Disclaimer

All information provided by the International Trademark Association in this document is provided to the public as a source of general information on trademark and related intellectual property issues. In legal matters, no publication whether in written or electronic form can take the place of professional advice given with full knowledge of the specific circumstances of each case and proficiency in the laws of the relevant country. While efforts have been made to ensure the accuracy of the information in this document, it should not be treated as the basis for formulating business decisions without professional advice. We emphasize that trademark and related intellectual property laws vary from country to country, and between jurisdictions within some countries. The information included in this document will not be relevant or accurate for all countries or states.
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INTA GUIDELINES FOR TRADEMARK EXAMINATION

1. INTRODUCTION

1.1 Purpose
The purpose of this document is to provide general guidelines on a full range of issues related to examination of applications for trademark registration. These Guidelines are not intended to be limited to the trademark law of any specific territory; rather, they follow generalized conceptual lines. The Guidelines are meant to reflect various international systems in an effort to harmonize trademark law. The intention is that these guidelines be available as a reference document, particularly for Trademark Registration Offices.

1.2 Referenced Agreements and Treaties

- The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPs)
- The Trademark Law Treaty of 1994
- The Singapore Treaty on the Law of Trademarks, adopted by WIPO in March 2006
- The United States Trademark Act of 1946 (the Lanham Act)
- The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on June 27, 1989 (Madrid Protocol)
- Paris Union and WIPO Joint Recommendation Concerning Provisions of Well Known Marks, adopted in 1999
- Canadian Trade-Marks Act, 1985

2. PRE-APPLICATION

2.1 Third Party Searching
Trademark Offices should provide access to records of existing marks so that an applicant may search the records to identify existing marks that may pose a conflict to a proposed mark. The records, which may be paper, microfilm, or electronic, should be organized to allow for ease in discovering potential conflicting marks.
2.2 **Classification Systems**

For providing harmonization across jurisdictions, generally accepted classification systems, such as the International Classification of Goods and Services for the Purposes of the Registration of Marks (Nice Classification) should be used to classify an application’s goods and services, and the International Classification of the Figurative Elements of Marks (Vienna Classification), should be used to classify design marks.

3. **APPLICATION**

3.1 **Filing**

Trademark Offices should allow for the receipt of applications and prosecution documents by hand, by post, by facsimile, and/or by electronic transmission. Payment of fees should be allowed by cash, check, credit card, EFT, and/or deposit account. The Trademark Office should issue confirmation of receipt of the application in a similar transmission means as that of the application filing.

3.2 **Response Time**

Trademark Offices should examine the application and issue a notification of objections to registration within a reasonable period after the filing date, i.e., within three to six months after the filing, as the latest period for issuance of the first official action. The applicant should be provided a reasonable time period within which to respond to any objections issued by the Trademark Office. In that more than one response to an official action may be required, the recommended deadline for an applicant’s response to each official action is within three to six months after issuance of the official action.

4. **MULTI-NATIONAL APPLICATIONS**

Existing mechanisms that allow for the submission of a single application resulting in registrations that provide protection in multiple territories is encouraged. Multi-national applications are currently available to applicants in certain countries that are members of multilateral agreements. Such mechanisms include:

- The Madrid System for the International Registration of Marks
- The “Organisation de la Propriété Intellectuelle” (OAPI)
- The Banjul Protocol on Marks
- The European Community Trade Mark (CTM)
- The Benelux Trademark

4.1 **National Examination**

INTA supports the Madrid Protocol and harmonization efforts under multilateral treaties and can provide assistance to countries in their consideration of adherence to the applicable systems. The Madrid Protocol provides initial formalities examination
by WIPO and substantive examination is carried out by national member registries, based on applicable national law. Protection in the first five years is dependent upon the basic trademark registration issued in the country of origin.

The CTM is a single registration effective in all the current and future member nations of the European Union. The Uniform Benelux Trademark Law provides for a single registration for Belgium, the Netherlands and Luxembourg.

5. SCOPE OF EXAMINATION

5.1 Determined by Trademark Office

In all cases, the scope of examination, as well as the criteria by reference to which the examination is conducted, will be determined by the substantive law under which a Trademark Office operates. Each Trademark Office should publish its requirements and make them available to the public.

Although the wording of a given territory’s trademark law may vary widely, there generally are three main areas of examination:

- Formalities
- Absolute Grounds (inherent registerability of a mark)
- Relative Grounds (conflict with prior trademark rights)

A formalities examination should be conducted prior to registration; however, the extent of absolute and relative examination may vary widely. In many countries there is no examination on relative grounds, though frequently a search is carried out to make the applicant aware of possible relative objections. As an alternative, or in addition to relative grounds examination, some Trademark Offices provide for an opposition procedure in which the Trademark Office will examine relative grounds specifically raised by the opponent. The guidelines presented here incorporate a discussion of oppositions. Cancellation of marks is noted, but in that cancellation actions are taken post-registration, they are not discussed in detail in this Examination Guidelines document.

By way of example, the following table provides a non-exhaustive survey, current as of late 2007, of the examination policies adopted by the identified Trademark Offices. These policies are subject to change.
<table>
<thead>
<tr>
<th>TMO</th>
<th>Formal</th>
<th>Absolute</th>
<th>Search</th>
<th>Relative¹</th>
<th>Opposition Available</th>
<th>Pre/Post Reg.</th>
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</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes - within 3 months of publication</td>
<td>pre-registration</td>
</tr>
<tr>
<td>Bahrain</td>
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<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes - within 2 months of publication</td>
<td>post-registration</td>
</tr>
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<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes - within 2 months of publication</td>
<td>pre-registration</td>
</tr>
<tr>
<td>Brazil</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes - within 60 days of publication, if opposed, owner has 60 days to reply</td>
<td>pre-registration</td>
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<tr>
<td>Canada</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes - within 2 months of publication</td>
<td>pre-registration</td>
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<tr>
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<td>Yes</td>
<td>Yes - within 3 months of publication</td>
<td>pre-registration</td>
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<td>post-registration</td>
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<tr>
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<tr>
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<td>Yes</td>
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<td>Yes - within 2 months of publication</td>
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<tr>
<td>OHIM</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes²</td>
<td>No</td>
<td>Yes - within 3 months of publication</td>
<td>pre-registration</td>
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<tr>
<td>Oman</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes - within 2 months of publication</td>
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<tr>
<td>Russia</td>
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<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Only cancellation-type actions available</td>
<td>post-registration</td>
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<tr>
<td>Singapore</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes - within 2 months of publication</td>
<td>pre-registration</td>
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<tr>
<td>South Africa</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes - within 3 months of publication</td>
<td>pre-registration</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes - within 2 months of publication</td>
<td>pre-registration</td>
</tr>
<tr>
<td>Sweden</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes - within 2 months of publication</td>
<td>post-registration</td>
</tr>
<tr>
<td>UK</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes³</td>
<td>No⁴</td>
<td>Yes - within 3 months of publication</td>
<td>pre-registration</td>
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<tr>
<td>USA</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes - within 1 month of publication</td>
<td>pre-registration</td>
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¹ Refusal based on prior rights.
² In addition to an OHIM search of CTM registrations, searches are conducted by each national country (except France, Germany, and Italy, which are currently not providing search reports). Search reports are provided in the language of the country that conducted the search. Search reports are prepared according to the principles of each country, rather than according to the principles of the CTM system. Moreover, in certain cases, (typically due to the absence of a sufficiently sophisticated automated search program) phonetic comparisons are not made.
³ Effective October 2007, the Office will conduct a search, and if a conflicting mark is identified, both parties will be notified and the owner of the identified mark then must oppose. The Office will not issue an objection on relative grounds.
⁴ As of 10/07.
5.2 INTA Recommendation on Examination
INTA supports full pre-registration examination, but accepts that this may not be practicable for Trademark Offices with limited resources or those having a low turnover of applications. In such cases INTA encourages Trademark Offices to provide resources to the public to allow an ex parte search and opposition procedure.

INTA supports the availability of low cost, accessible opposition procedures, and that an opposition may be filed within three months after publication. A three month time limit is consistent with notification requirements of certain multi-territorial agreements, such as the Madrid Protocol and Agreement.

6. FORMALITIES EXAMINATION
All Trademark Offices should examine applications to confirm that they contain the essential minimum data specified by the local trademark law. These data include:

- Applicant Details
- Representation of the Mark
- Specification of Goods and/or Services, including classification

In some cases, examination may be required of Paris Convention or other priority claims; however applications made according to the Madrid Agreement that claim priority should receive priority “without requiring compliance with the formalities prescribed” in Article 4D of the Paris Convention.5

If the applicable trademark law requires a “use” or “intent-to-use” basis for filing, examination of this formality is required.

There are also certain additional formalities requirements for special types of marks. For a discussion of requirements for Collective and Certification marks, see Sections 6.3.1 and 6.3.2.

