximises the benefits of harmonisation while minimising the risks of over-protection.

The comparative chapter demonstrates that, at the level of regulatory architecture, the European Union provides the most appropriate primary model for Georgia. The EU’s insistence on clarity and precision of representation, its demanding standards for acquired distinctiveness—especially for non-traditional

indicia—and its codified functionality exclusions together offer a coherent doctrinal framework that is compatible with Georgia’s legal tradition and international obligations. At the same time, the United States, with its longer and more diverse case-law on non-traditional marks, supplies a valuable empirical and analytical laboratory. U.S. practice on secondary meaning, survey evidence, and the gradual refinement of aesthetic functionality can and should inform the interpretation of Georgian law, even if the statutory template is drawn primarily from EU sources.

On that foundation, the article makes three substantive contributions of direct relevance for Georgian practice. First, it proposes a modern, capacious definition of the non-traditional trademark, aligned with TRIPS and EU law yet tailored to domestic needs: any sign that departs from the classical typographical and two-dimensional graphic paradigm but is capable of indicating commercial origin and can be represented with sufficient clarity and precision should, in principle, be eligible for protection. Secondly, it offers a systematic classification of non-traditional signs into visually perceptible, invisible organoleptic, and hybrid categories. This tripartite structure is not intended to be exhaustive, but it gives administrative and judicial authorities a stable conceptual map within which to situate novel signs. Thirdly, the article identifies three doctrinal pillars that must be calibrated with particular care in the Georgian context: (i) the requirement that the representation of a sign be clear and precise; (ii) the centrality of acquired distinctiveness (secondary meaning) for many non-traditional marks; and (iii) the dual doctrine of utilitarian and aesthetic functionality, which prevents trademark law from displacing design, patent, and competition law.

The 2024 amendments to the Law of Georgia on Trademarks—especially the abolition of the graphic-representation requirement—are an important and welcome step in the direction of international harmonisation. Nonetheless, the current text leaves several crucial points implicit or ambiguous. In light of the analysis developed in this article, the following legislative refinements are recommended:

1. Clarify the legal definition of a trademark. Article 3(1) should define a trademark expressly as any symbol or combination of symbols that (a) distinguishes the goods or services of one undertaking from those of other undertakings; and (b) is presented for registration in such a way that the competent authorities and the public can clearly and precisely determine the subject-matter of protection.

Making this telos explicit will align Georgian law with the Sieckmann criteria and reduce the scope for arbitrary or overly formalistic refusals.

2. Transform the closed list into an open catalogue. Article 3(2) should be redrafted to be non-exhaustive, expressly mentioning words, letters, numerals, figurative elements, 3D shapes, single colours, patterns, position marks, motion marks, holograms, sound marks, and multimedia marks.

This approach better reflects the functional definition of a trademark and ensures that the law remains technologically neutral and future-proof.

3. Refine aesthetic functionality. The formula "confers substantial value on the goods" should be updated to specify that this value is aesthetic, preventing the conflation of trademark and design protection.

In other words, a sign should be excluded where, by conferring aesthetic appeal, it substantially increases the attractiveness of the goods, and consumers' decision to purchase is largely driven by that aesthetic feature. This clarification would sharpen the conceptual boundary between trademarks and designs: products whose competitive edge lies primarily in their visual or other sensory appeal should, in the first instance, be protected under design law, with the possibility of subsequent trademark registration only where the sign has, in addition, acquired a genuine source-identifying function.

Legislative amendments alone, however, are insufficient. To ensure coherent implementation, it is essential that the national registration authority develop and publish detailed guidelines on the examination of non-traditional marks.

Administrative and Examination Guidelines:

- **Detailed Examination Guidelines:** The national registration authority should publish guidelines explaining how clarity-and-precision requirements apply to different categories of signs and new file formats.
- **Standardized Evidentiary Expectations:** Guidelines should set clear rules for establishing acquired distinctiveness, including the appropriate use of consumer surveys and market data.
- **Secondary Meaning Thresholds:** Applicants should be expected to submit methodologically sound sociological research showing that a significant share of the relevant public perceives the sign as a designation of origin.
- **Practical Illustrations:** Provide examples of utilitarian and aesthetic functionality based on EU and U.S. case-law to reduce uncertainty for rights holders.

Particular emphasis should be placed on the evidentiary standard for secondary meaning: since likelihood of confusion is assessed from the perspective of the average reasonably well-informed, observant, and circumspect consumer, the same benchmark should govern proof of acquired distinctiveness. This would relieve examiners of the unrealistic burden of substituting their own subjective perception for that of consumers while enhancing transparency and predictability for rights holders.

From a policy perspective, the proposed framework seeks to strike a “golden mean” between two opposing risks. On the one hand, under-protection of non-traditional signs could undermine incentives to invest in innovative forms of branding and leave Georgian undertakings at a disadvantage in transnational markets. On the other hand, overly permissive registration of such signs—especially where driven by the interests of large multinational corporations—could lead to over-concentration of communicative symbols, inhibit competition, and compromise consumer autonomy. By anchoring Georgia’s approach in a clarified definition of the trademark, a nuanced doctrine of acquired distinctiveness, and a carefully delimited concept of functionality, the recommendations advanced in this article aim to ensure that non-traditional marks serve as instruments of fair competition and reliable consumer information rather than as tools of market foreclosure.

Finally, the article’s classification of non-traditional trademarks and its sketch of minimum filing requirements for each category are only a starting point. Each type of sign—single colours, position marks, texture marks, olfactory and taste marks, trade dress, and others—raises specific questions that warrant more detailed doctrinal and empirical investigation. Future research, including the subsequent stages of the author’s dissertation, will therefore examine in depth the conditions under which particular non-traditional indicia should be registrable in Georgia; how conflicts between trademarks, designs, and geographical indications ought to be resolved; and what methodological standards should govern consumer surveys in a small but rapidly integrating market. Addressing these issues systematically will not only refine the protection of non-traditional marks at the national level but also contribute to the broader comparative debate on how trademark law can adapt to an evolving sensory and technological landscape without losing sight of its foundational normative commitments.

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