

TM5

Guidelines for Application Requirements for Color Marks



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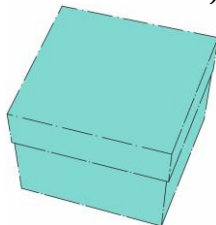
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Sample Color Marks

Example 1: U.S. Federal Trademark Registration No. 2359351 owned by Tiffany LLC

Mark: (Drawing only to show placement of the color)

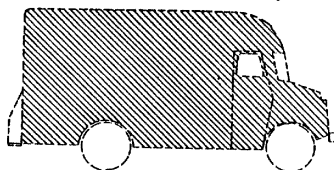


Description of Mark: The color(s) blue is/are claimed as a feature of the mark. The mark consists of a shade of blue often referred to as robin's-egg blue which is used on boxes. The matter shown in broken lines represents boxes of various sizes and serves to show positioning of the mark. No claim is made to shape of the boxes.

Goods/Services: Jewelry (Class 014) and Retail jewelry store services (Class 035) along with a variety of other goods and services.

Example 2: U.S. Federal Registration No. 2131693 owned by United Parcel Service of America, Inc.

Mark: (Drawing only to show placement of the color)

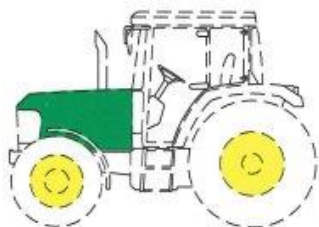


Description: The mark consists of the color brown applied to the vehicles used in performing the services. The drawing is lined for the color brown.

Goods/Services: Motor vehicle transportation and delivery of personal property (Class 039)

Example 3: U.S. Federal Registration 3857088 owned by Deere & Company.

Mark: (Drawing only to show placement of the color)



Description: The mark consists of the color combination green and yellow in which green is applied to an exterior surface of the vehicle and yellow is applied to the wheels. The broken-line outlining is to show the position or placement of the mark on the goods. The outlining and the shape of the vehicle are not claimed as part of the mark.

Colors Claimed: The colors green and yellow are claimed as a feature of the mark.

Goods/Services: Tractors and lawn and grounds care tractors (Class 012)

Identifying the Mark

- 1. Does your Office recognize color marks? If so, please provide the definition of a color mark as set out in your trademark law, regulations or guidance including case law (whichever controls for each office).**

USPTO

The USPTO recognizes color marks. Color marks are marks that consist solely of one or more colors used on particular objects. For marks used in connection with goods, color may be used on the entire surface of the goods, on a portion of the goods, or on all or part of the packaging for the goods. Similarly, service marks may consist of color used on all or part of objects or materials used in the advertising and rendering of the services, such as devices or vehicles. [TMEP Section 1202.05](#).

CNIPA

Yes. Trademark Examination and Adjudication Guidelines: a color combination mark is composed of two or more colors which applies in a specific way. A color combination mark is composed of colors only without any concrete shapes.

EUIPO

Colour marks are defined by Article 3(3)(f) EUTMIR as trade marks that consist exclusively of a single colour without contour or a combination of colours without contours.

What is protected is the shade of colour(s) and, in the case of more than one colour, the systematic arrangement of the colours in a predetermined and uniform way (24/06/2004, [C-49/02](#), Blau/Gelb, EU:C:2004:384, § 33; 14/06/2012, [T-293/10](#), Colour per se, EU:T:2012:302, § 50).

JPO

Yes, Article 2 of the Trademark Act states as follows:

“Trademark” in this Act means, among those which can be perceived by people, any character, figure, sign or three-dimensional shape or color, or any combination thereof; sounds, or anything else specified by Cabinet Order which is: used by a person in connection with a good which the person produces, certifies or assigns as its business; or used by a person in connection with the services which the person provides or certifies as its business (except those provided for in the preceding item).

<https://www.japaneselawtranslation.go.jp/ja/laws/view/4032>

KIPO

Yes, KIPO recognizes color marks by guidelines. The examination guidelines for trademarks, Part 8: Examination of Non-Traditional Marks (p.80201), stipulates the concept and examination method of color marks.

Link: <https://www.kipo.go.kr/ko/kpoContentView.do?menuCd=SCD0200155>
(guidelines)

2. Must a color mark be filed on a special application form? Please provide a link to proper online form.

USPTO

The USPTO does not have a specific application form for applying for color marks. The applicant would choose one of the online TEAS forms found at:
<https://www.uspto.gov/trademarks-application-process/filing-online/index-all-teas-forms>.

CNIPA

The CNIPA does not have a specific application form for applying for color combination marks. The application form could be found at:
https://sbj.cnipa.gov.cn/sbj/sbsq/sqss/202112/t20211231_573.html.

EUIPO

There is no special application form. E-filing is the recommended means of filing. Filing an application through the EUTM Easy Filing form is not possible for colour marks.
<https://euipo.europa.eu/eutm-efiling/>. The applicant needs to choose the type of mark that it wants to register in the application form, in this case “Colour mark”.

JPO

The JPO does not have a specific application form for applying for color marks. The applicant would use the common application form found at:
<https://www.jpo.go.jp/e/faq/yokuaru/forms.html>.

KIPO

KIPO does not have a specific application form for applying for color marks. The applicant would use the common application form found at:
<https://www.patent.go.kr/smart/portal/Main.do>

3. Are fees for a color mark the same as for a word mark or other figurative mark? Please provide amount if fees are not the same.

USPTO

The fees for a color mark are the same as for a word mark or figurative mark.

CNIPA

Fees for a color combination mark are the same as for a word mark or other figurative mark.

EUIPO

Yes, there are no different fees for colour marks.

JPO

Yes, the fees are the same.

KIPO

Yes, the fees are the same in KIPO.

4. Does your office list a special type or category of mark on your application form? If so, is “color mark” listed as a special type or category of mark?

USPTO

The USPTO does not list color marks as a particular type of mark on the application form; however, color marks are identified as a “Special Form” mark and should be depicted in a “Special Form Drawing.”

CNIPA

CNIPA list a special category of mark on the application form. Color combination mark is listed as one of them.

EUIPO

Yes. ‘Colour mark’ is listed as a mark type and can be selected in the form.

JPO

The applicant has to list “Color Mark” next to “Trademark For Which Registration Is Sought” on the application form. In addition to color marks, other types of trademarks that require such a description include three-dimensional mark, motion mark, sound mark, position mark, and hologram mark.

KIPO

Yes. The applicants can select the ‘Color mark’ in the form.

5. How would a color mark be identified or designated in an application form when the applicant is filing?

USPTO

The applicant must submit the following with the application:

The applicant must provide a drawing of the mark that shows color(s), claim color in the description of the mark, and identify any color(s) claimed in the reproduction of the mark in the application.

See TMEP Sections [807.07-807.07\(g\)](#) and [1202.05\(c\)](#) for color mark drawings and TMEP Sections [808-808.03\(f\)](#) for description of the mark. *See also* TMEP Section 1202.05(d); and Trademark Rules of Practice (“Trademark Rule(s)”) 2.21(a)(3), 2.37 and 2.52(b)(1), 37 C.F.R. §§ 2.21(a)(3), 2.37 and 2.52(b)(1).

CNIPA

A color combination mark is identified as such by ticking the corresponding box.

EUIPO

You need to choose the type of mark that you want to register, in this case “Colour mark”. The indication of generally recognised colour codes, such as Pantone, Hex, RAL, RGB or CMYK, is compulsory.

JPO

It is necessary to be recognized that a trademark in an application constitutes a color mark by stating the trademark is “Color Mark” in the application, and providing a [Detailed Description of Trademark] section in which a specific and clear statement is provided to explain about such as color names and combination ratio of the three primary colors (RGB) so as to specify the color mark.

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0400.pdf#page10>.

KIPO

Color mark can be identified or designated by selecting the ‘Color mark’ in the application form.

6. Are single color marks registrable? If yes, please specify how the mark is described in the application.

USPTO

Yes, single color marks are registrable at the USPTO if certain requirements are met. Marks consisting solely of a color or colors on goods are not considered inherently distinctive, and cannot be registered on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. See response to Question 5 for information on description of the mark and color claim statement.

CNIPA

Single colors are not registrable in China.

EUIPO

Yes, single color marks are registrable. Applicants must choose as a type of mark “colour” and indicate the colour by reference to a generally recognised colour code such as Pantone, Hex, RAL, RGB or CMYK. A representation of the mark has to be filed, it must consist of a representation of the colour without contours in one single JPEG file or on one single A4 sheet. Descriptions are not allowed for single colour marks.

JPO

Yes. A description in an application for a color mark shall be made by one of the following:

- ① An image or a photograph showing the color for which registration is sought,
- ② One or more different images or photographs showing the colors for which registration is sought by using only the said colors and drawing any other parts by using such as dashed lines in order to define the colors and the positions thereof.