6.1 Representation of the Mark
It is recommended that Trademark Offices not require that a mark must be “visually perceptible.” Instead, graphical representation depicting marks should be permitted. Where “paperless” applications are available, such as via the Internet, digital representations should be permitted.

The types of marks shown below are among those that are deemed registerable as of the date of this revision, and for which the suggested means of their representation in an application is provided. As technological advances and marketing customs develop, additional types of marks should be considered for registration:

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5 Madrid Agreement, Article 4 (2).
6.1.1 Device (Design) Marks
A graphical representation of the device should be included in the application, including a design classification as specified in the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (1973, as amended).

6.1.2 Three-Dimensional Form Marks
The representation should include sufficient views for the shape to be clearly identified. Any non-distinctive portion of an otherwise distinctive three-dimensional mark should not be included in the official representation of the mark. If a non-distinctive portion must be included for reference, such as for placement or orientation, the scope of the trademark and the non-distinctive portion should be clearly indicated. For example, the distinctive shape of a tool is depicted in a three-dimensional drawing, while the non-distinctive handle might be shown in two-dimensional dashed line. In a photographic specimen, the non-distinctive portion may be obliterated, or identified by a written disclaimer in the application.

6.1.3 Color Marks
A literal description of the color in a mark generally should be accepted unless words do not adequately describe the color with sufficient particularity. In that case, reference to accepted color definition standards, such as RAL, the RGB color numbering system, the Pantone® system, or other similar identification systems, should be accepted and may be required if the Trademark Office does not publish applications in color.

6.1.4 Sound Marks
Either the musical notation or a written description of the sound should be accepted and should be required if the Trademark Office cannot include digital representations, such as sound files. Where the sound may be only partially represented by visual notation, a clarifying description in words of the sound in the application should be included. The following are suggested representation forms for sound marks:

- Musical notation and/or description of the sound in words
- The instrument(s) on which the music is played should be included if it forms part of the mark (the title of the piece of music is not precise enough)
- Graphic (electronic) measurement of the volume and character of the sound
- Digital representation
- Computer representations (tones)
- A combination of any of the above

6.1.5 Scent Marks
Representation should consist of a written description that conveys the identity of the scent clearly and unambiguously and permits its differentiation from other scents. Additional representations might include submitting a sample of the scent
(scratch and sniff) or a chemical formula of the compound that creates the scent. However, these should not substitute for the written description, as the scent sample may dissipate and the chemical formula may not be readily understood by the general public.

6.1.6 Flavor Marks
Representation should consist of a written description that conveys the identity of the flavor clearly and unambiguously and permits its differentiation from other flavors. Additional representations might include submitting a sample of the flavor or a chemical formula of the compound that creates the flavor. However, these should not substitute for the written description, as the flavor sample may dissipate and the chemical formula may not be readily understood by the general public.

6.1.7 Touch Marks
Representation should consist of a written description that conveys the identity of the touch characteristic clearly and unambiguously and permits its differentiation from other touch characteristics. Additionally, the representation should be “clear, precise, self-contained, easily accessible, intelligible, durable and objective.”

6.1.8 Moving Image Marks
The mark may be represented by a series of pictures that represents the motion with written description of movement. Alternatively, moving images, such as video, may be provided to a Trademark Office in physical or electronic means where the Office allows access to such formats.

6.1.9 Gesture Marks
Gesture marks are moving image marks but sometimes are identified separately. As with moving image marks, gesture marks may be represented by a series of pictures that represents the motion with written description of movement or by moving images provided in physical or electronic means.

6.1.10 Hologram Marks
Holograms are marks that appear to change when viewed from different angles. A single drawing or series of drawings generally cannot accurately represent a hologram; therefore, holograms are typically identified by a description of the mark.

It should be noted that registration of a hologram may be refused if the drawing shows more than one image, in that the application would seek protection for two separate marks.

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6 European Court of Justice C-273/00; Sieckmann, 2002.
6.2 Classification
The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1957, as amended) provides a widely accepted system of classification of goods and services and its adoption is recommended.

6.2.1 Description of the Goods
The goods and/or services in an application should be described clearly, with specificity, so it can be readily discerned what goods/services are sought to be protected. The description of goods/services selected and utilized by the applicant should be accepted unless:

- It would be unclear to the public what the goods/services in the registration protects; or
- Goods or services clearly are misclassified according to the applicable governing classification system, in which case a proper reclassification should be proposed by the examiner.

6.2.2 Use of Class Headings Discouraged
While some Trademark Offices accept as a listing of goods and services the “class heading” of the International Nice Agreement, this practice is not generally accepted at this time. Many territories that are party to multi-territorial application procedures, such as the Madrid Protocol/Agreement, require that the list of goods/services be identical to or narrower than the goods/services in the basic application or registration.

6.2.3 Use of “All Goods In Class” Discouraged
INTA discourages use of the phrase “all goods in the class” as a permitted definition of goods or services in applications, because, among other things, classifications may change over time, thereby creating ambiguity as to the scope of protected goods. INTA recommends that the specific goods or services be defined in any application for registration.

6.2.4 Retailing of Goods
It is recommended that the use of a mark as the name of a trading establishment, such as a retail store or in a catalog name, should be recognized both as use of that mark in relation to the sale of goods or services offered by that establishment as well as in relation to the service of retailing and ancillary advisory and other services. Such services may be classified consistently in either class 35 or 42 according to the preference of the Trademark Office pending clarification of the Nice classification. INTA supports the classification of retail services in class 35.
6.3 Other Types of Marks

6.3.1 Collective Marks

A collective mark is one used or intended to be used by members of a cooperative, an association, or other collective group or organization. The mark is owned by the collective entity even though the members use it individually. The collective entity itself may advertise or promote under the mark the goods or services of its members and may use it itself if it is used at the same time by the members in accordance with the regulations governing the use of the collective mark.

An example of a collective mark that may be instructive is the FTD mark used by member florists of the Florists’ Transworld Delivery Association. In general, collective marks are examined in the same manner as other trademark and service mark applications with particular attention to commonly used words that might be disclaimed under the particular practice, such as “member” or “association”.

6.3.1.1 Application for a Collective Mark

In addition to the usual filing particulars, the applicant should state that the application is for a collective mark and submit a copy of the regulations governing the collective mark’s use. The application should also include the following:

- A statement of what class of persons is entitled to use the mark, and their relationship to the applicant. If proof of use is required, the first use dates of the mark and whether the first use was by a member of the applicant should be indicated.

- A statement that the applicant is exercising or will exercise legitimate control over use of the mark by its members.

- A document setting forth the precise manner in which the applicant intends to control use of the mark by its members; specifically, who is authorized to use the mark, how members qualify for membership in the group.

Where required, specimens in a use-based application for a collective mark should be examined to show use of the mark by a member on the member’s goods or in the sale or advertising of the member’s services. [Note that a collective mark is different from a collective membership mark. A specimen for a collective membership mark should readily identify membership, such as a membership card.]

6.3.2 Certification Marks

Certification marks are marks owned by one person and used by others in connection with their goods or services to certify characteristics of their goods or services. Because a certification mark serves to certify characteristics rather than
identify the individual source of the goods or services, an owner should not be permitted to use a certification mark in the course of trade. Where recognized, a certification mark may be used to designate geographic origin, quality, or other origin. Examples of certification marks are “AKC” and “CFP CERTIFIED FINANCIAL PLANNER OF AUSTRALIA”. In general, certification marks are examined in the same manner as other trademark and service mark applications. INTA supports the recognition of certification mark applications.

6.3.2.1 Application for a Certification Mark
If a Trademark Office permits the filing of certification marks, an application to register a certification mark should include, in addition to the general information required in all trademark or service mark applications, statements that support the issuance of a mark to act as a symbol of guarantee or certification and not as an indicator of source or origin of goods and services. For example only, the U.S. requires the following:

- A statement that the mark will be used by a party (parties) other than the applicant, and that the applicant does not or will not engage in the marketing or production of any goods/services to which the mark is applied.

- A statement that the mark will certify the qualities or characteristics of the goods/services and not indicate the individual source of the goods/services.

- At some point during the examination, documentation setting forth the standards or criteria used by the applicant to control use of the mark and to demonstrate that the applicant is engaged in a certified program.

- A certification statement that identifies the characteristics of the goods/services certified or to be certified.

- A statement that the applicant does not and will not engage in discriminatory practices which would bar use of the mark by third parties who meet the standards established by the owner (special attention should be paid to non-governmental entities seeking registration of a mark to certify geographic origin).

6.3.2.2 Requirements for Use-based Certification Marks. A use-based application should provide dates of first use of the mark and a statement that the first use was by the applicant (or a party or parties other than the applicant).

6.3.2.3 Examination of Application for Certification Marks. Specimens should be examined to ensure that the mark certifies a region or other
origin, material, mode of manufacture, quality, accuracy, or other characteristics of such goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

Specimens must be examined to ensure that the mark functions in a way such that the buyers are likely to recognize the mark as a symbol of guarantee or certification.

