

SHAPE MARKS

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1 INTRODUCTION

The shape marks covered by this chapter includes two-dimensional and three-dimensional shape marks. Shape marks may also be a faithful representation or not a faithful representation of the goods themselves.

2 RELEVANT LEGISLATION

Trade Marks Act [Cap. 332, 2005 Ed.]

Absolute grounds for refusal of registration

7. —(1) The following shall not be registered:

- (a) signs which do not satisfy the definition of a trade mark in section 2(1);
- (b) trade marks which are devoid of any distinctive character;
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services; and
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade.

(2) A trade mark shall not be refused registration by virtue of subsection (1)(b), (c) or (d) if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

(3) A sign shall not be registered as a trade mark if it consists exclusively of —

- (a) the shape which results from the nature of the goods themselves;
- (b) the shape of goods which is necessary to obtain a technical result; or
- (c) the shape which gives substantial value to the goods.

Trade Marks Rules

Application for registration

15. —(2) An application for the registration of a 3-dimensional shape as a trade mark shall not be treated as such unless the application form contains a statement to that effect.

3 REPRESENTATION OF SHAPE MARKS

The representation of a shape trade mark should where practicable, be in the form of a perspective or isometric drawing that shows clearly all the features of the trade mark. The parts of the configuration claimed to constitute the trade mark should be shown in solid lines, while the unclaimed parts, if any, should be shown in broken lines.

(See Chapter on “What is a trade mark?” on how shape marks should be graphically represented.)

(a) Description of the mark

The Examiner should ensure that there is no discrepancy between the description and the graphical representation and the relationship between them is clearly spelled out, for example by including a **cross reference** to the representation in the description. It is important to note that such a description is an integral part of the representation of the trade mark.

If a description is supplied after filing, then care should be taken to ensure that the description is exactly in accord with the trade mark as filed as any difference between the representation and description may affect the identity of the trade mark and, therefore, would constitute an unallowable amendment to the trade mark.

The examiner will usually require that the description includes words such as “... as shown in the representation on the application” to qualify that the description is limited by reference to the drawing or representation.

(b) Indication on Form TM 4

If the applicant is seeking protection for a 3D shape, he should tick the appropriate box on Form TM 4. Rule 15(2) of the Trade Marks Rules states that an application for the registration of a 3D mark will not be treated as such unless the application form contains a statement to that effect. This indication, together with the representation and description, will indicate clearly that the applicant is applying for a 3D shape mark.

4 SECTION 7(3) OBJECTIONS APPLICABLE TO 2-DIMENSIONAL AND 3-DIMENSIONAL SHAPE MARKS

Shape suggests three-dimensional form. Confusion however arises where, although the sign sought to be registered appears to be a 3D shape mark, the graphic representation is in two-dimensions. The Registrar will ask the question, “Is such a sign a three-dimensional shape or a two-dimensional drawing or picture of a figurative mark?”

Usually the answer to this question should be **clear from the indication/description** of the mark on the application form. But even if it is not, it should make no difference to the applicability of Section 7(3). This was the approach taken in *Philips v Remington [1998] R.P.C. 283*. The sign there was a picture of the head of a three-headed shaver.

Thus, Section 7(3) objections can be raised for 2-D graphical representation of a 3-D shape mark. In the *Philips* case, it was found that the mark was objectionable under an equivalent of our Section 7(3)(b) – that the sign was of a shape which was necessary to obtain a technical result, thus, it shall be refused registration.

5 SPECIFICATION

Where the shape is of the goods themselves, or a container for the goods, the specification should be confined to the goods represented, or to the goods sold in the container represented, otherwise there is the question of whether the applicant intends to use the mark for the specified goods.

For example, where the mark concerned is the shape of a bottle, then a specification under class 3 for “perfumes” will be acceptable while “eyebrow pencils” will not be acceptable.

6 REGISTRABILITY OF SHAPE MARKS

In examination of the registrability of shape marks, the first hurdle will be whether the shape falls foul of Section 7(3) of the Trade Marks Act.

