

Distinctive character of colour marks

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INTRODUCTION

Colours and TM

Can be used as part of a word mark

Can be used as part of a figurative mark

Can be used as a position mark

Can be used as part of a 3D mark

Colour per se

Colours and TM

The issues:

Article 4: representation

Article 7: distinctive character

Article 7: descriptive

Article 7: colour gives a substantial value to the goods

Article 7(1)(b) EUTMR

Trade marks which are devoid of any distinctive character shall not be registered

Essential function of the mark: to distinguish that product from those of other undertakings

This being said....!!!

Article 7(1)(b) EUTMR

**21/01/2011, T-310/08, executive edition,
EU:T:2011:16, § 22**

It is not necessary for the trade mark to convey exact information about the identity of the manufacturer of the goods or the supplier of the services. It is sufficient that the trade mark enables members of the public concerned to distinguish the good or service that it designates from those which have a different commercial origin

Article 7(1)(b) EUTMR

19/09/2001, T 335/99, T 336/99 & T 337/99, Tabs (3D), EU:T:2001:219, §44

A minimum degree of distinctive character is sufficient to render the absolute ground for refusal set out in Article 7(1)(b) EUTMR inapplicable

Article 7(1)(b) EUTMR

**18/06/2002, C 299/99, Remington, EU:C:2002:377,
§ 38**

**The sign must be perceived as a mark by the
relevant consumer**

No a priori exclusion of any type of signs

Article 7(1)(b) EUTMR

**18/06/2002, C 299/99, Remington, EU:C:2002:377,
§ 38**

**The sign must be capable of being memorised
by the relevant consumer**

**Role of the level of attention of the consumer in
that regard?**

Article 7(1)(b) EUTMR

05/04/2001, T 87/00, Easybank, EU:T:2001:119, § 39

Sign does not need to be unusual or striking

16/09/2004, C-329/02 P, SAT.2, EU:C:2004:532, § 41

Originality or imaginativeness not required

Specific level of linguistic or artistic creativity not required

Article 7(1)(b) EUTMR

However...

**09/10/2002, T 173/00, Colour (shade of orange),
EU:T:2002:243, § 29**

“While the public is accustomed to perceiving word or figurative marks immediately as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the external appearance of the goods or where the sign is composed merely of a colour or colours used to signal services”

COLOUR MARKS

COLOUR MARKS

Do colours convey a message?

Color Psychologie

Perception of colours is cultural: ex: mourning colours

COLOUR MARKS

Warm colours stimulate

Cold colours reassure

Red: heat, fire, or spice, danger

Green refers to nature

Blue is pure

Orange stands for creativity

COLOUR MARKS

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Orange stands for creativity

COLOUR MARKS

**Opinion AG Leger in Libertel Case C-104-1,
par. 102**

Colours convey a message

**Colours serve to attract the attention of
consumers**

COLOUR MARKS

But can a colour work as a TM?

COLOUR MARKS

Joint declaration of the Council and the Commission: Ohim O.J. No. 5/96, p.607

“Article 2 does not exclude the possibility ... of registering as a trade mark a combination of colours or a single colour ... provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings”□

COLOUR MARKS

Colours are now listed in article 4 EUTMR

COLOUR MARKS

**Judgment of 06/05/2003, C-104/01, Libertel,
EU:C:2003:244: 27**

A colour is usually a simple property of things

**Depending of the context a colour may be
capable of constituting a sign**

SINGLE COLOUR MARKS

06/05/2003, C-104/01, Libertel, EU:C:2003:244, § 40; and 24/06/2004, C-49/02, Blau/Gelb, EU:C:2004:384, § 38; 09/12/2010, T-282/09, Carré convexe vert, EU:T:2010:508, § 23

Colours are capable of conveying certain associations of ideas, and of arousing feelings, they possess little inherent capacity for communicating specific information, especially since they are commonly and widely used in order to advertise and market goods or services, without any specific message