6.4 Amendment to Application
Applicants should be permitted to amend the formalities data for the purpose of:

- Correcting Errors
- Overcoming Objections

An amendment is a formal change or correction made by an applicant or registrant to any aspect of a pending application or a registration. It may be administrative or substantive in nature, and in the form of a change, an addition, or a deletion. An amendment may also be filed to overcome an objection by the Trademark Office or help resolve a dispute with a third party. Examples include a change of address, a change of ownership, a restriction to the specification of goods or services, and an amendment to the trademark itself.

Unless an amendment expands the scope of the application coverage (e.g., by adding a class of goods or services) an official fee should not be imposed if the amendment is made in response to a requirement issued by, or an error made by the Trademark Office. Trademark Offices often impose an administrative fee if a Registrant submits a voluntary amendment after registration issues.

Depending upon the circumstances, an amendment may be requested in writing, by telephone, or electronically, such as online or by e-mail. In some instances, a Declaration or Affidavit to support the written amendment might be required, for example, if registration is being allowed on an amended basis relating to acquired distinctiveness. However, following the Trademark Law Treaty, formalities such as notarization and legalization should not be required.

Generally, if an amendment is required to correct an administrative error made by the Trademark Office, it should be allowed at any time. Examples include amendment to the applicant’s address, amendment to the classification or specification of goods, or correction of the filing date.

6.4.1 Amendments to the Mark
An amendment to the mark in an application should not be allowed at any time if it would materially alter the character of the mark as originally filed. The general test of whether an amendment is a material alteration is whether the mark would have to be re-advertised in order to fairly give notice to the public for purposes of
opposition or cancellation. Also, in countries where searches are conducted, the addition of an element to a mark that would require an additional search of the office records would constitute a material alteration and should not be allowed. Deletion from the drawing page of informational matter, which is not a component of the mark itself, such as the size, alcoholic content, volume and weight of the product, should be allowed.

6.4.2 Amendments to the Specification
Additions or changes to the specification of goods that broaden the scope of goods as originally filed should be prohibited at all times during prosecution and after registration. Additions or deletions as to words in the specification of goods which do not broaden the original scope should be allowed at all times because it does not prejudice the rights of others.

6.4.3 Amendments to the Classification
If a post-publication amendment to classification is permitted, the mark may be republished at the discretion of the Trademark Office to give formal and proper notice to the public.

6.4.4 Amendments to the Dates of Use
In applications where dates of first use of a mark are required, amendments should be permitted, but if such amendment is made after publication, the mark should be republished to give notice to third parties.

6.4.5 Amendments Affecting Disclaimer
If disclaimers are either required or permitted under the applicable substantive law, a pre-publication amendment submitting a disclaimer, that otherwise complies with local law, should be freely permitted. If an applicant desires to submit a disclaimer after the mark has been advertised, either voluntarily or in response to a requirement by certain Trademark Offices and the amendment is otherwise proper, the amendment should be allowed. If the applicant desires to delete a disclaimer after advertisement (but before registration) either due to clerical error or erroneous requirement by the Examiner, the amendment should be permitted if otherwise acceptable and if the Examiner has jurisdiction, and the mark should be republished. If the Trademark Office allows the amendment, it may either issue a Certificate of Correction or a new Registration Certificate.

6.5 Divisional Applications
INTA supports allowing applicants to divide applications at any stage of prosecution. Once divided, each divisional should be treated as a separate application at examination.

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7 Not all Trademark Offices call for disclaimers. In the UK, for example, an applicant can volunteer a disclaimer or limitation, but the Registry cannot require the disclaimer.
7. ABSOLUTE GROUNDS EXAMINATION
Distinctiveness and functionality are the two primary considerations in absolute examination of an application to register a mark.

7.1 Distinctive Character
Trademark law exposes a fundamental tension between the need for a trademark to be capable of distinguishing the goods or services of the owner from those of others and the need of all traders to describe their goods or services.

Distinctiveness is needed for registration of any sign as a trademark. Marks that are essentially descriptive, should not be capable of being monopolized by one trader (see Section 7.3.2 below). However, a mark which, rather than being descriptive of the goods, is suggestive (i.e. use of a consumer’s cognitive facilities is required to make an association between the mark and the goods or services concerned) should be considered inherently distinctive.

Distinctiveness may be inherent or acquired.

7.2 Functionality
If a proposed mark consists entirely of an essential feature of a product, it should be unregisterable. A single functional element of a combination of elements, however, should not necessarily defeat an application. The application should be denied only if the functional elements dominate the mark.

7.2.1 Word Marks
7.2.1.1 Distinctiveness. Word marks that merely describe the related goods or services do not meet the required level of distinctiveness to be registrable. The following is a discussion of distinctiveness issues related to certain types of word marks:

7.2.1.1-1 Letters and Numerals
Provided that they function to identify source or origin of goods and services, and subject to the following requirements, letters and numerals should be registrable as trademarks. Distinctiveness, and not the total number of letters/numerals in the mark, should be determinative. Such distinctiveness may be inherent or acquired. Alphanumeric marks do not have to be pronounceable to be protected. Letters or numerals should not be registrable if they are either nondistinctive, or deceptively misdescriptive of the nature or quality of the respective goods or services.

The overall distinctiveness of marks incorporating letters and numerals may be enhanced by the addition of stylized font and/or design features. However, where the letters or numerals that form part of a design are nondistinctive or merely descriptive or lack distinctiveness,
a requirement for a disclaimer\textsuperscript{8} of the exclusive use of those letters or numerals apart from the trademark as a whole may be required.

Model designations or code numbers should not be registerable unless they also function as trademarks.

7.2.1.1-2 Laudatory Marks
Laudatory marks contain an expression about the quality of the product or service. Laudatory marks should not be registered absent a showing of acquired distinctiveness.

7.2.1.1-3 Names of Colors
Word marks that consist solely of the name of a single color are likely to lack the required inherent distinctiveness for registerability unless the particular color is unusual or unlikely to be needed for use by competitors for the goods concerned. Generally, if the color itself is needed in the trade, the word should not be registerable even if acquired distinctiveness can be shown.

EXAMPLE OF A WORD MARK FOR THE NAME OF A COLOR FOUND TO BE DISTINCTIVE:

- PEA-GREEN for travel services.

7.2.1.2 Functionality. Word marks are typically not “functional.”

7.2.2 Device (Design) Marks
Absolute grounds are the same as letters and numbers (above) and three-dimensional marks (described below).

7.2.3 Three-Dimensional Marks
7.2.3.1 Distinctiveness. Distinctiveness should be a required element for registration of a three-dimensional mark, just as it is for other types of trademarks. The required distinctiveness can be inherent, i.e. the shape is clearly distinctive, and immediately recognized by the public as a mark, and/or such distinctiveness may be acquired through use.

If a three-dimensional mark is initially rejected as non-distinctive in the examination process, provision should be made for allowing submission by the applicant of arguments and evidence in favor of registration. Where the Examiner determines that the mark, while not inherently distinctive, has acquired distinctiveness, the resulting registration of the mark should provide the same scope of protection as if the mark had been determined to be inherently distinctive.

\textsuperscript{8} Where allowed.
7.2.3.2 Functionality. Many shapes have some utilitarian quality in relation to the goods. However, utilitarianism should not \textit{per se} disqualify a shape from registration as “functional.”

If an objection on the basis of functionality is entered, the applicant should have the opportunity to present evidence, for example, of multiple alternative suitable designs in use in the marketplace, which can be produced at comparable cost. This would tend to rebut the claim that the design in question must be kept available for use by competitors.

7.2.4 Holograms

7.2.4.1 Distinctiveness. As with three-dimensional marks, distinctiveness should be a required element for registration of hologram marks. Distinctiveness can be inherent where the public immediately recognizes the use as a mark, and/or such distinctiveness may be acquired through use.

In addition, if a hologram has two or more views, registration may be refused on the basis that the application consists of more than one mark.

7.2.4.2 Functionality. Holograms that are used for non-trademark purposes prevent the hologram from functioning as an indicator of source. If similar holograms are used on products as anti-counterfeiting devices, consumers may be less likely to perceive use of a hologram as a trademark.

- **EXAMPLES OF HOLOGRAM MARKS FOUND TO BE NON-FUNCTIONAL:**
  - sticker on credit card (American Express)
  - label on electronic media (VF - VIDEO FUTUR)

7.2.5 Color Marks

7.2.5.1 Distinctiveness. In order to constitute a trademark, a color or combination of colors must be capable of distinguishing the goods of the applicant, and must be perceived by the purchasing public as identifying and distinguishing the goods on which it is used and indicating their source.