It must be noted that if any of the criteria listed in Section 7(3) is satisfied, the sign cannot be registered as a trade mark. Furthermore, even substantial evidence of use will not overcome the fundamental objection that the shape cannot be registered as a trade mark.

(a) Section 7(3)(a) - Shapes resulting from the nature of the goods

This ground prevents the registration of shapes that result from the nature of the goods. It is not concerned to prevent registration of marks consisting of the shapes of the goods themselves as shapes of distinctively shaped goods can function as a trade mark, but rather, shapes that result from the nature of the goods.

The nature of the goods refers to their essential qualities or innate characteristics. For example, a sign consisting of the shape of a banana for bananas would be a shape, which results from the nature of the goods themselves. So too, would a sign consisting of a bunch of bananas for bananas. To assess whether a shape is one which results from the nature of the goods, the Registrar will look at the goods to determine their nature and consider the following:

- (i) the extent to which the shape is regarded as the “normal” shape of the goods;
- (ii) where the goods have a “uniform” shape, whether the shape is a variation from the “uniform” shape; if so, the shape may not be objectionable on the ground that it results from the nature of the goods;
- (iii) where the goods come naturally in a range of shapes, then any one of the usual shapes will be open to objections.

Example

A picture of a lemon as a proposed trade mark for lemons would not be acceptable because the sign would consist exclusively of a shape which results from the nature of the goods themselves – lemons. Likewise a picture of lemons on the branch, or a silhouette of a lemon.

If the goods were lemon juice, then a picture of a lemon should not fall foul of this provision. Likewise if the proposed mark was a yellow plastic container in the shape of a lemon, the shape may not be objected to on the ground that it results from the nature of the goods.

Where the specification is wide, “the goods” refer to any of the goods in respect of which the mark is sought to be registered. Thus, a picture of a banana for fruit would be just as objectionable as a picture of a banana for bananas.

Although the natural shapes of the goods in question cannot be registered, if the shape has been the subject of substantial design input, then this objection no longer applies. For example, in *Philips v Remington (Case C-299/99)*, Phillips' 3-headed shaver mark for "electric shavers" did not fall foul of this particular provision since the mark is considered to have been subject to a substantial design input.

There is some overlap between this objection and the objections on the grounds that the mark is devoid of distinctive character or that the mark is descriptive of the goods or services. For example, where the trade mark is a picture of a bunch of bananas for bananas, obviously, objections can also be taken that the mark is descriptive and thus, not distinctive of the goods in question.

(b) Section 7(3)(b) - Shapes that are necessary to obtain a technical result

The purpose of this provision is to exclude shapes which are merely functional in the sense that they are motivated by and are the result of technical considerations.

The ECJ in the *Philips v Remington* case ruled that a sign consisting exclusively of the shape of the goods is unregistrable under this provision if the essential features of that shape are attributable only to the technical result. The fact that there are other shapes which allow the same technical result to be obtained is no defence.

A shape which is necessary to obtain a technical result is also likely to indicate the intended purpose of the goods, or it may be customary in the trade and therefore, non-distinctive. Thus, the grounds under Section 7(1)(b) (that the shape is devoid of distinctive character), Section 7(1)(c) (that the shape exclusively designates the intended purpose or a characteristic of the goods) and Section 7(1)(d) (that the shape is a shape that is customary in the bona fide and established practices of the relevant trade) would also apply.

(c) Section 7(3)(c) - Shapes which give substantial value to the goods

The purpose of this provision is to exclude "aesthetic-type shapes" (see remarks of the UK Court of Appeal in *Philips v Remington*), i.e., shapes which have eye appeal or are purchased primarily because of the eye appeal, for example, novelty soaps, ornaments, figurines, toys, etc. The decision whether the value is substantial requires, "*a comparison ... between the shape sought to be registered and shapes of equivalent articles. It is only if the shape has, in relative terms, substantial value that it will be excluded from registration.*" Any other value, for example, value due to use of better quality materials, should be disregarded.