Specifically, it shall be presented by an image or a photograph that shows in the entire space therein the color for which registration is sought. It would be acceptable if a color is presented in a part of the trademark representation section, however, it is not accepted if the color is presented in such manner that it could be associated with a certain character or figure.

In addition, a [Detailed Description of Trademark] section must be provided in an application in which a specific and clear statement is provided to explain about such as color names and combination ratio of the three primary colors (RGB) so as to specify the color mark.

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/document/syouhyoubin/54-01.pdf>.

KIPO

Yes, single color marks can be registered. Applicants should choose “color mark” in the application form, and indicate the color by reference to a generally recognized color code such as Pantone, Hex, RAL, RGB or CMYK.

7. Are color marks that consist of multiple colors registrable? If yes, please specify how the mark is described in the application.

USPTO

Yes, marks consisting of multiple colors are registrable. See the response to Question 5. Applicants must submit a statement in the “Description of the Mark” field identifying the color(s) and describing where the color(s) appear(s) and how they are used on the mark. Trademark Rule 2.52(b)(1), 37 C.F.R. § 2.52(b)(1). The description of the mark must be clear and specific, use ordinary language, and identify the mark as consisting of the particular colors as applied to the identified goods or used in providing the identified services. If the colors are applied only to a portion of the goods, the description must indicate the specific portion claimed as the color mark and explain the purpose of the broken lines. Trademark Rule 2.52(b)(4), 37 C.F.R. § 2.52(b)(4). Similarly, if the mark includes gradations of color, the description should so indicate.

CNIPA

Color marks that consist of multiple colors are registrable. Such a mark is described as a color combination mark in the application.

EUIPO

Yes, marks consisting of colour combinations are registrable. Applicants must choose as a type of mark “colour” and indicate the colour by reference to a generally recognised

colour code such as Pantone, Hex, RAL, RGB or CMYK. A representation of the mark has to be filed under one single JPEG file or on one single A4 sheet. It must show the systematic arrangement of the colour combination in a uniform and predetermined manner. A description detailing the systematic arrangement of the colours can also be added.

For colour combinations, the EUTMIR has applied the case-law according to which the representation ‘must be systematically arranged by associating the colours concerned in a predetermined and uniform way’, as the Court of Justice stated that the mere juxtaposition of two or more colours, without shape or contours, or a reference to two or more colours ‘in every conceivable form’, did not meet the requisite standards of precision and uniformity (24/06/2004, C-49/02, Blau/Gelb, EU:C:2004:384, § 33-34)

JPO

Yes, the same as those described in Q6.

Specifically, the trademark shall be presented in straight stripes of colors combined in parallel (or any manner similar thereto), which is recognized as the simplest way to describe two or more colors. If the trademark is presented in any other way, it should be regarded as a composite trademark consisting of figures and colors and cannot be considered to present a color mark. As long as a trademark is presented in straight stripes of colors in parallel, it is acceptable regardless of whether the stripes are placed vertically, horizontally, or diagonally. The colors may be presented in gradation.
<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/document/syouhyoubin/54-01.pdf>.

KIPO

Yes, but no particular description is required in the application.

8. Are color marks required to feature a literal or figurative element for registration?

USPTO

No, color marks are not required to feature a literal or figurative element for registration. Marks that feature a literal or figurative element in color(s) are not considered “color marks.” Color marks are marks that consist solely of one or more colors used on or in connection with particular goods or services.

CNIPA

Color combination marks consist merely of the colors themselves, not featuring any literal or figurative element.

EUIPO

No.

JPO

No, A trademark that could be associated with a certain character or figure shall not be recognized as a color mark.

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0102.pdf#page=16>.

KIPO

No, it is not required.

9. Are there any restrictions under national law that limit whether a color mark may be registered? If yes, please indicate the relevant section(s) of law.

USPTO

Certain restrictions do exist under U.S. trademark law that limit whether a color mark may be registered. For example, if a color mark is functional then it is not registrable – even if the applicant claims secondary meaning/acquired distinctiveness. A color may be functional if it yields a utilitarian or functional advantage, for example, yellow or orange for safety signs. A color may also be functional if it is more economical to manufacture or use. For example, a color may be a natural by-product of the manufacturing process for the goods. In such a case, appropriation of the color by a single party would place others at a competitive disadvantage by requiring them to alter the manufacturing process. Several U.S. cases support functionality refusals for color marks. *See, e.g., Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161 (1995); *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 32 USPQ2d 1120 (Fed. Cir. 1994); *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417 (Fed. Cir. 1985).

Similarly, U.S. trademark law prohibits registration of a mark with an “aesthetically” functional feature, such as color, when evidence establishes that a particular color provides identifiable competitive advantages and, thus, should remain in the public domain. *See In re Florists’ Transworld Delivery Inc.*, 106 USPQ2d 1784 (TTAB 2013) (when the record showed that, in the floral industry, color has significance and communicates particular messages (e.g., elegance, bereavement, Halloween), which extends to floral packaging, the TTAB found the examining attorney had demonstrated a competitive need for others in the industry to use black in connection with floral arrangements and packaging therefor and concluded that the proposed mark was functional under Section 2(e)(5) of the Trademark Act).

The examining attorney must assess each color mark application on its own merits. In cases where the applicant must show acquired distinctiveness, a refusal to register is issued on the grounds that the proposed color mark is not inherently distinctive and, thus, does not function as a trademark or a service mark under Sections 1, 2, 3 and 45, 15 U.S.C. §§ 1051, 1052, 1053 and 1127. Should the examining attorney believe that the color is also functional with respect to the identified goods, a refusal under Trademark Act Section 2(e)(5), 15 U.S.C. § 1052(e)(5), may also be issued.

CNIPA

Restrictions under national law are the same for a color mark as for other literal or figurative marks, *i.e.*, Articles 10, 11, 30 and 31 of the Trademark Law.

EUIPO

The only limitation under EUTM law is the list of absolute grounds included in article 7.1 EUTMR. There is no explicit limitation in relation to the registration of colour marks in the Regulation.

In practice, as regards the registration as trade marks of colours per se of single colour, the fact that the number of colours actually available is limited means that a small number of trade mark registrations for certain services or goods could exhaust the entire range of colours available. Such an extensive monopoly would be incompatible with a system of undistorted competition, in particular because it could have the effect of creating an unjustified competitive advantage for a single trader. Nor would it be conducive to economic development or the fostering of the spirit of enterprise for established traders to be able to register the entire range of colours that is in fact available for their own benefit, to the detriment of new traders (06/05/2003, C-104/01, *Libertel*, EU:C:2003:244).

As has been confirmed by the Court of Justice, consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour per se is not used as a means of identification in current commercial practice (06/05/2003, C-104/01, *Libertel*, EU:C:2003:244). A colour is not normally inherently capable of distinguishing the goods of a particular undertaking (para. 65). Therefore, single colours are not distinctive for any goods and services except under exceptional circumstances.

As regards combination of colours, a refusal can only be based on specific facts or arguments, and where such specific arguments for refusal are not established, the mark must be accepted.

If one of the two colours is either the commonplace colour for the product or the natural colour of the product, that is to say, a colour is added to the usual or natural colour of the product, an objection applies in the same way as if there were only one colour. In the assessment a careful analysis of the goods and services concerned and of the situation on the market must take place.

JPO

While there are no restrictions under other national laws on the registration of color marks, a color mark which lacks distinctiveness cannot be registered without proof of distinctiveness acquired through use. Also, even in cases where distinctiveness acquired through use is recognized, a color mark may not be registered if it consists of only colors spontaneously arising from the goods, etc., or if it consists of only colors that are essential to secure the function of the goods, etc.

KIPO

There are no restrictions under other national laws. Ineligible color mark applications will be rejected based on the examination criteria and examiner judgment.

10. If a color performs a function (is utilitarian) as associated with the identified goods/services, is the color registrable as a mark? If not, please indicate the criteria/standard used to make such a determination and include a citation to law or court decision.

USPTO

No, a color that performs a utilitarian function is not registrable as a mark. Please see the answer to Question 9 (above).

CNIPA

For the time being, there is no consideration of functionality about color marks in either legal text or examination practices.

EUIPO

A mark that consists of a colour will be refused when this specific colour performs a function (is utilitarian) in relation to the identified goods/services. The consumer will not perceive such a sign as a badge of commercial origin and the mark would be refused under article 7(1)(b) EUTMR (lack of distinctiveness).

JPO

No, a trademark that is not distinctive may not be registered. Please refer to the Article 3(1)(iii) of the Trademark Act. Trademarks indicating colors in a common manner that correspond to the characteristics of the goods or services are not registrable due to lack of distinctiveness. For details, please refer to the Trademark Examination Guidelines Part I, Chapter 5: Article 3(1)(iii).

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0105.pdf>.