Although it is not impossible for a single color to be fanciful in connection with goods or services, a single color ordinarily will lack sufficient distinctiveness to be registerable, unless a substantial acquired distinctiveness through past use prior to the filing date is demonstrated. Color combinations may be inherently distinctive, or they may gain distinctiveness through use.

Determining if sufficient distinctiveness exists for registration will depend on the appearance of a mark, including color. For example, a device mark consisting of a circle divided into two colors may possess sufficient
distinctiveness without a showing of acquired distinctiveness. On the other hand, the same two colors individually, apart from the design, would not have the same trademark impact, and would need support from the past use to be registerable.

7.2.4.1 Functionality. For marks consisting of a single overall color the applicant must satisfy the Examiner that the overall color is not functional or generic for the goods/services, such as those colors needed by competitors providing the same goods/services as those of the application.

7.2.6 Sound Marks
7.2.6.1 Distinctiveness. Sound marks are registerable if they are not the only sound made by the operation of the product (i.e., a running motorcycle). Where the operation of a product produces more than one sound, the mark may be registerable if the applicant can clearly show that the sound, although it may be nondistinctive, has acquired distinctiveness. An example would be a toilet flushing sound for plumbing services, which has acquired distinctiveness through use.

7.2.6.2 Functionality. It is recommended that the sound made by goods during their use, and which arises purely as a function of that use, should not be accepted for registration, for example, the sound of a siren does not serve as a trademark for a siren.

EXAMPLE OF A SOUND MARK FOUND TO BE DISTINCTIVE:

- The giggle of a cartoon dough figure for baking goods

7.2.7 Scent Marks
7.2.7.1 Distinctiveness. A scent that is capable of distinguishing the goods or services of the owner from those of others should be capable of registration. A scent mark that is not directly associated with a product or service should be considered distinctive. A scent mark may be registerable if it is inherently distinctive or upon a showing of acquired distinctiveness.

7.2.7.2 Functionality. Many products have scents intended to enhance their attractiveness. Such goods range from cleaning products to perfumes. Potential purchasers are unlikely to regard such fragrances as an indication of origin, and thus it may be difficult to establish adequate distinctiveness. Furthermore, scents that arise from the goods or services specified should not be accepted for registration.

For a scent mark to be registerable, assuming that the mark can be represented properly, an applicant must establish:

- That the scent is used or intended to be used as a trademark.
• That the scent does not arise from the goods or services, but is added or is a combination created by the applicant.

• That the public associates, or will associate, the scent exclusively with the applicant for the goods or services specified.

EXAMPLES OF SCENT MARKS FOUND TO BE DISTINCTIVE AND NON-FUNCTIONAL:

• the scent of a rose as applied to car tires
• the scent of bubblegum for an oil based metal cutting fluid

7.2.8 Flavor Marks

7.2.8.1 Distinctiveness. Distinctiveness requirements for flavor marks are similar to those for scent marks.

7.2.8.2 Functionality. Flavors that arise from the goods or services specified should not be accepted for registration. If a product employs a flavor to mask an unpleasant taste, the flavor is functional and is not protectable as a mark. For a flavor mark to be registerable, assuming that the mark can be represented properly, an applicant must establish that:

• the flavor is used or intended to be used as a trademark
• the flavor does not arise from the goods or services, but is added or is a combination created by the applicant
• the public associates, or will associate, the flavor exclusively with the applicant for the goods or services specified

EXAMPLE OF A FLAVOR MARK FOUND TO BE DISTINCTIVE AND NON-FUNCTIONAL:

• Taste of liquorice for paper goods.

7.2.9 Touch Marks

7.2.9.1 Distinctiveness. While a touch mark may possibly be inherently distinctive (i.e., where the touch characteristic, properly defined, is unusual and unexpected in the context of the goods or services involved), it is more likely that evidence of distinctiveness acquired through use will have to be provided before a touch mark is registerable as a trademark or service mark.

7.2.9.2 Functionality. Where a texture is essential to the use and purpose of the article or which inherently affects its cost or quality, it is not protectable.
Functional touch characteristics are subject to the same exclusions or limitations as functional product configurations or generic word marks.

EXAMPLE OF A TOUCH MARK FOUND TO BE DISTINCTIVE AND NON-FUNCTIONAL:

- velvet textured covering on the surface of a bottle of wine

7.2.10 Moving Image Marks

7.2.10.1 Distinctiveness. Moving image marks (including gesture marks) are treated as device marks and may be registerable if inherently distinctive or offer a showing of acquired distinctiveness. Moving images that are distinctive, and not functional or ornamental should be eligible for registration.

7.2.10.2 Functionality. Moving image marks, provided they function as indicators of source or origin, should be evaluated for registerability under the same criteria as design marks. However, a distinction must be made between a moving image that does not function as an indication of source of origin, i.e., one that comprises a copyrightable work (such as a motion picture) and a moving image which functions as an indication of source or origin and is therefore eligible for registration as a trademark. Where separate pictures are submitted, the specimens cannot depict more than one mark.

EXAMPLES OF MOVING IMAGE MARKS FOUND TO BE DISTINCTIVE AND NON-FUNCTIONAL:

- A television station’s moving logo
- a man tapping the side of his nose in a knowing way

7.3 Distinctiveness Issues

7.3.1 Generic Terms
Terms which are generic should not be considered the subject of a trademark and should never be registered. For purposes of examination, a generic “mark” is a common descriptive term for a particular good or service. Such generic terms can include former trademarks (such as ESCALATOR) that are in common use as the name of a type of product by multiple sources. Such terms do not function as source identifiers, and should be left free for use by competitors. Examiners should not consider marks to be generic if an applicant can prove that the mark covers merely the preferred “brand” of a particular type of service, i.e., there is still recognition by consumers of the mark as a particular source of goods or services. This will allow for preservation of well-known marks, which are in danger of becoming generic. Where an applied-for mark is well known through extensive use, but has never been registered, consideration can be given to
policing efforts by the applicant as relevant in an evaluation as to whether the mark is presently generic, or is still functioning as a trademark to identify source.

7.3.2 Descriptive Terms

7.3.2.1 Definition. Descriptive terms are those which (i) specify the name of the goods or services, or (ii) describe an ingredient, quality, characteristic, feature, purpose, function or use of the specified goods or services. The reason for assessing whether a term is descriptive for purposes of registration is that, in the course of trade, anyone should be able to use words which describe a product or service.

7.3.2.2 The Mark Must be Examined as a Whole. The mark cannot be dissected and its individual parts be examined separately for descriptiveness. The mark will be considered descriptive if, as a whole, it describes an ingredient, quality, characteristic feature, purpose or use of the specified goods or services. Certain elements of the mark may be disclaimed (where allowed), but it is the overall level of distinctiveness, which must determine whether the mark is registrable.

7.3.2.3 No Imagination. The Examiner should not need to exercise his/her imagination to determine the type of goods or a characteristic of the goods described by the trademark. If such thinking is needed to generate a descriptive meaning, it is likely that the mark has enough distinctiveness to be registrable.

7.3.2.4 Test. The test to be applied is: Does the average consumer understand the term to describe an ingredient, quality, characteristic, feature, purpose, function or use of the goods or services of the applicant?

7.3.2.5 Examination of Goods or Services. The Examiner should examine the goods or services for which registration is sought and consider the manner in which the mark is used or intended to be used to establish a determination of descriptiveness. Also of relevance is the actual or likely effect of use of the mark on the average purchaser of the goods or services. Sources used in examining for descriptiveness will include dictionaries, databases, Internet searches, industry literature, surveys, and other such sources to show general understanding of the words/designs of the mark.

7.3.2.6 Acquired Distinctiveness. A descriptive term can acquire distinctiveness through use; evidence of acquired distinctiveness must be shown in order for a descriptive term to be registrable. A generic term is never registrable because it is incapable of being or becoming distinctive of the goods or services of one person or business. The test for determining if a term is generic involves assessing its primary significance to the relevant public (see Section 7.3.1 above).
7.3.3 Surnames
A surname should be capable of registration and protection as a trademark provided it functions primarily as an indicator of source or origin with respect to the relevant goods/services, and therefore, is not considered primarily merely a surname.

If a word that is a surname also has another meaning in the applicable language, the mark is not primarily merely a surname and thus a surname objection should not be raised by the Examiner.

7.3.3.1 The Surname Alone. In evaluating whether the primary significance of a term is a surname, rather than a source indicator, reference resources such as telephone directories, census data, Internet searches, etc., should be taken into account.

The same considerations should be applied when the mark under consideration appears with grammatical elements, such as plurals or possessives. Once evidence of surname significance is produced by the Examiner, the burden should shift to the applicant to prove that the surname has acquired distinctiveness, such that the surname significance is not the primary significance of the term. Such proof could take the form of consumer surveys or affidavits, sales and advertising evidence, and so forth, which demonstrates that the consuming public views the term as a trademark.

7.3.3.2 Combinations. When a surname appears in combination with other elements, overall distinctiveness should be assessed. The commonness of the surname should still be a factor.