COLOUR MARKS

24 June 2004, Heidelberger Bauchemie, C-49/02, EU:C:2004:384, paragraph 37

25 September 2002, Viking-Umwelttechnik v OHIM (Juxtaposition of green and grey), T-316/00, EU:T:2002:225, paragraph 23

9 July 2003, Stihl v OHIM (Combination of orange and grey), T-234/01, EU:T:2003:202, paragraph 26)

28 January 2015, Gradient of five shades of the colour green, T-655/13, EU:T:2015:49, paragraph 24)

03/05/2017, T 36/16, GREEN STRIPES ON A PIN (col.), EU:T:2017:295, § 29

Does the colour(s) convey specific information regarding the origin of a product or service?

COLOUR MARKS

**Judgment of 06/05/2003, C-104/01, Libertel,
EU:C:2003:244: 65**

Lack of distinctive characters of colours

“Consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging”

COLOUR MARKS

**21/10/2004, C-447/02 P, Orange, EU:C:2004:649,
§ 78**

Colour will not be perceived as a sign

“Thus, although no different requirements apply to colour marks in respect of distinctive character, the relevant public’s perception is not necessarily the same in the case of a sign composed of a colour per se as it is in the case of a word or figurative mark, and the public will not immediately interpret a sign, such as a simple colour, which forms part of the external appearance of the goods, as a sign”

COLOUR MARKS

Is this affirmation still accurate?

The Orange logo, consisting of the word 'orange' in white lowercase letters with a trademark symbol, set against a solid orange rectangular background.

orange™

The Vodafone logo, featuring a white speechmark icon above the word 'vodafone' in white lowercase letters with a trademark symbol, set against a red background with a white speechmark shape.

vodafone™

COLOUR MARKS

Is this affirmation still accurate?



COLOUR MARKS

Is this affirmation still accurate?



SINGLE COLOUR MARKS

**06/05/2003, C-104/01, Libertel, EU:C:2003:244, §
55-56**

General interest

Competition considerations

Given the limited number of colors...

But this is also true for single letters...

SINGLE COLOUR MARKS

Competition considerations DECISION OF 23 OCTOBER 2015 – R 1206/2014-4 – HEATHER VIOLET COLOUR MARK for chains in class 6



COLOUR MARKS

**Judgment of 06/05/2003, C-104/01, Libertel,
EU:C:2003:244: 66**

In the case of a colour per se, distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific

COLOUR MARKS

**Judgment of 24 June 2004, C-49/02,
'Blue/Yellow', para. 39**

**Save in exceptional cases, colours do not
initially have a distinctive character**

SINGLE COLOUR MARKS

**06/05/2003, C-104/01, Libertel, EU:C:2003:244,
§ 66**

**21.10.2004, C-447/02 P, Orange, EU:C:2004:649,
§ 79**

**Distinctiveness conceivable if the goods are
limited and the market is limited**

SINGLE COLOUR MARKS

DECISION OF 11 FEBRUARY 2010 – R 371/2009-2] – YELLOW (COLOUR MARK) 24-25



Goods are also specialized products ('rubber teats for milking installations'), used only by a small group of target consumers (only farmers)
Goods typically sold in black

SINGLE COLOUR MARKS

Routinely rejected

13/09/2010, T 97/08, Colour (shade of orange) II, EU:T:2010:396 for robots



SINGLE COLOUR MARKS

Routinely rejected

DECISION OF 1 SEPTEMBER 2011 – R 605/2011-1 – BLUE (COLOUR MARK) for plastics



SINGLE COLOUR MARKS

**12/04/2016, R 2167/2015-1, PASTEL ORANGE
(col.) tyre pressure sensors**

Orange used as a warning colour



SINGLE COLOUR MARK

Colour is functional

DECISION OF 23 SEPTEMBER 2010 – R 339/2010-1 – YELLOW
FLUORESCENT (PANTONE 809C) (COLOUR MARK) goods in class 16
Colour yellow used to increase the visibility of the goods, par 21



