

Working Group on the Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks

First Session

Geneva, June 28 and 29, 2010

Report

Prepared by the Secretariat

INTRODUCTION

1. The Working Group on the Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks (hereinafter referred to as the “Working Group”) held its first session, in Geneva, from June 28 to 29, 2010.
2. The following States party to the Singapore Treaty were represented at the meeting: Australia, Denmark, Estonia, France, Latvia, Mali, Poland, Romania, Russian Federation, Singapore, Spain, Switzerland, Ukraine and United States of America (14).
3. The following Member States of WIPO took part in the meeting in an observer capacity: Austria, Brazil, Canada, Chile, China, Czech Republic, Germany, Guatemala, Japan, Jordan, Lesotho, Mexico, Norway, Portugal, Qatar, Slovenia, South Africa, Sudan, Turkey, United Kingdom, Uruguay and Zambia (22).
4. The following intergovernmental organizations took part in the meeting in an observer capacity: European Union, African Intellectual Property Organization (OAPI) and Benelux Organization for Intellectual Property (BOIP) (3).

5. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Brazilian Intellectual Property Association (ABPI), International Federation of Industrial Property Attorneys (FICPI), International Trademark Association (INTA) and Japan Patent Attorneys Association (JPAA) (5).
6. The list of participants is contained in Annex II of this Report.
7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions on the basis of all observations made.

Agenda Item 1: Opening of the session

8. Ms. Binying Wang, Deputy Director General, opened the first session of the Working Group on the Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks (Working Group) and welcomed the participants.
9. Mr. Marcus Höpferger (WIPO) acted as Secretary to the Working Group.

Agenda Item 2: Election of a Chair and two Vice-Chairs

10. Mr. Mikael Francke Ravn (Denmark) was elected Chair of the first session of the Working Group and Mrs. Liubov Kiriya (Russian Federation) and Ms. Mei Lin Tan (Singapore) were elected Vice-chairs of the first session of the Working Group.

Agenda Item 3: Adoption of the Agenda

11. The Working Group adopted the Draft Agenda (document STLT/WG//1/2 Prov.) without modifications.

Agenda Item 4: Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks

12. Discussion was based on document STLT/WG/1/2 and on three Informal Documents prepared by the Secretariat on June 29, 2010, reflecting the suggestions made by delegations during the course of the meeting.
13. The Secretariat noted that at its first ordinary session, held in Geneva from September 22 to October 1, 2009, the Assembly of the Singapore Treaty on the Law of Trademarks approved the initiation of a review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks and the convening of one session of a Working Group to meet back to back with the first ordinary session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) in 2010, as set out in document STLT/A/1/4.
14. The Secretariat further noted that the SCT had agreed on "Areas of Convergence relating to the Representation of Non-Traditional Marks", which are contained in document WIPO/STrad/INF/3 and were brought to the attention of the WIPO General Assembly at its Thirty-Eight Session, held in Geneva from September 22 to October 1, 2009. Against that background, document STLT/WG/1/2 constituted an attempt from the Secretariat to provide a draft for provisions to be inserted in the Regulations to the Singapore Treaty, in accordance with the decision of the Singapore Treaty Assembly. The Secretariat clarified that nothing in document STLT/WG/1/2 was

to suggest that States party to the Singapore Treaty were under an obligation to accept the registration of non-traditional marks if their national law did not contemplate such protection.

15. The Chair opened the floor for comments of a general nature.
16. The Delegation of Denmark said that the process of finding “Areas of Convergence” had the purpose of establishing a basis for further harmonization of procedures and practices in Member States, particularly in relation to applications, examination and registration of trademarks. The Delegation believed that this purpose would serve the interests of both applicants and offices and welcomed WIPO’s continued efforts to further this process.
17. The Delegation noted that although the Areas of Convergence on the Representation of Non-Traditional Marks contained detailed information on the type of reproductions that would be acceptable to Member States, the conclusions were not unambiguous and completely clear in relation to some types of marks. Rather, there seemed to be a number of divergent views with regard to the interpretation of key elements, such as what constitutes a “sufficiently clear representation” of the mark as required by Article 5(1)(a)(iv) of the Singapore Treaty and what was the relationship between that article and Rules 3(4)(c) and (d) of the Regulations.
18. The Delegation further noted that by using the phrase “shall consist of” the drafted rules restricted the acceptable means of representation, and thus excluded other types of representation, i.e., a representation of a sound mark in the form of a sound file provided by electronic means or a representation of a hologram mark in an electronic file in the form of a movie clip or an animation. A very restrictive attitude towards acceptable types of representation could deter States from joining the Singapore Treaty, as States may either not be ready to apply the rules as drafted, or may believe that the rules will limit their choice of acceptable means of representation to the disadvantage of their applicants.
19. The Delegation of France expressed general support for the proposal before the Working Group and declared that SCT Members had invested a lot of work in reaching agreement on the areas of convergence.
20. The Delegation of Ukraine supported the views expressed by the Delegation of Denmark and declared that, since Ukraine had just recently become a party to the Singapore Treaty, the national office had not been able to accept all types of non-traditional marks. Nevertheless, its position was that it should be possible to broaden the technical possibilities of representing those traditional marks which were already in use.
21. The Delegation of Switzerland supported the position expressed by the Delegation of Denmark and said that the SCT should also look at the relationship of the draft provisions and Article 8(4) of the Singapore Treaty.
22. The Delegation of Germany said that the draft was a good starting point and concurred with the opinion expressed by the Delegation of Denmark on the point that some of the provisions in the draft may become too restrictive for offices
23. The Delegation of Mali welcomed the convocation of the Working Group meeting with the aim of approving certain rules on the representation of non-traditional marks.
24. The Representative of OAPI informed that although Mali was the only Member State of the Organization, which was also a Member of the Singapore Treaty, any decisions to be adopted in relation to non-traditional marks were important for a future review of the Bangui Agreement. The agreement was presently limited to visible signs, but could be further developed to cover non-visible signs.

