

Visible signs

Three-Dimensional Marks and position marks

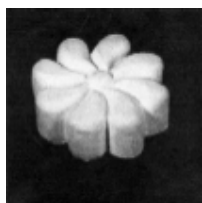
It is stated in the Trade Marks Act, Section 2(1)(iv), that a trademark may consist in the shape, equipment or packaging of the goods. If a mark meets the requirements of distinctive character and the capability to distinguish, it is registrable. In other words, the form itself must be able to function as a trademark for the goods.

The registration of a three-dimensional mark gives the owner exclusive rights to the form of the goods, thus limiting other traders' possibility of shaping or packaging their goods in a similar fashion.

Examples of Registered Three-Dimensional Marks

The following examples are registered marks consisting in the goods themselves:

MP666313 (class 29)



VR 1998 00597 (class 28)



The following examples are registered marks consisting in a part of the goods(=equipment):

VR 1987 03157 (class 25)



VR 1987 00083 (class 25)



The following examples are registered marks consisting in the packaging:

VR 1996 03700 (class 3)

MP698955 (classes 29 and 30)



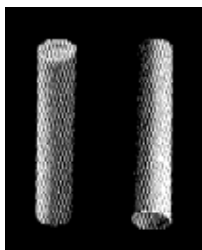
VR 1996 01449 (class 33)



Examples of Three-Dimensional Marks Devoid of Distinctive Character

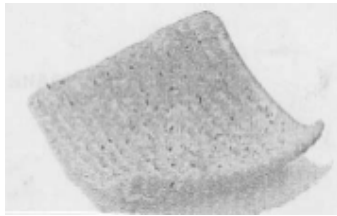
The distinctiveness of a shape depends on whether the shape is commonly used within the given type of goods (e.g. wine gums shaped as bears). Whether the shape is determined by the function, or whether it is a basic geometric shape or an immaterial variation hereof (e.g. a square box), and whether elements of the shape is purely ornamental rather than being a trademark. It should be noted that the fact that the goods, parts of the goods or their packaging are made of uncommon materials, e.g., a perfume bottle made of leather, does not provide distinctive character on its own.

An example of a shape which is devoid of distinctive character is the cylinders below:



In the decision of April 3rd 2001 of the Maritime and Commercial Court, in the case of V-0032-98 the court found that this mark, the shape of a cardboard cylinder, consisted in such a well-known geometric shape that it could be characterised as a primary form. Therefore, the court found that “the mark lacked distinctive character and that trademark protection by way of distinctive character acquired through use had not been obtained either.” This was affirmed in the appeal.

VA 1999 03986:



In this case, the office found that “the fact that the illustrated “snack” is slightly curved or that its surface is grooved does not provide sufficient distinctive character, because these elements are commonly used for snacks and potato crisps. Nor the fact that the basic shape of the mark is square provides distinctiveness, because snacks and potato crisps are commonly formed in simple geometric shapes, such as round, square, oval or triangular.

Three-Dimensional Marks Containing Figures or Words

In principle, a three-dimensional mark is distinctive if it contains a distinctive word or figurative element.

However, the registration of such a mark seldom covers the equipment of the goods as such, only the distinctive elements themselves. Trademark rights to the shape, equipment or packaging of the goods are solely obtained, if they themselves have distinctive character.

Examples of three-dimensional marks containing words or figures:

VR 1999 02865



VR 2000 00349



VR 1999 04194



Three-Dimensional Marks Claiming Colours

A mark in colours may possess distinctive character based on the colours. It is decisive whether the colours are used in such a way that they function as a trademark of the applicant, which usually presupposes several colours being used, that the colours are used in an unusual fashion in relation to the goods, and that the colours are not perceived as mere ornamentation.

Example of use of colours which does not provide distinctive character:

MP692850, goods in class 3



Color marks

The Demand for Graphical Reproduction

Colour marks can be unambiguously represented by reproducing the colour itself and stating an internationally recognized colour code, e.g. Pantone.

If the application concerns a colour mark, it will be noted in the remarks.

Distinctive Character

When evaluating whether a certain colour has the necessary distinctive character for registration, it is carefully considered whether a registration in any way unduly limits the availability of colours for other traders which offer similar goods or services as the ones stated in the application.

At the same time, the evaluation must establish whether the colour mark is perceived, by the relevant consumers, as an identification of the goods and services applied for, originating from a particular company, thus distinguishing the goods or services from those of other companies.