7 ASSESSING DISTINCTIVENESS OF SHAPE MARKS

(a) Whether the shape is devoid of distinctive character

Even if the preliminary obstacle under Section 7(3) is overcome, it is still necessary to ascertain whether a 3-D mark is to be refused registration under one or more of the absolute grounds for refusal – including whether the mark is devoid of distinctive character. The ECJ in *Philips v Remington* has settled for us the question whether “*there is a special category of marks which, even though not devoid of distinctive character in fact are none the less incapable of being a trade mark as a matter of law*” and the answer is “no”. This means that there is no need to consider the question whether the 3-D mark can, by itself, function as a trade mark within the definition of a trade mark because, the answer is yes, a 3-D mark can function as a trade mark. What needs to be considered is whether the mark is devoid of distinctive character or is objectionable due to any of the other absolute grounds of refusal (e.g. the mark is descriptive of the goods).

With respect to the absolute grounds of refusal, there is no distinction between the different categories of trade marks. The criteria for assessing the distinctive character of 3-D marks are thus no different from those to be applied to other categories of marks. As such, in order to be capable of distinguishing the goods, the shape of an article in respect of which a sign is registered does not require any capricious addition e.g., an embellishment which has no functional purpose (see *Philips v Remington*).

The test is simply, whether the mark serves to identify the product in respect of which registration is applied for as originating from a particular person, and thus, is capable of distinguishing the goods and services of one person from goods and services of other persons. A trade mark’s distinctiveness must be assessed by reference to first, the goods or services in respect of which registration is sought and second, by reference to the perception of the relevant persons, namely the consumers of the goods or services (*Rewe Zentral v OHIM [2002] ECR II-705, paragraph 27; Bosch v OHIM [2002] ECR II-4881, paragraph 20*). It is relevant to look at the presumed expectations of the average consumer of the category of goods or services in question, and assuming that such a consumer is reasonably well informed and reasonably observant and circumspect (see *Philips v Remington*). So, “... *it may in practice be more difficult to establish distinctiveness in relation to a shape of product mark than a word or figurative trade mark. But whilst that may explain why such a mark is refused registration, it does not mean that it cannot acquire distinctive character following the use that has been made of it and thus registered as a trade mark...*” (see *Linde AG (Case C-53/01) at paragraph 48*).

As the perception of the average consumer is a relevant question, “*account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same in relation to a figurative mark consisting of a faithful representation of the product itself as it is in relation to a word mark or a figurative or three dimensional mark not faithfully representing the product. Whilst the public*

is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself.” (see *Henkel KGaA v OHIM (Case T-30/00) at paragraph 49*).

The European Court of First Instance has found the following 3-D shape marks to be non-registrable:

- (i) “a rectangular parallelepiped shape with rounded edges” for soaps (Reason: *a rectangular parallelepiped is a shape commonly used for soaps. Where the claimed shape is a slight variation of the various parallelepipedal shapes commonly used for soaps, it will not enable the relevant public to distinguish immediately and with certainty the applicant’s soaps from those having a different trade origin*);
- (ii) “round tablet, comprising two layers, whose colours, white (lower part) and red (upper part) are also claimed for registration” in respect of washing or dishwashing preparations in tablet form (Reason: *the 3-dimensional shape..., a round tablet, is one of the basic geometrical shapes and is an obvious one for a product intended for use in washing machines or dishwashers... Where, as in the present case, the target sector of the public sees the presence of coloured elements as a suggestion that the product has certain qualities, and not as an indication of its origin, there is no distinctive character*).