25. The Representative of INTA said that the organization attached considerable importance to the simplification and harmonization of trademark procedures. For that reason INTA supported the conclusion of both the Trademark Law Treaty and the Singapore Treaty on the Law of Trademarks, and also actively took part in the work of the SCT towards the adoption of the Areas of Convergence on Non-traditional marks. The Representative added that INTA welcomed the decision of the Singapore Treaty Assembly to transform the areas of convergence into specific provisions. The Representative announced that the Chair of the INTA Committee on non-traditional marks was present at the meeting and would offer comments on the specific provisions.
26. The Representative of FICPI joined the Representative of INTA in welcoming the decision of the Singapore Treaty Assembly. The Representative shared some of the concerns expressed by the Delegation of Denmark but offered to provide more detailed comments on the specific provisions.

Three-dimensional Mark

27. The Delegation of Australia supported the draft, as presented to the meeting, and pointed out that the provision effectively articulated the minimum requirements for the granting of a filing date.
28. The Delegation of Spain supported the draft and stated that Spain would allow either a single view of the mark in order to grant a filing date, or different views, if necessary.
29. The Delegation of Switzerland supported the general comments made by the Delegation of Germany and requested that the phrase "sufficiently clear" be reformulated so as to clarify that the demand for "a sufficiently clear reproduction" of the mark referred to the three dimensional character of the sign and not its technical clarity.
30. The Delegation of Ukraine indicated that a filing date could be granted on the basis of a single view. However, the national Office should have the opportunity to request supplemental views.
31. The Delegation of Mali requested that the term "sufficiently clear" be stricken from the text. The Delegation opined that, because a mark must always be sufficiently clear in order to be registered, it would be superfluous to include the term "sufficiently clear" in Rule 3(4)(e), account being taken also of Rule 3(4)(a) and (b).
32. The Delegation of the Russian Federation stressed that the suggestions made in the draft document constituted the work of the SCT and represented a compromise among the views of many different delegations. The Delegation expressed the need for care when drafting the document and stated that the efforts of the Working Group must allow for an expansion of the number of adherents to the Singapore Treaty and must not allow the introduction of new elements to the draft, which would pose obstacles to that expansion.
33. The Delegation indicated its full support for the text proposed by the Secretariat but acknowledged that it still had questions. The Delegation pointed out that the structure of the text had changed from its initial formulation and requested a precise text for Rule 3(4) as a whole, in order to avoid misunderstandings.
34. The Delegation of Romania supported the draft and stated that it was for the Office to determine whether the representation was sufficiently clear or not.
35. The Delegation of the United States of America supported the draft and explained that the practice of the national Office did not allow an applicant to submit multiple views. If an applicant were to submit multiple views, the national Office would request a single rendition.

36. The Representative of OAPI commended the earlier observation of the Delegation of Switzerland, concerning the precision of the three-dimensional character of the sign, rather than its technical quality. The Representative stated that a very precise, single view of the three-dimensional sign should allow the grant of a filing date and noted that although the granting of a filing date did not constitute registration, it allowed the sign to be accepted when submitted.
37. The Delegation of Germany supported the draft, but explained that in Germany, the scope of protection was determined at the time of filing. Therefore the Delegation requested that it be made very clear to the applicant that the scope of protection for the mark would be restricted to the one view submitted, as the national office could not request additional views.
38. The Representative of INTA sought clarification from the Secretariat of the proposed renumbering of the subparagraphs following implementation of the draft. The Representative also commended the comments made by the Delegation of Switzerland and the Representative of OAPI and requested that those suggestions be explored further.
39. With respect to the renumbering of the subparagraphs, the Chair assured the Representative of INTA, that the issue would be examined and clarified.
40. The Secretariat responded to the question raised by the Delegation of Mali, concerning the insertion of the words “sufficiently clear reproduction” in the draft. Because Article 5 of the Singapore Treaty obliged Contracting Parties to grant a filing date upon presentation of certain elements, a counterbalance to this obligation was provided by requiring that the reproduction in the application be sufficiently clear. This was a general rule that applied to all marks, both traditional and non-traditional. The language was included again in the draft so that offices were not bound to grant a filing date, without receiving an application which was sufficiently clear.
41. The Chair summarized that although there was a great deal of support for the draft rule, concerns had also been raised by a number of delegations. The Chair proposed that a redraft be prepared, in the form of an informal document, which would meet those concerns.
42. The Representative of INTA referred to Article 5(1)(a)(iv) of the Singapore Treaty, which required a sufficiently clear representation of the mark in order to receive a filing date. Noting that this requirement applied to all types of mark, the Representative suggested that it was unnecessary to include the phrase “sufficiently clear” in draft Rule 3(4)(e).
43. The Delegation of Ukraine favored retaining the phrase “sufficiently clear” in subparagraph (e) because it was important that the representation of a three-dimensional mark was very clear to examiners.
44. The Chair wondered whether the removal of the phrase “sufficiently clear” from subparagraph (e) might signal that three-dimensional marks were subject to a special rule. The Chair suggested that retaining the language could make it clear that three-dimensional marks must accord with Article 5 of the Treaty.
45. The Delegation of Australia believed that “sufficiently clear” should be retained in subparagraph (e) as it reinforced the requirement to submit a clear representation of the three-dimensional mark.

Hologram Mark

46. The Delegation of the United States of America explained that under national practice, descriptions were used to further define the mark being claimed and provide clarity to the public. When the mark was a special form mark, such as a hologram, or the mark

contained a figurative element, the national Office always required a description. The Delegation was concerned that the wording of the draft would allow an Office to require a description, only if the drawing was unclear. The Delegation requested that the following language be stricken from the draft: "Where a single drawing or a series of drawings do not accurately represent the hologram". The Delegation suggested that a new phrase be added so that the sentence would read as follows: "The Office may require the applicant to furnish a description of the hologram mark where it is necessary to define the nature of the mark being claimed".