7.3.3.2-1 The Surname Together With Other Elements of a Name, Including Multiple Surnames, and Personal Names. The presence of elements of a name other than the surname itself could serve to make the mark more distinctive. The more unusual the accompanying element, the more likely the surname is a mark and will be registerable. The test remains whether the primary significance of the mark as a whole is a surname, or functions as a source identifier.

7.3.3.3 Phonetic Equivalents. A deviant spelling of a surname should be regarded as having more distinctiveness than the surname itself. If the word happens to be, at the same time, a deviant spelling of a surname and a dictionary word, and it is likely to be primarily understood in the actual context as the dictionary word, a surname objection should not be raised.

7.3.3.4 Surname Combined With Other Elements. An additional element will affect the primary significance of the combination to an extent
depending on its own distinctiveness. Mere addition of a description of the goods or services on or in connection with which the mark is applied should not be considered to add distinctiveness. A design or description of some inventiveness with regard to the goods or services may increase the trademark significance and decrease the surname significance. As the added element moves towards something that would be registerable in its own right, and would be viewed by the public as the dominant portion of the mark, a surname objection ceases to be applicable.

7.3.4 Geographical Marks
INTA supports the protection of geographical indications as an intellectual property right, but INTA also firmly advocates that such protection must not prejudice other existing intellectual property rights, including trademarks. Harmonious co-existence of geographical indications and trademarks is possible as long as conflicts between these rights continue to be resolved pursuant to the well-established intellectual property principles of territoriality, exclusivity and priority. The priority principle espoused by INTA means that a validly registered prior mark should prevail against a later geographical indication and vice versa.

In evaluating whether to register a term demonstrably having geographical significance, the Examiner must initially evaluate whether the average consumer would connect the term with the geographical origin of the goods/services claimed in the application. In this evaluation, the Examiner should consult appropriate geographical dictionaries, atlases, and databases related to the goods to determine if there is an association between the goods and the geographical location.

7.3.4.1 Geographical Terms that do not Indicate Geographical Origin of Goods and are Arbitrary in Relation to the Claimed Goods/Services. Many marks are geographical terms but do not serve as an indication of the geographical origin of the goods, or relate to the goods in any way. In such cases, registration should be allowed without proof of acquired distinctiveness.

EXAMPLE - NORTH POLE for Bananas

Here the mark, although it is well known as a geographical place does not serve to relate the goods to the place in the mind of the consumer, and therefore does not serve as an indication of geographical origin of the goods. Therefore, the mark should be treated as an arbitrary designation, which should be registered without proof of acquired distinctiveness, because any geographical meaning is clearly not related to the goods. Additionally, this category includes other such marks where any geographical connection between the goods and the place is not perceived by the average consumer.
Also illustrative of this category of marks are names of rivers, seas, lakes, bays, oceans, mountain ranges, streets, roads, towns, etc., which are registerable without proof of acquired distinctiveness unless viewed by the average consumer as indicative of the geographical origin of the claimed goods or services. Where the river, sea, lake, etc., has a reputation for a particular good, or where a region is known by the river, sea, lake, etc., of the region, an applicant should either: 1) not be granted rights to that name, or, 2) should be required to include a disclaimer (where applicable) for the geographic place.

7.3.4.2 Geographical Terms that do not Primarily Indicate Geographical Origin, but Suggest a Desirable Quality of the Claimed Goods/Services.
Other geographical terms suggest, for example, that the product is stylish or of high quality, but do not serve primarily to indicate the geographical origin of the goods. In such cases, registration is allowed without proof of acquired distinctiveness.

EXAMPLE - HYDE PARK for Men’s Suits

7.3.4.3 Geographical Terms that Primarily Describe the Geographical Origin of the Goods.
Where a mark serves primarily to indicate geographical origin of the goods, and in any case where the term is needed by multiple producers of goods in the region to indicate origin due to a reputation in the region for producing goods of a particular character or quality, registration should not be allowed, even if some acquired distinctiveness could be demonstrated. In addition to current needs, consideration should be provided prior to granting rights where there is a strong likelihood of others needing to use the name of the geographic place in the future or as the region develops.

EXAMPLE - FLORIDA for Oranges

Particular care in this regard should be taken where the goods claimed in the application are natural produce.

7.3.4.4 Geographical Terms that Primarily Describe or Misdescribe the Source or Origin of the Goods, But May Not Be Needed For Use By Multiple Producers.
Where the term may not be needed by multiple producers in the area but serves primarily to describe the geographical origin of the goods, OR the term is a place which has a reputation in the goods or services claimed, registration should be allowed only with proof of acquired distinctiveness. The larger the population of the place concerned and/or the stronger the connection between the goods and the geographical location, the more acquired distinctiveness will have to be demonstrated.
EXAMPLE - PARIS for Jeans

Because Paris is known as a center for fashion and style, the mark PARIS for clothing or related services is likely to primarily describe (or misdescribe, if not originating in Paris) the origin of the goods to the average consumer. Therefore, a showing of a high degree of acquired distinctiveness should be required before registration is allowed, in order that the mark primarily indicates to the average consumer the source of the goods, rather than the geographical location, i.e., functions as a trademark.

7.3.4.5 Additional Protection for Geographical Indications for Wines and Spirits. When the claimed goods include wines or spirits, Article 23 of the TRIPs Agreement requires that registration be refused for trademarks that comprise or consist of a “geographical indication.” This rule applies even if the trademark does not, in the Examiner’s judgment, deceive the purchasing public as to the place of origin of the goods. Further, the rule applies even though the geographic indication may not be recognized in the examining Trademark Office, provided the geographic indication is recognized in its country of origin.

This rule applies only to terms that are comprised of or contain geographical indications. It does not disqualify a trademark for wines or spirits from registration simply because it has a geographical component.

A “geographical indication” is a term designated under the laws of its country of origin to identify goods (including wines or spirits) from which “a given quality, reputation or other characteristic...is essentially attributable to its geographic origin.” (TRIPs Article 22). TRIPs exempts from this rule trademarks applied for, or where rights have been acquired through use in good faith, either before the date of TRIPs or before the geographical indication was protected in its country of origin. (TRIPs Article 24 (5)).

EXAMPLE: LAKE NIAGARA for wine would not be affected by this rule because the registration issued in 1987.

EXAMPLE: BOUNTIFUL BORDEAUX for wine not originating in the Bordeaux region of France would not be registerable because the term “Bordeaux” is a geographical indication for wine.

7.3.5 Family Marks
A family of marks should be recognized. In order to constitute a family of marks, a group of marks must have a recognizable common characteristic and be used in such a way that the public associates not only the individual marks, but also the common characteristic of the family of marks, with the trademark owner. Simply
using a series of similar marks does not of itself establish the existence of a family; there must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods.

A family of marks should be recognized when the pattern of usage of the common element is sufficient to be indicative of the origin of the family.

In order to claim a family of marks, an owner must demonstrate that the mark(s) asserted to comprise the family has been used and advertised in promotional material or used in everyday sales activities in such a manner as to create common exposure and thereafter recognition of common ownership based upon a feature common to each mark.

7.4 Modification by Disclaimer

7.4.1 The Purpose of Disclaimer

In territories where disclaimers are permitted or required, disclaimers may serve as a means of preventing one party from obtaining exclusive rights in certain nondistinctive components of a mark that otherwise would be distinctive and registerable as a whole. Examples of such nondistinctive components that may be incorporated in an otherwise distinctive mark include descriptive or generic matter, terms common to the trade, and geographical terms or surnames not having trademark significance.

7.4.2 Voluntary and Mandatory Disclaimers

Disclaimers may be given voluntarily by the applicant in its application to register the mark, provided the mark, as a whole is not disclaimed. Also, Examiners, in some territories, may ask for the disclamer of any component of a trademark which is not independently registerable, for example, due to its descriptiveness or its being generic (see Section 7.1).

7.4.3 The Effect of Disclaimers

Disclaimers are ineffective in overcoming objections that: (i) the whole of a mark is descriptive or generic; or that (ii) the mark is scandalous, deceptive, or confusing.

Disclaimers do not prejudice or affect the right of a registrant (a) to defend its mark through passing off or other common law remedies or unfair competition or (b) to seek registration, without disclaimer, of a previously disclaimed component.

A disclaimer is a concession that the disclaimed component is not per se distinctive, and is one factor to be weighed in determining confusion. However, in an infringement analysis, it is the totalities of the components of a mark that must be considered, including any disclaimed components.
7.4.4 Disclaimer of Descriptive or Generic Terms

7.4.4.1 Form of Disclaimer. Disclaimers can be entered in the form:

“The applicant disclaims the right to exclusive use of [disclaimed component] apart from the mark as a whole.”

Each descriptive or generic unit, of however many components, should be separately disclaimed.

