

## INTERSECTION OF 3-D MARKS WITH INDUSTRIAL DESIGNS: THE CONTEXT OF 3-D SHAPE PROTECTION

**Amelia Anggriany Siswoyo**

Sekolah Tinggi Ilmu Hukum Graha Kirana, Jl. Kirana Raya No.20, Medan, Indonesia  
amelia.siswoyo@graha-kirana.com

### ABSTRACT

*3-D (three-dimensional) shapes are objects that fall within the scope of regulation of two Intellectual Property Laws, namely the Trademark Law and the Industrial Design Law. There is a regulatory conflict between the Trademark Law and the Industrial Design Law in terms of protecting 3-D (three-dimensional) shapes. This research is normative juridical legal research. This research will use a legal approach and a conceptual approach, as well as data analysis using qualitative descriptive methods. The results of this research conclude that there is a need for determining indicators as a differentiator or boundary line for 3-D (three-dimensional) shapes in terms of protecting Intellectual Property Brands or Industrial Designs. The determining indicators are 'as an identification mark of a trading product', good faith, distinctiveness and The Functionality Doctrine or functionality doctrine.*

Bentuk 3-D (tiga dimensi) merupakan obyek yang masuk ke dalam ruang lingkup pengaturan dua Undang-Undang Kekayaan Intelektual, yaitu UU Merek dan juga UU Desain Industri. Di sinilah terjadi persinggungan pengaturan antara UU Merek dan UU Desain Industri dalam hal perlindungan bentuk 3-D (tiga dimensi). Penelitian ini adalah penelitian hukum yuridis normatif. Penelitian ini akan menggunakan pendekatan Undang-Undang dan pendekatan konseptual, serta analisis data menggunakan metode deskriptif yang bersifat kualitatif. Hasil penelitian ini menyimpulkan bahwa diperlukan adanya indikator penentu sebagai pembeda atau *borderline* bentuk 3-D (tiga dimensi) dalam hal perlindungan Kekayaan Intelektual Merek atau Desain Industri. Indikator penentu tersebut adalah 'sebagai tanda pengenal suatu produk perdagangan', itikad baik, *distinctiveness* dan *the functionality doctrine* atau doktrin fungsionalitas.

**Kata Kunci:** *Mark Opportunity, Three-Dimensional, Industrial Design, Shaped Protection.*

### A. PENDAHULUAN

Trademarks have long been known to humans since ancient times (Harahap, 1996). Trademark is normatively defined as a sign that can distinguish goods and services produced by a company against other companies. The sign in question can be in the form of words, letters, numbers, photos, images, shapes, labels, logotypes, colors, or a combination thereof that can be used as a differentiator in the trade of goods and/or services (Jened, 2013). In the traditional sense of trademarks, trademarks are limited to visual creations, namely signs that can be in the form of letters, words, names, numbers,

images, colors, color arrangements, or combinations of these elements that are used in trading activities of goods and / or services to distinguish one product from one company from the products of other companies (Mayana, 2017).

Over time, in the development of trademarks, in addition to traditional trademarks, also developed the concept of non-traditional trademarks that have been accepted for registration and applied in several countries in the world (Jened, 2013). More simply put, a non-traditional mark is a mark that has the ability to distinguish a product or has a distinguishing power but is not included in the qualifications of the traditional understanding of the mark. This leads to a very broad scope of understanding for non-traditional marks, which can trigger confusion.

Before the latest Trademark Law was enacted (Law No. 20/2016 on Trademarks and Geographical Indications), Law No. 31/2000 on Industrial Design (Industrial Design Law) was already in force, which regulates the protection of 3-D (three-dimensional) forms that can be used to produce a product, goods, industrial commodities, or handicrafts (Article 1 number 1 of Law No. 31/2000 on Industrial Design). This development indicates the difficulty of distinguishing the protection of 3-D (three-dimensional) forms, namely between trademarks and industrial designs, because there has been an overlap of regulation (Nadeak, 2019). Three dimensions can be understood as a props where the tool has height, width and length so that it has volume and can be seen on all sides. (Sudjana, 2011). So that the scope of three dimensions in the protection of the trademark in question is not only the packaging of a product but also the product itself.

