

Tightening of the Danish Practice on distinctiveness in relation to figurative marks

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The IP offices of the European Trade Mark and Design Network, including the Danish Patent and Trademark Office have agreed on a Common Practice in relation to when a figurative mark, containing purely descriptive/non-distinctive words, passes the absolute grounds examination because the figurative element renders sufficient distinctive character.

In Denmark this new practice will be a tightening of the current very gentle practice in relation to the assessment of distinctiveness of figurative marks. The new practice will be implemented as of 1 January 2016 in Denmark and will apply to applications filed after the implementation date.

Some of the key messages and main statements of the principles of the Common Practice are the following:

Word elements

In general, descriptive/non-distinctive word elements appearing in basic/standard typeface, lettering or handwritten style typefaces – with or without font effects (bold, italics) – are not registrable. If such standard typefaces incorporate elements of graphic design as part of the lettering and these elements are sufficient to distract the attention of the consumer from the descriptive meaning of the word element or likely to create a lasting impression of the mark, the mark is

registrable.

The mere addition of a single colour to a descriptive/non-distinctive word element, either to the letters themselves or as a background, will not be sufficient to give the mark distinctive character. However, it cannot be excluded that a particular arrangement of colours, which is unusual and can be easily remembered by the relevant consumer, could render a mark distinctive.

Figurative elements

Descriptive or non-distinctive verbal elements combined with simple geometric shapes such as points, lines, line segments, circles, triangles, squares, rectangles, parallelograms etc. are unlikely to be acceptable, in particular when the above mentioned shapes are used as a frame or border. The reason for this is that a geometric shape which merely serves to underline, highlight or surround the word element will not have sufficient impact on the mark as a whole to render it distinctive.

However, geometric shapes can add distinctiveness to a sign when their presentation, configuration or combination with other elements creates a global impression which is sufficiently distinctive.

In general, when a figurative element that is distinctive on its own is added to a descriptive and/or non-distinctive word element, then the mark is registrable, provided that said figurative element is, due to its size and position, clearly recognizable in the sign.

In some cases the figurative element consists of a representation of the goods and services claimed. In principle, said representation is considered to be descriptive and/or devoid of distinctive character whenever it is a true-to-life portrayal of the goods and services or it consists of a symbolic/stylised portrayal of the goods and services that does not depart significantly from the common representation of said goods and services;

In other cases the figurative element may not represent the goods and services but may still have a direct link with the characteristics of the goods and/or services. In such cases the sign will be considered non-distinctive, unless it is sufficiently stylised.

For further information and illustration of the principles see the Common Practice.