In addition, trademarks representing a function may not be registered. Please refer to Article 4(1)(xviii) of the Trademark Act. Colors consisting solely of characteristics which its goods, etc. (meaning goods or packages of goods or services) naturally have are not registrable. For details, please refer to the Trademark Examination Guidelines Part III, Chapter 16: Article 4(1)(xviii).

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0316.pdf>.

KIPO

No, a trademark that is not distinctive are not be registered, based on the Trademark Act Article 33(1)(iii)(A trademark consisting solely of a mark indicating, in a common manner, the place of production, quality, raw materials, effect, usage, quantity, shape, price, method of production, method of processing, method of use or time of the goods), Article 33(1)(vi)(a trademark which is unrecognizable for consumers to identify which goods related to whose business it indicates), Article 33(1)(vii) (a trademark which is unrecognizable for consumers to identify which goods related to whose business it indicates).

11. Can color marks be considered inherently distinctive and therefore registrable without a showing of acquired distinctiveness?

USPTO

Color marks can be inherently distinctive when used on product packaging, depending upon the character of the color design. A recent U.S. case indicates that multi-color marks on packaging may be inherently distinctive in limited cases. *In re Forney Indus.*, 955 F.3d 940 (Fed. Cir. 2020). A single-color mark applied to a product is never inherently distinctive. Therefore, in general, to register a color mark, the applicant must show the color mark has acquired distinctiveness.

CNIPA

No. Color combination mark do not contain inherently distinctiveness.

EUIPO

Yes, nevertheless single colours are usually not distinctive for any goods and services. It cannot be excluded that such marks are distinctive under exceptional circumstances. Such exceptional circumstances require the applicant to demonstrate that the mark is unusual or striking in relation to these specific goods or services. These cases will be very rare, for example in the case of the colour black for milk.

JPO

As per Question 10, a trademark indicating colors that correspond to the characteristics of the goods or services in a common manner is not registrable (please refer to Article 3(1)(iii) of the Trademark Act). In addition, a trademark that is customarily used for the designated goods or designated services cannot be registered (please refer to Article 3(1)(ii) of the Trademark Act). Color marks that do not fall under these categories also cannot be registered as trademarks without distinctiveness, in principle (please refer to Article 3(1)(vi) of the Trademark Act). Therefore, as a general rule, a color mark may be registered as having distinctiveness only when, as a result of use of the color mark, consumers are able to recognize the goods or services as those pertaining to a business of a particular person. <https://www.japaneselawtranslation.go.jp/ja/laws/view/4032>.

KIPO

No. Color combination mark do not considered inherently distinctive, same as in Q10.

12. Are marks that feature a literal or figurative element and one or more colors registrable as a color mark? If yes, please specify how this is indicated in an application.

USPTO

Marks that feature a literal or figurative element in color(s) are not considered “color marks.” Color marks are marks that consist solely of one or more colors used on or in connection with particular goods or services.

CNIPA

No.

EUIPO

No. If a mark contains a word element or a figurative element in colour, the mark can only be applied for and registered as figurative mark. In these cases, the applicant needs to choose the mark type ‘Figurative’ in the application form. However, the applicant can represent the color(s) as applied on a good.

JPO

No. Please refer to Question 8.

KIPO

No. Same as Question 8.

13. Does your office allow disclaimers in relation to color marks?

USPTO

No. By definition, a color mark does not include words or design elements. If an applicant only seeks registration for the use of the color, no word or design element should appear on the drawing. *See* TMEP Section 1202.05(d)(iv).

CNIPA

No. Color combination mark contains only two or more colors.

EUIPO

No, as from 23 March 2016, verbal disclaimers are no longer possible. The legislation only stipulates visual disclaimers such as dotted lines for one type of mark, namely position marks.
However, this does not exclude the use of dotted lines for other types of mark or for other purposes provided that they do not undermine the capacity of the representation of the

mark to enable the competent authorities and the public to determine the clear and precise subject matter of the protection afforded.

Applicants may file a description detailing how the combination is to be applied to the goods when they have this possibility. This is never compulsory. Description can only be filed for specific types of marks (position marks ([Article 3\(3\)\(d\) EUTMIR](#)), pattern marks ([Article 3\(3\)\(e\) EUTMIR](#)), colour marks ([Article 3\(3\)\(f\)\(ii\) EUTMIR](#)), motion marks ([Article 3\(3\)\(h\) EUTMIR](#) — although only where still images are used), and ‘other’ marks ([Article 3\(4\) EUTMIR](#)).

JPO

No.

KIPO

No.

14. If your answers to questions 12) and 13) were “yes,” may color marks that feature a literal element be: A. Registered in their entirety? B. Registered only with a disclaimer of the shape of the goods?

USPTO

N/A. The answer to questions 12) and 13) is “no”.

CNIPA

N/A

EUIPO

N/A

JPO

N/A

KIPO

N/A

Reproduction of the Mark

15. Is a graphical representation or a drawing of a color mark required to show the manner in which the color mark is used?

USPTO

Yes.

All marks, other than sound and scent marks, require a drawing of the mark. An application for a color mark that is filed without a drawing will be denied a filing date. Because color marks are visual and the applicant must submit:

(i) a drawing of the mark that shows the color(s) and placement of the color(s) on the packaging of or on the product identified in the application or as used in providing the services identified in the application;

(ii) a description of the color(s) comprising the mark; and

(iii) a statement identifying which color(s) is/are claimed as the applied-for mark and describing where the color(s) appear and how the color(s) is/are used.

See TMEP Sections 807.07-807.07(g) and 1202.05(c) for color mark drawings and Sections 808-808.03(f) for description of the mark. *See also* Trademark Rules 2.21(a)(3), 2.37 and 2.52(b)(1), 37 C.F.R. §§ 2.21(a)(3), 2.37 and 2.52(b)(1).

CNIPA

Yes.

EUIPO

No.

The only obligation is for the applicant to submit a representation of the colour or colours without contours in one single JPEG file or on one single A4 sheet. Where there is more than one colour, the reproduction must show the systematic arrangement of the colour combination. There is no obligation to show the manner in which the colour mark will be used.

JPO

Yes.

KIPO

Yes, only drawing (not graphical representation).

16. How many renditions of a color mark are permitted under your national law?

USPTO

An application must be limited to only one mark.

Under Trademark Rule 2.12(a)(3), 37 C.F.R. § 2.21(a)(3), an applicant must submit “a clear drawing of the mark” to receive a filing date. An application that includes two or more drawings displaying materially different marks does not meet this requirement. These requirements also apply to color marks.

CNIPA

Two.

The reproduction of color combination mark should be a color block containing the color combination or a graphic shape outlining the location of the color. The outlining and the shape are not claimed as part of the mark with using of broken-line instead of full line.

EUIPO

Only one representation per trade mark application is allowed.

JPO

A description of a color mark in the “Trademark” section shall be made by one of the followings:

- (i) An image or a photograph showing the color for which registration is sought,
- (ii) One or more different images or photographs, showing the colors for which registration is sought by using only the said colors and drawing any other parts by using such as dashed lines in order to define the colors and the positions thereof.

In the case of (ii) above, there is no limitation on the number of pictures or photographs.

KIPO

Only one rendition is permitted.

17. Reproductions of color marks:

- A. Must a reproduction of a color mark be a pen-and-ink or computer-aided-design (CAD) line drawing?**
- B. If answer to A. is “no,” is a photograph acceptable?**
- C. If answer to B. is “yes,” please indicate any requirements for photograph submissions and provide link to any online guidance.**

USPTO

- A. No. A color mark application requires a “Special Form” drawing. A “Special Form” drawing may be an illustrated drawing of the mark or a photograph. See TMEP § 807.
- B. Yes. See the answer to Question 17.A. above. In the case of digitized images, the requirements for such images, including photographs, are listed in TMEP § 807.05(c).
- C. Yes, requirements are listed in TMEP § 807.05(c).

CNIPA

- A. No.
- B. Yes.
- C. The applicant should submit clear colorful drawing of color combination mark.

EUIPO

- A. The representation of a colour mark must consist of a representation of the colour or colours without contours in **one single JPEG file** or on **one single A4 sheet**. Where there is more than one colour, the reproduction must show the systematic arrangement of the colour combination.
- B. --

C. --

JPO

- A. No.
- B. Yes.
- C. The applicant would attach a photograph(s) to the application form to depict a view or two different views of a color mark. And the following requirements apply to the photograph(s) showing the color mark.
 - Sizes: 8x8cm. However, 15x15cm is acceptable when it is necessary.
 - The background must be plain.
 - Photographs which should not easily deteriorate or fade.
 - Photographs must be firmly attached to the application form without hiding the descriptions, and should not be folded.
 - When attaching photographs of the mark to show its more than one different views, the applicant must use the images to the same scale and leave a space between them.

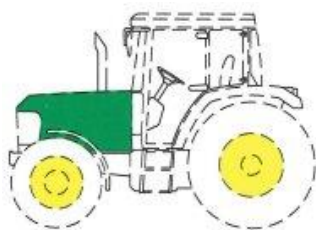
KIPO

- A. No.
- B. Yes.
- C. There are no specific requirements.