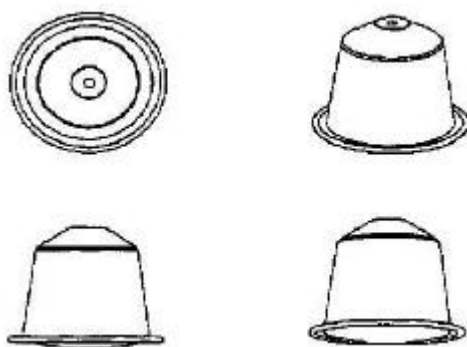
The European Court of First Instance has, however found the following 3-D shapes to be registrable:

“a bottle comprising a main section with, at its base, a recess, in the shape of a slightly truncated cone with, in its flat section, a stylised star in relief. In the lower part of the main section, which is nearly cylindrical from bottom to top, there is an initial series of wavy grooves and, in the upper part, which is of slightly smaller diameter and bobbin-shaped, there are spiralling grooves which form lozenges when seen through the bottle. The top section, which is the shape of a slightly truncated cone, ends in a cylindrical neck with a blue cap” in respect of beverages (Reason: *although the bottle’s bobbin shape and the oblique, horizontal grooves are admittedly features of numerous bottles currently available on the market, particular note should be taken of the manner in which those various elements are put together. In that regard, it should be emphasized that a sign consisting of a combination of elements, each of which is devoid of any distinctive character, can be distinctive provided that concrete evidence, such as, for example, the way in which the various elements are combined, indicates that the sign is greater than the mere sum of its constituent parts...the combination of the parts in this case, is truly specific and cannot be regarded as commonplace. The nearly cylindrical main section of the bottle bears oblique grooves which, first, completely cover the bobbin-like part of the bottle and accentuate the curved, rounded effect of the bottle’s upper part and second, are highlighted by the presence on the lower part of the bottle of grooves running in the opposite direction, the whole forming a design which is striking and easy to remember. That combination thus gives the bottle at issue a particular appearance which, taking account also of the overall aesthetic result, is capable of holding the attention of the public concerned and enabling the public, made aware of the shape of*

the packaging of the goods in question, to distinguish the goods covered by the registration application from those with a different commercial origin).

Example 1

Singapore Application No. : T01/14770J
Applicant : Société Des Produits Nestlé S.A.
Date of application : 15 July 2001
Mark : 3D shape of packaging of the goods.



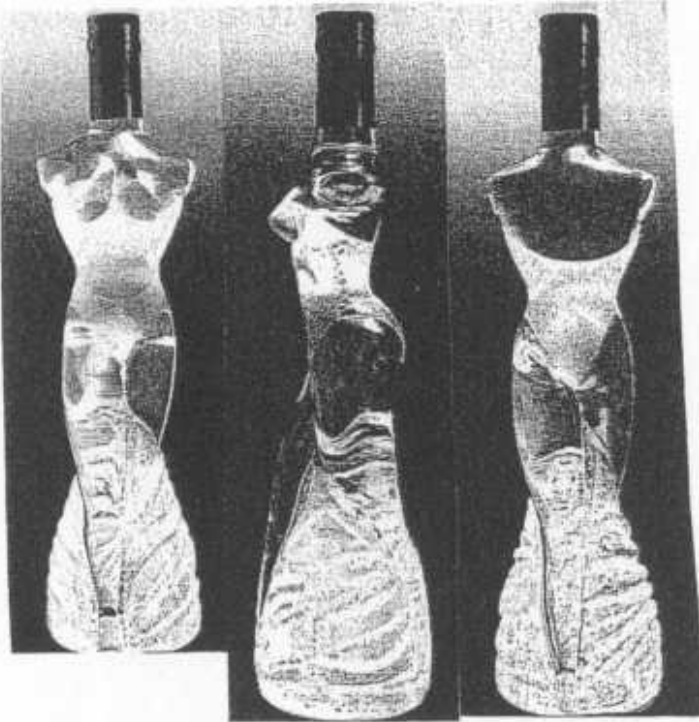
Class 30: Coffee and coffee mixtures.

Objection: Devoid of distinctive character.

Decision: The mark is not acceptable as it is quite unlikely that the mark will be recognised as a trade source. The packaging is one that the target sector of the public will see as signifying certain functionalities, for example, as a container for holding the coffee mixture, and not as an indication of its origin. There is no distinctive character in the packaging. The public is likely to recognise the applicant's house mark, rather than the container as the trade mark. The Registrar took into consideration the fact that similar containers with a peel-off cover have been in use in the market for other products such as dairy creams, fruit jellies, instant noodles and ice-creams.

