



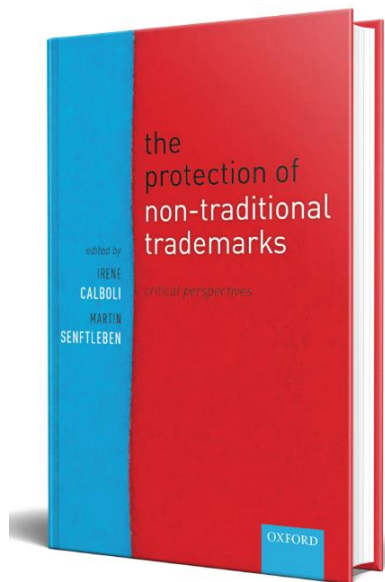
# Latest Developments in the Protection of Non Traditional Trade Marks

Irene Calboli, Texas A&M University School of Law

23 June 2020

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December 2018



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*Edited by*

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**Martin Senftleben** is Professor of Intellectual Property, Centre for Law and Internet, Vrije Universiteit Amsterdam, and Of Counsel, Bird & Bird.

In recent years, the domain of trademark law and the scope of trademark protection has grown exponentially. Today, a wide variety of non-traditional marks, including colour, sound, smell, and shape marks, can be registered in many jurisdictions. However, this expansion of trademark protection has led to heated discussions and controversies about the impact of the protection of non-traditional marks on freedom of competition and, more generally, on socially valuable use of these or similar signs in unrelated non-commercial contexts. These tensions have also led to increasing litigation in this area across several jurisdictions.

This book provides an overview of the debate and state of the law surrounding non-traditional marks at the international, regional, and national level. In particular, this book addresses relevant international treaties administered by the World Intellectual Property Organization (WIPO) and the Agreement on Trade-Related Aspects to Intellectual Property Rights (TRIPS) as well as several regional and national legislations and leading judicial decisions in order to examine current law and practice culminating in critical reflections and suggestions on the topic.



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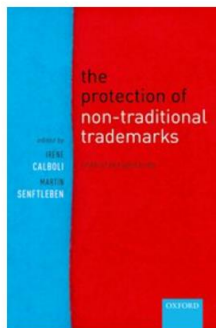
Overview

Description

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## The Protection of Non-Traditional Trademarks

Critical Perspectives

Edited by Irene Calboli and Martin Senftleben

- Detailed analysis of the issues related to the protection of non-traditional marks including colour, sound, smell, and shape marks
- Overview of the debate and state of the law surrounding non-traditional marks at the international, regional, and national level
- Addresses relevant international treaties administered by the World Intellectual Property Organization (WIPO) and the Agreement on Trade-Related Aspects to Intellectual Property Rights (TRIPS) as well as several regional and national legislations and leading judicial decisions

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Terminology

Non-traditional trademarks?

Non-conventional trademarks?

New types of marks?



ADIDAS

Figurative Trademark



Word Trademark

ADIDAS

PHILIPS

JUST DO IT

VOLVO

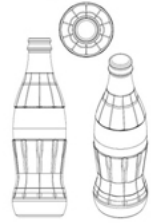
Combined Trademark



Kobold



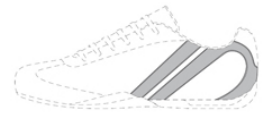
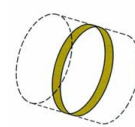
Shape Mark



Shape Mark containing word elements



Position mark



Pattern mark
















Color (single) mark



PANTONE  
1837

Colour  
(combination) mark



 <p>Word mark</p>	 <p>Figurative mark</p>	 <p>Figurative mark containing word elements</p>	 <p>Shape mark</p>
 <p>Shape mark containing word elements</p>	 <p>Colour per se</p>	 <p>Sound mark</p>	 <p>Multimedia mark</p>
 <p>Position mark</p>	 <p>Motion mark</p>	 <p>Pattern mark</p>	 <p>Hologram mark</p>
 <p>Other</p>			





## Legal Context

**Paris Convention** for the Protection of Industrial Property does not provide for a definition of registrable subject matter. It only identifies specific exception and signs that cannot be registered (such as national symbols)

Article 15 of the TRIPS Agreement (1994): Any sign ... capable of distinguishing [products], ***shall*** be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, ***shall*** be eligible for registration as trademarks. ... *Members may require, as a condition of registration, that signs be visually perceptible.*

Singapore Treaty on Trademarks (WIPO 2006) allows (even though it does not impose) for the registration of non-conventional marks such as holograms, scent marks, sound marks, motion marks and three-dimensional (“3D”) marks.



## Signs that can be registered today in most jurisdictions

- Words, including descriptive words and popular phrases
- Names, including the names of historical figures
- Symbols
- Colors, including single colors
- Product packaging
- Product configurations
- Retail store designs and restaurant décor
- Look and feel of a website
- Other non-traditional marks such as sounds, scents, tastes, textures, holograms, and movements
- Artistic works currently or formerly protected by copyright
- Designs currently or formerly protected by patent



## EU Trade Mark Directive 2015/2436

### Article 3: Signs of which a trade mark may consist

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are **capable of:**

- (a) **distinguishing** the goods or services of one undertaking from those of other undertakings; and
- (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.



## EU Trade Mark Directive 2015/2436 *Article 3 (current text)*

### **Signs of which a trade mark may consist**

A trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

- (a) distinguishing the goods or services of one undertaking from those of other undertakings; and
- (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

## EU Trade Mark Directive 2008/95/EC *Article 2 (previous text)*

### **Signs of which a trade mark may consist**

A trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.



















*C-421/13, Apple Inc. v Deutsches Patent- und Markenamt*



**Signing:** To sign *light*, take your strong hand and raise above and to the side of your head. Take your fingers from being extended and together to extended outward. The sign looks like a *light* is flicking on, spreading out it's rays.



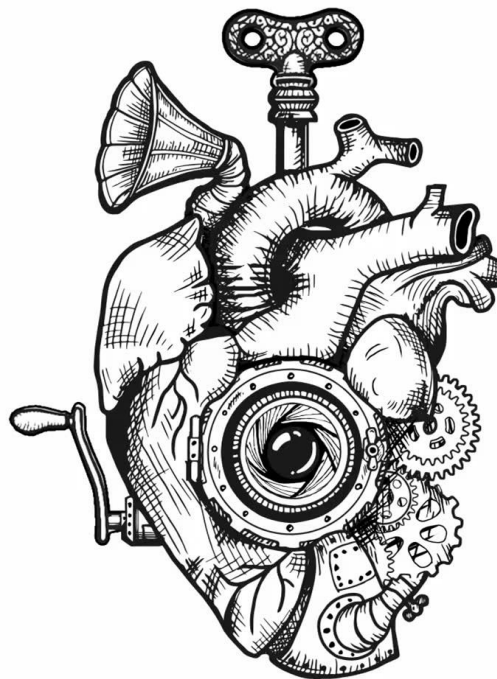
Solt users would be able to interact with their smartwatch without touching the device.

Image: Google

Unlike cameras, which are used in other motion sensing technologies, radar has a high positional accuracy, and thus works better in this context than cameras would. It's able to pick up on slight movements better.

EUTM No 017280264, 017280249, 017280281





EUTM 17279704-  
Multimedia mark



## U.S. Trademark Act (Lanham Act)

- Lanham Act (15 U.S.C. §1127):
  - Trademarks: [any] word, name, symbol, or device, or any combination thereof, used in commerce to **identify** and **distinguish** “products” and to indicate source
- Restatement (Third) of Unfair Competition (1995):
  - “A trademark is a word, name, symbol, device, or other designation ... that is **distinctive** of a person’s goods or service and that is used in a manner that identifies those goods and distinguishes them from th[ose] of others ...”