18. If the answer to question 17.B. is “yes”:

- A. Must an illustration showing use of the color mark on the specified goods be included in the reproduction?**
- B. If the answer to A is yes, then how is this illustration indicated?**
- C. If the answer to A is yes, then must the illustrative matter be disclaimed?**

PLEASE NOTE: In this color mark registration, the configuration of the tractor is in dotted lines as it is represented in the drawing only to show how the color mark appears on the goods and is not claimed as part of the color trademark here (see Example 3, *supra*).



USPTO

Typically, yes. Illustration requirements depend on the nature of the use of the color mark and the goods or services associated with the mark. For goods, the drawing of the mark must be a substantially exact representation of the mark as used, or intended to be used, on the goods. Trademark Rule 2.51, 37 C.F.R. § 2.51. For services such as retail services, a drawing might depict a retail-outlet featuring the various color claimed shown within broken-line drawing of the retail setting. Broken or dotted lines inform the viewer where

and how color is used on the product or product package, while at the same time making it clear that the shape of the product, or the shape of the product package, is not claimed as part of the mark.

CNIPA

- A. The reproduction of color combination mark should be a color block containing the color combination or a graphic shape outlining the location of the color.
- B. If the illustration submitted by the applicant is a graphic shape outlining the location of the color, the outlining and the shape are not claimed as part of the mark with using of broken-line instead of full line.

EUIPO

No.

JPO

- A. No.
- B. N/A
- C. N/A

KIPO

- A. No.
- B. N/A
- C. N/A

19. Is a description of a color mark required by law for registration? If “no,” may a description be included voluntarily?

USPTO

Yes, a description of a color mark is required by USPTO regulations for registration. An application to register a proposed color mark must include: (1) a claim that the color(s) is a feature of the mark; and (2) a statement in the “Description of the Mark” field naming the color(s) and describing where the color(s) appear(s) and how they are used on the mark. Trademark Rule 2.52(b)(1), 37 C.F.R. § 2.52(b)(1).

The description of the mark must be clear and specific, use ordinary language, and identify the mark as consisting of the particular color as applied to the goods or services. If the color is applied only to a portion of the goods, the description must indicate the specific portion. Similarly, if the mark includes gradations of color, the description should so indicate.

CNIPA

A description of a color mark is required by law (*see* Article 13 of the Implementing Regulations of the Trademark Law) for registration.

EUIPO

No, such a description is not required by law. A description detailing the systematic arrangement of the colours (when applying for a combination of colours) is merely optional and references to colours in words in the mark description are accepted.

JPO

Yes.

KIPO

Yes.

20. If your office requires or accepts a description of a color mark, please provide a possible acceptable description of the mark for Example 2.

USPTO

The following could be an acceptable description of the mark for Example 2:
The mark consists of the color brown, which appears on the cab and body of the vehicles, in this case a delivery truck, used in performing the services.

CNIPA

Example 2 is not registrable in China as it is a single color mark. The following could be an acceptable description of the mark for Example 3:
The color(s) green and yellow is/are claimed as a feature of the mark. The color(s) green is Pantone 364C, the color(s) yellow is Pantone 190C. The broken-line outlining is to show the position or placement of the mark on the goods. The outlining and the shape of the vehicle are not claimed as part of the mark.

EUIPO

The trade mark consists of the colour ‘brown’ applied to vehicles such as vans.

JPO

The trademark for which registration is sought is a color mark, and consists of the color brown (combination of RGB: R●●●, G●●●, B●●●) for the body part of a vehicle. The dashed lines show an example of the shape of an article used in the provision of services and is not an element constituting the trademark.

KIPO

All examples are described in a combination of RGB or CMYK.

Examples of How Color Marks are Applied to a Product Configuration

21. Do your laws require a photograph showing an example of how a color mark is used as a source indicator for goods or services?

USPTO

No, U.S. law does not require a photograph, but the USPTO will accept photographs as examples of use of a mark. A color mark application requires a “Special Form” drawing. A “Special Form” drawing may be an illustrated drawing of the mark or a photograph. See [TMEP § 807](#). Therefore, the USPTO will accept photographs as drawings for a color mark. The colors in the drawing and the specimen showing use of the mark must match.

CNIPA

Colors are searched under design code 29.1, with 29.1.12 for two colors, 29.2.13 for three colors, 29.1.14 for four colors and 29.1.15 for five or more colors. Other figurative codes for the type of goods/services are also searched.

EUIPO

No.

JPO

No, a photograph showing an example of a color mark for which registration is sought is not required. However, when proving distinctiveness acquired through use, materials showing how the color in question is used as an indication of the origin of the goods or services are required.

KIPO

No.

Searching Your Office Database for Color Marks

22. How does an examiner or applicant search for similar marks on your database?

USPTO

A search can be conducted for key words used in the description of the mark, such as color, trade dress, configuration, design, three-dimensional marks, and packaging. In addition, searches may be limited by appropriate classes. Also, the color as applied to packaging or containers may be searched by using design codes for any corresponding colors claimed in the mark or the name of the color in the mark description. For example, design codes may be searched for “brown” as a single color used for the entire goods/services.

CNIPA

Colors are searched under design code 29.1, with 29.1.12 for two colors, 29.2.13 for three colors, 29.1.14 for four colors and 29.1.15 for five or more colors. Other figurative codes for the type of goods/services are also searched.

EUIPO

EUIPO offers the online database eSearch plus which is free of charge to conduct searches for trade marks. eSearch plus is used by both examiners and applicants. One must select the mark type ‘Colour’ in the advanced search option. Furthermore, TMview is also used by examiners and applicants to search for conflicting trade mark where one can select the mark type ‘Colour’ in the advanced search form.

JPO

Color marks are searched using the code for the color, for example, 29.1.7.02 for brown, along with codes for the type of goods/services. If the user wants to perform a search only for color per-se marks, he or she can add the following code 44.1 “Color per se mark” or select “Color mark” in the Trademark Type field. Also, keyword searches can be performed for detailed descriptions of trademarks.

KIPO

Color marks may be searched by entering the national code number for color marks (980700). Also, it can be searched by AI figure search tool.

23. Searchable Online Database:

A. Is your database of marks able to be searched online? If so, please provide a link to your searchable mark database.

B. If the answer to A. is “yes,” is a fee required to use this service?

C. If the answer to A. is “yes,” is a login account required to use this service?

USPTO

A. Yes. The USPTO Trademark Search database may be accessed at

<https://tmsearch.uspto.gov/search/search-information>.

B. There is no fee to search the USPTO records.

C. A login account is not required to search the database of marks.

CNIPA

A. Yes. It can be accessed at

http://wcjs.sbj.cnipa.gov.cn/txnT01.do?locale=en_US&locale=en_US; it is the English page and has five modes of trademark search.

B. There is no fee.

C. A login account is not required.

EUIPO

- A. Yes. It can be accessed at <https://euipo.europa.eu/eSearch/>. As explained, the advanced search tool enables one to filter trade marks per need, and there is also a possibility of doing an image search.
- B. There is no fee.
- C. A login account is not required.

JPO

- A. Yes, users can access to the “J-PlatPat” database. Trademark and figurative mark search database can be accessed at: <https://www.j-platpat.inpit.go.jp/t0100>.
- B. There is no fee.
- C. A login account is not required.

KIPO

- A. Yes, a trademark database which is used by KIPO examiners is not available online but the Korean Institute of Patent Information KIPI provides a free online database service with data received from KIPO.
(<http://kdtj.kipris.or.kr/kdtj/searchLogina.do?method=loginTM>).
- B. There is no fee.
- C. A login account is not required.

24. If the answer to question 23.A. is “yes,” are there instructions for use of the search features online? If “yes,” please provide link to online material.

USPTO

Additional information on searching is available here:

<https://www.uspto.gov/trademarks/search>

The Design Code Manual is available here: <https://tmdesigncodes.uspto.gov/>.

Videos with instructions on searching and other topics are available here:

<https://www.uspto.gov/trademarks/videos> and

<https://www.uspto.gov/trademarks/videos#type-trademark-basics>.

CNIPA

We give tips about search methods on the search page. When you click the icon (❗), the content will be displayed. Guidelines for the declaration of goods and services and similar goods and services table: <http://sbj.cnipa.gov.cn/sbsq/sphfwfl/>.

Graphic coding: <http://sbj.cnipa.gov.cn/sbsq/txys/>

EUIPO

Yes. Instructions for use have been made available at the EUIPO webpage which can be found here: <https://euipo.europa.eu/ohimportal/en/esearch>.

JPO

Brief instructions on searching are available on the following website.