Example 2

Singapore Application No. : T0412651H
Applicant : Bismarck Premium Brands GMBH
Date of application : 21 April 2004
Mark : 3-D "lady-shaped" bottle.

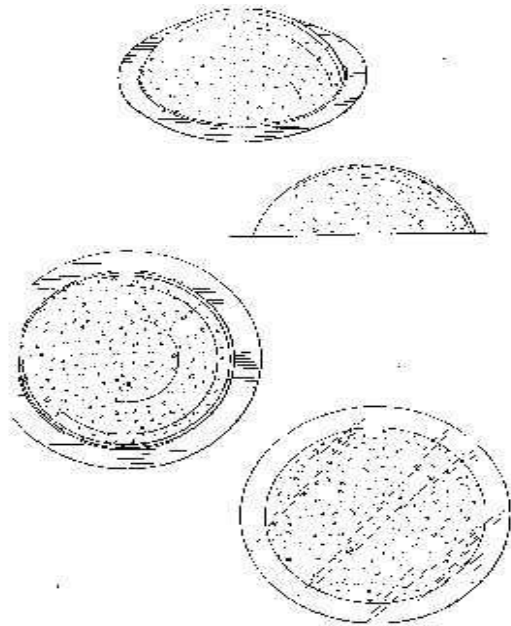


Class 32 and Class 33: Beverages and alcoholic beverages.

Decision: The mark is acceptable as it consists of an unusual 3-D shape of a bottle which gives the bottle a particular appearance which, taking account also of the overall aesthetic result, is capable of holding the attention of the public concerned and enabling the public, made aware of the shape of the packaging of the goods in question, to distinguish the goods covered by the registration application from those with a different commercial origin. From the perspective of the average consumer, the distinctive shape functions as the indicator of the source or origin of the products and is therefore, capable of distinguishing the applicant.

Example 3

Singapore Application No.	: T99/12636G
Applicant	: Unilever PLC
Date of application	: 4 November 1999
Mark	: The mark consists of a three-dimensional shape of a speckled capsule.



Class 3: Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps, hand washes; perfumery; essential oils; cosmetics; hair care preparations; deodorants for personal use; anti-perspirants; dentifrices.

Objection: Devoid of distinctive character.

Decision: The public is unlikely to attach trade mark significance to the speckled capsule. That is, the public will not see the 3-D shape as signifying that the product comes from a particular undertaking – that it serves to distinguish that the products comes from a particular source as opposed to some other source. Rather, the public is most likely to conclude that the 3-D shape is nothing more than a product design, even if it is possible that the public may see the shape as rather unusual for goods applied for.

(b) Uniqueness is not the same as distinctiveness as a trade mark

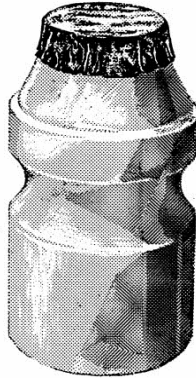
The test for prima facie acceptance is whether the average consumer will assume that all goods that come in that shape belong to the **same undertaking**.

The test is not whether the shape is “unusual”, “memorable” “recognisable on being seen a second time” or that the mark is eye catching or highly decorative per se.

Example

Yakult Honsha KK's Trade Mark Application [2001] R.P.C. 39

Mark: 3D shape of a bottle.



Class 29: Jellies, jams; eggs, milk and other dairy products, including yoghurt and yoghurt preparations; edible oils and fats; preserves, pickles; and meat, fish, poultry and game preparations and extracts.

Class 32: non alcoholic drinks; syrups and other preparations for making beverages.

Objection: Devoid of distinctive character.