EXAMPLE: TOFFEE and CRISP should be separately disclaimed in the mark TOFFEE CRISP, but the words RED WINE should be disclaimed as a phrase in the mark JUMBO'S RED WINE.

An example of a disclaimer involving a representation is:

“The applicant disclaims the right to exclusive use of the representation of wine bottles per se apart from the mark as a whole (where the application covers wine and wine bottles appear in the mark).

7.4.5 Use of Hyphenated and Compound Words and Disclaimers

A disclaimer of a descriptive or generic portion of a mark may be considered more appropriate where the term is separated from the remainder of the mark.

EXAMPLE - Disclaimer may not be required for WINTERWINE or WINTER-WINE, although WINE must be disclaimed for WINTER WINE (all for wine).

7.4.6 The Extent of a Disclaimer

Any or all components of a mark may be disclaimed separately, provided there is something distinctive about the mark as a whole.

EXAMPLE: TOFFEE CRISP for a candy bar (each word disclaimed separately).

To avoid cluttering the Register, but subject to context, disclaimers should not be requested for insignificant words, prepositions, articles, conjunctions, and the like, for example, “brand”, “product”, “in”, “and”, “a”, “company”, “Ltd.”, “Inc.” and “the”.

7.4.7 Disclaimers and Proof of Acquired Distinctiveness

Disclaimers are not required for components that have been registered independently upon proof of distinctiveness by the same applicant (or its predecessor-in-title) for the same goods or services.

Disclaimers may be suggested by the applicant when all the words of the trademarks are non distinctive and the trademark as a whole is non distinctive.
7.4.8 Trends in Disclaimer Practice

The practice of requiring disclaimers has been abolished by certain countries (such as Australia). As of the publication date of these Guidelines, INTA is reviewing recommendations as to voluntary and required use of disclaimers.

7.5 Assessment of Acquired Distinctiveness

Distinctiveness is required for registration of any word or design as a trademark. If the mark is not inherently distinctive, in many cases, it can be registered upon a showing of acquired distinctiveness. A mark, which, rather than being descriptive of the goods, is suggestive (i.e., use of a consumer's cognitive facilities is required to associate the mark with the nature of particular type of goods or services), should be considered inherently distinctive. Registration of suggestive marks should be allowed without a showing of acquired distinctiveness. A claim of acquired distinctiveness may apply to a portion of a mark. The standards for establishing acquired distinctiveness are the same whether the claim of distinctiveness pertains to the entire mark or to a portion of it.

Examiners may consider the following as criteria of acceptance of a claim of acquired distinctiveness by the applicant:

- Sales, volume, or revenue from services;
- Length and scope of use prior to filing (for example, in the U.S., proof of five years of substantially exclusive and continuous use of the word as a mark may be accepted as prima facie evidence that the mark has acquired distinctiveness);
- Geographical area of sales of goods or provision of services;
- Extent of advertisement featuring the mark;
- Degrees of popular awareness among the consuming public that the mark mandates from the applicant (by submission of a survey(s), statements by customers including retailers, etc.); and
- Ownership of prior registrations for the same mark in connection with the same or similar goods or services.

7.6 Scandalous Marks

Provided the “scandalous” term is capable of functioning as a trademark, the test for registrability should be whether a substantial body of the population would understand the mark applied for to consist of scandalous, immoral or offensive matter in relation to the respective goods or services.

If the Examiner believes that the mark falls within the above definition, an objection should be raised and the burden of proof shifted to the applicant to provide satisfactory evidence to the contrary.
7.7 Misdescriptive Marks
The expression “misdescriptiveness” is to be construed to exclude from registration trademarks that (i) misrepresent the character or nature of the goods/services **AND** (ii) where from the facts of the application (trademark/goods), it is likely that purchasers of the goods/users of the services will be deceived. Such trademarks are termed “deceptively misdescriptive.”

An important criterion is whether there is any real potential for deception of the public. The test is whether there is a real prospect of a purchaser of the goods/user of the service would be misled as to the characteristics and or nature of the goods/services. This would include a false association with a well-known product, which is not connected, to the product in question.

In order to determine whether a trademark is misdescriptive, it is first necessary to determine whether the term is descriptive of some goods/services. The test may be whether the trademark (or a term within the trademark) conveys an immediate idea of, for example, an ingredient, quality, characteristic, function or feature of the goods or services. If the term immediately conveys such an idea, but the idea is false, although plausible, then the trademark is deceptively misdescriptive and is unregistrable.

It is important to consider whether the idea is plausible. Arbitrary or fanciful trademarks should not be excluded from registerability by the application of this test.

A trademark may be misdescriptive without being deceptively misdescriptive. The trademark will only be deceptively misdescriptive if purchasers of the goods/users of the services are likely to take literally the misdescription.

A more detailed test may involve establishing:

- Whether the trademark misdescribes the goods; and if so,

- Whether a reasonable prospective purchaser is likely to take literally the misdescription.

Assessing this may involve establishing whether the misdescription would materially affect the decision to purchase the goods or utilize the services.

Where the trademark explicitly or implicitly misdescribes:

(a) Place names or devices of a geographical nature where the place has a reputation for the goods or services,

or
(b) A particular kind, quality, quantity, intended purpose or other characteristic, and the goods are not restricted to the goods of that origin or characteristic, then, subject to a proviso that there must be real potential for deception of the public, an objection should be raised.

Where an objection is raised on (a), the registration should be refused for the goods or services having their reputation in the place name or devices of a geographical nature. Where an objection is raised on (b), acceptance may be obtained after suitable restriction of the goods (subject to the distinctiveness of the trademark as a whole).

7.8 Flags, Coats of Arms, Emblems, Official Signs, Abbreviations, and Names of International Intergovernmental Organizations
There are provisions in the Paris Convention Article 6ter regarding the registerability of flags, coats of arms, emblems and official signs, etc. as trademarks or elements of trademarks. Article 6ter concerns trademarks, but its purpose is not to regulate their protection as subjects of industrial property but rather to exclude them from becoming such subjects in certain circumstances. The member states of the Paris Convention are free to apply these provisions also to service marks.

A trademark may not be registered if it includes coats of arms, flags or other official emblems, abbreviations, names or symbols of intergovernmental or international organizations, official seals, signs or hallmarks, the use of which is forbidden by law without authorization by the competent authority. Examples of abbreviations of such names are EFTA, UNESCO and WHO.

The competent authority referred to here is that of the country or state whose emblems, official signs and hallmarks are involved. These authorities may allow the use of such emblems, signs or hallmarks in certain trademarks, probably of their own citizens.

8. RELATIVE GROUNDS EXAMINATION
If a Trademark Office conducts a relative examination for similar prior marks, it is recommended that, rather than determining likelihood of confusion based solely upon classification of goods/services, the examination of marks should include an analysis of the actual conditions under which the purchasing public encounters the goods/services, under the respective marks in the marketplace.

8.1 Search - Compiling a Group of Similar Marks
If a mark ("claimed mark") meets registerability requirements following absolute examination, a search should be undertaken to determine the existence of similar marks in respect of goods/services identical or related to those of the application of the claimed mark. Similarity of marks should be determined according to the factors listed below. This search should include marks which are (i) currently registered in that country, or (ii) the subject of prior applications for registration in that country. Further, any similar well-known marks, which are known to the Examiner, whether or not registered, or the subject of a prior trademark application(s), may be included
with the marks located in the search, and conflict can extend beyond the goods/services for which the mark is well known.

If a similar mark is located by the search (“located mark(s)”), the Examiner must, considering all marks in their entireties, evaluate whether the goods to be sold or services to be provided under the claimed mark are likely to be confused as authorized by the owner of the located mark(s) or originating from the same source as the goods sold or services provided under the located mark(s). If in the Examiner’s judgment, confusion of the relevant segment of the purchasing public is likely to occur according to the standards listed below, the located mark(s) should be cited to the applicant in a written statement as a bar to the registration of the claimed mark.

8.2 Examination - Factors Involved in Assessing Likelihood of Confusion

The suggested factors to be included in an evaluation of likelihood of confusion are as follows:

8.2.1 Comparison of the Appearance, Sound, Connotation and Commercial Impression of the Marks

Marks should be compared in their entirety, and not dissected into elements unless these elements are likely to cause confusion as to the source of the goods/services associated with the respective marks. For example, similarities in the beginnings of the marks, and differences of only one or two letters between the marks should be taken into account.

It is proper to take into consideration the relative strength of a prior mark in assessing whether registration of a later applied-for mark is likely to cause confusion with the prior mark. The existence of an identical or closely similar distinctive mark should normally bar registration of a subsequently applied-for mark, unless other factors, such as, but not limited to, the nature of the pertinent goods or services, channels of trade, and sophistication of the consumer, are such that confusion would be unlikely.

If a located mark shows additional matter, including but not limited to a house mark, or matter which is descriptive or suggestive of the goods or services, it should not automatically lead to a finding of non-confusion. The same thoughtful analysis should apply where a country has adopted a likelihood of association provision concerning prior marks.