J-PlatPat Help (Trademark and figurative mark search):

<https://www.j-platpat.inpit.go.jp/help/en/t01/t0101.html>

J-PlatPpat Operation Manual:

<https://www.inpit.go.jp/content/100881965.pdf>

KIPO

Users can find search instructions here:

<http://beginner.kipris.or.kr/beginner/beginnerMain.jsp>.

The English version of the search instructions is available here:

<http://eng.kipris.or.kr/enghome/tutorial/tutorial.jsp>.

A video tutorial and download on searching is available here:

http://www.kipris.or.kr/khome/guide/easy/easy_kdtj02.jsp.

The English version of video tutorial and download is available here:

http://eng.kipris.or.kr/enghome/guide/easy/easy_kpat.jsp

25. How would a user search your database for the mark in Example 1?

USPTO

Using the appropriate search field, key words from the description may be searched, such as brown\$. The use of the dollar signs in the search will also yield the plural versions of these terms. Design codes may also be searched such as the entire good/service (design code 29.02.02), trucks (design code 18.05.05), and human powered land vehicles (design code 22.01.07).

CNIPA

A single color mark is not acceptable, only a combination of two or more colors can be applied for trademark registration. Colors are searched under design code 29.1, with 29.1.12 for two colors, 29.1.13 for three colors, 29.1.14 for four colors and 29.1.15 for five or more colors. For the mark in Example 1, figurative codes for motor vehicles (18.1.7) and trucks (A18.1.8) would also need to be searched.

EUIPO

[eSearch plus](#) uses image recognition technology to find similar-looking trade marks and designs. The search system analyses the colours, shapes and textures, rather than keywords as in the classic text-based search systems. The system allows for the upload of 1 image when searching for trade marks.

In order to perform a basic search by images similar to the mark in Example 1, please find some recommendations below (and [here](#)).

1. Click on the camera icon or in the dedicated box or drag and drop your image(s)- Supported file formats are JPEG, PNG, GIF and TIFF extensions, larger than 100x100 pixels and with a maximum size of 2 Megabytes.
2. Once your image(s) is uploaded, you can:
 - Click and adjust the rectangle to select the area of the image(s) to search.
 - Select if you want to search for trade marks, designs or both. When uploading 1 image you'll have the possibility to search for both, if uploading more than one image the system will show results only for designs.
 - Type the necessary characters in the search bar in case you want to do a combined search of an image along with trade mark name or design verbal elements.
3. You can preview the details of each trade mark or design, check full information about, zoom in the images or generate reports. In the design results tab you can also browse through the different views available of the design by clicking on the arrows at the side of the image.

Generate reports: Select the trade marks (or designs) you want to include in your report by clicking in the tick box next to each image and click on 'Generate PDF'. The report with your selection will be created instantly. You also have a 'select all' option. This option will allow you to select a maximum of 100 trade marks to include in the report.

To obtain further information of a trade mark or a design, hover over the image and select 'View full info'.

JPO

To search for a color mark, such as Sample 1, the user selects the appropriate code from the Japanese subsection table of the Vienna Classification (<https://www.j-platpat.inpit.go.jp/t1101>).

Then, the user would enter, for example, the following codes he or she thinks appropriate to perform a search:

A18.1.8 Lorries, coaches, tractors, trolleybuses
29.1.7.02 Brown (figures)

On the other hand, if the user wishes to perform a search only for color per se marks, he or she can add the following code or select "Color mark" in the trademark type:

44.1 Color per se mark.

KIPO

A search can be conducted by entering the national code number for color marks (980700).

In Korea, a color mark should be filled with a single color or combination of colors, so that there is no space left in the drawing. Therefore, the presented Example 1 cannot be registered as a color mark in Korea.

26. What is the standard for determining likelihood of confusion for color marks?

USPTO

The standard for determining likelihood of confusion is the same for color marks as for any other type of mark: the likelihood of consumer confusion due to similarity of appearance, sound (if any), meaning and relationship of the goods and channels of trade. Confusion may be found with the same or similar colors associated with similar shapes or even two-dimensional designs for the same shape for related goods and/or services along with the word for the color itself. The question is whether consumers would believe the marks identified the same source.

CNIPA

The colors and combination of them in the color combination trademark are the same or similar, and there is no obvious difference in the specific ways of use in the commercial activities, and the overall visual effect may cause relevant public's misunderstanding of the origin of goods or services.

EUIPO

Likelihood of confusion must be appreciated globally, taking into account all the factors relevant to the circumstances of the case; this appreciation depends on numerous elements and, in particular, on the degree of recognition of the mark on the market, the association that the public might make between the two marks and the degree of similarity between the signs and the goods and services.

The Office normally examines the most salient and habitually relevant factors relating to likelihood of confusion and establishes their degrees:

- similarity of the goods and services;
- the relevant public and its degree of attention and sophistication;
- similarity of the signs taking into account their distinctive and dominant elements;
- the distinctiveness of the earlier mark.

These factors will be assessed also in relation to colour marks, the same criteria would apply as for other types of marks. Each case will be examined on its merits individually. When the likelihood of confusion between two colour marks per se is assessed, a phonetic or conceptual comparison of the signs cannot be made and the visual similarities will depend on the colours being the signs.

In the overall assessment, the Office takes into account the fact that there is a 'public interest in not unduly restricting the availability of colours for other traders who market goods or services of the same type as those in respect of which registration is sought' (24/06/2004, C-49/02 Blau/Gelb, EU:C:2004:384, § 41; 06/05/2003, C-104/01, Libertel,

EU:C:2003:244, § 52-56). The inherent distinctiveness of colour marks per se is limited. The scope of protection should be limited to identical or almost identical colour combinations.

JPO

Judgement on the similarity of color marks is made by comprehensively examining the color marks' overall appearance composed of its hue (color shade), chroma (vividness of color) and brightness (chromatic luminosity) so that the trademark is examined as a whole.

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0310.pdf#page19>.

KIPO

Judging the similarity of a color mark is based on specific comparisons of hue(color shade), saturation(vividness of color; chroma), and lightness(brightness) figures, as well as overall appearance.

- 27. Would a potential bar to registration be a word mark consisting of the name of the color? For example, if a color mark consisting of a shade of blue for jewelry (as per Example 1 at the beginning of the Questionnaire) for related or identical goods or services were filed, would a word mark for “blue” act as a bar to registration?**

USPTO

Yes, a two-dimensional design for the same shape for identical or related goods or services may be a potential bar under the likelihood of confusion standard.

CNIPA

No.

EUIPO

There could be a likelihood of confusion based on conceptual identity. It will nevertheless depend on the assessment of the particular case, other factors (*e.g.*, enhanced distinctiveness, etc.) and the arguments of the parties.

JPO

In judging the similarity between single-color marks and character marks, even if both are identical or similar in terms of sounds and concepts, color marks are not regarded as similar in principle, since the appearance of the colors is mainly an important factor in judging the similarity.

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0310.pdf#page20>

KIPO

Yes. If a two-dimensional image is similar to the appearance of a three-dimensional mark perceived from a certain angle, thereby causing confusion as to the source of the goods, it can be a potential bar.

Acquired Distinctiveness or Secondary Meaning

28. Does your office recognize claims of acquired distinctiveness or secondary meaning with respect to color marks? If yes, please answer the questions 29-42 below.

USPTO

Yes.

CNIPA

Yes.

EUIPO

Yes, it does. According to Article 7(3) EUTMR, a trade mark may still be registered despite the fact that it does not comply with Article 7(1)(b), (c) or (d) EUTMR, provided that it ‘has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it’. There is no limitation in relation to specific types of marks.

Distinctive character acquired through use means that, although the sign lacks inherent distinctiveness ab initio with regard to the goods and services claimed, at least a significant proportion of the relevant public has, owing to the use made of it on the market, come to see it as identifying the goods and services claimed in the EUTM application as originating from a particular undertaking. Thus, the sign has become capable of distinguishing those goods and services from those of other undertakings because they are perceived as originating from a particular undertaking. In this way, a sign originally unable to be registered under Article 7(1)(b), (c) or (d) EUTMR can acquire new significance, and its connotation, no longer purely descriptive or nondistinctive, allows it to overcome those absolute grounds for refusal of registration as a trade mark.

JPO

Yes.

KIPO

Yes.

29. What is the standard for acquired distinctiveness in relation to color marks?

USPTO

Consumers must perceive the mark as a source indicator. Evidence provided to support a claim of acquired distinctiveness should demonstrate that when consumers encounter the mark in connection with the specified goods or services, they associate the goods or services with a particular source.

CNIPA

After use, consumers are able to identify the source of goods or services through the mark.

EUIPO

There must exist, in the perception of the public, a link between the sign and the goods and services in the sense that the relevant class of persons, or at least a significant proportion thereof, identify the goods and services as originating from a particular undertaking because of the trade mark.