Decision: The fact that a container is unusual or attractive per se does not mean that it will be taken by the public as an indication of origin. The relevant question is not whether the container would be recognised on being seen a second time, that is to say, whether it is of memorable appearance, but whether by itself its appearance would convey trade mark significance to the average customer. The Court hearing this case accepted that the bottle shape which is the subject of these applications is **both new and visually distinctive**, meaning that it would be recognised as different to other bottles on the market. However, that does not mean that it is inherently **distinctive in a trade mark sense**.

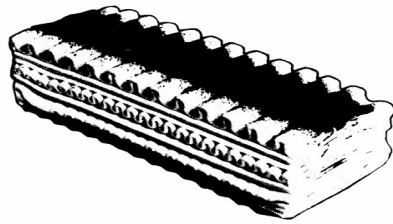
The **average consumer** will be likely to conclude that the design in the application was nothing more than a bottle of pretty ordinary shape. There is nothing which would convey to someone who was not a trade mark specialist that the bottle was intended to be an indication of origin or that it performed that function. Even were it to be recognised as of different shape to other bottles on the market, there is nothing inherent in it, which proclaims it as having trade mark significance.

(c) Mere product recognition is not sufficient

Example

Unilever Plc's Trade Mark Application [2002] EWHC 2709

Mark: 3D shape of the goods.



Class 29: Ice cream products.

Objection: Devoid of distinctive character.

Decision: In a case of marks consisting of product shapes, it was not enough to prove that the public recognised them as the product of a particular manufacturer. It had to be proved that consumers regarded the shape alone as a badge of origin in the sense that they relied upon that shape alone as an indication of trade origin, particularly to buy the goods. In coming to this conclusion, Jacob J applied the guidelines as propounded above in that identification that a product came from a undertaking must be due to use of the mark as a trade mark.

The shape would not be considered to be distinctive if a minor but none the less significant portion of the public would take it to denote goods of other traders (15% in this case). A trade mark must be a unique identifier – denoting one trader and none other.

(d) Interplay between the various objections

Example

Dyson Ltd's Trade Mark Application [2003] R.P.C. 47

Mark: Clause to say mark consists of a transparent bin.

The mark consists of a transparent bin or collection chamber forming part of the external surface of a vacuum cleaner as shown in the representation.



The mark consists of a transparent bin or collection chamber forming part of the external surface of a vacuum cleaner as shown in the representation.



Class 9: Vacuum cleaners.

Objection: Mark is devoid of distinctive character and serves to designate the kind and intended purpose of the goods. The objection that the mark consists of a shape which is necessary to obtain a technical result was waived because the essential feature of the mark consisted not of a “shape” but a “transparent bin” – the description clause limits the scope of rights conferred by the graphic representation.

Decision: The Registrar referred to the *Baby Dry* and *Philips* cases and accepted the submission that there is no point in considering whether the mark failed to satisfy the definition of a trade mark independently of the other absolute grounds objections in the same subsection.

The mark was devoid of distinctive character because, in the absence of education as to trade origin of the goods concerned, the average consumer of vacuum cleaners was likely to regard the transparent bin as an indication that the vacuum cleaner was of a new bagless type or as a functional feature intended to let them know when the machine needed emptying.

Further the transparent bin serves to designate the kind and intended purpose of the goods ie that the *kind* of goods are bagless vacuum cleaners, and an **intended purpose** of the goods – so that the user can easily see when the vacuum cleaner needs cleaning. If consumers attach a merely functional significance to a feature, they will not normally accept it as an indication of the trade origin of the goods.

It was argued that as the transparent bin was a new feature at the time of its introduction and is still unique at the relevant date, it was not a normal means of designating a characteristic of the goods. The hearing officer did not accept this argument. Everything was new once. The use of the words “may serve in trade” in the provision indicates that new descriptive signs are also caught (see “*CYCLING IS ...*” *Trade Mark [2002] R.P.C. 37*).