47. The Delegation of Switzerland supported the proposal made by the Delegation of the United States of America. The Delegation also explained that under national practice, there were two different types of hologram marks: marks which showed one object with a three dimensional effect; and marks, which showed two or several objects that change. With respect to the latter type of mark, the Delegation believed that one single view would not be sufficient to show the object proposed for protection. Therefore, the Delegation suggested a further amendment to the draft, which would provide the Office with an option to accept a single view, rather than providing the applicant an option to submit a single view.
48. The Delegation of Japan raised two questions. First, the Delegation asked whether it would be acceptable under the draft provision for the Office to require both the drawing and a description, when the Contracting Party believed that the drawing alone could not accurately represent the mark. Second, after noting that the draft did not make explicit reference to electronic files and stating that a video file can represent a hologram mark by catching changing images, the Delegation asked whether it would be acceptable under the draft to require that the applicant submit a video file.
49. The Delegation of the Russian Federation supported the comments made by the Delegation of Switzerland, concerning the existence of two different types of hologram mark. The Delegation noted that with some holograms, different objects could appear depending on the viewer's angle and this meant there were high costs associated with the registration of such marks, and a consequent need for greater expertise in the examination. The Delegation suggested that countries should have the possibility to include in national legislation a number of limitations on protection for such marks.
50. The Delegation of France supported the current wording of the draft, but noted the modifications proposed by other delegations and asked the Secretariat to provide a new draft of this provision.
51. The Chair summarized the three issues, which had been raised by delegations. First, with respect to an Office requiring a description, the Chair suggested a redraft in line with the proposal made by the Delegation of the United States of America. Second, regarding the number of views to be submitted with an application, the Chair was concerned that if offices could decide on the number of views, this would not achieve legal certainty for applicants. The Chair solicited interventions from the Delegations on how to strike a balance between achieving legal certainty and maintaining options for offices. Third, in response to the question of filing a video clip raised by the Delegation of Japan, the Chair noted that there could be a need to open the text to accommodate electronic formats such as movie clips and suggested that this could be achieved by introducing "representation" into the text to replace "reproduction".
52. The Delegation of Germany stated that it could not support the draft because it would be insufficient for the applicant to submit one view, considering that holograms, by definition, contain multiple views. The Delegation referred to a national Court decision, which ruled that a complicated hologram could not be represented graphically at all, because it was not possible to represent the multiple angles of the hologram in the national register. On this point, the Delegation explained that the national register did not allow the submission of video clips. The Delegation expressed that the new rule concerning holograms should not give the applicant an option as to the number of views

for submission, rather the option should be that of the national Office. Finally, the Delegation suggested that the efforts to achieve legal certainty for hologram mark applicants may be premature, as hologram marks were a new type of mark, and court decisions were still emerging.

53. The Representative of OAPI shared the concerns of the Delegation of Germany and opined that the holographic effect of a mark would be difficult to appreciate in a single view. Therefore, the Representative proposed an amendment, which would insert the phrase “as many views of the sign as render the holographic effect in its entirety”. The Representative stated that this wording would avoid giving the option to the applicant and also avoid referring to a single view.
54. The Delegation of France explained that the national Office never demanded a description of the mark, however the applicant can provide a description, if they so desire.
55. The Representative of OAPI supported the draft, but requested that in the French version of the text, the word “*de*” in the penultimate line be changed to “*des*.”
56. The Representative of FICPI pointed out that the English version of the text was inconsistent insofar as it used both the term “capturing” and the term “render”. The Representative referred to the consistency of language present in the French version and suggested that there was no intention to create a difference in meaning. With respect to the number of views to be submitted, the Representative questioned whether the applicant would be granted a filing date following the submission of one view, or only after satisfying a request by the Office for additional views.
57. The Delegation of Mexico pointed out that there were inconsistencies with respect to usage of the term “description” in the draft subparagraphs of Rule 3. The Delegation noted for example that Rule 3(5) and (9) referred to a “description” whereas Rule 3(6), (7), and (8) referred to a “written description.”
58. The Delegation of Japan explained that the national Office was currently considering whether video clips could be used to represent holograms and sought clarification on the meaning of the phrase “capturing the holographic effect”. The Delegation sought assurance that the term “capturing” as contained in the draft did not exclude the possibility to file video clips.
59. The Chair responded to the intervention of the Delegation of Mexico by proposing an amendment so that the term “description” would be used consistently throughout, rather than the phrase “written description”. In response to the question raised by the Delegation of Japan, the Chair believed that video clips would not be excluded, as the provision emphasized that the holographic effect must be captured, and did not emphasize the media that the mark would be represented in. The Chair believed that the comments made by the Representative of FICPI were correct insofar as the term “capture” should have been used consistently in subparagraph (5). In addition, the reference to “render” should have been omitted.
60. When analyzing the redrafted provision, the Delegation of Germany requested that the phrase “in its entirety” be re-inserted into paragraph (5) so that the first sentence of that paragraph would end with the phrase “capturing the holographic effect in its entirety”.
61. The Representative of AIPLA questioned why the phrase “at the option of the Office” was absent from the first sentence of paragraph (5).
62. In response to the question raised by the Representative of AIPLA, the Secretariat explained that the phrase was omitted in order to advance the draft and to avoid a reference to national law. The Secretariat noted however, that the office still had the possibility to request additional views from the applicant in the event that the representation did not capture the holographic effect.

63. The Representative of INTA noted the addition of the phrase “in its entirety” to the first sentence of paragraph (5) and suggested, in light of this addition, the same phrase should also be added to the second sentence of paragraph (5) as follows: “Where the Office considers that the view or views submitted do not capture the holographic effect in its entirety, it may require the furnishing of additional views”.
64. The Delegation of China requested that the term “written” be reinserted into the draft to precede the term “description,” where it appeared. The Delegation opined that it was advantageous to refer to a “written description” for two reasons. First, a written description would be clear for the examiner. Secondly, a written description would provide a record of the description. The Delegation stated that without a requirement for a written description, the description could be oral and this would not provide the requisite clarity.