Brands have an important role in various fields. Not only in the field of business and trade, social activities also feel the importance of brands. A brand is an idea that forms an intangible assets. This means, brands may be intangible concepts, but their value and influence hold immense power. They can make or break a company's success and significantly impact consumer behavior. The brand as a product identity makes it easier for consumers to recognize it (Intelektual, 2020).

Meanwhile, industrial design or product design is a branch of design science that studies aspects related to the design of tools or commodity products used in everyday life. The commodity must be reproduced or produced in a certain amount. The multiplication of the number of goods must follow industrial rules where each item made must be exactly the same shape (consistent) with each other both produced by machines (manufacturing industry) and hands (handicraft industry). The user of the design is human, so the design is required to be able to meet the needs of users both physical and psychological needs. The design must be able to fulfill functional, comfortable, safe, effective and valuable (efficient) requirements. Psychologically, the design is also required to be able to provide a sense of peace, confidence, clarity of identity, and pleasure. In short, product design must be able to provide or add to the aesthetic experience for its users (Intelektual, 2020). According to Indonesian law (Law

No. 31 of 2000), an industrial design refers to a creative aspect of a product's appearance. This can involve the shape, layout, or combination of lines and colors, in either 2D or 3D. The key is that it's visually attractive and can be used to create physical products, goods, or handicrafts.

3-D (three-dimensional) brands are one of the modern brand alternatives and can stimulate the creativity of brand makers in creating new brands with new breakthroughs. The 3-D (three-dimensional) brand is defined as a sign that occupies three dimensions of space, namely the height, width, and depth of an object (Nadeak, 2019). The shape of the 3-D (three-dimensional) brand itself is one way to create a brand that is different from other manufacturers and difficult for other manufacturers to follow. 3-D (three-dimensional) brands can be related to signs in the form of packaging, the shape of the product itself, or even in the spatial design of the place of sale of service products can also be combined with other brand elements such as words, logos, and/or colors (Indriyanto, 2017).

One of the debates regarding the concept of a 3-D (three-dimensional) trademark that has occurred is regarding the registration of the packaging/trade dress of Coca-Cola carbonated soft drink glass bottles registered as a trademark. The trade dress/packaging design of Coca-Cola carbonated soft drink products, where without any logo or other things related to the Coca-Cola brand, consumers can identify and know that the soft drink packaging is the Coca-Cola brand. This is because the bottle does have a characteristic that makes consumers only by holding the glass bottle can identify the manufacturer of the product. When viewed from the definition of industrial design, the design of a trade dress/packaging in the form of 3-D (three-dimensional) is included in the category of industrial design protection and it turns out that the Coca-Cola carbonated soft drink bottle cannot be protected as a whole as a brand and only the image element is protected, because a beverage bottle has the main characteristics of a three-dimensional sign shape configuration so that it is often associated with a form of industrial design protection.

Trademark protection and industrial design protection address distinct aspects of a product. While trademarks identify the source of a product, industrial design protection is all about making a product visually attractive. This attractiveness is meant to entice consumers to buy it. So industrial design not only adds aesthetic value but also the commercial value of the product. Meanwhile, trademark protection aims more to be distinctive signs or symbols as business identifiers. Trademarks provide identity and distinction in business, activities, operations or circulation of goods and services in trade (Nasional, 2013).

The 3-D (three-dimensional) shape is an object that falls within the scope of the regulation of two laws, namely the Trademark Law and the Industrial Design Law. This is where the regulatory intersection between the Trademark Law and the Industrial Design Law occurs. An understanding of the 3-D (three-dimensional) shape included in

the trademark and 3-D (three-dimensional) becomes important to prevent the overlapping of the regulation of the three-dimensional shape. Errors in the understanding of 3-D shapes can lead to errors in providing protection in the field of IPR against 3-D shapes (Nadeak, 2019).