## 3-D Marks (U.S. Trademark Manual of Examining Procedure 807.10)

- The applicant must submit a drawing that depicts the mark in a single rendition
  - The mark description must state that the mark is 3D in nature
  - The 3D feature of the mark must be shown in the supporting specimens of use, in order for the drawing to comprise a substantially exact representation of the mark used
- \*\* There appear to be around 1,700 live trademark registrations for 3D objects



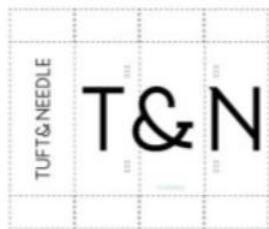
## U.S. 3D Registered Trademarks



Mark registration Ser. No. 88084591, for a brown beer bottle



Mark registration Ser. No. 87756307, for a translucent piggy bank



Mark registration Ser. No. 87732130, for product packaging for mattresses



Mark registration Ser. No. 87673715, for a shoulder rest for violin or viola



Mark registration Ser. No. 87756609, oblong shaped identification tag





## U.S. 3D Registered Trademarks



Mark  
registration Ser.  
No. 74,650,913  
for candy



Mark  
registration  
Ser. No.  
72,464,602  
for solid  
chocolate,  
wrapped



Mark  
registration  
78,578,036  
for candy

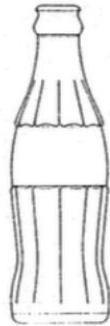


Photo of Hershey's Kisses with broken tips

© 2019 Matthew M. Yospin



## U.S. 3D Registered Trademarks



Mark  
registration  
Ser. No.  
73088384



Mark  
registration  
Ser. No.  
74611506



Mark  
registration  
Ser. No.  
74611507



Mark  
registration  
Ser. No.  
77878543



Mark  
registration  
Ser. No.  
77818735



Mark  
registration  
Ser. No.  
75796806



Mark  
registration  
Ser. No.  
85226870

Images from Coca-Cola's registrations for non-traditional trademarks: shapes of bottles  
and more



## U.S. 3D Registered Trademarks

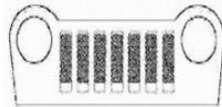
**Crocs footwear**  
U.S. Reg. No.  
5149328



**Coca-Cola bottle**  
U.S. Reg. No.  
0696147



**Mrs. Butterworth's container**  
U.S. Reg. No. 1138877

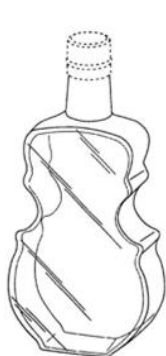


**FCA US (Jeep)  
automobiles**  
U.S. Reg. No.  
3199299



## U.S. 3D Registered Trademarks

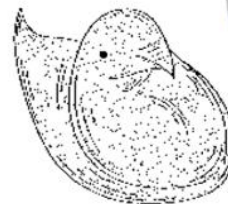
**U.S. Reg. No.  
3825320**



**Crown Royal bottle  
U.S. Reg. No.  
3067575**



**Peeps marshmallow  
candies  
U.S. Reg. No. 2185581**



## U.S. 3D Registered Trademarks

### United States of America United States Patent and Trademark Office



Reg. No. 4,903,968  
Registered Feb. 23, 2016

Int. Cl.: 28

TRADEMARK

PRINCIPAL REGISTER

LEGO JURIS A/S (DENMARK CORPORATION)  
KOLDINGVEJ 3  
BELLUND DK-7199, DENMARK

FOR: TOY FIGURES; PLAY FIGURES; POSITIONABLE TOY FIGURES; MODELED PLASTIC TOY FIGURINES; THREE DIMENSIONAL POSITIONABLE TOY FIGURES SOLD AS A UNIT WITH OTHER TOYS; CONSTRUCTION TOYS; TOY CONSTRUCTION SETS, IN CLASS 28 (U.S. CLS. 22, 23, 28 AND 50).

OWNER OF ERPN CMNTY TM OFC REG. NO. 090050450, DATED 4-18-2000, EXPIRES 4-1-2016.

OWNER OF U.S. REG. NO. 4,520,327.

THE MARK CONSISTS OF THE THREE-DIMENSIONAL CONFIGURATION OF A TOY FIGURE FEATURING A CYLINDRICAL HEAD ON TOP OF A CYLINDRICAL NECK, ON TOP OF A TRAPEZOIDAL TORSO OF UNIFORM THICKNESS, WITH FLAT SHOULDERS AND A FLAT BACK, WHERE ARMS ARE MOUNTED SLIGHTLY BELOW THE UPPER SURFACE OF THE TORSO, ON TOP OF A RECTANGULAR PLATE, ON TOP OF LEGS WHICH BULGE FORWARD AT THE TOP AND ARE OTHERWISE RECTANGULAR WITH UNIFORM THICKNESS, ON TOP OF FLAT SQUARE FEET.

SEC. 2(F).

SER. NO. 86-537,461, FILED 2-17-2015.

ELLEN B. AWRIKH, EXAMINING ATTORNEY



*Michelle K. Lee*  
Director of the United States  
Patent and Trademark Office



Funded by the European Union



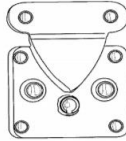
## U.S. 3D Registered Trademarks

Int. Cl.: 18

Prior U.S. Cls.: 1, 2, 3, 22 and 41

**United States Patent and Trademark Office** Reg. No. 3,617,909  
Registered May 12, 2009

### TRADEMARK PRINCIPAL REGISTER



LOUIS VUITTON MALLETTIER (FRANCE CORPORATION)  
2, RUE DU PONT-NEUF  
75001 PARIS, FRANCE

FOR: LEATHER AND IMITATION LEATHER PRODUCTS, NAMELY, TRAVEL TRUNKS, TRAVEL BAGS, TRAVEL CASES, TRAVEL GARMENT BAGS, SUITCASES, LUGGAGE, TOILETRY CASES, SOLID EMPTY, BACK PACKS, HANDBAGS, BEACH BAGS, LEATHER SHOPPING BAGS, SHOULDER BAGS, ATTACHE CASES, BRIEFCASE-TYPE PORTFOLIO CASES, BRIEFCASES, SCHOOL BAGS, UNDERARM BAGS, MANUFACTURED LEATHER GOODS, NAMELY, WALLET, UMBRELLAS, IN CLASS 18 (U.S. CLS. 1, 2, 3, 22 AND 41).

FIRST USE 1-1-1986; IN COMMERCE 1-1-1986.

OWNER OF U.S. REG. NOS. 1,650,162 AND 2,828,919.

THE MARK CONSISTS OF A SOLID BRASS LOCK COMPRISED OF A HASP WITH A RIVET ON EITHER SIDE, A LOCK PLATE WITH FOUR RIVETS, ONE ON EACH CORNER AND TWO RELEASE MECHANISMS, ONE ON EITHER SIDE OF THE POINT WHERE THE HASP ATTACHES TO THE LOCK PLATE AND A LOCK HOUSING.

SEC. 2(F).

SER. NO. 76-572,393, FILED 1-29-2004.

DANIEL CAPSHAW, EXAMINING ATTORNEY

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## U.S. 3D Registered Trademarks

Int. Cl.: 18

Prior U.S. Cl.: 3

Reg. No. 1,643,625

United States Patent and Trademark Office Registered May 7, 1991

### TRADEMARK PRINCIPAL REGISTER



LOUIS VUITTON (FRANCE CORPORATION)  
30 RUE LA BOETIE  
PARIS, FRANCE

FOR LEATHER AND IMITATION LEATHER PRODUCTS, NAMELY TRAVELING BAGS, HAND BAGS, SHOULDER BAGS USED FOR LUGGAGE AND SHOPPING BAGS AND BEACH BAGS IN THE NATURE OF LUGGAGE, IN CLASS 18 (U.S. CL. 3).