SINGLE COLOUR MARKS

Certain colours are common for certain types of goods

Green is traditionally associated with agriculture

**DECISION OF 21 APRIL 2009 – R 1675/2008-4 –
COLOUR MARK OPAL GREEN, par. 19**

**For ‘teat rubbers and preformed milk tubing,
both for milk plant’.**



SINGLE COLOUR MARKS

Use of colours is unusual in the sector



SINGLE COLOUR MARKS

Unusal colour



SHADE OF COLOURS

DECISION OF 14 JULY 2015 – R 518/2015-2 – Shades of blue (col.)
For various devices in class 9



COMBINATION OF COLOURS

Guidelines: as a general principle an arbitrary combinations of two or more colours should be registered

See also:

06/04/2018, R 2622/2017-4, DEVICE OF A RECTANGULAR LABEL, par. 14,18

23/01/2018, R 200/2017-2, GREY AND ORANGE (col.), PAR.38

02/03/2018, R 1666/2017, San Pellegrino can;

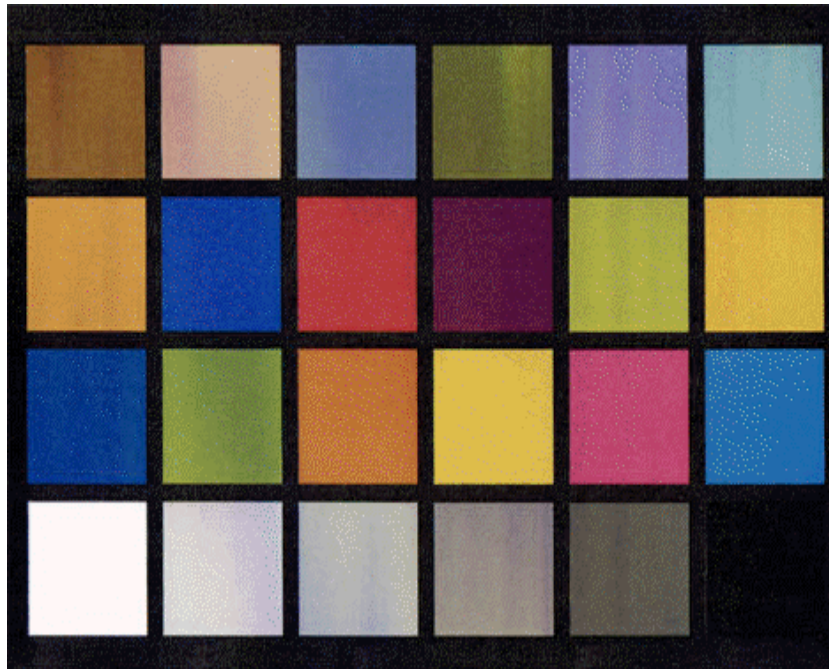
29/10/2008, R 1462/2008-4, Volley ball;

06/07/2015, R 2688/2014-4, Device of pet food packaging III

COMBINATION OF COLOURS

Too many colours difficult to memorize

12/11/2008, T-400/07, Farben in Quadraten, EU:T:2008:492, § 47



COMBINATION OF COLOURS

Too many colours difficult to memorize

26/03/2018, R 2202/2017-5, DEVICE CONSISTING OF HORIZONTAL STRIPES WITH COLOURS FROM DARK RED TO YELLOW (fig.), par. 28



COMBINATION OF COLOURS

Certain colours are common for certain types of goods

19/09/2001, T-118/00, Tabs (3D.), EU:T:2001:226, § 61, 64
white for washing tablets

06/04/2017, R 1740/2016-4, REPRESENTATION OF A PACKAGING (fig.), par.19
Yellow for biscuits and baked goods

DECISION OF 22 NOVEMBER 2012 – R 1325/2012-1 – ZINC YELLOW RAL 1018
(COLOUR MARK), par. 19
Yellow in the building industry

DECISION OF 6 FEBRUARY 2014 – R 256/2012-1 – ORANGE AND POWDER
BLUE (COLOUR MARK), par. 30.
Blue and orange for cars

COMBINATION OF COLOURS

Certain colours are common for certain types of goods

28/04/2016, R 1532/2015-1, DEVICE OF A WAVY ELONGATED RECTANGLE IN BLUE WITH A GREEN EDGE ON BOTH LONG SIDES (fig.), par.27.