Motion or Multimedia Mark

65. The Delegation of Australia supported the draft text as presented to the meeting.
66. The Delegation of the United States of America explained that the national Office allowed an applicant to provide one frame, or a single point of movement, or a series of up to five frames of the movement; whichever best depicted the commercial impression of the mark. The Delegation proposed an amendment so that the first sentence would read, in its entirety, as follows: “Where the application contains a statement to the effect that the mark is a motion or multimedia mark, the reproduction of the mark shall consist of a series of still images, which put together, will depict movement, or a single point of the movement, at the option of the applicant”.
67. The Delegation of Switzerland explained that national practice required applicants to submit several reproductions, so that the Office had a clear idea of the movement. The Delegation also requested that the Secretariat clarify the meaning of the term “multimedia mark” and noted that the term had not been defined in the Singapore Treaty or in other treaties. The Delegation wondered whether it was premature to introduce this type of mark.
68. The Representative of FICPI pointed out three differences between the SCT area of convergence on motion or multimedia marks, and the draft text. First, the area of convergence used the term representation, whereas the draft used the term reproduction. Second, regarding the requirement for the submission of a recording in analog or digital format, the area of convergence used the word “alternatively,” whereas the draft used the phrase “may further require”. Third, the area of convergence allowed for the submission of an electronic file where such filing is available, whereas this language was absent from the draft. The Representative requested that the Secretariat clarify these divergences between the area of convergence and the draft text.
69. The Secretariat acknowledged that use of the term “reproduction” in the draft text was limiting and that the broader term “representation” could be used instead. Regarding the effect of the word “further” in the draft, the Secretariat clarified that it was not intended to introduce an alternative. Responding to the concerns raised by the Delegation of Switzerland, the Secretariat stated that although motion or multimedia marks were new and were not mentioned in the Singapore Treaty, work had been carried out in this area for over three years in the SCT and the marks were even brought to the attention of the WIPO General Assembly. Finally, concerning the number of views to be submitted by an applicant, the Secretariat suggested a redraft, which would allow for one, or several images depicting movement.
70. The Representative of OAPI noted that the dynamic aspect of movement required that new terminology be utilized. The Representative suggested that the term reproduction be used instead of the term representation.

71. The Representative of INTA wondered whether area of convergence number 4 (as contained in document WIPO/STrad/INF/3) intended for a recording of the motion mark to be an alternative for a description of the mark, or if the recording could also be an alternative to representation of the mark by still images. Noting that new provisions under the Singapore Treaty should not restrict the freedom of offices to evolve with new technology, the Representative suggested that digital representation of the movement should be considered as an alternative to graphic representation. The Representative also wondered whether it should be possible to submit the recording at any stage, including at the examination. Therefore, the Representative suggested that the phrase “with the application” be deleted from the draft, due to its limiting effect.
72. The Representative of AIPLA noted that if the draft were amended to allow for one representation or several representations, the phrase “which put together” should be deleted from the draft, as this language would not be appropriate for a situation where only one representation has been submitted.
73. The Delegation of Germany shared the concerns raised by the Delegation of Switzerland, with respect to the term “multimedia mark” lacking a clear definition. The Delegation suggested that the Secretariat could give an example of such a mark. The Delegation also expressed dissatisfaction with the wording proposed by the Delegation of the United States of America, on the basis that a movement could not be shown adequately in a single view.
74. The Chair suggested a redraft, which would avoid stating that one view must be accepted by the Office, and would instead place emphasis on the requirement that the representation depict movement. This would allow for the submission of one view, provided that it depicted movement. The Chair also indicated that the redraft would address usage of the terms reproduction and representation in order to allow for electronic filing. The Chair clarified that the term “written” would be deleted from the text.
75. The Representative of OAPI observed that there was a difference between a motion mark and a multimedia mark. The Representative described a multimedia mark as a mark consisting not only of movement or motion, but also of sound. The Representative questioned the appropriate manner in which to deal with such a mark and asked whether multimedia marks should be split into a motion mark and a sound mark.
76. The Representative of INTA referred to the last sentence of paragraph (6), which provided that “the Office may further require that a recording of the sign in analog or digital format be submitted”. The Representative indicated that the word “further” precluded an office from accepting a video recording as the only representation of the mark and the Representative regarded this as a limitation on the evolution of the practice of offices.
77. The Chair responded to the intervention of the Representative of INTA by saying that the word “reproduction” would be replaced by the word “representation” with respect to both Rule 3(5) and (6). The Chair stated that the term “reproduction” contemplated graphic or photographic representation, whereas the term “representation” was broader and encompassed electronic filing such as video files. The Chair also suggested that the word “further” could be deleted from draft Rule 3(6), in order to satisfy the concern raised by the Representative of INTA in that regard.
78. In light of the Chair’s proposal, which contemplated the submission of a video file, the Representative of FICPI questioned whether the word “still”, as it appeared in paragraph (6) in relation to images, was necessary and appropriate.
79. The Chair agreed with the comment made by the Representative of FICPI and believed it would be appropriate to delete the word “still” from paragraph (6).
80. The Representative of OAPI proposed that the final two sentences of paragraph (6) be combined using a comma, rather than maintained as two separate sentences.

81. The Chair responded to both issues, which were raised by the Representative of OAPI. Concerning omission of the term “multimedia mark”, the Chair explained that the draft text had not dealt with the sound element of a multimedia mark whatsoever, nor had the SCT dealt with the sound component when it discussed multimedia marks. Therefore, in accordance with the concerns raised by the Delegation of Switzerland, the term could be omitted from the draft. With respect to combining the final two sentences of paragraph (6), the Chair opined that an amendment of that nature could contribute to ambiguity, whereas the proposed wording made it clear that an Office could require either a description or a recording, or both.
82. The Representative of AIPLA expressed concern that deleting the reference to “still” images could be problematic insofar as an Office could receive an application containing a video representation but could be unable to publish that representation for the purpose of opposition. The Representative suggested an amendment similar to the following: “Where the Office considers that the image or images submitted do not depict movement, or are not in publishable form, it may require the furnishing of additional images”.
83. The Chair referred to the intervention of the Representative of AIPLA and indicated that it would be desirable to have a wording that accommodated offices which allowed for video filing and offices which did not. The Chair proposed an amendment so that Rule 3(6) would read as follows: “Where the application contains a statement to the effect that the mark is a motion mark, the representation of the mark shall consist of one or a series of still or moving images depicting movement”. The Chair explained that this wording would create flexibility for offices, by allowing an office to either accept a video file, or refuse to accept a video file and require a graphic or photographic representation instead.
84. The Delegation of the United States of America expressed concern in relation to insertion of the phrase “at the option of the Office”. The Delegation explained that the national Office allowed the applicant to choose whether to submit a single rendition of the motion mark or a series of up to five frames, and the Delegation believed that the new phrase would limit the option, which was given to the applicant under national practice.
85. The Chair responded to the intervention of the Delegation of the United States of America by clarifying that under the new wording, the Office was not required to choose only one type of acceptable representation. The Office could allow an applicant to file an application with any type of representation listed in the provision.