FIRST USE 12-31-1959; IN COMMERCE 12-31-1959.

PRIORITY CLAIMED UNDER SEC. 44(D) ON FRANCE APPLICATION NO. 145653, FILED 7-25-1989, REG. NO. 1453055, DATED 7-25-1989, EXPIRES 7-25-1999.

OWNER OF U.S. REG. NOS. 286,345, 1,522,311 AND OTHERS

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE THE OVERALL SHAPE OF THE BAG, THE STRAP OR THE DRAWSTRINGS, APART FROM THE MARK AS SHOWN.

THE DRAWING IS LINED FOR THE COLORS YELLOW AND DARK BROWN.

THE MATERIAL IN DOTTED LINES IS USED TO SHOW POSITIONING OF THE MARK.

SER. NO. 74-022,168, FILED 1-24-1990.

TERESA M. RUPP, EXAMINING ATTORNEY



## U.S. 3D Registered Trademarks

### United States of America United States Patent and Trademark Office



**Reg. No. 3,936,105**  
**Registered Mar. 29, 2011**  
**Int. Cl.: 18**

**TRADEMARK**  
**PRINCIPAL REGISTER**

HERMES INTERNATIONAL (FRANCE SOCIÉTÉ EN COMMANDITE PAR ACTIONS)  
24 RUE DU FAUBOURG SAINT HONORÉ  
F-75008 PARIS, FRANCE

FOR: HANDBAGS, IN CLASS 18 (U.S. CLS. 1, 2, 3, 22 AND 41).

FIRST USE 0-0-1986, IN COMMERCE 0-0-1986.

OWNER OF U.S. REG. NOS. 1,806,107 AND 2,447,392.

THE MARK CONSISTS OF THE CONFIGURATION OF A HANDBAG, HAVING RECTANGULAR SIDES A RECTANGULAR BOTTOM, AND A DIMPLED TRIANGULAR PROFILE. THE TOP OF THE BAG CONSISTS OF A RECTANGULAR FLAP HAVING THREE PROTRUDING LOBES, BETWEEN WHICH ARE TWO KEYHOLE-SHAPED OPENINGS THAT SURROUND THE BASE OF THE HANDLES. OVER THE FLAP IS A HORIZONTAL RECTANGULAR STRAP HAVING AN OPENING TO RECEIVE A PADLOCK EYE. A LOCK IN THE SHAPE OF A PADLOCK FORMS THE CLASP FOR THE BAG AT THE CENTER OF THE STRAP. THE BROKEN LINES IN THE DRAWING REPRESENT THE LOCATION OF THE HANDLES AND ARE NOT PART OF THE MARK.

SEC. 2(F).

SER. NO. 76-700,120, FILED 10-29-2009.

LIEF MARTIN, EXAMINING ATTORNEY



*David J. Kappas*  
Director of the United States Patent and Trademark Office





## U.S. 3D Registered Trademarks

### United States of America United States Patent and Trademark Office



**Reg. No. 4,197,020**  
**Registered Aug. 28, 2012**  
**Int. Cls.: 14 and 35**

**TRADEMARK**  
**SERVICE MARK**  
**PRINCIPAL REGISTER**

CARTIER INTERNATIONAL A.G. (SWITZERLAND CORPORATION)  
HINTERBERGSTRASSE 22, POSTFACH 61  
6312 STEINHAUSEN, SWITZERLAND

FOR: JEWELRY AND WATCHES, IN CLASS 14 (U.S. CLS. 2, 27, 28 AND 59).

FIRST USE 2-6-1977; IN COMMERCE 2-6-1977.

FOR: RETAIL STORE SERVICES FEATURING JEWELRY AND WATCHES; ONLINE RETAIL STORE SERVICES FEATURING JEWELRY AND WATCHES, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 2-6-1977; IN COMMERCE 2-6-1977.

THE MARK CONSISTS OF THREE-DIMENSIONAL PRODUCT PACKAGING COMPOSED OF AN 8-SIDED BOX AND LID IN THE COLOR RED WITH GOLD MARKINGS. THE FOUR CORNERS OF THE BOX ARE CHAMFERED. THE TOP HORIZONTAL SIDE OF THE LID IS IMPRINTED WITH A SERIES OF EQUALLY SPACED DIAMOND IN THE COLOR GOLD, ABUTTING A GOLD LINE AROUND THE PERIMETER OF THE LID. THE VERTICAL SIDES OF THE PACKAGING FEATURE A GOLD HORIZONTAL CHAIN-LIKE PATTERN, POSITIONED ON THE UPPER SIDES OF THE LID AND THE LOWER SIDES OF THE BOX. THE VERTICAL SIDES OF THE PACKAGING ALSO FEATURE A LINE OF GOLD DOTS ON THE LOWER SIDES OF THE LID AND THE UPPER SIDES OF THE BOX. THE COLORS RED AND GOLD ARE CLAIMED AS FEATURES OF THE MARK. THE PROPORTIONAL RELATIONSHIP BETWEEN THE WIDTH, HEIGHT, AND DEPTH IS NOT A FEATURE OF THE MARK, AND THE PROPORTIONAL RELATIONSHIP BETWEEN THE HEIGHT OF THE LID AND HEIGHT OF THE BOX IS NOT A FEATURE OF THE MARK. THE PROPORTIONAL RELATIONSHIPS ARE SHOWN IN BROKEN OR DOTTED LINES, WHICH INDICATE THAT THEY ARE NOT A PART OF THE MARK.

THE COLOR(S) RED AND GOLD IS/ARE CLAIMED AS A FEATURE OF THE MARK.

SEC. 2(F).

SER. NO. 85-369,086, FILED 7-12-2011.

SEAN CROWLEY, EXAMINING ATTORNEY



*David J. Kappas*  
Director of the United States Patent and Trademark Office



## U.S. 3D Registered Trademarks

### United States of America United States Patent and Trademark Office



Reg. No. 4,487,142  
Registered Feb. 25, 2014  
Int. Cl.: 14

CARTIER INTERNATIONAL A.G. (SWITZERLAND CORPORATION)  
HINTERBERGSTRASSE 22, POSTACH 61  
6312 STEINHAUSEN, SWITZERLAND

FOR: WATCHES, IN CLASS 14 (U.S. CLS. 2, 27, 28 AND 50)

FIRST USE 4-0-2007; IN COMMERCE 4-0-2007.

TRADEMARK  
PRINCIPAL REGISTER

THE MARK CONSISTS OF A THREE-DIMENSIONAL CONFIGURATION OF A PORTION OF A WATCH CASE WITH AN INTEGRATED CROWN PROTECTOR, WINDING CROWN, AND CROWN PROTECTOR. THE BROKEN LINES IN THE MARK INDICATE PLACEMENT AND ARE NOT PART OF THE MARK.

SEC. 2(f).

SER. NO. 85-788,509, FILED 11-27-2012.

ELLEN PERKINS, EXAMINING ATTORNEY



*Michelle K. Lu*  
Deputy Director of the United States  
Patent and Trademark Office



## U.S. 3D Registered Trademarks

Int. Cl.: 14

Prior U.S. Cls.: 2, 27, 28 and 50

United States Patent and Trademark Office

Reg. No. 3,282,846

Registered Aug. 21, 2007

### TRADEMARK PRINCIPAL REGISTER



CARTIER INTERNATIONAL N.V. (NETHERLD  
ANTILLES COMPANY)  
SCHARLOOEWEG 33  
CURACAO, NETHERLD ANTILLES

FOR: HOROLOGIC AND CHRONOMETRIC IN-  
STRUMENTS, NAMELY, WATCHES, IN CLASS 14  
(U.S. CLS. 2, 27, 28 AND 50).