The acquisition of distinctive character through use must be proven **for the part of the EU in which the trade mark concerned did not initially have this character**. This may prove difficult and burdensome for the applicant, particularly when the objection exists **throughout the EU**. This is normally the case for colour marks, when they are found to be devoid of distinctive character, as it may be assumed that the assessment of their distinctiveness will be the same throughout the EU, unless there is concrete evidence to the contrary (24/02/2016,T-411/14, Shape of a bottle (3D), EU:T:2016:94, § 68).

JPO

Consumers are able to recognize the goods or services as those pertaining to a business of a particular person as a result of the use of the trademark.

KIPO

When the trademark is recognizable to consumers as a trademark indicating the source of goods of a specific person as a result of using the trademark before filing an application for trademark registration, trademark registration may be granted limited to the goods on which such trademark is used.

30. What factors are considered for proving acquired distinctiveness as to color marks? Please provide a link to any online guidance.

USPTO

Factors considered will include substantially exclusive use, length of use, advertising expenditures, unsolicited media coverage, consumer studies, other evidence of consumer recognition, and promotional materials showing the applied-for mark used in a trademark manner (as opposed to merely illustrative or decorative manner) in advertisements. No

single factor is determinative. See [TMEP Sections 1212 et seq.](#), for general discussion of acquired distinctiveness. Notably, attorney argument cannot substitute for evidence.

CNIPA

The following factors should be considered comprehensively:

- the public's recognition of the mark,
- the time and mode of use of the mark,
- sales volume, turnover and market share of goods/services using the mark;
- advertising and publicity coverage of goods/services using the mark;
- other factors that make the mark acquire distinctiveness characteristics.

More information in the Trademark Examination Standards:

http://sbj.saic.gov.cn/tzgg/201701/t20170104_233075.html.

More information in the Trademark Examination and Adjudication Guidelines:

<https://sbj.cnipa.gov.cn/sbj/zcwj/202112/W020231026360188451411.pdf>

EUIPO

In establishing acquired distinctiveness, account may be taken of, inter alia, the following factors:

- The market share held by the mark with regard to the relevant goods or services;
- How intensive, geographically widespread and long-standing use of the mark has been;
- The amount invested by the undertaking in promoting the mark for the relevant goods or services;
- The proportion of the relevant public who, because of the mark, identifies the goods or services as originating from a particular undertaking.

More information on standard of proof, the actual assessment of the evidence can be found here: [EUIPO Guidelines on Article 7\(3\) EUTMR](#).

JPO

For example, the following facts will be taken into consideration in making judgement. Specifically, the facts showing condition of use of the trademark shall be substantially grasped considering the nature etc., of those facts, and will be utilized in estimating the level of consumers' awareness of the trademark.

- The composition and mode of the trademark in an application,
- The mode of use, volume of use (an amount of production, an amount of sales, etc.), period of use and areas of use of the trademark
- The method, period, areas and scale of advertising,
- Whether a mark identical with or similar to the trademark in an application is used by any person other than the applicant (in the case of an application for collective trademark registration, "the applicant" or person other than its "members") is

using a mark identical or similar to the applicant's trademark, and the status of its use,

- The characteristics of the goods or services and the actual state of their transaction,
- The outcome of the questionnaire regarding consumers' awareness of the trademark.

2.(2), Part II: Article 3(2), Examination guideline

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0200.pdf>.

The Trademark Examination Manual 54.06 Evidence to Prove That a Color Trademark Has Acquired Distinctiveness Through Use:

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/document/syouhyoubin/54-06.pdf>

KIPO

As a result of exclusive use of a trademark by the trademark owner, acquired distinctiveness would be recognized factoring in length of use (in principle, we require a period of at least more than five years; however, even if the mark has been used less than five years, we can find acquired distinctiveness where other factors other than the time period can be sufficiently proved), the status of use, sales revenue and advertising records as well as characteristics of the goods in relation to the trademark. (See Chapter 9 'Acquired Distinctiveness' of Part 4 'Requirements for Trademark Registration' of the Trademark Examination Guidelines.)

31. What type of evidence is considered to prove that a mark has acquired distinctiveness as to color marks? Please provide a link to any online guidance.

USPTO

See response to Question 30 above. Under Trademark Rule 2.41(a)(3), 37 C.F.R. § 2.41(a)(3), an applicant may submit affidavits, declarations under 37 C.F.R. § 2.20, depositions, or other appropriate evidence showing the duration, extent, and nature of the applicant's use of a mark in commerce that may lawfully be regulated by the U.S. Congress, advertising expenditures in connection with such use, letters, or statements from the trade and/or public, or other appropriate evidence tending to show that the mark distinguishes the goods or services. An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner's method of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product. See [TMEP § 1212.06](#) for discussion of actual evidence of acquired distinctiveness.

CNIPA

Any evidence that could prove the five aspects listed in 31. The evidence should also clearly indicate the pending trademark, the designated goods and/or services, the date of using the trademark, and the trademark user's name.

EUIPO

Article 97 EUTMR contains a non-exhaustive list of means of giving or obtaining evidence in proceedings before the Office, which may serve as guidance to applicants. Examples of evidence that may help to show acquired distinctiveness include, inter alia:

- sales brochures
- catalogues
- price lists
- invoices
- annual reports
- turnover figures
- advertising investment figures and reports
- advertisements (press cuttings, billboard posters, TV adverts), together with evidence of their intensity and reach
- customer and/or market surveys
- affidavits.

The Office must make an overall assessment of all the evidence submitted (judgement of 04/05/1999, C-108/97 and 109/97, Chiemsee, EU:C:1999:230, § 49), weighing up each indication against the others.

More guidance can be found in the same [link](#).

JPO

Facts will be proved on, for example, the following evidence:

- ① Photographs, movies, etc., showing the actual state of use of a trademark,
- ② Business documents (Order slips [purchase orders], shipment slips, invoices [delivery slips and certificates of receipt], bills, receipts, account books, etc.
- ③ Advertisements (newspapers, magazines, catalogues, leaflets, TV commercials, etc.) used by the applicant and proofs proving its past record
- ④ Articles in general newspapers, trade journals magazines and the Internet presenting the trademark in an application by persons other than the applicant
- ⑤ Outcome reports on the (questionnaire intended for consumers regarding awareness (However, due consideration will be given to the objectivity and neutrality of the questionnaire with respect to the conductor, method, and respondents

2.(3), Part II: Article 3(2), Examination guideline:

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0200.pdf>.

The Trademark Examination Manual 54.06 Evidence to Prove That a Color Trademark Has Acquired Distinctiveness Through Use:

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/document/syouhyoubin/54-06.pdf>.

KIPO

Those who claim the acquired distinctiveness need to provide evidence of:

- ① a trademark in use,
- ② the goods to which the mark has been applied,
- ③ the fact that the mark has been used for a considerable length of period,
- ④ the fact that the mark has been used across the country or in a certain area,
- ⑤ production, manufacture, process, certification, sales volume, revenue and market share,
- ⑥ how and how often the mark has been used,
- ⑦ how and how often, and how long the mark has been advertised and what has been advertised,
- ⑧ objective consumer studies,
- ⑨ information which can prove quality or reputation of the goods,
- ⑩ data that prove the applied-for mark has been exclusively used.

32. What amount of evidence is required to prove that a color mark has acquired distinctiveness?

USPTO

No set amount is required. A claim of acquired distinctiveness is highly dependent on the nature of the mark and the goods and services, and is determined on a case-by-case basis. The less distinctive the mark, the more evidence or higher quality evidence is required.

CNIPA

No set amount is required, but the more effective evidence the better. We take the rule of corroboration, and a single piece of evidence is not enough for proving acquired distinctiveness. All the evidence should constitute a chain, to show that the pending trademark has been widely or continuously used, and has been accepted by the public as a trademark.

EUIPO

No set amount is required. The Office will make an overall assessment of all the evidence to decide if the mark has come to identify the goods or services concerned as originating from a particular undertaking. Applicants should take great care to make sure not only

that the evidence shows use of the **mark applied for** but also that it is sufficient to identify the **dates** of such use and the specific geographical **territory** of use within the EU.

Evidence that cannot be related to a certain point in time will normally be insufficient to show that distinctiveness had been acquired before the filing date, and evidence of use outside the EU cannot show the required market recognition of the relevant public within the EU.

Furthermore, evidence that mixes material relating to the EU with that relating to non-EU territories, and does not permit the Office to identify the specific extent of EU-only use, will be similarly devoid of probative value for the relevant EU public.

JPO

Evidence is required to show that the consumers of the goods or services throughout Japan are able to perceive the trademark as an indication of trade source, and the amount of evidence is less important.

KIPO

There is no set amount of evidence required to prove that the mark concerned has acquired distinctiveness by its use.

Any person who claims acquired distinctiveness may submit evidence that shows, for instance, 1) the mark which he/she has used, 2) specific goods on which he/she has used the mark, 3) the fact that the mark has been used continuously for a considerable period of time, 4) the fact that the mark has been used nationwide or in certain regions, etc.