When comparing composite marks composed of both words and devices, either portion may generally be considered to be dominant, and there should be no definite rule on this issue. The strength or attractiveness (i.e., comparative size of the device element and meanings) of the word and the device portions of the particular mark(s) in relation to the goods or services must be evaluated. In some cases, a distinctive design may clearly function as the dominant portion of a mark, barring registration of all marks containing a confusingly similar design, even if the word portions of the marks are clearly different.
8.2.2 Fame of the Earlier Mark
It is highly recommended that, in the spirit of Article 6bis of the Paris Convention, well-known or famous marks of domestic or foreign third parties known to the Examiner even if not registered, should be included in the confusion analysis. Further, in the spirit of TRIPs Article 16(3), a very well known or famous similar mark, whether or not registered in the country of examination, should be cited against any claimed mark covering goods/services in all classes, in order to prevent confusion, as well as dilution of such well-known or famous marks.9

8.2.3 Comparison of Goods and Services
Another factor in determining whether granting the registration of similar marks is likely to lead to confusion among the purchasing public is a comparison of the similarity or dissimilarity and type of goods or services described in a located mark.

However, there should be no per se refusal to register because two similar marks are to be used on or in connection with goods/services which are similar or are in the same or related classes. In a fair evaluation of all relevant confusion factors, including actual conditions in the marketplace, the factor of similar or related goods/services may not be dispositive.

Additionally, where the goods of the claimed mark and located mark(s) are dissimilar, the Examiner should consider in the confusion analysis that in some cases (for example, clothing and fragrance), goods emanating from a single source are sold commonly to the same purchaser group in a complementary or pre-packaged way.

8.2.4 Comparison of Trade Channels
This factor should measure the likelihood of whether confusion is likely when the same purchasers will encounter the goods/services of the claimed mark and the located mark. The facts of each case should be evaluated concerning confusion. No specific formula of products meeting in the trade, manufacturing, wholesaling or retailing market should per se prohibit concurrent registration of the similar marks, whether or not the goods upon which the marks being used, are related. For example, in very sophisticated markets or for very expensive items, goods may generally be sold under somewhat similar marks without consumer confusion, as compared with inexpensive goods, which are more likely to be purchased on impulse, without careful examination by the purchaser as to source or origin.

8.2.5 Status of the Register and Concurrent Use

9 Because dilution is not generally considered to be an issue related to examination for registerability, these Guidelines do not discuss dilution. INTA has additional publications on the subject of dilution which may be helpful and of interest in this regard.
Clearly, if multiple marks containing a similar word or design element can and have co-existed on the Register in the name of different proprietors without apparent confusion among the relevant purchasers, such evidence is in favor of an applicant for registration of an additional such mark. In countries having provisions for opposition proceedings, the owners/users having earlier rights than the applicant will have an opportunity to object to additional registrations.

It is recommended in jurisdictions where no search of the Register is conducted during examination, and no opposition is allowed, that notice of the mark to be approved for registration be forwarded to the earlier owner(s), or made available publicly, prior to approval for registration. Earlier owners would thereby have notice of a potentially confusing mark, which could be objected to according to the provisions within the jurisdiction, or could later be the subject of a suit for injunctive relief in a court proceeding.

8.2.6 The Variety of Goods on Which a Mark is or is not Used (House Mark, “Family” Mark, Product Mark)

The owner of a house mark used on a wide variety of products, or of a family of marks used on goods sold and advertised together, may be considered as having more latitude to exclude second comers from the registration of similar marks than the owner of an ordinary mark which is not well known. This is especially true if the applied for mark has not already become well known through use at the time of the application.

8.2.7 Any Other Established Fact Probative on the Issue of Whether the Claimed Mark is Likely to be Confused with the Cited Mark(s)

The mark may be examined for any other fact probative issue to determine a likelihood of confusion with cited marks.

9. OBSERVATIONS PROCEDURE / LETTER OF PROTEST

9.1 General

Third parties may bring to the Trademark Office’s attention facts that would support a refusal of registration on absolute grounds, through certain mechanisms, such as the observations procedure of the CTM or letter-of-protest practice in the United States (“Protest”). The third party does not become a party to the action.

With the advent of online search capabilities, an administrative procedure for lodging of Protests from third parties who object to the registration of marks in pending applications should be available. A Protest should not be used to delay registration or to present purely adversarial arguments. A Protest should not be used as a means to present arguments more appropriately presented in an opposition proceeding.

A Protest is necessary to permit third parties to bring to the attention of the registry facts which could affect or prevent registration of the mark. A Protest should contain proof and support of the information regarding the facts set forth as to non-registerability.
Acceptable reasons on which to base a Protest include:

- The term is generic
- The term would cause a likelihood of confusion with a registered mark
- Pending litigation relevant to the registerability of the mark is underway

If the administrative body denies the Protest, the protester should be able to pursue remedies otherwise available, such as an opposition proceeding. A Protest should not stay the time period for filing an opposition.

A procedure should be available for petitioning the denial of a Protest.

9.2 CTM System
Article 41 of the Council Regulation (EC) No 40/941 of 20 December 1993 on the Community trade mark, foresees the possibility for any third party to file observations also known in other countries as a letter of protest.

Article 41: Observations by third parties

1. Following the publication of the Community trade mark application, any natural or legal person and any group or body representing manufacturers, producers, suppliers of services, traders or consumers may submit to the Office written observations, explaining on which grounds under Article 7, in particular, the trade mark shall not be registered ex officio. They shall not be parties to the proceedings before the Office.
2. The observations referred to in paragraph 1 shall be communicated to the applicant who may comment on them.

If a third party believes that a trademark should not have been accepted in regard to absolute grounds, it can file observations to the OHIM by means of a simple letter. The OHIM will review the letter and determine whether it raises serious doubts as to the registerability of the trademark. If it considers that it raises serious doubts then it will reopen examination of the trademark.

Important remarks:

- the deadline to file the observations by third party is fixed and the observations must be filed prior to the opposition deadline.
- Once the third party has filed the observations it is not a party anymore to the proceedings. If serious doubts have been raised the proceedings will only be between the CTM Applicant and the OHIM.
- As the proceedings will only be between the CTM Applicant and the OHIM, even if the Applicant obtains from the third party a declaration stating that the trademark does not raise serious doubts anymore, this letter will not stop the proceedings.
10. CONDUCT OF THE DIALOGUE BETWEEN TRADEMARK OFFICE AND APPLICANT

10.1 Applicant's Opportunity to Overcome the Examiner's Citation of Similar Marks

After the submission by the Examiner of marks believed to be confusingly similar, the applicant for registration of the claimed mark must then be given an opportunity to rebut the Examiner's determination of the non-registerability of the claimed mark, by submitting to the Trademark Office evidence that no likelihood of confusion exists. Doubt in the Examiner's mind should be resolved against the second comer applicant, which has a duty to avoid confusion in its choice of marks.

10.1.1 Amendment

If local law allows, there should be provision prior to publication for the applicant to amend the form of the claimed mark, if, in the Examiner's view, such amendment would decrease or eliminate any likelihood of confusion. However, no amendment should be allowed which materially alters the character of the mark. This would provide for elimination of any likelihood of confusion without need for the applicant to lose its current priority date, or go to the expense of filing a new application. (See Section 6.4 above).

10.1.2 Argument

The applicant should have an opportunity to submit specific written arguments that the factors and evidence considered in a confusion evaluation have not been properly evaluated by the Examiner, and that confusion is therefore not likely.

Also, provision should be made for a telephone or personal interview with the Examiner wherein it is possible to present oral arguments on non-confusion.

Additionally, provision should be made for submission of physical or documentary evidence, including affidavits of persons with actual knowledge of the goods/services concerned. Such evidence may not have been initially available to the Examiner, but may demonstrate that under a fair evaluation of the factors to be considered, confusion is not likely to occur.

10.1.3 Consent

A Trademark Office may decide, if local legislation permits, to accept a straightforward letter of consent for registration of a claimed mark from the owner of a cited mark.

Alternatively, where the applicant and the owner of the cited mark agree that no confusion is likely to occur, provision should be made for evidence in the form of a written consent by the owner(s) of the cited mark(s) which illustrates that, in spite of a fair evaluation of the confusion factors on the basis of evidence available to the Examiner, the applicant's mark should be registered. Such consent may include the following factors, where applicable, in each case:
• That a significant period of concurrent use has passed with no evidence of actual confusion among the relevant purchasing public;

• That the applicant’s goods/services are distinct from the goods/services of the cited marks;

• That the trade channels and/or the purchaser groups are different;

• That the applicant and the owners of the cited marks agree not to use the mark of the other on their own goods/services, and agree not to use their own mark on the goods/service of the other;

• That if confusion should occur, the owners of the respective marks will work together and take reasonable action(s) to promptly obviate such confusion;

Inclusion of any other relevant factors illustrating that in this specific case, confusion is not likely to occur.