FIRST USE 6-15-1996; IN COMMERCE 6-15-1996.

NO CLAIM IS MADE TO THE EXCLUSIVE  
RIGHT TO USE THE REPRESENTATION OF THE  
NUMBERS 1-12 OR THE WATCH HANDS, APART  
FROM THE MARK AS SHOWN.

THE MARK CONSISTS OF A CONFIGURATION  
OF A WATCH CASE WITH A SQUARE FACE, THE  
CASE FRAMING THE WATCH CONSISTS OF THIN  
HORIZONTAL BRANCCARDS AND THICK CON-  
CAVE VERTICAL BRANCCARDS, BOTH FORMED  
OF THE CASE METAL AT EACH CORNER THE  
VERTICAL BRANCCARDS ARE ELONGATED BE-  
YOND THE BOTTOM AND TOP OF THE WATCH

CASE, AND END IN INWARDLY ANGLED COR-  
NERS; THE VERTICAL BRANCCARDS ARE BEV-  
ELED TO SLOPE DOWNWARD LATERALLY  
FROM THE INSIDE TO THE OUTSIDE (THEY  
ARE SOMETIMES DECORATED WITH JEWELS);  
THE ELONGATED BRANCCARD CORNERS FRAME  
THE END LINKS IN THE BRACELET CHAIN OR  
THE END OF THE WATCH STRAP, ART DECO  
ROMAN NUMERALS INCLINE CONFORM TO THE  
ANGLE DIRECTION OF THE WATCH HANDS AT  
SUCH TIME AS THE HANDS ARE JUXTAPOSED TO  
THAT NUMERAL; AN OCTAGONAL WINDING  
CROWN WITH CABOCCON; AND A CHAPTER  
RING/MINUTE GUIDE ON THE WATCH FACE  
LOCATED BETWEEN THE CENTER OF THE DIAL  
AND THE NUMERALS.

SEC. 2(F).

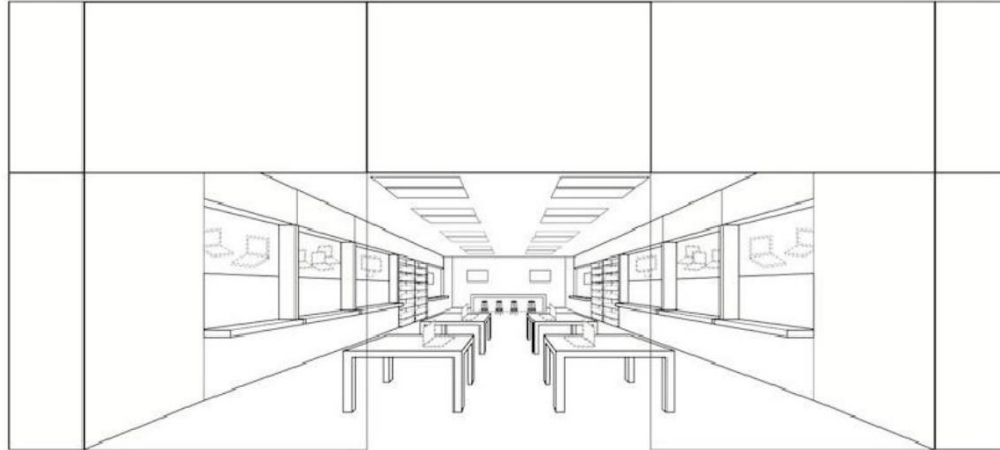
SER. NO. 78-853,190, FILED 4-4-2006.

ERNEST SHOSHO, EXAMINING ATTORNEY



## U.S. 3D Registered Trademarks

U.S. Reg. Num.  
**4277914**



Apple has been granted a trademark for the glass-fronted, rectangular-patterned design of its Apple Store.  IMAGE: U.S. PATENT AND TRADEMARK OFFICE



## Color Marks (U.S. Trademark Manual of Examining Procedure 807.14 (e)(iii) & 1202.05(a))

- The registrability of a color mark depends on the manner in which the proposed mark is used
- A color takes on the characteristics of the object or surface to which it is applied and the commercial impression of a color will change accordingly
- Color marks are **never inherently distinctive**, and cannot be registered on the principal Register **without a showing of acquired distinctiveness**



## U.S. Color Registered Trademarks

Louboutin 	Coca-Cola 	Fiskars 	Home Depot 
Wiffle Ball 	Slip 'N Slide 	Caterpillar 	Mars (Reese's) 
Cadbury 	T-Mobile 	Mattel (Barbie) 	Owens-Corning 
UPS 	Qualitex 	3M (Post-It) 	Tiffany 

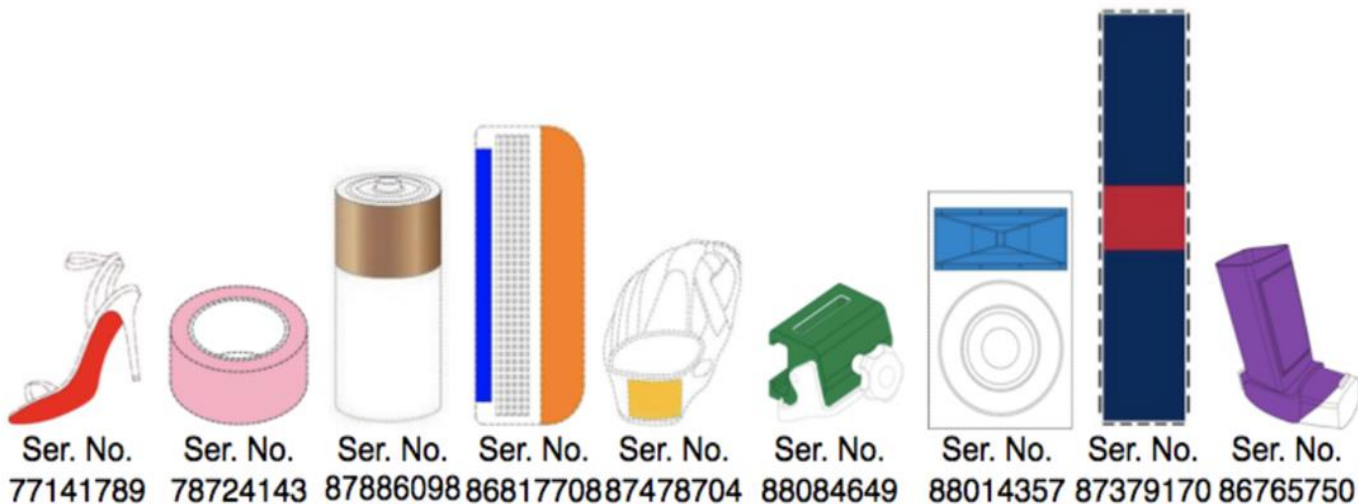


## Color Marks (U.S. Trademark Manual of Examining Procedure 1202.05(a))

- The examining attorney MUST refuse to register a color mark on the principal register, unless the applicant establishes that the proposed mark has acquired distinctiveness
- The examining attorney must issue this refusal in all color mark applications where acquired distinctiveness has not been shown, regardless of the filing basis of the application
- *The ground for refusal is that the color is not inherently distinctive and thus does not function as a trademark*



## U.S. Color Registered Trademarks



Images from registrations for color marks





## Color Marks (U.S. Trademark Manual of Examining Procedure 1202.05(a))

- If the color is not distinctive, it is registrable only on the supplemental register
- The burden of proving that a color mark has acquired distinctiveness is substantial
- The applicant must demonstrate that the color has acquired source-indicating significance in the minds of consumers



## Color Marks (U.S. Trademark Manual of Examining Procedure 1202.05(b))

- A color mark is **not registrable** on the Principal Register, or the Supplemental Register, **if the color is functional**
- A color is functional if it yields a utilitarian or functional advantage (ex. Yellow or orange for safety signs)
- A color may also be functional if it is more economical to manufacture or use