Blue and green to cosmetics (soap, hair lotions, gels)

DECISION OF 21 MAY 2015 – R 2149/2014-2 – GOLD, WHITE (COLOUR MARK), par. 22.

Silver and gold for PC and tablets

COMBINATION OF COLOURS

Certain colours are common for certain types of goods

25/09/2002, T-316/00, Grün/Grau, EU:T:2002:225, § 30;
Green and grey for garden choppers and shredders; rotary cultivators

12/09/2014, R 1033/2014-4, Red and grey , § 28-20
For pipes and hoses, grey is the natural colour of the surface

31/08/2016, R 1643/2015-4, REPRESENTATION OF RECTANGLE IN BLUE AND YELLOW (fig.) § 24
Yellow and blue for lighters

COMBINATION OF COLOURS

Certain colours are common for certain types of goods

The rule also applies if only one colour of the combination is customary: drill appears usually in grey

03/02/2011, T-299/09 & T-300/09, Gelb-Grau, EU:T:2011:28, § 67, 72;



COMBINATION OF COLOURS

03/05/2017, T 36/16, GREEN STRIPES ON A PIN (col.), EU:T:2017:295, § 50

The colour is perceived as a pure decorative element

Colours convey an aesthetic message: allows the goods to blend in their environment



COMBINATION OF COLOURS

Colour perceived as a decorative element

26/03/2018, R 2202/2017-5, DEVICE CONSISTING OF HORIZONTAL STRIPES WITH COLOURS FROM DARK RED TO YELLOW (fig.)

In relation to tee shirts



COMBINATION OF COLOURS

Colour combination is banal, not striking, not unusual 10/07/2017, R
1624/2016-5, YELLOW-GREY (fig.), par.19

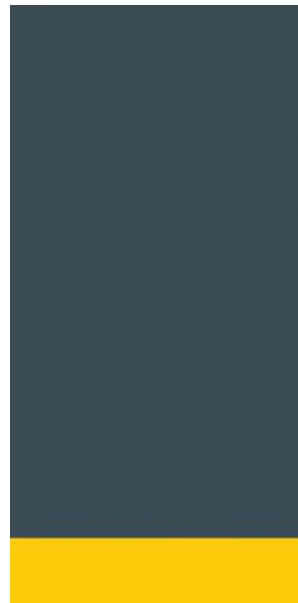


SINGLE COLOUR MARK

10/07/2017, R 1624/2016-5, YELLOW-GREY (fig.), par 19, 22 for pipes,
hand tools

No shocking effect

Sign is to simple



CONCLUSIONS

Single colour marks: almost impossible

Combination: as a matter of principle: yes, but:

Too many colours

One of the two colours is either the commonplace colour for the product or the natural colour of the product or services : yellow for postal services

The colour is perceived as a pure decorative element: colour of a car

Colour has a technical function: red for fire extinguishers

Colour may indicate a particular characteristic of the goods: green refers to the ecological characteristics of the goods

Colour combination is already on the market

COMBINATION OF COLOURS

Unless:

Too many colours

One of the two colours is either the commonplace colour for the product or the natural colour of the product or services : yellow for postal services

The colour is perceived as a pure decorative element: colour of a car

Colour has a technical function: red for fire extinguishers

Colour may indicate a particular characteristic of the goods: green refers to the ecological characteristics of the goods

Colour combination is already on the market

CONCLUSIONS

1038 Filed

291 Accepted

A vast majority are combinations of colours

CONCLUSIONS



FURTHER READINGS

Völker, Stefan, Das Ende der Farbmarke?, Markenrecht 2003 p.49-56

Cusamano, Giuseppe E., Ritorno ai marchi di colore, Rivista di diritto industriale 2003 II
p.238-247

thank you!



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