## **B. METODE**

This research follows a legal approach called normative juridical research. This means we'll be relying on existing legal materials, like laws and scholarly articles, to analyze the topic (Soekanto, 2008). Primary data is a source of legal material with binding and related to the discussion, namely Law No. 20 of 2016 concerning Trademarks and Geographical Indications, PerMenKumHAM Number 67 of 2016 concerning Trademark Registration and Law No. 31 of 2000 concerning Industrial Design. While secondary data the author uses materials in the form of legal journals on trademarks and industrial designs, legal literature, and legal articles. This research will use a legal approach and conceptual approach, meaning that it uses the law to conduct research and also analyze the resolution of problems seen from the aspect of legal concepts that underlie and are related to the legal issues being addressed. (Marzuki, 2009). The process of using library materials is carried out by means of research using descriptive methods that are qualitative in nature.

## **C. HASIL DAN PEMBAHASAN**

### **1. 3-D (three-dimensional) shape: Brand Protection**

Over time, in the development of trademarks, in addition to traditional trademarks, the concept of non-traditional trademarks has also developed. For this reason, on November 13, 2006, WIPO held the "Sixteenth Session of Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications". The agenda of this forum includes discussing new types of marks, namely non-traditional marks (New Types of Marks). One of the results of the forum is the elaboration of new mark categories namely Visible and Non-Visible (visible and invisible). Visible marks include three-dimensional marks, color, holograms, position, motion, slogans, film and book titles, multimedia marks, and gestures. Meanwhile, non-visible brands include sound, scent, taste and texture (Amrikasari, 2019).

Trademarks that can be protected by registration. Trademarks that can be protected by registration are marks in the form of signs that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color arrangements, in the form of 2 (two) dimensions and/or 3 (three) dimensions, sound, holograms, or a combination of 2 (two) or more. The marks are divided into two groups, namely traditional marks and non-traditional marks. Traditional marks are

limited to marks in the form of images, names, words, letters, numbers, color arrangements, or a combination of these elements (Mayana, 2017). The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indication formed by the World Intellectual Property Organization (WIPO) to conduct further analysis of non-traditional marks and classify non-traditional marks into two groups, namely Visual non-traditional marks, such as three-dimensional marks, colors, holograms, slogans, film and book titles, multimedia marks, positions, and gestures and Non-Visual Nontraditional Marks, such as sound, aroma, taste and texture (Mayana, 2017).

The term 3 (three) dimensional shape is often used in various fields, such as in the fields of art and mathematics as well as in the field of trademark law as it is today. Dimension is defined as a measure that expresses the existence of something such as length, width, height, area or volume. Something is said to be three-dimensional when it has three sizes, namely length, width and height. Based on these definitions and characteristics, it can be understood that the form of 3 (three) dimensions is very broad in scope, it can be in the form of goods, the form of goods packaging, it can even include images, logos, names, words, letters, numbers, which form 3 (three) dimensions. Therefore, the author needs to emphasize that this paper will only discuss 3 (three) dimensional forms in the form of the shape of goods and the form of goods packaging. (Wijayanti, 2021).

Three-dimensional Trademark is one type of Non-Traditional Trademark or Modern Trademark. The shape of a product or the packaging of a product can be registered under the 3 (three) dimensional Trademark protection regime. A three-dimensional trademark is a form of intellectual property protection in the form of a trademark given to a sign with a three-dimensional shape configuration (Xavier Nugraha, 2020). In Australia and the UK, the definition of a trademark has expanded to include the shape and appearance of the product/packaging. This development indicates the difficulty of distinguishing the protection of the shape and appearance aspects of the product/product packaging, whether the protection is under the Trademark regime or industrial design protection. In addition, the difficulty also arises because so far there is a difference between the trademark and the goods to which the trademark is attached (Saidin, 2015).

The definition of 3-D (three-dimensional) marks in the European Union is contained in Article 4 of the European Union Trade Mark Regulation 2017/1001 Of The European Parliament And Of The Council (EUTMR) which states "An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colors, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of: a. Distinguishing the goods or services of one undertaking from those of other undertakings; and b. being represented on the Register of European Union trade marks". Implicitly, the above

definition states a three-dimensional shape but it can be understood in the sentence "any signs including the shape of goods or of the packaging of goods" is the same meaning as a three-dimensional shape (Oma, 2016). So it can be said, that any three-dimensional shape including the packaging and the product itself can be protected with a trademark as long as it is able to distinguish the goods or services of one business from another. Three-dimensional shapes that are not allowed in trademark protection are those that are exclusively formed due to several reasons, including the nature of the goods, the shape is necessary to obtain technical results, or provides substantial value to the goods. All grounds of refusal set out in Article 7(1) and (3) of the EUTMR must always be "interpreted in the light of the public interest underlying each of them" (Oma, 2016).