## Color Marks (U.S. Trademark Manual of Examining Procedure 1202.05(c))

- An applicant may not seek to register the color of the wording or design apart from the words or designs themselves if the color does not create a separate commercial impression
- The commercial impression of a color may change depending on the object to which it is applied.
- Granting an application for registration of color in the abstract, without considering the manner or context in which the color is used, would be contrary to law and public policy



## U.S. Color Registered Trademarks

Int. Cls.: 3, 8, 14, 16, 18, 20, 21, 25, 28 and 35

Prior U.S. Cls.: 1, 2, 3, 4, 5, 6, 13, 22, 23, 25, 27,  
28, 29, 30, 32, 33, 37, 38, 39, 40, 41, 44, 50, 51, 52,  
100, 101 and 102

Reg. No. 2,184,128

United States Patent and Trademark Office

Registered Aug. 25, 1998

TRADEMARK  
SERVICE MARK  
PRINCIPAL REGISTER



TIFFANY AND COMPANY (NEW YORK COR-  
PORATION)  
727 FIFTH AVENUE  
NEW YORK, NY 10022

FOR: FRAGRANCE PRODUCTS, NAMELY,  
PERFUME, COLOGNE, TOILET WATER,  
TOILET SOAP, BABY POWDER, BODY  
CREAM, BATH GEL, SHOWER GEL, BODY  
LOTION AND PERSONAL DEODORANT, IN  
CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 0-0-1987; IN COMMERCE  
0-0-1987.

FOR: TABLEWARE, NAMELY, KNIVES,  
FORKS AND SPOONS, POCKET KNIVES, SCIS-  
SORS, AND RAZORS, IN CLASS 8 (U.S. CLS. 23,  
28 AND 44).

FIRST USE 0-0-1939; IN COMMERCE  
0-0-1939.

FOR: JEWELRY, WATCHES AND CLOCKS;  
PRECIOUS AND SEMI-PRECIOUS STONES;  
DECORATIVE ART OBJECTS MADE IN



## U.S. Color Registered Trademarks

### United States of America United States Patent and Trademark Office



**Reg. No. 5,176,498**  
**Registered Apr. 04, 2017**  
**Int. Cl.: 14**  
**Trademark**  
**Principal Register**

Tiffany (NJ) LLC (DELAWARE LIMITED LIABILITY COMPANY)  
15 Sylvan Way  
Parisippany, NJ 07054

CLASS 14: Jewelry  
FIRST USE 00-00-1982; IN COMMERCE 00-00-1982  
The color(s) blue is/are claimed as a feature of the mark.

The mark consists of a shade of blue that is used on product packaging in the form of jewelry pouches with drawstrings. The broken lines depicting the jewelry pouch and drawstrings indicate placement of the mark on the product packaging and are not part of the mark.

OWNER OF U.S. REG. NO. 2416794, 2184128, 2359351  
SEC.2(f)  
SER. NO. 87-196285, FILED 10-07-2016  
ANDREW C LEASER, EXAMINING ATTORNEY

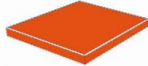


*Michelle K. Lee*  
Director of the United States  
Patent and Trademark Office



## U.S. Color Registered Trademarks

**United States of America**  
United States Patent and Trademark Office



**Reg. No. 4,000,067**  
**Registered July 26, 2011**  
**Int. Cls.: 3, 14, 18, 25**  
**and 35**

**TRADEMARK**  
**SERVICE MARK**  
**PRINCIPAL REGISTER**

HERMES INTERNATIONAL (FRANCE SOCIETE EN COMMANDITE PAR ACTIONS)  
24 RUE DU FAUBOURG SAINT HONORE  
PARIS, FRANCE F-75008

FOR: PERFUMES, SOAPS, TOILET WATER, SHOWER GEL, SHOWER CREAM, BODY LOTIONS, DEODORANTS FOR PERSONAL USE, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 0-0-1939; IN COMMERCE 0-0-1966.

FOR: JEWELRY, CLOCKS AND WATCHES, IN CLASS 14 (U.S. CLS. 2, 27, 28 AND 50).

FIRST USE 0-0-1939; IN COMMERCE 0-0-1966.

FOR: HANDBAGS, WALLETTS AND LUGGAGE, IN CLASS 18 (U.S. CLS. 1, 2, 3, 22 AND 41).

FIRST USE 0-0-1939; IN COMMERCE 0-0-1966.

FOR: CLOTHING, NAMELY, SHOES, HATS, CAPS, SCARVES, SHAWLS, GLOVES, TIES AND BELTS, IN CLASS 25 (U.S. CLS. 22 AND 39).

FIRST USE 0-0-1939; IN COMMERCE 0-0-1966.

FOR: RETAIL STORE FEATURING CLOTHING, NAMELY, SHOES, HATS, CAPS, SCARVES, SHAWLS, GLOVES, TIES, BELTS AND ONLINE RETAIL STORES SERVICES FEATURING JEWELRY, WATCHES, CLOTHING, FASHION ACCESSORIES, PERSONAL CARE PRODUCTS, BABY PRODUCTS AND TOYS, GAMES AND TOYS, HOME, BATH, KITCHEN, TRAVEL WARES AND ACCESSORIES, PAPER PRODUCTS, MONEY CLIPS OF COMMON METAL, CUFFLINKS AND PERFUMERY, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 0-0-1939; IN COMMERCE 0-0-1973.

THE MARK CONSISTS OF THIS SHADE OF THE COLOR ORANGE, WHICH IS APPLIED TO THE EXTERIOR OF MERCHANDISE BOXES FOR THE GOODS AND USED IN CONNECTION WITH THE SERVICES. THE DOTTED LINES OUTLINING THE BOX INDICATE THAT THE BOX IS NOT BEING CLAIMED AS PART OF THE MARK AND THAT THE DOTTED LINES ARE USED MERELY TO SHOW PLACEMENT OF THE MARK.

THE COLOR(S) ORANGE IS/ARE CLAIMED AS A FEATURE OF THE MARK.



*David J. Kappas*  
Director of the United States Patent and Trademark Office



## U.S. Color Registered Trademarks

Int. Cl.: 39

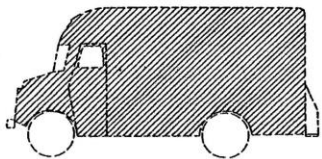
Prior U.S. Cls.: 100 and 105

Reg. No. 2,131,693

Registered Jan. 27, 1998

**United States Patent and Trademark Office**

### SERVICE MARK PRINCIPAL REGISTER



UNITED PARCEL SERVICE OF AMERICA,  
INC. (DELAWARE CORPORATION)  
55 GLENLAKE PARKWAY, NE  
ATLANTA, GA 30328

FOR: MOTOR VEHICLE TRANSPORTATION  
AND DELIVERY OF PERSONAL PROPERTY,  
IN CLASS 39 (U.S. CLS. 100 AND 105).  
FIRST USE 0-0-1917; IN COMMERCE  
0-0-1917.

THE DRAWING IS LINED FOR THE COLOR  
BROWN.

THE MARK CONSISTS OF THE COLOR  
BROWN APPLIED TO THE VEHICLES USED  
IN PERFORMING THE SERVICES.  
SEC. 2(F).

SER. NO. 75-039,323, FILED 12-26-1995.

TERESA M. RUPP, EXAMINING ATTORNEY

# The most efficient vehicle yet devised for crossing the Atlantic.



The familiar brown UPS  
package car has symbolized effi-  
cient delivery service in America  
for over 70 years.

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and from Europe.

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of the United States



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the shipping business.