33. Is evidence dependent upon geographic coverage (for example, is nationwide fame necessary)?

USPTO

No, there are no geographic requirements other than providing evidence of use in the United States. However, a showing of nationwide recognition of the mark would be strong evidence of acquired distinctiveness.

CNIPA

Yes. It should be based on the knowledge of the domestic public. Evidence of nationwide recognition is good for proving acquired distinctiveness.

EUIPO

Pursuant to Article 1 EUTMR, a European Union trade mark has a unitary character. Accordingly, a trade mark must be refused registration even if it is devoid of distinctive character only in part of the European Union. And as a logical consequence, acquired distinctiveness must be established throughout the territory in which the trade mark did not ab initio have distinctive character. This may prove difficult and burdensome for the

applicant with regard to colour marks, where the consumer perception of a potential lack of inherent distinctiveness will most likely be the same in each and every Member State of the EU.

Acquired distinctiveness **must be shown throughout the European Union**. However, there are two scenarios where, under strict conditions, evidence filed to establish that a particular sign has acquired distinctive character through use is relevant for several Member States or even for the whole of the EU: Regionalisation and extrapolation. In light of this, the Office considers that in certain cases, it is possible to extrapolate from selective evidence to draw broader conclusions, and as a result, evidence showing distinctiveness acquired through use in certain Member States can be used to make inferences with regard to the market situation in other Member States not covered by the evidence.

In that regard, the Court has held that evidence of acquired distinctiveness for the ‘combination of the colours green and yellow’ throughout the EU was acceptable despite a lack of turnover figures for two Member States, since it is not necessary to provide the same types of evidence for each and every Member State, considering also that the various items of evidence can be mutually corroborative (28/10/2009, T-137/08, Green/Yellow, EU:T:2009:417, § 33-42 et seq.).

Please find more information on acquired distinctiveness in the [following link](#).

JPO

Yes. “The consumers are able to recognize the goods or services as those pertaining to a business of a particular person” means that the consumers of the goods or services throughout Japan are able to perceive the trademark as an indication of trade source.

For reference, visit:

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0200.pdf>

KIPO

Basically, it is assumed that a trademark has nationwide fame, but, in some cases, a trademark could have fame only in a certain area considering the nature of the goods.

34. What evidence is considered stronger or more probative?

USPTO

“Direct” evidence is considered stronger and more probative. Direct evidence demonstrates that the applicant has been successful in educating the public to associate the proposed mark with a single source. Direct evidence may include affidavits or declarations by the consuming public asserting recognition of the mark as a source indicator, surveys or market research showing that the consuming public views the proposed mark as an indication of the source of the product or service, and

advertisements promoting the mark, rather than promoting the goods generally. “Look for” advertising, which highlights the mark as identifying source, is particularly relevant.

Circumstantial evidence that demonstrates general exposure of the mark to the purchasing public but not that the public views the mark as a source indicator may be relevant but is not conclusive. This evidence may include long use of the mark in commerce, prior registrations, product advertising materials and expenditures, sales figures, and unsolicited media coverage. See TMEP Section 1212.06.

CNIPA

Evidence that directly proves that the applicant has used the trademark for a long time, continuously and authentically in the specified goods/services. And evidence that directly proves that consumers are able to distinguish goods/services from other goods/services providers.

EUIPO

Direct evidence is usually the most relevant means of evidence and can consist of the following: surveys, market research, statements from independent trade and professional associations or public authorities.

Secondary evidence can support direct evidence and can consist of, for example: sales figures; invoices; magazines; catalogues; advertising material.

JPO

Evidence (a photograph, advertising literature, results of consumer surveys, etc.) that only the color is functioning independently (separating from figures and characters etc.) as an indication of trade source for identifying its goods or services.

<https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/kijun/document/index/0200.pdf>

KIPO

A Consumer Awareness Survey can be used as evidence to identify acquired distinctiveness. The survey shall be conducted by a reliable research agency that meets certain requirements. For example, a polling organization in accordance with the Public Official Election Act falls under the criteria. The survey is considered reliable if it is designed to have sample representativeness in some respects—*e.g.*, geographic region, gender, age, etc.—targeting actual or potential consumers of the same product concerned and it uses a sample size of more than 500 respondents, and if the questionnaire is fairly and appropriately structured. Examiners are not bound to the survey results; however, they may consider the results as strong evidence when making decisions about acquired distinctiveness by use where a survey that meets the reliability requirements indicates that more than 50% of respondents recognize the mark as representing a specific person's goods and/or services.

35. If a color mark is refused, can an applicant overcome the refusal during examination and does the applicant have a deadline by which to submit any evidence that may be needed to overcome said refusal?

USPTO

Yes, a refusal may be overcome during examination. The applicant may submit evidence during the response period indicated by the Office action. An Applicant must respond to the first refusal within 3 months of the date of the Office Action.

CNIPA

The examiner may ask the applicant to make an explanation or amendment to the application to overcome the refusal. The applicant may submit feedback and evidence within 15 days after receipt of the notice. But the procedure is initiated by the examiner, and is not a necessary procedure.

EUIPO

Following an objection, the applicant has two months to file its observations and evidence. It is only once that this deadline has expired that the Office will refuse the mark (after giving it due regard to the observations and evidence filed by the applicant).

The applicant can submit a claim indicating that the sign has acquired distinctive character through use within the meaning of Article 7(3) EUTMR. The claim can be made together with the application or, at the latest, in reply to the examiner's first objection.

The applicant can make a principal or a subsidiary claim. In the case of a principal claim (*i.e.*, irrespective of the outcome on inherent distinctiveness), the Office will take a single decision both on the mark's inherent distinctiveness and, where there is none, on the claim of acquired distinctiveness through use. If the claim was filed as a subsidiary, the Office will take two separate decisions at different points in time: first, one on the mark's inherent distinctiveness and then, once that decision (finding lack of inherent distinctiveness) has become final, another decision on the claim of acquired distinctiveness through use. Once the decision on inherent distinctiveness is final, the applicant will be given a deadline of 2 months by the Office to file its evidence of use.

JPO

Yes, the applicant may overcome a refusal during the examination by submitting written opinion, which is not limited to color marks. A domestic applicant is required to submit the evidence within 40 days from the mailing date of the Notification of Reasons for Refusal, and an applicant who resides overseas is required to submit it within 3 months from the said date. Further, the applicant may request an extension of time.

https://www.jpo.go.jp/e/system/patent/shinsa/kyozetu_entyou_160401.html

KIPO

Yes, the applicant may overcome a refusal during examination by submitting a written opinion, accompanied by evidence within the response period, which is generally two months to respond to a refusal.

36. If a mark has registered on the basis of acquired distinctiveness, how is that indicated in your database?

USPTO

The mark in the USPTO database will indicate that the mark has registered under “Section 2(f)” or “Section 2(f) in part.”

Section 2(f) is the provision under U.S. trademark law that permits registration of nondistinctive matter when acquired distinctiveness has been established to the satisfaction of the Office.

CNIPA

There are no special tags in the open database of the Internet for the mark registered on the basis of acquired distinctiveness

EUIPO

In the ‘Trade mark information’ in eSearch plus, there is an indication ‘YES’ in the field ‘Acquired distinctiveness’ if the trade mark was registered due to acquired distinctiveness.

JPO

The data of a trademark on which our office made a judgment that as a result of the use of the trademark, consumers are able to recognize the goods or services as those pertaining to a business of a particular person and registered under the Trademark Act, Article 3(2) is stored in our database with a flag.

Accordingly, the “additional information” stored in our database is displayed as “Article3(2) application”. This enables us to confirm that the trademark was registered under the said clause.

Trademarks registered under article 3(2) include:

Registration No. 5930334

Registration No. 6534071

For trademarks registered in accordance with Article 3(2), it shows “Article 3(2) application” among detailed information available on the J-PlatPat. For example, by accessing the link below and then clicking “Reg. No. 5930334”, you can confirm that there is the description “Article 3(2) application” at the “Additional information” section among detail information on the registration.

(Reg. No. 5930334) <https://www.j-platpat.inpit.go.jp/c1800/TR/JP-2015-029914/8BB25799D7BDE6FDB5F3547D0DF0693028610D9FE6C7FFE5B02BC855AEAFE170/40/en>

KIPO

It will be indicated as a trademark that has acquired distinctiveness in accordance with Article 33(2) of the Trademark Act. There is a denotation in the database.

37. If your office accepts evidence of acquired distinctiveness, in what language must the evidence appear?

USPTO

English.

CNIPA

Chinese.

EUIPO

According to Article 24 EUTMIR, supporting documents to be used in written proceedings before the Office may be filed in any official language of the Union. Where the language of such document is not the language of the proceedings, the Office may, of its own motion require that a translation be supplied.

JPO

Japanese.

KIPO

Korean.

38. If the evidence is in a foreign language, must it be translated? If yes, must this translation be certified or notarized?