8 ACQUIRED DISTINCTIVENESS

(a) Whether the 3-D mark has acquired distinctiveness by virtue of use

Notwithstanding that the mark may be prima facie devoid of distinctive character, it is still acceptable if it has acquired distinctiveness by virtue of the use made of it (Section 7(2) of the Trade Marks Act allows registration of marks which have become distinctive by virtue of use made of it). In assessing the distinctive character of a mark, the following may be taken into account:

- (i) the market share held by the mark;
- (ii) how intensive, geographically widespread and long standing use of the mark has been;
- (iii) the amount invested by the undertaking in promoting the mark;
- (iv) the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking;
- (v) statements from chambers of commerce and industry or other trade and professional associations.

If on the basis of those factors, the Registrar finds that the relevant class of persons or at least a significant proportion thereof, identify goods originating from a **particular undertaking** because of the trade mark on the basis of acquired distinctiveness the requirement for registering the mark is satisfied (see *Windsurfing Chiemsee v Boots (Case C-108/97)*).

Again, the test of acquired distinctiveness is from the perspective of the average consumer. The distinctive character of a sign consisting in the shape of a product **even that acquired by the use** made of it must be assessed in the light of the **presumed expectations of an average consumer** of the category of goods or services in question who is reasonably well informed and reasonably observant and circumspect. The essential consideration is that the relevant class of persons of the product identifies the 3-D shape as originating from a given undertaking as a result of the **use of the mark as a trade mark** and as a result of the nature and the effect of it - which make it capable of distinguishing the product concerned from those of other undertakings.

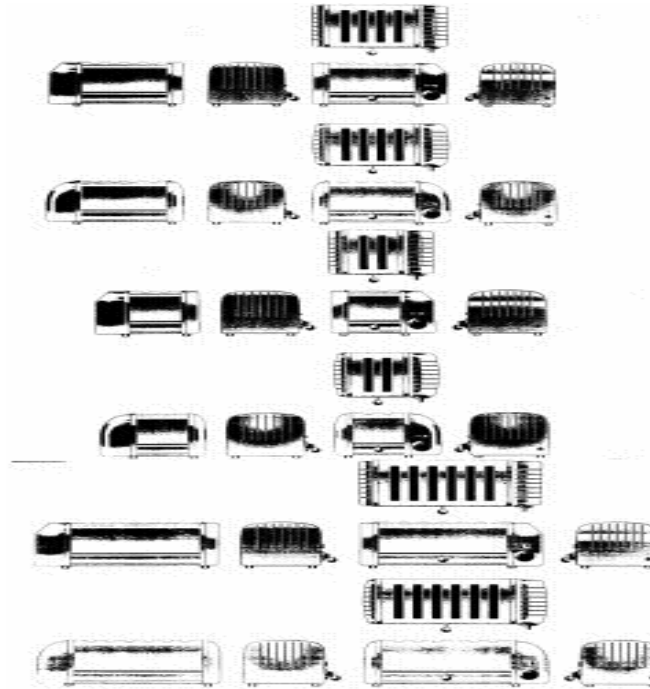
In this regard, it is not enough to prove that the **public recognised the shape as the product of a particular manufacturer**. It has to be proved that consumers regarded the shape alone as a badge of origin in the sense that they relied upon that shape alone as an indication of trade origin, particularly to buy the goods.

(b) Evaluation of evidence

Example

Dualit Ltd's (Toaster Shapes) Trade Mark Applications [1999] R.P.C. 890

Mark: A series of 6 marks showing 2 slice, 4 slice and 6 slice versions of 2 distinct designs of toaster.



Class 11: Toasters.

Objection: Devoid of distinctive character.

Decision: It cannot be said that if the shapes had never been used by the applicant, another trader could not use the shape fairly or honestly. Acquired distinctiveness was not established as the evidence showed that the public surveyed recognised the features rather than the shape.

(c) **De facto monopoly**

In cases where applicant is the only supplier of those goods, use of the shape of the goods may be sufficient to give it distinctiveness under Section 7(2) if as a result of use, a substantial portion of the consumer associates the shape as that belonging to the applicant and no other or believes that goods of that shape comes from the same applicant (see *Philips v Remington*).