## U.S. Color Registered Trademarks

### United States of America United States Patent and Trademark Office



Reg. No. 4,084,102  
Registered Jan. 10, 2012  
Int. Cl.: 7

TRADEMARK  
PRINCIPAL REGISTER

DEERE & COMPANY (DELAWARE CORPORATION)  
GLOBAL INTELLECTUAL PROPERTY SERVICES  
ONE JOHN DEERE PLACE  
MOLINE, IL 61265

FOR: FORESTRY MACHINES, NAMELY: FELLER BUNCHERS, SKIDDERS, HARVESTERS  
AND FORWARDERS, KNUCKLEBOOM LOADERS, IN CLASS 7 (U.S. CLS. 13, 19, 21, 23,  
31, 34 AND 35).

FIRST USE 12-31-2005; IN COMMERCE 12-31-2005.

OWNER OF U.S. REG. NOS. 1,254,339, 1,503,576, AND 3,132,124.

THE COLOR(S) GREEN AND YELLOW IS/ARE CLAIMED AS A FEATURE OF THE MARK.

THE MARK CONSISTS OF THE COLOR COMBINATION GREEN AND YELLOW IN WHICH  
GREEN IS APPLIED TO AN EXTERIOR SURFACE OF THE MACHINE AND YELLOW IS  
APPLIED TO THE WHEELS. THE BROKEN-LINE OUTLINING IS TO SHOW THE POSITION  
OR PLACEMENT OF THE MARK ON THE GOODS. THE OUTLINING AND THE SHAPE  
OF THE MACHINE ARE NOT CLAIMED AS PART OF THE MARK.

SEC. 203.

SER. NO. 85-463,506, FILED 8-22-2011.

LINDA ESTRADA, EXAMINING ATTORNEY



*David J. Kappas*

Director of the United States Patent and Trademark Office





## U.S. Color Registered Trademarks

**Int. Cl.: 16**

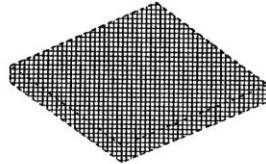
**Prior U.S. Cls.: 2, 5, 22, 23, 29, 37, 38 and 50**

**Reg. No. 2,390,667**

**United States Patent and Trademark Office**

**Registered Oct. 3, 2000**

### TRADEMARK PRINCIPAL REGISTER



MINNESOTA MINING AND MANUFACTURING  
COMPANY (DELAWARE CORPORATION), AKA  
3M  
3M CENTER  
SAINT PAUL, MN 551441000

FOR: STATIONERY NOTES CONTAINING ADHESIVE ON ONE SIDE FOR ATTACHMENT TO SURFACES, IN CLASS 16 (U.S. CLS. 2, 5, 22, 23, 29, 37, 38 AND 50).

FIRST USE 0-0-1978; IN COMMERCE 0-0-1978.

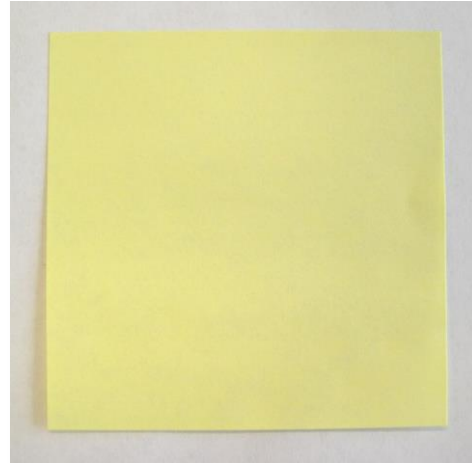
THE MARK IS LINED FOR CANARY YELLOW, AND THE APPLICANT CLAIMS COLOR AS THE MARK.

THE MARK CONSISTS OF THE COLOR CANARY YELLOW USED OVER THE ENTIRE SURFACE OF THE GOODS. THE MATTER SHOWN IN BROKEN LINES SHOWS THE POSITION OF THE MARK AND IS NOT CLAIMED AS PART OF THE MARK.

SEC. 2(f).

SER. NO. 75-087,575, FILED 4-5-1996.

TERESA M. RUPP, EXAMINING ATTORNEY

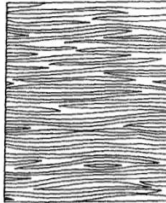


## U.S. Color Registered Trademarks

Int. Cl.: 18  
Prior U.S. Cls.: 1, 2, 3, 22 and 41  
United States Patent and Trademark Office  
Corrected

Reg. No. 2,075,141  
Registered July 1, 1997  
OG Date May 26, 1998

TRADEMARK  
PRINCIPAL REGISTER



LOUIS VUITTON MALLETIER  
(FRANCE CORPORATION)  
54, AVENUE MONTAIGNE  
75008 PARIS, FRANCE

OWNER OF FRANCE REG. NO.  
9347892, DATED 8-3-1993, EXPIRES  
1-30-2002.

OWNER OF U.S. REG. NO. 1,931,144.

THE COLOR YELLOW IS CLAIMED  
AS A FEATURE OF THE MARK.

THE MARK CONSISTS OF RAISED  
DARK YELLOW WAVY LINES ON A  
LIGHTER YELLOW BACKGROUND.

FOR: TRUNKS FOR TRAVELLING,  
SUITCASES, TRAVELLING BAGS,  
HANDBAGS, LUGGAGE, COSMETIC  
CASES SOLD EMPTY, VANITY CASES  
SOLD EMPTY, TOILETRY CASES SOLD  
EMPTY, BACK PACKS, SHOULDER  
BAGS, TOTE BAGS, LEATHER SHOP-  
PING BAGS, WAIST PACKS,  
BRIEFCASES, ATTACHE CASES, BRIEF-  
CASE-TYPE PORTFOLIOS, PURSES,  
CHANGE PURSES, WALLETS, KEY  
CASES, DOCUMENT CASES, BUSINESS  
CARD CASES AND BILLFOLDS, IN  
CLASS 18 (U.S. CLS. 1, 2, 3, 22 AND 41).

SER. NO. 75-034,621, FILED 12-19-1995.



## Sounds Trademarks (U.S. Trademark Manual of Examining Procedure 1202.15)

- Sound marks function as source indicators when they assume a definitive shape or arrangement and create in the hearer's mind an association of the sound with a good or services
- Sounds can be registered on the Principal Register when they are arbitrary, unique or distinctive and can be used in a manner so as to attach to the mind of the listener and be awakened on later hearing in a way that would indicate for the listener that a particular product or service was coming from a particular, even if anonymous source



## U.S. Sounds Registered Trademarks

Examples of sound marks include:

A series of tones or musical notes, with or without words and

Wording accompanied by music



U.S. Reg. Num. **87245350**



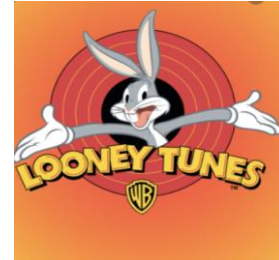
U.S. Reg. Num. **73553567**

## U.S. Sounds Registered Trademarks

- Examples of commonplace sound marks include goods that make the sound in their normal course of operation
- Sound marks for goods that make the sound in their normal course of operation can be registered only on a showing of acquired distinctiveness



