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Practice Amendment Notice

PAN 2/06 - Issued 12 April 2006

This Notice affects Examination practice about: **colour trade marks**.

The text of paragraph 16.1.1 has been amended. This is not a change in practice but merely a clarification of existing practice.

16.1 Colour trade marks - Colour(s) alone – in the abstract or applied to the goods or their packaging

16.1.1 Graphical representation

In *Libertel* (C-104/01), the ECJ decided that to be represented graphically, colour marks must be presented in a way that is "clear, precise, self-contained, easily accessible, durable and objective" (the Sieckmann criteria) (C273/00). The court determined that providing a sample of the colour(s) proposed for registration on paper is not sufficient by itself to satisfy the requirement for graphical representation of the sign. However, the court stated that the Sieckmann criteria may be satisfied by designating the colour using an internationally recognised colour identification code.

Single Colours

With that in mind, marks consisting of colour alone will be considered to be graphically represented if they are filed in the form of a written description of the colours(s) (eg dark blue) and are accompanied by the relevant code(s) from an internationally recognised colour identification system. There are a number of colour identification systems in existence e.

g. Pantone®, RAL and Focoltone®. This is not an exhaustive list and the choice of which system to use is one for the applicant.

A degree of interpretation of the graphical representation is permissible. For example, it seems to be permissible to require third parties to look up the colour which corresponds with a particular colour code. However, there are limits to what can reasonably be expected of third parties. It must be reasonably practicable for persons inspecting the register, or reading the Trade Mark Journal, to be able to gain an understanding from the graphical representation of what the trade mark is. Representations which are precise but impossible to interpret without costly specialist equipment or services, place too high a burden on third parties and are likely to be rejected because they are not "easily accessible." Accordingly, a mark defined as "a blue bottle of optical characteristics such that if the wall thickness is 3mm the bottle has, in air, a dominant wavelength of 472 to 474 nanometres, a purity of 44 to 48%, an optical brightness of 28 to 32%" was rejected by The Appointed Person in Ty Nant Spring Water Ltd's Application [2000] RPC 55, because it would require third parties to use a spectrophotometer to ascertain whether a particular colour was or was not covered by the description, and in fact served to veil the identity of the sign (cobalt blue).

Combinations of Colours

In *Heidelberger Bauchemie GmbH*, Case C-49/02, the ECJ introduced an additional requirement for marks consisting of a combination of colours in the abstract, without contours. In this case the representation must also include "a systematic arrangement associating the colours in a predetermined and uniform way."

Unfortunately, it is not very clear what this means in practice. The ECJ offered no examples of the ways in which the requirement might be satisfied. However, the following representation of CTM number 2177566 appears to plainly fall within the guidance.

E2177566



Goods/services: CI 6, 11, 19 and 20

Description: The distribution and ratio of the colours to each other is 50 - 50, whereby the colour blue runs horizontally above the colour red, forming a striped whole.

Indication of colour: Blue: Ral 5015, red: Ral 2002.

Alternative ways of representing colour marks graphically may be accepted as long as they satisfy the criteria set out above.

Representing Colour(s) in the Abstract as Opposed to Colour(s) Applied to the Goods or to their Packaging

The ECJ has made it clear that there is no reason why, in principle, colour (s) cannot be registered in the abstract, as opposed to specific applications of colour such as being applied to the exterior of the goods themselves, or to their packaging. Applicants should consider whether the way colour is used forms an essential part of the subject matter of their trade mark. For example, if evidence of acquired distinctiveness is likely to show that a specific colour has come to be recognised as a trade mark when it is used in a particular manner, for example on the sides of the overhead canopy of a fuel service station, it may be advisable to define the mark in this way from the outset. It is not possible to amend the trade mark application after it has been made in ways which substantially affect the identity of the mark.

Failure to Meet the Requirements for Graphical Representation of the Trade Mark

An application which does not meet the requirements will face an objection under Section 32(2)(d) of the Act because it does not contain a graphical representation of the trade mark. The applicant or his representative will be notified in writing about this and given two months to remedy this deficiency, under Rule 11. Failure to remedy the deficiency within this two month non-extendable period will result in the application being deemed never to have been made.

If the requirements are subsequently met, the filing date of the application will be the date upon which everything required by Section 32 (2) is received at the registry.

16.2 Assessing distinctive character

Single colours

In *Libertel* (C-104/01) the court decided that colour, per se, may have a distinctive character and may be capable of distinguishing the goods and services of one undertaking from those of other undertakings. However, as colour per se is not normally used by traders as a means of brand identification, unlike words or pictures, consumers are not in the habit of making assumptions about the origin of goods and services based solely on their colour or the colour of their packaging.

It follows therefore that single colours will only in exceptional circumstances be capable of denoting the origin of a product or service. Marks consisting of a single colour will usually be liable to objection under Section 3(1)(b) of the Act because they lack the capacity to distinguish. In some cases single colours may also attract additional objections under Section 3(1)(c) and (d) of the Act if the colour sends a descriptive message or the colour is customary in the trade i.e. the colour RED for fire fighting services, or the colour GREEN for ecological goods/services.

There may be occasions where colour applied to the goods themselves may be inherently more distinctive than when the colour is applied to the packaging; for example, GREEN beer may be quite distinctive, yet the colour GREEN applied to a beer bottle or can would be non-distinctive.

The examination of single colour marks requires careful analysis, not least because there is a public interest in not unduly limiting the availability of colours for other traders. Each case must be assessed individually.

Two or more colours

A combination of colours may be registrable, but this will depend on how the colours are presented and what they are applied to. If the colours are presented as a figurative mark, such as a square or circle, then as few as two colours could be accepted; but if they are simply the colours of the packaging of the product they are less likely, prima facie, to indicate trade source. When applications consist merely of colours applied to the goods or their packaging it will be necessary to consider how unusual the colour combination is in relation to the goods and whether, prima facie, the combination is likely to strike the relevant consumer as an indication of trade source. It is, for example, unlikely that the average consumer of

washing tablets would, without extensive and exclusive use, view colour combinations such as green and white or yellow and white as an indication of trade source; it is more likely that they would be taken to indicate the presence of two active ingredients and therefore be given no trade mark consideration.

In addition to considering whether colour combination marks are liable to objection under Section 3(1)(b) of the Act, as with single colours, consideration under Section 3(1)(c) and (d) must also be given.

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