Color Mark

86. The Delegation of Spain stated that the national Office would require the applicant to use the common name for a color, as well as an indication of the color code. The Delegation explained that the national Office required that only colors which were delineated by a concrete shape could be registered.
87. The Delegation of Switzerland stated that it should be at the option of the Office, and not the option of the applicant, to require an indication by means of a recognized color code. The Delegation also believed that the Office should have the option to require a paper representation or an electronic representation in accordance with national law. The Delegation sought clarification as to whether the Office could require paper or electronic representation.

88. The Representative of INTA suggested that a period be inserted into the draft in the following manner: “The Office may require a designation of the color(s) by using their common names. The Office may also require a written description...”
89. The Delegation of Germany supported the comments made by the Delegation of Switzerland concerning the capacity of the Office to require an indication by means of a recognized color code. The Delegation maintained that such a requirement was necessitated by the *Libertel* decision of the European Court of Justice (ECJ). The Delegation also supported the proposal made by the Representative of INTA so that the Office could require both a designation of the color by its common name and a written description on how the color applied to the goods.
90. The Delegation of Slovenia indicated that Slovenia was preparing to join the Singapore Treaty. The Delegation noted that there were a number of international color codes in existence and suggested that a national Office could designate a particular code to be used by that Office. The Delegation noted however that the codes were complicated and instead of educating trademark examiners in the field, it was easier to allow applicants to choose which code to use.
91. The Chair suggested a redraft to take account of the concerns raised. First, the Chair suggested deleting the phrase “on paper or in an electronic format” so that no Office would be obliged to accept electronic filing. Second, the Chair suggested adopting the amendment proposed by INTA. Third, in relation to color codes, the Chair suggested wording, which would allow the Office to require a color code indication, but allow the applicant to choose which code to use, so long as the code was recognized.
92. In relation to the proposed new draft of this provision, the Delegation of Switzerland noted that the draft no longer contained a reference to a sample “on paper or in an electronic format”. The Delegation sought clarification as to whether the national Office could decide and impose the nature and format of the sample to be submitted.
93. In response to the question raised by the Delegation of Switzerland, the Chair noted that the wording allowed the Office to decide the format of the sample.
94. The Representative of the European Union suggested there may have been an omission when redrafting, insofar as the applicant had a choice of color code, when the Office made a color code available, however, there was no counterpart obligation on the Office to accept the applicant’s choice of color code.
95. The Delegation of China pointed out that the references to color in paragraph (7) should be consistent in multiple and singular forms.
96. The Chair acknowledged the observation made by the Delegation of China that the third sentence should refer to color both in the singular and the plural. In response to the intervention of the Representative of the European Union, the Chair noted that this was the first time the issue had been raised and solicited comments from Member States on whether there should be an obligation on offices to accept a color code even where the Office did not require the applicant to submit a color code.
97. The Delegation of Ukraine believed that the Office should be entitled to restrict an applicant with respect to the color code submitted; otherwise, different applicants would submit different codes and this would make the task of the examiner very difficult.
98. The Representative of FICPI believed that the wording allowed the applicant to define the color by reference to a color code of the applicant’s choosing. The Representative opined that this would be the best way to establish distinctiveness, which was an important aspect of color *per se* marks and requested that the text be clear on this point.

99. The Representative of INTA questioned how the draft had transitioned from the applicant having the option, to the Office having the option. The Representative suggested that both the Office and the applicant should have the option, which would accord with the practice of the Trade Marks and Designs Registration Office of the European Union (OHIM).
100. The Chair indicated that it was necessary to receive a clear indication from Member States as to whether or not offices should be obliged to accept color codes, even though the offices may not have required color codes.
101. The Delegation of the Russian Federation explained that the national Office lacked experience with color codes. The Delegation believed that each Office should be able to decide which color code they would like to use and the applicant should be given the opportunity to choose from an approved list of color codes.
102. The Delegation of the United States of America believed that the Office should retain some discretion as to which color codes were acceptable. The Delegation did not support placing a mandatory obligation on the Office.
103. The Delegation of Australia supported the comments made by the Delegation of the United States of America.
104. The Chair asked the Delegation of the Russian Federation whether the Delegation supported a redraft, which would allow offices to determine what the color code should be.
105. The Delegation of the Russian Federation answered the question posed by the Chair in the affirmative and proposed a redraft so that the last sentence of paragraph (7) would read as follows: "The Office may further require an indication of the color or colors by a recognized color code chosen by the applicant from the list established by the Office".
106. The Delegation of Switzerland suggested that the term "recognized color code" could be interpreted as meaning a color code, which had been approved by the Office. The Delegation suggested that this interpretation could avoid the need to introduce the additional wording proposed by the Delegation of the Russian Federation.
107. The Chair asked the Delegation of the Russian Federation whether the interpretation posited by the Delegation of Switzerland would be satisfactory.
108. The Delegation of the Russian Federation answered the Chair's question in the negative on the basis that the term "recognized color codes" could have different meanings and the wording would lack a reference to the powers of the trademark Office.
109. The Delegation of Ukraine supported the comments made by the Delegation of the Russian Federation and believed that the meaning of the phrase "recognized color code" referred to those codes, which had been adopted by industry. The Delegation noted that the number of recognized color codes could increase over time and the Delegation was concerned that it would be difficult for each Office to deal with the many different color codes submitted by applicants.
110. The Delegation of France proposed the following wording: "The Office may further require an indication of the color or colors by a recognized color code chosen by the applicant and accepted by the Office".
111. The Delegation of Mali noted that the last sentence of paragraph (7) stated that the Office "may" further require... The Delegation pointed out that an Office could not require something that had not been accepted by that Office. The Delegation stressed the importance of providing a choice to both the applicant and the Office.