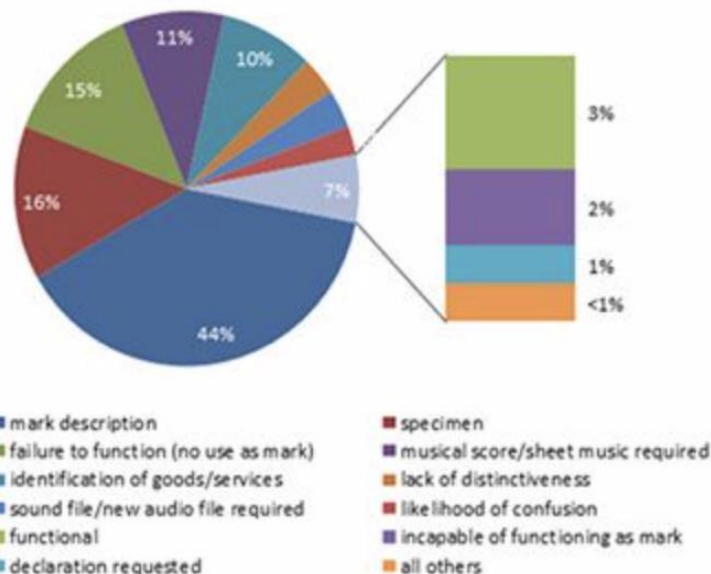
U.S. Reg. Num. 76163189



U.S. Reg. Num. 75934534

## U.S. Sounds Trademarks

Frequency Of Sound TM Objections



- mark description
- specimen
- failure to function (no use as mark)
- musical score/sheet music required
- identification of goods/services
- lack of distinctiveness
- sound file/new audio file required
- likelihood of confusion
- functional
- incapable of functioning as mark
- declaration requested
- all others

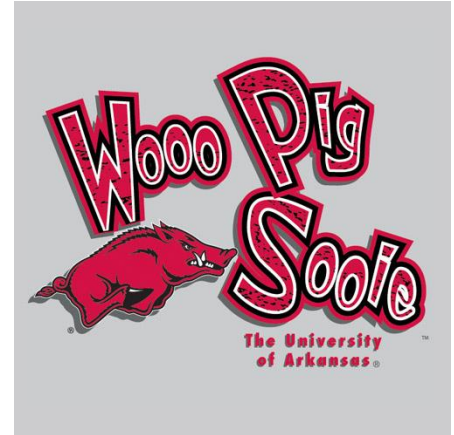


## U.S. Sounds Trademarks

*Board of Trustees of the University of Arkansas v. B&J's Inc.* (T.T.A.B. Sep. 16, 2015)).

The Board of Trustees of the University of Arkansas opposed the Registration of the mark for SOOIE-T for apparel based on the university's registrations for the word mark WOOOO PIG SOOIE for apparel and a sound mark that “consists of a crowd cheering the following words ‘**woooooo. Pig. Sooie! Wooooo. Pig. Sooie! Wooooo. Pig Sooi! Razorbacks!**’” for collegiate athletic and sporting events

Case settled but the opposer's motion of summary judgement on its dilution claim was denied on the basis there was a genuine dispute of material fact regarding the fame of the marks



## Smell Trademarks (U.S. Trademark Manual of Examining Procedure 1202.13)

- The Scent of a product may be registerable if it is used in a nonfunctional manner
- 
- Scents that serve a utilitarian purpose, such as the scent of perfume or an air freshener, are functional and not registrable
- The amount of evidence required to establish that a scent or fragrance functions as a mark is substantial





## Smell Trademarks (U.S. Trademark Manual of Examining Procedure 1202.13)

- An individual's perception of a scent is influenced by a lot of environmental variables such as temperature, humidity and wind conditions
- One person's perception of an odor will differ greatly from another's because of personal factors such as age, gender, and genetics



## U.S. Smell Trademarks

*Sherrell Perfumers Inc. v. Revlon Inc.*, 483 F. Supp. 188 (S.D.N.Y. 1980).

”Without a universal method of identifying and classifying scents and given their subjective nature, consumers are bound to be confused as more scents enter the marketplace. Without the ability to distinguish scents accurately, proving infringement might be an almost impossible task.”



## U.S. Smell Trademarks

United States of America  
United States Patent and Trademark Office

NON-VISUAL PLAY-DOH SCENT  
MARK

**Reg. No. 5,467,089**

**Registered May 15, 2018**

**Int. Cl.: 28**

**Trademark**

**Principal Register**

Hasbro, Inc. (RHODE ISLAND CORPORATION)  
1027 Newport Avenue  
Pawtucket, RHODE ISLAND 02862

CLASS 28: Toy modeling compounds

FIRST USE 9-12-1955; IN COMMERCE 9-12-1955

The mark is a scent of a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough

SEC.2(F)

SER. NO. 87-335,817, FILED 02-14-2017

May 18, 2018 the USPTO approved Hasbro's trademark application for the modeling clay's "sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of slated, wheat-based dough"



## Taste Trademarks (U.S. Trademark Manual of Examining Procedure 1202.13)

- A flavor can never be inherently distinctive because it is generally seen as a characteristic of the goods
- The board has observed that it is unclear how a flavor could function as a source indicator because flavor or taste generally performs a utilitarian function and consumers generally have no access to a product's flavor or taste prior to purchase
- An application to register a flavor requires a substantial showing of acquired distinctiveness.



## U.S. Taste Trademarks

*In re Pohl-Boskamp GmbH & Co. KG*, 106 U.S.P.Q. 2d 1042, 1049 (T.T.A.B. 2013).

Pohl-Boskamp GmbH & Co. KG tried to register the flavor and scent of peppermint as a trademark for nitroglycerin spray used to treat chest pain. During the examination, it was found that the peppermint flavor makes the Nitrolingual Pumpspray product more effective at treating angina, so it was considered functional and therefore ineligible.



## Gesture Trademarks (U.S. Trademark Manual of Examining Procedure)

- The number of records in the USPTO database with the phrase “hand gesture” in the description of the mark is less than 100
- Most of these records are logo marks containing an image of a hand gesture rather than for a transitory hand gesture itself when made by a live person in the course of providing services or goods
- In general, one cannot trademark a hand gesture, as it does not fit the Trademark Office’s criteria for trademarkable material
- Hand gestures are difficult to protect, because anyone can perform it and it is not the sort of thing that can be used to differentiate competitors in the marketplace



## U.S. Gesture Trademarks

In 2013 Lambda Tau Upsilon Christian Sorority applied to register a mark described as a hand gesture

The services were "association services, namely, organizing chapters of a sorority and promoting the interests of members thereof."

The examining attorney did not say that the hand gesture was per se not permitted but the mark received two office actions because the specimen did not contain a comparable drawing as shown in the application and then was abandoned



## U.S. Gesture Trademarks

Gene Simmons attempted to trademark the “Devil horns” hand gesture but withdrew the filing after a few weeks due to criticism.

When asked about the backlash, Simmons responded “People got very upset—unqualified, no experience, no resume – those are the people in the peanut gallery. And so people get upset about something when they don’t know the facts. Actually, you can trademark anything. And if nobody objects, I can own every breath of air you take.”





## Multimedia Trademarks (U.S. Trademark Manual of Examining Procedure 807.11 & 904.03(I))

- Applicants must describe the motion mark and provide a drawing that either shows a single point in the movement or “up to 5 freeze frames showing various points in the movement.”
- The specimen must show the entire repetitive motion in order to depict the commercial impression conveyed by the mark
  - Video clip
  - A series of still photos
  - A series of screen shots



## U.S. Multimedia Registered Trademarks

Int. Cl.: 12

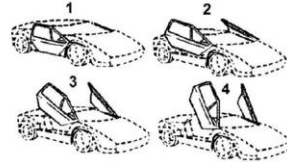
Prior U.S. Cls.: 19, 21, 23, 31, 35 and 44

United States Patent and Trademark Office

Reg. No. 2,793,439

Registered Dec. 16, 2003

### TRADEMARK PRINCIPAL REGISTER



AUTOMOBILE LAMBORGHINI HOLDING S.P.A.  
(ITALY CORPORATION)  
VIA MODENA, L/B  
40019 SANT' AGATA BOLOGNESE  
BOLOGNA, ITALY

FOR: AUTOMOBILES, IN CLASS 12 (U.S. CLS. 19,  
21, 23, 31, 35 AND 44).