USPTO

Yes, foreign evidence must be translated. Certification or notarization is not required. The translator should sign the translation, but does not have to swear to the translation. See TMEP [§ 710.01\(b\)](#).

CNIPA

Yes. The evidence is written in a foreign language, a Chinese translation shall be attached. Otherwise, it is deemed not to be submitted.

No. The translation does not require notarization.

EUIPO

We refer to the answer provided to question 41 here above.

Whenever a translation is provided, there is no need for it to be certified or notarized.

JPO

Yes, a Japanese translation must be attached to foreign evidence. However, translation in itself is not sufficient. The applicant is required to submit evidence to prove that the trademark is recognized among the consumers in Japan. Hence, particularly, advertising materials, newspaper articles, magazine articles are generally expected to be originally written in Japanese.

Certification or notarization is not required for this translation.

KIPO

Yes, any evidence in a foreign language must be translated, however, certification or notarization thereof is not required.

39. Must the evidence provided in support of registration be legalized, notarized, certified or similar?

USPTO

Yes. Declarations attesting to the truth of the matter asserted must be signed under penalty of perjury in accordance with Trademark Rule 2.20, 37 C.F.R. § 2.20 or 28 U.S.C. § 1746. See [TMEP § 804.01\(a\)\(i\)](#) (Verification with Oath) for more information.

CNIPA

The evidence should be authentic and legally accurate. A trademark registered by deception, including the provision of false evidence, can be declared invalid.

EUIPO

No, there is no obligation to provide legalized, notarized, certified or similar evidence.

JPO

No. However, if there is any doubt as to the credibility of the evidence, the examiner may require the submission of additional materials.

KIPO

No.

40. If the evidence must be legalized, notarized, certified or similar, please explain the process and requirements in order for the evidence to be acceptable.

USPTO

Evidence provided to support registration, including a statement of facts, must be supported by a declaration or affidavit. Only the applicant or a person with first-hand knowledge of the relevant facts may submit a statement of the facts, and the statement must include the following language:

The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or submission or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.

Trademark Rule 2.20, 37 C.F.R. § 2.20.

Alternatively, 28 U.S.C. § 1746 permits the following declaration language if executed outside the United States, its territories, possessions, or commonwealths:

“I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.
Executed on (date).
(Signature).”

If executed within the United States, its territories, possessions, or commonwealths, the following declaration may be submitted:

“I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.
Executed on (date).
(Signature).”

See [TMEP § 804.01\(a\)\(i\)](#) for verifications made in a foreign country.

CNIPA

The evidence should be original or notarized copy.

EUIPO

Statements in writing sworn, affirmed or having a similar effect under the law of the Member State in which the statement is drawn up (affidavits) are valid means of evidence (Article 97(1)(f) EUTMR.).

Before the Office, their evidential value is assessed in light of EU law, not the laws of a Member State.

The Office will assess the probative value of the information the affidavit contains, considering:

- the document's origin, including the capacity of the person giving the evidence
- the circumstances of its preparation;
- to whom it is addressed;
- whether the content makes sense and seems reliable; and
- the relevance of the contents of the statement to the particular case.

JPO

N/A

KIPO

N/A

41. Please provide two examples of color marks where sufficient evidence of acquired distinctiveness was provided to overcome a refusal.

USPTO

Example 1: U.S. Registration No. 4197020, issued August 28, 2012, on the Principal Register under Section 2(f) of the Trademark Act (acquired distinctiveness claimed as to mark as a whole), owned by Richemont International SA (by assignment through merger with Cartier International AG), for the following goods and services: Jewelry and watches (International Class 014) and Retail store services featuring jewelry and watches; online retail store services featuring jewelry and watches (International Class 35).

Mark: (the drawing shows only the placement of the claimed color on the product)



Description of the Mark and Color Claim Statement: “The color(s) red and gold is/are claimed as a feature of the mark. The mark consists of three-dimensional product packaging composed of an 8-sided box and lid in the color red with gold markings. The four corners of the box are chamfered. The top horizontal side of the lid is imprinted with a series of equally-spaced garlands in the color gold, abutting a gold line around the perimeter of the lid. The vertical sides of the packaging feature a gold horizontal chain-like pattern, positioned on the upper sides of the lid and the lower sides of the box. The vertical sides of the packaging also feature a line of gold dots on the lower sides of the lid and the upper sides of the box. The colors red and gold are claimed as features of the mark. The proportional relationship between the width, height, and depth is not a feature of the mark, and the proportional relationship between the height of the lid and height of

the box is not a feature of the mark. The proportional relationships are shown in broken or dotted lines, which indicate that they are not a part of the mark.”

PLEASE NOTE: The applicant submitted evidence of acquired distinctiveness, including, long term exclusive use (over 70 years at the time of submission), large sales figures (over 60 million USD), and examples of extensive marketing and advertising expenditures).

Example 2: U.S. Registration No. 6000045, issued March 3, 2020, on the Principal Register under Section 2(f) of the Trademark Act (acquired distinctiveness claimed as to mark as a whole), owned by August National Inc., for Promotion of goods and services through sponsorship of sports events (International Class 035) and Organizing and conducting golf tournaments (International Class 041).

Mark: (the drawing shows only the placement of the claimed color on the device used in connection with the services)



Description of the Mark and Color Claim Statement:

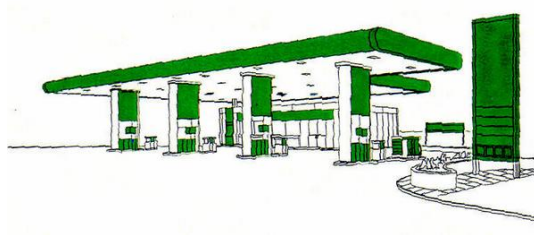
The color(s) green and gold is/are claimed as a feature of the mark. The mark consists of the colors green and gold where the color green is applied to the jacket and the color gold is applied to the three waist buttons and the two sleeve buttons on each arm of the jacket. The dotted lines are intended to show the position of the mark and are not part of the mark as shown.

PLEASE NOTE: The applicant submitted evidence of acquired distinctiveness, including, evidence of long-term exclusive use (use since the 1930s), and an extensive amount of articles of third parties showing the fame and recognition of the mark.

CNIPA

EUIPO

Example 1: EUTM No. 1991, for Class 4 Oils and greases; lubricants; fuels; transmission oils, hydraulic oils; all included in Class 4; and Class 37 Vehicle lubrication, maintenance, cleaning and repair; anti-rust treatment for vehicles; vehicle wash; vehicle service stations; vehicle upholstery repair; vehicle tyre fitting and repair; all included in Class 37.



Example 2: EUTM No. 10194835, for Class 7 Circulator pumps.



JPO

Example 1: Registration No. 5930334



Example 2: Registration No. 6534071



KIPO

There is only one example in KIPO.



2020WON3207 “Even if the trademark in the present case is a color-only trademark and has a shape or form that could be a design, it cannot be said that it is unreasonable in the public interest to grant the applicant exclusive rights to the trademark in the present case as it has been widely recognized in Korea as a mark of origin of the applicant's own goods, which is an essential function of a trademark, through a long period of use.”

Additional Application Information for Users

42. Does your office have a specific webpage with information about applying for color marks?

USPTO

No. While there is no specific webpage dedicated to color marks, guidance for applicants is available in our online Trademark Manual of Examining Procedure, which can be searched by topic and keyword. TMEP Section 1202.02 discusses registration of trade dress and TMEP Sections 807.14(e)(iii) and 1202.05-1202.05(i) discuss color marks.

CNIPA

EUIPO

Please consult our Guidelines on the specific requirements for [Colour marks](#) and on the [distinctiveness of colour marks](#).

JPO

No. There is no specific webpage dedicated to color marks.

KIPO

No. There is no specific webpage only for color marks.

43. Does your office have any additional information about applying for color marks that is not available online? If so, please attach this information with your response to this questionnaire.

USPTO

No. All information is available at the office webpage www.uspto.gov and in the Trademark Manual of Examining Procedure, available at <https://tmept.uspto.gov/RDMS/detail/manual/TMEP/current/d1e2.html>.

[TMEP Section 1202.05](#) discusses registration of color as a mark.

CNIPA

EUIPO

No. All information is available at <https://www.euipo.europa.eu/en> and <https://guidelines.euipo.europa.eu/>

JPO

No. All information is available at the office webpage <https://www.jpo.go.jp/e/index.html> and in the “Examination Guidelines for Trademark”, and “The Trademark Examination Manual”, available at <https://www.jpo.go.jp/e/system/laws/rule/guideline/trademark/index.html>.

KIPO

No. All information is available at <https://www.kipo.go.kr/ko/kpoContentView.do?menuCd=SCD0200155> or <https://www.law.go.kr/%ED%96%89%EC%A0%95%EA%B7%9C%EC%B9%99/%EC%83%81%ED%91%9C%EC%8B%AC%EC%82%AC%EA%B8%B0%EC%A4%80>