112. The Representative of FICPI noted that Rule 3(2) already granted the Office an option to require a color code indication, but did not provide a narrow definition of that requirement. The Representative highlighted that color *per se* marks were relatively unusual and that companies, which have a color capable of constituting such a mark, have typically defined that color from the outset, by reference to a particular code. The Representative was concerned that a system whereby individual offices recognized only certain codes would make registration problematic for applicants; especially considering that distinctiveness was so important for color *per se* marks. The Representative believed that the number of “recognized” color codes was quite small and that the draft text would be suitable for offices.
113. In relation to the concern raised by the Delegation of the United States of America, the Representative believed it was desirable, from an applicant’s perspective, to allow the applicant’s code of choice in as many countries as possible. The Representative proposed the following amendment to the final sentence of paragraph (7): “The Office may further require or allow an indication of the color or colors by a recognized color code chosen by the applicant”.
114. The Delegation of Mali believed that the final sentence of paragraph (7) should indicate that the applicant’s choice of code must also be recognized by the Office, as this would satisfy the concerns raised by the Delegation of the Russian Federation. The Delegation suggested that the final sentence of paragraph (7) be reworded as follows: “The Office may further require that the color or colors be recognized in accordance with a color code chosen by the applicant”.
115. The Chair proposed the following amendment to the final sentence of paragraph (7): “The Office may further require an indication of the color or colors by a recognized color code, chosen by the applicant and accepted by the Office”. The Chair explained that this would allow offices to accept any color code or to make a list of acceptable codes.
116. The Delegation of Uruguay pointed out that paragraph (7) referred to a “written description” and suggested that the term “written” be deleted from the text, as had been agreed by the Standing Committee.

Position Mark

117. The Delegation of Slovenia, noting the rarity of position marks and explaining that the national Office had no examples, sought clarification of the scope of protection for these types of marks. The Delegation asked whether protection extended to the position, the mark, or both.
118. The Representative of INTA pointed out the following divergence between the wording of area of convergence number 5, concerning position marks, and the draft proposal: the former stated that it “may” be required that matter for which protection is not to be claimed be represented in broken or dotted lines, whereas the latter stated that matter for which protection is not claimed “shall” be represented in broken or dotted lines. The Representative wondered whether this was introducing unnecessary rigidity in light of the fact that position marks may be represented by means of a photograph or also by means of a written description.
119. The Chair acknowledged that the requirement for broken or dotted lines could be too restrictive and suggested a redraft taking that into account.
120. The Representative of OAPI referred to the intervention of the Delegation of Slovenia and similarly requested clarification on whether the sign was protected or the position was protected.

121. The Chair responded to the requests for clarification by stating that the scope of protection for position marks was a matter for national law and there were many different views on that issue. The Chair requested that the SCT focus not on defining the scope of protection but rather on amending the draft proposal.
122. The Delegation of the United States of America explained that under national practice, descriptions were used to further define the mark being claimed and provide clarity to the public. When the mark was a special form mark, such as a position mark, or the mark contained a figurative element, the national Office always required a description. The Delegation was concerned that the wording of the draft would allow an Office to require a description, only if the representation was unclear. The Delegation requested that the following language be stricken from the draft: "If the graphic representation supplied is not sufficiently clear". The Delegation suggested that a new phrase be added so that the sentence would read as follows: "The Office may require a written description explaining the position of the mark in relation to the product, where it is necessary to define the nature of the mark being claimed".
123. The Chair suggested a redraft, which would take account of the concerns raised by the Representative of INTA and the Delegation of the United States of America.

Gesture Mark

124. The Delegation of Switzerland referred to area of convergence number 6 and believed that, for the time being, there was no need for specific rules concerning gesture marks, in light of the fact that figurative marks and motion marks were already regulated in the Treaty and the Regulations.
125. The Delegation of the United Kingdom pointed out that the provision in question differed from the other draft amendments insofar as the following phrase was not used: "where the application contains a statement". The Delegation sought clarification on whether or not this was a result of deliberate intent.
126. The Representative of OAPI noted that gesture marks could carry a particular meaning in everyday life. The Representative offered the example of "thumbs up" or "thumbs down", and noted that the meaning of each was different. The Representative suggested that a gesture mark could be defined by reference to the meaning of the gesture.
127. The Representative of FICPI expressed the view that a gesture mark referred to something that part of the human body does and which, by use, has come to be associated with a particular product. The Representative questioned whether this was really the same as a motion mark and asked the Committee to consider the differences between a gesture mark and motion mark in more detail.
128. The Delegation of China supported the comments made by the Delegation of Switzerland. The Delegation explained that gesture marks were not recognized under national law and believed that there was no need to create this category of marks.
129. Noting the interventions made by the Delegations of Switzerland and China, the Chair proposed to strike the provision on gesture marks from the draft. The Chair noted further that area of convergence number 6 indicated that the term "gesture mark" was used by industry, but not necessarily in legal statutes, and although there may have been a difference between gesture marks and motion marks from a business perspective, applicants had an opportunity to register a motion mark that consisted of a gesture.

Sound Mark

130. The Delegation of Spain explained that sound marks were protected in Spain but the manner in which the sound mark should be presented, such as musical notation on a stave or in an electronic file, was determined by national law, and not by the applicant.
131. The Delegation of Japan sought clarification on whether paragraph (10)(c) in document STLT/WG/1/2 simply confirmed the general rule that Contracting Parties could decide that musical notation was the only adequate means to represent a sound mark, or whether it implied that the Office could not consider that only a sound recording adequately represented the mark.
132. The Chair clarified that the options listed in paragraph 10 were options that the applicant had and not options, which were subject to determination by the Office. However, subparagraph (c) allowed offices, which only accepted musical notation on a stave, to maintain that practice.
133. The Delegation of Ukraine supported the preceding interventions and explained that although musical notation was required under national law; musical notation did not by itself reflect a sound mark. The Delegation stated that in addition to the musical notation, the applicant should be able to submit in digital format, a sound file, a recording, or any other means of expression.
134. The Delegation of Germany explained that the national Office required both musical notation on a stave and a sound recording. The Delegation sought clarification as to whether the Office could continue with this dual requirement or if it would be at the option of the applicant.
135. Responding to the question raised by the Delegation of Germany, the Chair clarified that it was for the applicant to decide whether or not to submit a digital or analog recording of the sound and Rule 3(10)(c) only permitted the Office to require a musical notation on a stave, not a sound recording.
136. In response to the Chair's clarification, the Delegation of Germany indicated that the draft was not acceptable. The Delegation pointed out that the draft did not state explicitly that the means of representation were at the option of the applicant.
137. The Representative of FICPI suggested that the problem with Rule 3(10)(c) could have stemmed from an effort to interpret a decision of the ECJ, which required graphic representation. The Representative suggested that the Committee take account of other decisions, such as the decision of OHIM to register Tarzan's yell, which was adequately represented by a combination of a graphic representation and a sound recording. The Representative suggested that subparagraph (c) could be amended so that the musical notation requirement was retained only where graphic representation was required.
138. In light of the Chair's clarification of Rule 3(10)(a), the Representative of INTA proposed that the phrase "at the option of the applicant" be inserted into that subparagraph. The Representative shared the concerns of the Representative of FICPI regarding subparagraph (c), which might exclude the registration of non-melodic sound marks, such as the lion's roar of the MGM Corporation. The Representative expressed the view that the best way to represent sound marks was by a sound recording and hoped that efforts could be made to facilitate the submission of sound recordings.
139. The Representative of OAPI was concerned that allowing the applicant to choose the means of representation of the sound mark under Rule 3(10)(a), could be problematic insofar as certain offices may not be able to satisfy the applicant's choices. Some offices may have the capacity to accept only certain types of submissions, such as musical notation on a stave.