Distinctiveness has a vital and fundamental function in a brand. Distinctiveness is the character or characteristic of a mark that can be recognized by consumers to indicate the origin of goods and/or services between one producer and another. The function of distinguishing power is to convey the distinctive characteristics of a brand and the source of goods and/or services, so that consumers can distinguish the source of one good and/or service from other goods and/or services (Yuliana Utama, 2021).

A brand's ability to stand out is crucial for trademark protection (Wauran, 2015). This "distinctive power" is what separates a protectable trademark from a generic term. In Indonesia, trademarks are generally evaluated for distinctiveness based on a few key factors, (1) Similarity: Does the mark resemble an existing well-known trademark or a registered one?, (2) Descriptiveness: Does the mark simply describe the product or service it represents?, (3) Complexity: Is the mark too simple (like a single line) or too complex to be easily recognized? . For example, Article 20(b) of the Trademark Law (amended by Article 108 of the Job Creation Law) states that marks cannot be registered if they are merely descriptive of the goods or services they represent. Similarly, Article 20(f) prohibits registering common names as trademarks. These regulations suggest that marks using common or descriptive words, or those that are overly complex, will likely be denied protection. Additionally, the explanation of Article 20(e) suggests that overly simple marks (like a single dot) also lack distinctiveness. However, the explanation for Article 20(e) lacks clear guidelines for evaluating distinctiveness, especially for 3D trademarks (like product shapes). This creates some uncertainty in the trademark registration process (Wijayanti, 2021).

A mark is considered distinctive if it "identif[ies] the product in respect of which registration is applied for as originating from a particular undertaking, and thus distinguish[es] that product from products of other undertakings". Which means that the mark is able to distinguish a product belonging to it because there are similar products. The mark here is understood as a three-dimensional form as explained

earlier. Essentially, a non-distinctive shape can't be trademarked. Because if the shape is commonly used by competitors, it wouldn't help consumers recognize the product as belonging to a specific company. Trademark protection is meant to prevent confusion and establish a clear source for a product. Distinctiveness must be assessed firstly with reference to the goods and/or services for which registration is requested and secondly, with reference to public perception as relevant consumers. The relevant consumer is defined as the "average consumer who is reasonably well-informed and circumspect". The average consumer should be able to distinguish the mark from other products without making an analytical or comparative examination without paying special attention. The distinctiveness of a 3-D (three-dimensional) trademark should be assessed by considering the mark as a whole as the average consumer would not proceed to analyze its various details. In other words, the 3-D (three-dimensional) shape can directly indicate the origin of the product just by its graphical appearance without the need for further analysis of the shape (Nadeak, 2022).

Until now, the regulation on distinguishing power and the level of distinguishing power has not been specifically regulated in Law No. 20/2016 on Trademarks and Geographical Indications and the Job Creation Law. In the Advanced Intellectual Property Module on Trademarks and Geographical Indications, it is only explained that distinguishing power is divided into 2 (two) categories, namely high distinguishing power and low distinguishing power. High distinguishing power will result in the decision to register the trademark application, while low distinguishing power will result in the decision to reject the trademark application. In addition to considering the distinguishing power in assessing a mark applied for during substantive examination, the Examiner also looks at the criteria of the type of goods or services applied for to be compared with the type of goods or services in the registered mark or filed earlier. However, a more complex regulation related to the criteria for the level of distinguishing power is needed to ensure legal certainty in determining marks that have distinguishing power.