10.1.4 Provision for Appeal
Where the applicant has presented all of its arguments and evidence against likelihood of confusion, but the Examiner issues a final refusal to register the claimed mark, an appeal to a higher authority should be available to the applicant, at which appeal the evidence on likelihood of confusion is evaluated de novo, where permitted by law.

11. PUBLICATION
Once an Examiner approves an application, arrangements should be made for publication of the application for opposition purposes.

11.1 Details to be Included
The publication should include:

• A representation of the mark
• Full details of the applicant
• A full list of goods and/or services specified
• Details of any disclaimer, limitation or condition of registration
• The date of application
• The date of first use, if applicable
• Any convention priority claim
• An indication, if applicable, that the application was approved on the basis of distinctiveness acquired through use

12. EXAMINATION OF OPPOSITIONS
In addition to the recommendation that marks can be examined for inherent registrability and conflict with prior marks before publication, it is also recommended that a period exist for inter partes opposition proceedings. The Table in Section 5. provides examples of
opposition policies adopted by Trademark Offices as of 2007. These policies are subject to change.

12.1 Opposition Proceedings
Prior to registration of a trademark, there should be an opposition period of at least one to three months either as of right, for good cause or on consent, with the possibility of extending the period on consent for a limited period not to exceed two additional months (in some countries, a “cooling off period”), to permit the parties to settle without the necessity of proceeding with an opposition.

12.2 Standing/Entitlement
Any person or entity having a genuine interest, i.e. having rights in:

- a mark which is potentially conflicting or may be damaged by registration of the published mark;
- a mark which has already been used and is considered to have caused actual confusion with the goods or services of the opposer’s mark.

Additionally, persons who show that they would be damaged by registration of a published mark on the basis of inherent non-registrability, (i.e., genericness, mere functionality, mere descriptiveness, etc.) or on the basis of fraud or dilution, should also have standing to oppose. Payment of a uniform fee (without discriminating between national and non-national opposers) should be required to deter frivolous oppositions.

Alternatively, Trademark Offices could decline to require a showing of standing in the interest of preserving the integrity of the Register.

12.3 Notice/Proceedings
The nature of the Notice of Opposition will be a function of how a Trademark Office decides oppositions. In many jurisdictions, an opposition is similar to a civil trial, with various filings due over the course of time, with a decision being rendered by a board of judges (referred to in this Section as a Board Opposition). In other jurisdictions, an opposition is similar to a response to a formal refusal to register a mark, with a decision being rendered by an examining attorney (referred to in this Section as an Examiner Opposition). The proceedings should be available to the public.

For Board Oppositions, the Notice of Opposition should be filed with the Trademark Office and consist of a short and plain written statement signed by the potential opposer or its legal representative. The Notice of Opposition should disclose the name and address of the opposer, the serial number or registration number of the mark being opposed, and the ground(s) for opposition. The opposing party should pay the fee to institute the proceeding, but each party should pay its own costs thereafter.
For an Examiner Opposition, the Notice of Opposition should be a more comprehensive written statement, which includes all of the information one would find in an Board Opposition plus any evidence the opposing party wishes to put on the record.

12.4 Service
The Notice of Opposition should be promptly served on the applicant. All filings submitted to the Trademark Office thereafter should be promptly served on the other party. The fact that an opposition has been filed against a mark should be published by the Trademark Office so as to notify any interested third parties.

12.5 Answer
Upon receipt of the Notice of Opposition, the applicant should be given a minimum period of time, such as 30 or 60 days, in which to answer or seek dismissal, with the possibility of extending such time period on consent, and on approval by the Trademark Office, so as to permit the parties to attempt a settlement.

As with the Notice of Opposition, the nature of the answer will be a function of how the Trademark Office decides oppositions. For Board Oppositions, an answer should state in short and plain terms the applicant’s defenses to each claim asserted and admit or deny the averments upon which the opposer relies. If the applicant is without knowledge or information sufficient to form a belief as to the truth of an averment, applicant should so state, which will serve as a denial. An answer should contain any affirmative defenses.

In an Examiner Opposition, an answer should include all of the information one would find in an answer in a Board Opposition plus any evidence the defending party wishes to put on the record. The opposing party should be allowed a period of time, such as 20 days, within which to file a surreply, which should include evidence in support of the arguments presented in the surreply.

12.6 Default
If the applicant fails to respond, this should be viewed as a possible lack of interest on the part of the applicant to proceed with the application. Procedurally, when an applicant fails to answer, INTA recommends that the Trademark Office either: 1) mail a notice of default to the applicant or publish a notice for a period of 30 to 60 days; or 2) mail notice of the projected date of decision for the case and render a decision in the matter. Absent a showing of good cause for the lack of a timely response, the opposition should be sustained.

12.7 Amendment of Opposition Pleadings
There should be a procedure for amending opposition pleadings. Such amendment should be initially as of right, with a provision for amendment pursuant to motion later in the proceedings.
12.8 Procedure
Except as otherwise provided, and wherever applicable and appropriate, procedure and practice in *inter partes* proceedings shall be governed by the civil rules that apply in the jurisdiction in which the Trademark Office resides.

12.9 Consolidation of Proceedings
Consolidation of proceedings should be permissible only where the cases to be consolidated involve the same or related parties and the issues are the same or virtually identical. For example, consolidation may be appropriate where a word mark and a composite mark (including the word mark) of the same applicant are published together. We do not recommend consolidation of multiple party oppositions where several unrelated entities have opposed the same application, although it may be preferable to have oppositions against the same application heard by the same examiner or board of examiners.

12.10 Suspension
There should be a procedure for suspension of the opposition with consent of the parties. Suspension should be available if (i) a party or parties to a pending case are engaged in a civil action or another trademark appeal proceeding before the same Trademark Office which may have a bearing on the case; (ii) there is pending before the Trademark Office a motion which is potentially dispositive of the case; or (iii) there is good cause, upon motion or a stipulation of the parties approved by the Trademark Office.

12.11 Evidence
In an Examiner Opposition, evidence should be submitted in conjunction with the Notice of Opposition, the answer, and the surreply.

In Board Oppositions, the submission of evidence shall be as follows:

12.11.1 Timing of Submission
Offering of evidence into the opposition proceeding should be subject to time limits of 180 days. If the opposer/opponent fails to enter evidence within the set limit or any permitted extension, the opposition should be deemed abandoned. Entry of evidence on the part of the applicant should be optional, as the burden in opposing a published mark is on the opposer. The applicant must confirm continued interest in the application after the filing of the opponent's evidence in order to avoid abandonment of the application.

Alternatively, the Trademark Office may choose to render a decision in the matter whether the applicant chooses to respond or not.

12.11.2 Evidence from Other Proceedings
There should be a provision for determining admissibility of, and procedures for entering applicable evidence from other related proceedings, for example, a determination of the fame of either the opposer’s or the applicant's mark.
12.11.3 Forms of Evidence
There should be a provision enabling each party to obtain (i) documents in the possession of the other party, (ii) written responses to a limited number of interrogatories, (iii) written responses to requests for admissions, and (iv) the testimony of its own witnesses and of witnesses of the other party.

12.12 Protective Order
Upon motion by a party from whom discovery is sought, and for good cause, the Trademark Office may make any order, which justice requires, to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.

12.13 Sanction; Termination
Failure to respond to discovery requests should be subject to sanction by the Trademark Office. Repeated failure to respond to discovery requests should result in termination of the proceedings in a manner adverse to the offending party.

12.14 Motions and Briefs; Hearing
12.14.1 Interlocutory Hearings/Motions
There should be a procedure for resolving interlocutory matters, including provision for dismissal after submission of an answer, or summary judgment after the close of evidence taking, either by way of motion or hearing.

12.14.2 Final Brief and Hearing
Opposition proceedings should be resolved by written brief and/or oral hearing, and a reasoned opinion by at least three members of the Trademark Office. The Office should communicate to the parties the date by which it will render a decision, and it should render its decision by that date. If the Office is unable to render a decision by the noted date, it should communicate to both parties the new date by which it intends to render its decision.

12.15 Appeal
There should be provision for appeal within a given time limit (20 days) of the date of the written decision. In an Examiner Opposition, such appeals should be to either a board of examiners or judges within the Trademark Office, or to a civil court of competent jurisdiction. In a Board Opposition, such appeals should be to a civil court of competent jurisdiction.

12.16 Status of Application on Termination of Proceeding
On termination of a proceeding involving an application, the application, if the judgment is not adverse, returns to the status it had before the institution of the proceedings. If the judgment is adverse to the applicant, the application stands refused without further action and all proceedings thereon are considered terminated.
13. CANCELLATIONS

13.1 Cancellation Procedures

A mechanism should be offered to third parties to cancel an existing registration. In that these Guidelines deal with examination, please refer to other INTA documents for guidance.