140. The Delegation of Mali proposed that subparagraph (c) be stricken from the draft on the basis that subparagraph (a) gave the applicant a choice of representation, but subparagraph (c) took that choice away. The Delegation opined that subparagraph (c) was an option for the Office but not an obligation, and therefore the draft should be limited to subparagraphs (a) and (b).
141. The Delegation of France indicated that it could not accept the striking of subparagraph (c), in light of ECJ jurisprudence, which held that only a musical notation on a stave could constitute a sufficient representation of the mark.
142. The Delegation of the Russian Federation noted that under the Singapore Treaty, Contracting States were not obliged to register sound marks, but could choose to do so if they wished. The Delegation proposed that subparagraph (c) be retained as drafted, in light of the fact that some countries may be willing to register musical sound marks, but unwilling to register non-musical sound marks. The Delegation suggested that under subparagraph (a), indications of an obligatory nature could be provided to applicants so that applicants could choose their preferred means of representation of the mark from the possibilities offered.
143. The Delegation of Mali noted that the presence of the word “shall” in subparagraph (a) created an obligation. Noting that subparagraph (c) contains the word “may” rather than “shall” the Delegation opined that subparagraph (c) was unnecessary.
144. The Chair responded to the intervention of the Delegation of Mali by explaining that it was necessary for offices in the European Union to have the choice to require musical notation on a stave, in the event that the representation offered by the applicant did not adequately represent the mark.
145. The Representative of FICPI referred to the Community Trademark Implementation Regulation, Rule 3, paragraph 6, and suggested that subparagraph (c) of the draft could be reworded in a manner similar to the following: “Where the law of a Contracting Party requires a mark to be capable of being represented graphically, the representation of the sound mark shall consist of a graphical representation of the sound, in particular a musical notation, and this may be accompanied by a recording of the sound”.
146. The Chair suggested that subparagraph (a) could be redrafted to indicate clearly that the means of representation were at the option of the applicant. The Chair noted that it was important for some delegations, especially the European delegations, to maintain subparagraph (c) but suggested broadening the language to facilitate other means of representation.
147. The Delegation of Germany proposed that subparagraph (c) could be redrafted to include two bullet points following the word “only”. The first bullet point would read “a musical notation on a stave”. The second bullet point would read “both a musical notation on a stave and a sound file”. Following the bullet points, the text could continue as drafted, with the phrase “may adequately represent the mark”. The Delegation elaborated that the wording would create more flexibility for Contracting Parties, particularly European States, attempting to comply with both European jurisprudence and their own national law.
148. The Delegation of Mali acknowledged that it was now clear that subparagraph (a) left the choice to the applicant. Therefore, the Delegation supported the proposal made by the Delegation of Germany and believed that subparagraph (c) should be retained.
149. The Representative of OAPI stressed the importance of analyzing subparagraph (c) from an international perspective and noted that it could be difficult for an Office to recognize a mark if its means did not allow it to do so, due to the format in which the mark was submitted. The Representative highlighted the need to avoid constraining States that were beyond European jurisprudence and the need to ensure that international standards could be met.

150. The Chair suggested a redraft, which would indicate clearly in subparagraph (a) that the means of representation were at the option of the applicant, and would also take account of the interventions made by the Delegation of Germany and the Representatives of FICPI and INTA concerning subparagraph (c). The Chair suggested also that the redraft could attempt to facilitate the registration of sounds that could not be represented by musical notation on a stave.
151. In relation to the proposed redraft, the Representative of FICPI was concerned that an Office, which limited itself to representations consisting of musical notation on a stave, would be unable to accept a non-melodic mark, even though it may have been possible to represent the mark graphically, until such time as that Office accepted sound recordings. The Representative proposed adding the following words: "or other form of graphical representation".

Marks Consisting of a Non-Visible Sign other than Sound Marks

152. There were no comments on the proposed provision.

Model International Forms

153. The Delegation of the Russian Federation pointed out that the proposed amendments to Rule 3 must be accompanied by corresponding amendments to Model International Form No. 1, in particular, footnotes 13 and 14, relating to points 8.6 and 8.9.
154. The Chair replied that the Secretariat would make the appropriate changes to Model International Form No. 1 after the Assembly of the Singapore Treaty adopted the proposed new rules.
155. The Working Group agreed on the text for a revised Rule 3(4) to (10) as reproduced in the Annex to the Summary by the Chair (document STLT/WG/1/3). The Working Group further agreed to recommend to the Singapore Treaty Assembly the adoption of the text for a revised Rule 3(4) to (10) as reproduced in the Annex to this document, with November 1, 2011, as the date for its entry into force. Following the adoption of the recommended Rule change by the Assembly, the Secretariat was requested to introduce all consequential amendments to the model international forms.