Dualit Ltd's case, paragraph 119, "...The ECJ has recently re-stated the position it took in *Windsurfing* in the course of giving its judgement in the *Philips* case. Although the court accepted that it maybe possible to demonstrate the acquisition of trade mark character during a period in which a party is the only supplier of the goods to the market, it

emphasized...that this must be because “the identification, by the relevant class of persons, of the product as originating from a given undertaking is as a result of the use of the mark as a trade mark.” There is no evidence of that.”

Conclusion: - whether there is a monopoly in place is irrelevant – as long as the requirements as to acquired distinctiveness has been proved, the mark can be registered.

9 INDISTINCTIVE SHAPE WITH DISTINCTIVE ELEMENTS

A wholly indistinctive shape may be acceptable on the basis that other (non shape) distinctive elements are used in combination with the indistinctive shape. However, it must be immediately apparent in the representation that the distinctive elements make up an essential or prominent part of the mark and not form a de minimis portion of the indistinctive shape. The description for the mark must also be tailored accordingly.

10 SHAPE OF PACKAGING OR ASPECT OF PACKAGING

The definition of a "sign" that can constitute a trade mark, includes, "any letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape, colour, aspect of packaging or any combination thereof". Where what is sought for registration is the shape of the packaging, the same considerations as to distinctiveness that apply to the shape of goods also apply to the shape of the packaging of goods. Packaging may include the container in which the goods are sold or the outer packaging which covers the container. Shape is just one aspect of packaging. There may be other aspects (such as colours; or devices on the packaging, etc).

(a) Where it is not clear whether the trade mark is the shape of packaging or the shape of the goods

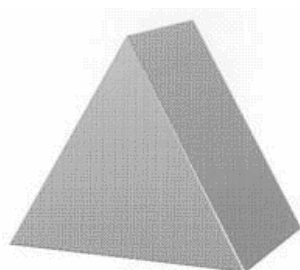
Where it is not clear whether the trade mark is the shape of packaging or the shape of the goods, the mark will be assessed on the basis that it is both. For unusual shapes of containers, even if it is accepted that the sign is different to a degree which renders it visually distinguishable from other such signs in use in the relevant market, the question to be determined is whether it is distinctively different so as to be likely to be perceived and remembered by the average consumer as a badge of origin.

Example

UK Decision of Appointed Person: Case O-106-03

Applicant : Kraft Jacobs Suchard SA ()

Mark : 3D mark.



Class 30: Chocolates and products containing chocolate.

Objection: Devoid of distinctive character.

Decision: It was ambiguous as to whether the mark consisted of the shape of the specified goods and/or the shape of their packaging. In order to defuse the uncertainty, it was felt necessary to treat the request as a 2 fold request for the protection in respect of:

- (i) the shape of the specified goods
- (ii) the shape of their packaging.

Applying the principles as stated in the *Yakult* case, even if it is accepted that the current sign is different to a degree which renders it visually distinguishable from other such signs in use in the relevant market, the question to be determined is whether it is distinctively different so as to be likely to be perceived and remembered by the average consumer as a non verbal trade mark. In the current case, the sign, viewed either as a representation of the shape of the specified goods or their packaging is insufficiently arresting to impact upon people in that way in a sector of the market where reasonably well-informed, observant and circumspect consumers would appreciate at a general level that variations of shape or of shape or colour in combination might or might not be consistent with the goods thus differentiated coming either from economically linked or from economically independent undertakings.

(b) Where the goods have no shape (e.g. liquids)

In relation to 3D marks consisting of the packaging of goods which are normally traded in packaged form (such as liquids), it is necessary to *assimilate* the packaging to the shape of the goods, so that the packaging constitutes the shape of the goods for the purposes of Section 7(3) and where appropriate assessment of whether the packaging might describe the characteristics of the product, including its quality under Section 7(1)(c) (see *Henkel KGaA v Deutsches Patent- und Markenamt (Case C-218/01)* where the mark in question is a coloured 3D mark of a liquid detergent bottle).