Criteria for classifying the strength of the distinguishing power of a trademark or known as the spectrum of distinctiveness consists of 5 (five) criteria, in order starting from the strongest potential to be registered as a trademark to the weakest or potentially rejected if registered as a trademark, namely: (scheme 1)

a. Fanciful

Marks that are unique, never existed / do not contain any meaning, easy to remember, do not have any meaning related to the type of goods / services. For example, Kodak is a brand of a company that sells various kinds of camera products, photography, printers and others. Kodak is a brand that is Fanciful, unique, never existed / does not contain any meaning, easy to remember, does not have any meaning related to camera and photography products. Consumers

will not think that Kodak is a brand that sells various kinds of camera and photography products.

b. Arbitrary

A mark that is a general attribute that is already known to the public and does not have any meaning related to the type of goods/services product. A mark that is a general attribute that the public is familiar with is at odds with the type of product being branded. For example, Apple is a brand of a company that sells electronic goods such as smart phones, laptops, computers, software and online services. Apple which means apple becomes a brand of electronic goods such as smart phones, laptops, computers.

c. Suggestive

A mark that is a general, publicly recognized attribute that suggests, explains and impresses the imaginative specificity of a product indirectly. For example the Cling brand, cling is a ready-to-use liquid cleaning product used to clean stains and dirt on glass. Cling which means impressing the item has just been cleaned well which makes the item very clean and shiny so that it imaginatively creates a "cling" sound as a clean and shiny effect. The Cling brand suggests, describes and impresses the imaginative specialty nature of the effects of using Cling Products which are ready-to-use liquid cleaning products used to clean stains and dirt on glass.

d. Descriptive

A mark that is a general attribute already known to the public that directly describes or illustrates the type of goods/services to be branded. Example: iced tea products are sold under the brand Es Teh. Iced Tea is a tea drink served cold with ice cubes. The Iced Tea mark is a mark that clearly explains or illustrates the type of goods. The Trademark Law states that the mark protected as a trademark is required not to be directly related to the type of product (goods or services) (Intellectual, 2020). This means that the mark protected as a trademark should not directly explain or illustrate the type of goods/services concerned. In this case, the registration of a Descriptive mark cannot be registered as a trademark, unless the mark has been used for a long time by the public as a consumer, and the public as a consumer is already aware of the mark as a distinguishing power or can be known as the Famous Unregistered Trademark (Nadeak, 2022).

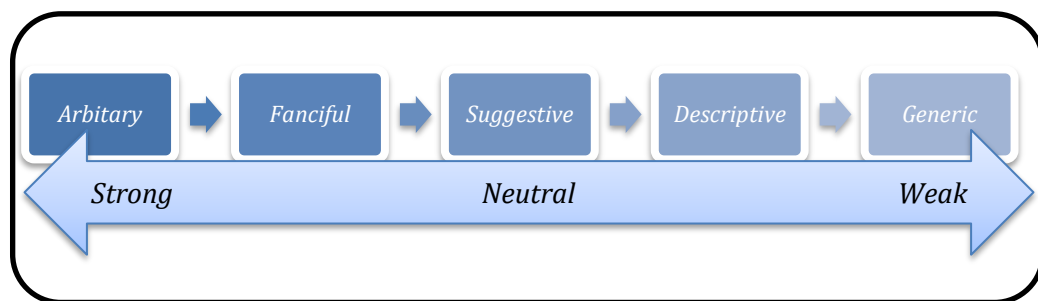
e. Generic

A mark that is a common attribute already known and used by the public, which directly describes or illustrates the type of goods/services to be branded. This mark has become such a popular attribute that it has become a generic



name for similar products that will be branded. Example of brand and term Odol. In Indonesia the term "Odol" has become a generic name for toothpaste. In the 1900s toothpaste brand Odol was one of the famous brands that was first produced in Germany. Odol entered Indonesia through the Dutch East Indies army, at that time, people had difficulty pronouncing the Dutch term, the word tandpasta (tand: tooth). As a result, the easiest way was taken by saying the brand name, 'Odol', which has become the generic name for toothpaste until now. Therefore, the registration of a brand that is generic in nature cannot be registered as a brand (Yudhistira, 2021).

This spectrum of distinctiveness classification is commonly known as the Abercrombie classification which was established by Judge Friendly, the Judge who decided the Abercrombie & Fitch v. Hunting World case in 1976. (McKenna, 2008). This classification is used as a reference for determining marks in the element of distinctiveness.