Summary by the Chair

156. The Working Group approved the Summary by the Chair as contained in document STLT/WG/1/3.

Agenda Item 5: Closing of the Session

157. The Chair closed the session on June 29, 2010.

[Annexes follow]



STLT/WG/1/3
ORIGINAL: ENGLISH
DATE: JUNE 29, 2010

Working Group on the Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks

First Session

Geneva, June 28 and 29, 2010

Summary by the Chair

adopted by the Working Group

Agenda Item 1: Opening of the Session

1. Ms. Binying Wang, Deputy Director General, opened the first session of the Working Group on the Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks (Working Group) and welcomed the participants on behalf of the Director General.
2. Mr. Marcus Höpperger (WIPO) acted as Secretary to the Working Group.

Agenda Item 2: Election of a Chair and two Vice-Chairs

3. Mr. Mikael Francke Ravn (Denmark) was elected Chair of the first session of the Working Group and Mrs. Liubov Kiriya (Russian Federation) and Ms. Mei Lin Tan (Singapore) were elected Vice-Chairs of the first session of the Working Group.

Agenda Item 3: Adoption of the Agenda

4. The Working Group adopted the Draft Agenda (document STLT/WG/1/2 Prov.) without modifications.

Agenda Item 4: Review of Rule 3(4) to (6) of the Regulations under the Singapore Treaty on the Law of Trademarks

5. Discussion was based on document STLT/WG/1/2. The Working Group agreed on the text for a revised Rule 3(4) to (10) as reproduced in the Annex to this document. The Working Group further agreed to recommend to the Singapore Treaty Assembly the adoption of the text for a revised Rule 3(4) to (10) as reproduced in the Annex to this document, with November 1, 2011, as the date for its entry into force. Following the adoption of the recommended Rule change by the Assembly, the Secretariat was requested to introduce all consequential amendments to the model international forms.

Agenda Item 5: Summary by the Chair

6. The Working Group approved the Summary by the Chair as contained in the present document.

Agenda Item 6: Closing of the Session

7. The Chair closed the session on June 29, 2010.

REGULATIONS UNDER THE SINGAPORE TREATY ON THE LAW OF TRADEMARKS

[...]

Rule 3
Details Concerning the Application

[...]

(4) [*Three-dimensional Mark*]

- (a) Where the application contains a statement to the effect that the mark is a three-dimensional mark, the reproduction of the mark shall consist of a two-dimensional graphic or photographic reproduction.
- (b) The reproduction furnished under subparagraph (a) may, at the option of the applicant, consist of one single view of the mark or of several different views of the mark.
- (c) Where the Office considers that the reproduction of the mark furnished by the applicant under subparagraph (a) does not sufficiently show the particulars of the three-dimensional mark, it may invite the applicant to furnish, within a reasonable time limit fixed in the invitation, up to six different views of the mark and/or a description by words of that mark.
- (d) Where the Office considers that the different views and/or the description of the mark referred to in subparagraph (c) still do not sufficiently show the particulars of the three-dimensional mark, it may invite the applicant to furnish, within a reasonable time limit fixed in the invitation, a specimen of the mark.
- (e) Notwithstanding subparagraphs (a) to (d), a sufficiently clear reproduction showing the three-dimensional character of the mark in one view shall be sufficient for the granting of a filing date.
- (f) Paragraph (3)(a)(i) and (b) shall apply *mutatis mutandis*.

~~(5) [*Hologram Mark, Motion Mark, Color Mark, Position Mark*] Where the application contains a statement to the effect that the mark is a hologram mark, a motion mark, a color mark or a position mark, a Contracting Party may require one or more reproductions of the mark and details concerning the mark, as prescribed by the law of that Contracting Party.~~

(5) [*Hologram Mark*] Where the application contains a statement to the effect that the mark is a hologram mark, the representation of the mark shall consist of one or several views of the mark capturing the holographic effect in its entirety. Where the Office considers that the view or views submitted do not capture the holographic effect in its entirety, it may require the furnishing of additional views. The Office may also require the applicant to furnish a description of the hologram mark.

(6) [*Motion Mark*] Where the application contains a statement to the effect that the mark is a motion mark, the representation of the mark shall, at the option of the Office, consist of one image or a series of still or moving images depicting movement. Where the Office considers that the image or images submitted do not depict movement, it may require the furnishing of additional images. The Office may also require that the applicant furnish a description explaining the movement.

- (7) [Color Mark] Where the application contains a statement to the effect that the mark is a color *per se* mark or a combination of colors without delineated contours, the reproduction of the mark shall consist of a sample of the color or colors. The Office may require a designation of the color or colors by using their common names. The Office may also require a description on how the color is or the colors are applied to the goods or used in relation to the services. The Office may further require an indication of the color or colors by a recognized color code chosen by the applicant and accepted by the Office.
- (8) [Position Mark] Where the application contains a statement to the effect that the mark is a position mark, the reproduction of the mark shall consist of a single view of the mark showing its position on the product. The Office may require that matter for which protection is not claimed shall be indicated. The Office may also require a description explaining the position of the mark in relation to the product.
- (9) [Sound Mark] Where the application contains a statement to the effect that the mark is a sound mark, the representation of the mark shall, at the option of the Office, consist of a musical notation on a stave, or a description of the sound constituting the mark, or an analog or digital recording of that sound, or any combination thereof.
- ~~(6)~~(10) [Mark Consisting of a Non-Visible Sign other than a Sound Mark] Where the application contains a statement to the effect that the mark consists of a non-visible sign other than a sound mark, a Contracting Party may require one or more representations of the mark, an indication of the type of mark and details concerning the mark, as prescribed by the law of that Contracting Party.
- ~~(7)~~(11) [Transliteration of the Mark] [...]
- ~~(8)~~(12) [Translation of the Mark] [...]
- ~~(9)~~(13) [Time Limit for Furnishing Evidence of Actual Use of the Mark] [...]
- [...]

[Annex II follows]

Liste des participants
List of Participants

*établie par le Secrétariat
prepared by the Secretariat*

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III. ORGANISATIONS INTERNATIONALES INTERGOUVERNEMENTALES/
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IV. ORGANISATIONS INTERNATIONALES NON GOUVERNEMENTALES/
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Association américaine du droit de la propriété intellectuelle (AIPLA)/American Intellectual
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VI. SECRÉTARIAT DE L'ORGANISATION MONDIALE DE LA PROPRIÉTÉ
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