

CNIPA issues guidance on distinctive characters for non-traditional marks (part 1)

Authors: Ling Zhao, Shufang Zhang
CCPIT Patent and Trademark Law Office

The China National Intellectual Property Administration (CNIPA) issued Guidance on Distinctive Characters for Non-traditional Trademarks on 29 December 2023. In the first of two articles, Ling Zhao and Shufang Zhang summarise the Guidance.

What are non-traditional marks?

The term non-traditional trade mark was proposed in the Singapore Treaty on the Law of Trademarks to refer to types of trade mark other than traditional textual and graphic trade marks.

In accordance with the current China Trademark Law, only three kinds of non-traditional trade marks are acceptable for registration in China: three-dimensional (3D) trade marks, colour combination trade marks and sound trade marks. Other types of non-traditional trade marks, such as single-colour, position and motion marks are yet to be acceptable in China.

The Guidance is formulated to help relevant business entities to better understand the requirements on distinctive character of non-traditional trade marks and to provide guidance on registration and use of non-traditional trade marks. The Chinese version of the guidance can be accessed on CNIPA's website [here](#).

The Guidance includes three parts to address the distinctive characters of the three types of non-traditional trade marks. In this article, we will look at the 3D trade marks. Colour combination and sound marks will be examined in a follow-up article.

3D trade marks

In practice, a 3D mark is generally presented as the 3D shape of the goods or the packaging or container of the goods, or other three-dimensional shapes.

When applying for a three-dimensional trade mark, the applicant must claim the mark as a 3D mark and submit

drawings that can identify and define the 3D shape. Drawings showing at least three different views must be submitted.

According to the Guidance, when a three-dimensional mark is composed of the following elements, the mark is considered to lack distinctiveness if:



Figure 1

- it is the 3D shape of the good itself, parts of the shape or appearance of the goods. For instance, the device in figure 1 used on the goods “clocks and watches” is liable to be regarded as the appearance of the goods and is considered to lack distinctiveness;

- it is the shape of the packaging or containers of the goods. For instance, the device shown in figure 2 used on the goods "condiments" is considered to be the shape of condiment containers and also lacks distinctiveness;



Figure 2

- it is a simple or ordinary three-dimensional shape or a three-dimensional shape that serves a decorative function as a trade mark. For instance, the device in figure 3 is liable to be regarded as an ordinary 3D shape and to lack distinctiveness;



Figure 3

- it is the shape of a generic or commonly used article in the service industry for the provision of relevant services. For instance, the device in figure 4 used on “amusement park services” is easily regarded as the specific content of the service and lacks distinctiveness.



Figure 4

Acquired distinctiveness

When a three-dimensional mark is considered to lack distinctiveness, evidence must be submitted for the purpose of registration to prove acquired distinctiveness by long-term and extensive use.

Disclaimers

A trade mark that is a combination of a 3D shape that lacks distinctive features and other 2D elements with distinctive features is generally regarded as bearing distinctive features in its entirety, but the applicant must disclaim the exclusive rights to the 3D shape part, and the disclaimer shall be included in the registration certificate as well as the Trademark Gazette.

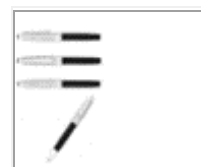


Figure 5

The applicant cannot claim exclusive rights for the 3D part that does not have distinctive features.

If the proportion of two-dimensional elements is too small or is in a position that is not easily recognisable, or if the mark as a whole is easily recognised as packaging decoration or the decorative appearance of the goods, etc., instead of as a trade mark, then the trade mark as a whole does not possess distinctive character.

For instance, even though there are words such as “MONTBLANC”, “MEISTERSTUCK” on the three-dimensional shape shown in figure 5, as the proportion of the words are small, this sign is still considered to lack distinctiveness when used on the goods “fountain pens”.

Ling Zhao, Shufang Zhang are members of CCPIT Patent and Trademark Law Office and Ling Zhao is a member of the [MARQUES China Team](#). The second part of this article, covering colour combination and sound marks, will be posted later this week.