*Scheme 1. Trademark spectrum of distinctiveness*

The implementation of Article 2 paragraph 3 of the Trademark Law, The Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Regulation of the Minister of Law and Human Rights Number 67 of 2016 concerning Trademark Registration (Permenkumham Number 12 of 2021) was issued. In Permenkumham Number 12 of 2021, the regulation of the 3-D (three-dimensional) shape can be seen from Article 16 letter g which contains that a functional shape cannot be registered. The functional form in trademark law is closely related to the three-dimensional form of the product itself. Of course this becomes a question in the future, what classification to declare a form is functional or not.

Registration of a 3-D mark also needs to prove the distinctiveness of the 3-D mark. The distinctiveness can be measured from the 3-D mark must not have functional properties and can make consumers identify who the producer of the product is. The meaning of consumers being able to identify the producer of a

product is where consumers by simply looking at the shape can visually identify who the producer of the product is public perception as a relevant consumer) (Nugraha, 2020).

While the functional intent in this case is a 3-D (three-dimensional) mark whose 3-D shape has functional product features cannot be registered as a mark. A product feature is considered functional if its 3-Dimensional shape is essential to the use or purpose of the product or if its 3-Dimensional shape has affected the overall cost or quality of the product. This is referred to as The Functionality Doctrine (Institute, 2023).

It can be said that a mark or 3-D (three-dimensional) shape as a brand has a distinctiveness of brand distinctiveness in the eyes of consumers. For example, in the case of Cola-Cola, the distinctiveness of the 3-D (three-dimensional) shape can be seen if in a dark room a consumer can actually identify the manufacturer of a product just by holding the bottle (public perception as a relevant consumer). This is because the bottle does have a characteristic that makes consumers only by holding it can identify the manufacturer of the product (Nugraha, 2020). But the Cola-Cola bottle, which is registered as a 3-D (three-dimensional) mark, does not have essential functionality related to the use or purpose of the 3-D (three-dimensional) shape of the Cola-Cola bottle. Therefore, the 3-D shape of the Cola-Cola bottle can be registered as a 3-D mark.

## **2. 3-D (three-dimensional) form: Industrial Design Protection**

Industrial Design deals with the visual embodiment of commercial products in three or two-dimensional patterns. An Industrial Design protects the external appearance of a product (Lindsey, 2006). The process of making an item must go through a design process with drawings or through a prototype process first. This prototype process is called design, which is known in two-dimensional and three-dimensional forms. Two-dimensional forms are found in the design of motifs for textiles, while three-dimensional forms are found in objects such as chairs or other objects whose manufacture requires a three-dimensional form. The pouring of the design can be through painting media in its two-dimensional form, or through sculpture for designs in three dimensions, such as a prototype of an object (Djumhana & Djubaedillah, 2010). Based on Article 1 number 1 of Law Number 31 of 2000 concerning Industrial Design (hereinafter written as Industrial Design Law), Industrial Design is:

"A creation about the shape, configuration, or composition of lines or colors, or lines and colors, or a combination thereof in the form of three dimensions or two dimensions that give an aesthetic impression and can be realized in three-dimensional or two-dimensional patterns and can be used to produce a product, goods, industrial commodities, or handicrafts."

WIPO formulates the definition of industrial design as "An Industrial design can incorporate either three-dimensional elements, like text, or two-thirds, such as patterns and lines or colors." Referring to both definitions, the main characteristics of industrial design can be formulated as follows:

- a. Creative works related to form, structure or composition of lines, colors, lines and colors or a combination of both
- b. The shape and form of the composition can be two-dimensional or three-dimensional.
- c. It should have an aesthetic appearance.
- d. The form must have an element of novelty,
- e. All these components can be used to create products, be it furniture, industrial products or crafts (works of art).