Therefore, colour marks will only have distinctive character in exceptional cases. If the mark is not distinctive, the reason for refusal will usually be pursuant Section 13(1).

In certain cases, colour marks which cover very few goods or services within a narrow field may have distinctive character.

As is the case with other marks, colour marks may acquire distinctive character through use and thus become registrable, cf. Section 13(2).

Practice is limited, but more information may be found in the preliminary ruling by European Court of Justice, C-104/01.

Holograms

Holograms are according to our practice being registered by taking a photocopy of the hologram, which shows the hologram in its entirety. A note in the registration specifies that the registration consists of a “hologram”.

Slogans

Slogans are treated as any other word mark. This means that we do not regard them as new types of marks.

Titles of films and books

Titles of film and books are treated as any other word mark. This means that we do not regard them as new types of marks.

Motion or multimedia signs

The so-called moving trademarks also constitute a challenge to the demand of an unambiguous representation of the mark. Moving trademarks are typically small animations, as seen in banners, but they can also be proper film sequences such as commercials. In this way, moving trademark consist in a long series of frames, which, put together, creates a movement. Consequently, such a mark is not sufficiently unambiguously represented by one of those pictures. However, the office has accepted the graphical representation of a mark that shows a numbered sequence of pictures, and because a note in the registration specifies that the registration consists of a “moving trademark”. The graphical representation of the mark can contain several pictures, which show how the mark “moves”, but there are not yet developed any practice on how many picture shall or may be contained in the graphical representation of the mark.

Gesture marks

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Non-visible signs

Sounds marks

According to practice, a sound mark (e.g. a signature tune) may be registered if it meets the requirements of distinctive character and graphical representation. This practice has been confirmed by the European Court of Justice in the judgment between Shield Mark and Joost Kist, Für Elise, C-283/01.

According to the European Court of Justice, the requirements of graphical representation involve it to be clear, exact, independent, easily accessible, comprehensible,

lasting, and objective. These requirements are the same as in the Sieckmann judgment on smell marks.

The European Court of Justice also states which types of graphical representation are acceptable. A system of musical notation, divided into measures/bars, among other things, with the designation of a key, notes, and pauses, constitutes a rendering which is true to the sequence of sounds that makes up the melody of the application. Thus, this kind of graphical representation meets the requirements set by the European Court of Justice. We no longer demand that the musical notation be accompanied by information about the instruments used to produce the sound.

The judgment of C-283/01 does not only treat the graphical representation of sound in the shape of a sonogram or an oscillogram. It is our practice to accept sonograms or oscillograms if they are accompanied by a description of the sound, giving an unambiguous impression of the mark. An example of the wording of such a description: "The mark is a sound mark in the form of the statement "hvaaa, hvor ska' vi hen du?" (Eng. = hey, where are we going, man).

Distinctive Character

In principle, a single tone is insufficient to fulfil the demand of distinctive character and should be available for the use of all traders.

Similarly, a sound mark can become so long that it will not be perceived as a trademark. Thus, a trademark consisting in a long piece of music or a conversation between several people will lack distinctiveness.

Finally, the description accompanying a sonogram or oscillogram must have distinctive character. If this is not the case, a sound reproduction of the mark must be submitted. Only if this reproduction is distinctive will the mark have distinctive character.

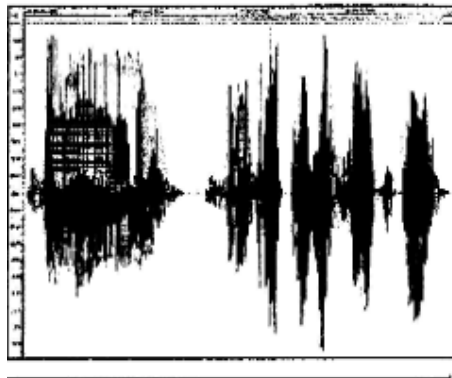
Practice

Examples of marks which are registered as sound marks:

VA 1997 04984:

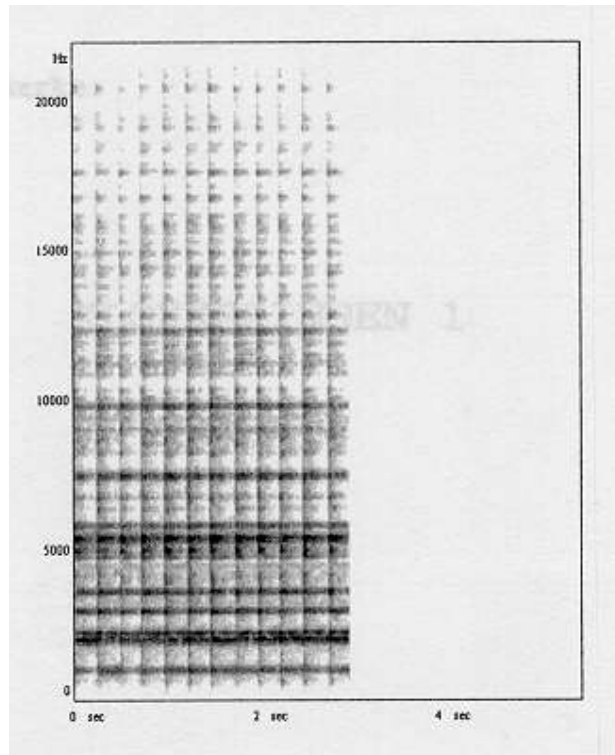
A musical score for a string quartet and piano. The score is arranged in six staves. From top to bottom, the staves are labeled: Violin I (Vcl. I), Violin II (Vcl. II), Viola (Vcl. III), Cello (Vcl. IV), Bass, and Piano (P.). The music is in 4/4 time and features a series of chords and melodic lines across the instruments. The piano part is written in the bottom staff, providing harmonic support for the strings.

VA 1999 02281:



The mark is a sound picture of "hvaaa, hvor ska' vi hen du?"

VA 2003 01441:



The mark consists in the sound of a small bell which has a stroke frequency of about 1 KHz. The acoustic pattern is repeated in different rhythms of six eighths and eight eighths.

Olfactory marks

In Section 2 of the Trade Marks Act, the list of signs which may serve as trademarks is not complete. In principle, signs which can be heard or smelled may be registered if they meet the requirements for trademarks.

However, the fact that sounds and smells cannot be perceived by the eye causes problems with regard to the requirement that trademarks must be capable of being graphically represented.

The Graphical Representation

It is our practice that smell marks, with today's technology, cannot fulfil the legal demand for graphical representation. Therefore, smell marks cannot be registered until a method exists which ensures an unambiguous graphical representation. This practice has been confirmed by the European Court of Justice in the case Sieckmann C-273/00.

The concept of graphical representation thus includes signs which cannot be visually perceived. In this way, a smell mark may be a trademark, although it cannot be visually perceived. However, they are required to be capable of being graphically rep-

resented, especially by the use of pictures, lines or written characters, and the representation must be clear and exact, independent, easily accessible, comprehensible, lasting, and objective.

The requirement of graphical representation is not fulfilled by smell marks by 1) a chemical formula, which is not comprehensible, 2) a written explanation, which is not sufficiently clear, exact or objective, 3) a deposit of a sample of the scent, which is inconstant. A combination of these methods does not fulfil the demands either.

The Sieckmann ruling does not comment on the use of gas chromatograms. A scent may be graphically represented by a gas chromatogram. The representation of a scent by a gas chromatogram depends on several conditions, including the pressure under which the chromatogram has been made, which type of pipes that have been used, the speed of the fluid through the pipe, which absorber was employed, etc.

According to practice, gas chromatography is thus not exact, and it is subject to so much uncertainty that it does not fulfil the demand for unambiguous graphical representation.

Distinctive Character

The evaluation of distinctive character is carried out in relation to the goods or services for which the smell mark has been applied, not the scent itself. If the scent is an inherent characteristic of the goods, the requirement of distinctiveness has not been met. For example, the smell of a rose is not distinctive for perfume, which usually incorporates scents of flowers, but it is distinctive for car tyres.

Practice

Until now, only two applications for smell marks have been filed: VA 1997 05710 for bubble bath and VA 1997 05711 for perfume. These cases were refused on the basis of ambiguous graphical representation in the form of gas chromatograms.

Taste marks

In Section 2 of the Trade Marks Act, the list of signs which may serve as trademarks is not complete. In principle, signs which can be tasted may be registered if they meet the requirements for trademarks.

However, the fact that tastes cannot be perceived by the eye causes problems with regard to the requirement that trademarks must be capable of being graphically represented.

We have no examples of marks which are registered or even applied for as taste marks.

Texture or feel marks

We have not decided our practice in this area.

We have no examples of marks which are registered or even applied for as texture or feel marks.