The principle of Industrial Design protection is to provide protection and recognition of two-dimensional and three-dimensional forms, where the form must give an aesthetic impression and can be produced repeatedly and can produce an item in two or three-dimensional form. From this understanding, it can be concluded that industrial design emphasizes its protection of the form, where the form is understood in industrial design as an external appearance (physical appearance) in a 2 (two) pattern, especially a 3 (three) dimensional pattern that gives an aesthetic impression (Nadeak & Wauran, 2019)

### **3. The Intersection of 3-D (Three-Dimensional) Marks with Industrial Designs**

The protection of the concepts of trademark and industrial design are actually different. Trademarks provide protection with the aim that the form given protection is able to be distinguished from similar products and shows the origin of goods related to the quality of the product. Meanwhile, industrial design aims to protect a new design produced through a thought process where the results can be seen in the aesthetic impression displayed by the shape. In other words, industrial design protection is given as a form of appreciation to designers for their new findings. The fundamental difference between trademarks and industrial designs is in the purpose of protection and its elements. Trademarks aim to build and protect the reputation of the product with regard to its quality assurance, while industrial designs protect new products as a tribute to the new invention. In addition, a mark must have a distinguishing power that is able to indicate its origin, while an industrial design must be new and have an aesthetic impression (Nadeak, 2019).

The Trademark Law states that three-dimensional shapes can be protected with trademark rights. It should be noted that initially the three-dimensional shape was protected by industrial design. The emergence of the Trademark Law then

causes the regulation of three-dimensional forms to occur dualism, namely the Trademark Law and the Industrial Design Law. Although trademarks and industrial designs have different concepts, the Indonesian regulations relating to the protection of three-dimensional forms in the Trademark Law and the Industrial Design Law do not contain clear limitations in terms of what qualifications of three-dimensional forms can be protected under each of these laws. Trademark and industrial design stipulate their limitations only by the distinguishing power of the mark, aesthetic impression, and the principle of novelty in industrial design without further explanation (Nadeak, 2019). The occurrence of friction between the protection of Trademarks and Industrial Designs is actually more due to the bad faith of the perpetrators. However, there are also tangents that are truly legal problems in the theoretical and practical realms. Examples arise in relation to packaging/trade dress issues.

There is a concept in intellectual property, especially trademark protection that can distinguish trademarks from industrial designs, namely the Functionality Doctrine. The Functionality Doctrine is a concept where a trademark must not have functional properties and can make consumers identify who the manufacturer of the product is. Functionality in the case of 3-D (three-dimensional) marks means if the 3-D shape is essential to the use or purpose of the product or if the 3-D shape has affected the cost or quality of the product as a whole. (Wijayanti & Wauran, 2021). This is referred to as The Functionality Doctrine. (Institute, 2023) A 3-D (three-dimensional) mark also needs to prove its distinctiveness, the distinctiveness can be measured from the 3-D (three-dimensional) mark must not have functional properties. Non-traditional marks such as 3-D marks are marks that are based on appearance, shape, smell, sound, or taste and to be registered as a mark must pass the tests of distinctiveness, graphic representation and non-functionality.

The Functionality Doctrine has been applied in the United States (Morton-Norwich factors) and for the registration of 3-D marks in the European Union also considers aspects of functionality. In the European Union Trade Mark Regulation Article 7 paragraph 1 letter (e) contains provisions on grounds for absolute refusal, which states that a mark cannot be registered as a mark if the shape or other characteristics are necessary to obtain a technical result. A shape that is necessary to obtain a technical result cannot be registered as a mark or in other words a shape that provides a technical advantage should not be registered as a mark.

#### **D. SIMPULAN**

Trademarks and industrial designs are essentially different types of intellectual property. The main difference between trademark and industrial design is in the purpose of protection and the elements themselves. The intersection between trademark and industrial design occurs when the protection of 3-D (three-dimensional) forms is carried

out. The 3-D (three-dimensional) form is equally protected both in terms of Trademark and Industrial Design. There is a need for a determining indicator as a differentiator or borderline 3-D (three-dimensional) form in terms of protection of Intellectual Property Trademarks and Industrial Designs. The determining indicators are 'as an identifying mark of a trade product', good faith, distinctiveness and The Functionality Doctrine. In the long term, Indonesia, in this case the Ministry of Law and Human Rights, Directorate General of Intellectual Property Rights, needs to amend Law Number 20 Year 2016 on Trademarks and Geographical Indications by adding the provisions of The Functionality Doctrine. Law Number 31 Year 2000 on Industrial Design also needs to be updated, by adding various provisions regarding the scope of industrial design protection.

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