FIRST USE 0-0-1980; IN COMMERCE 0-0-1980.

THE MATTER SHOWN IN DOTTED LINES IS  
NOT PART OF THE MARK.

THE MARK CONSISTS OF THE UNIQUE MOTION IN WHICH THE DOOR OF A VEHICLE IS OPENED. THE DOORS MOVE PARALLEL TO THE BODY OF THE VEHICLE BUT ARE GRADUALLY RAISED ABOVE THE VEHICLE TO A PARALLEL POSITION.

SEC. 2(F).

SER. NO. 75-883,661, FILED 12-28-1999.

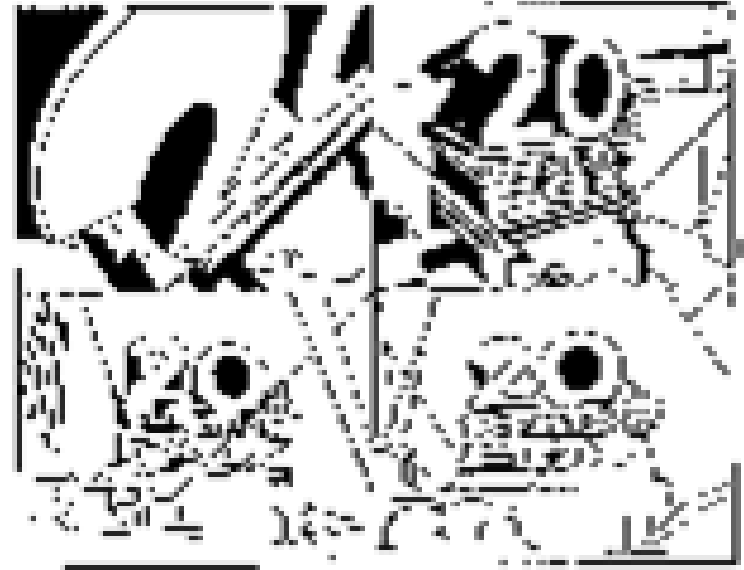
VIVIAN MICZNIK FIRST, EXAMINING ATTORNEY



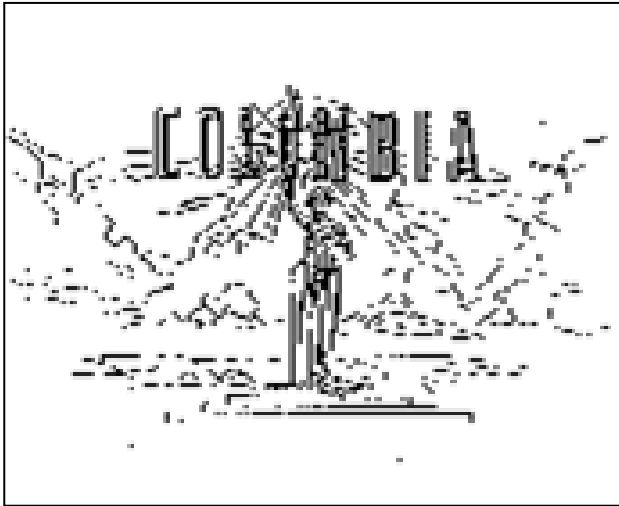
## U.S. Multimedia Registered Trademarks



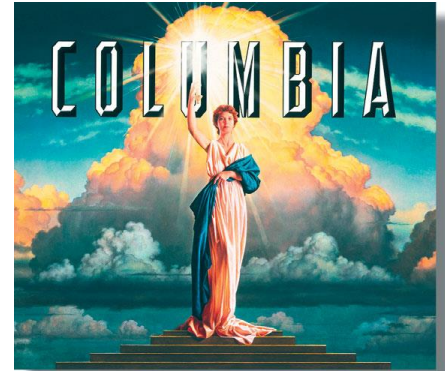
**TM 1.928.424:**  
computer generated  
sequence showing the  
central element from  
several angles as  
though a camera is  
moving around the  
structure. The drawing  
represents four “stills”  
from the sequence.



## U.S. Multimedia Registered Trademarks



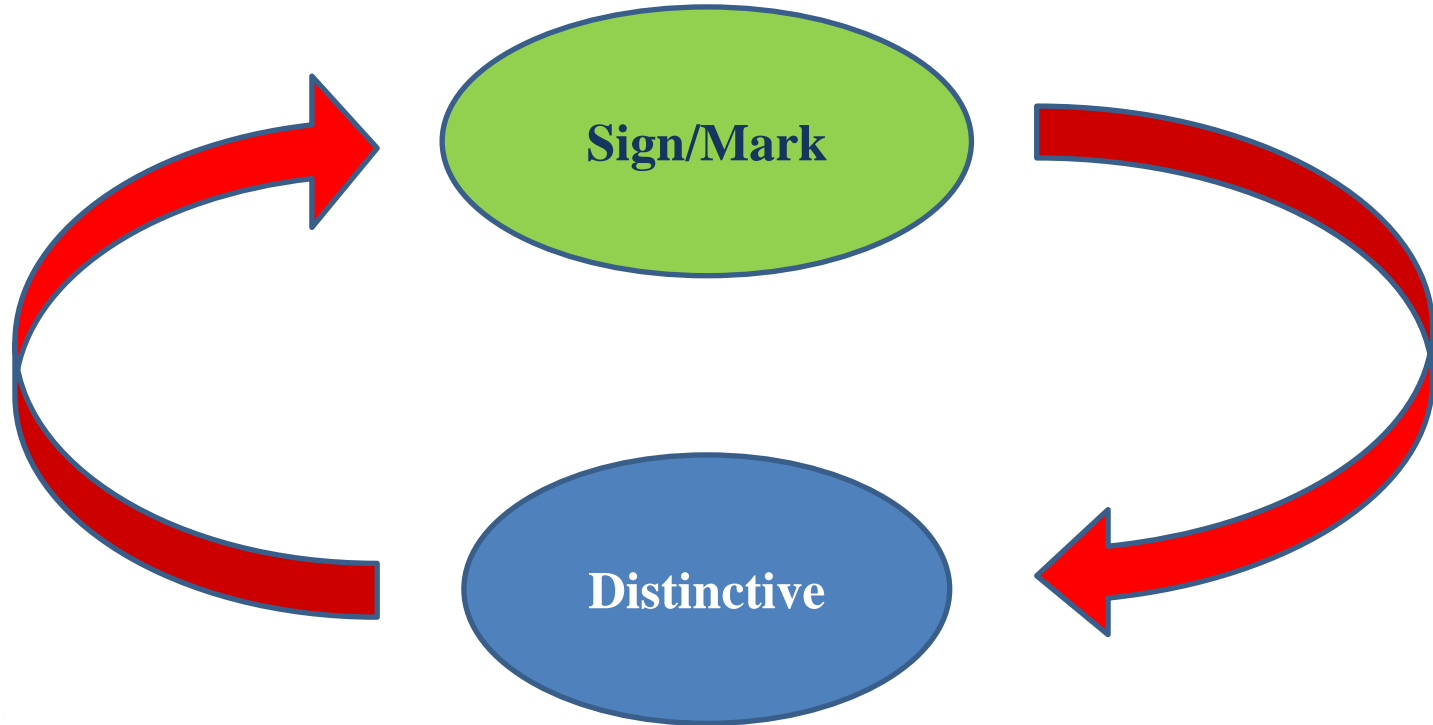
**TM 1.975.999**; moving image of a flash of light from which rays of light are emitted against a background of sky and clouds. The scene then pans downward to a torch being held by a lady on a pedestal. The word “COLUMBIA” appears across the top running through the torch and then a circular rainbow appears in the sky encircling the lady.



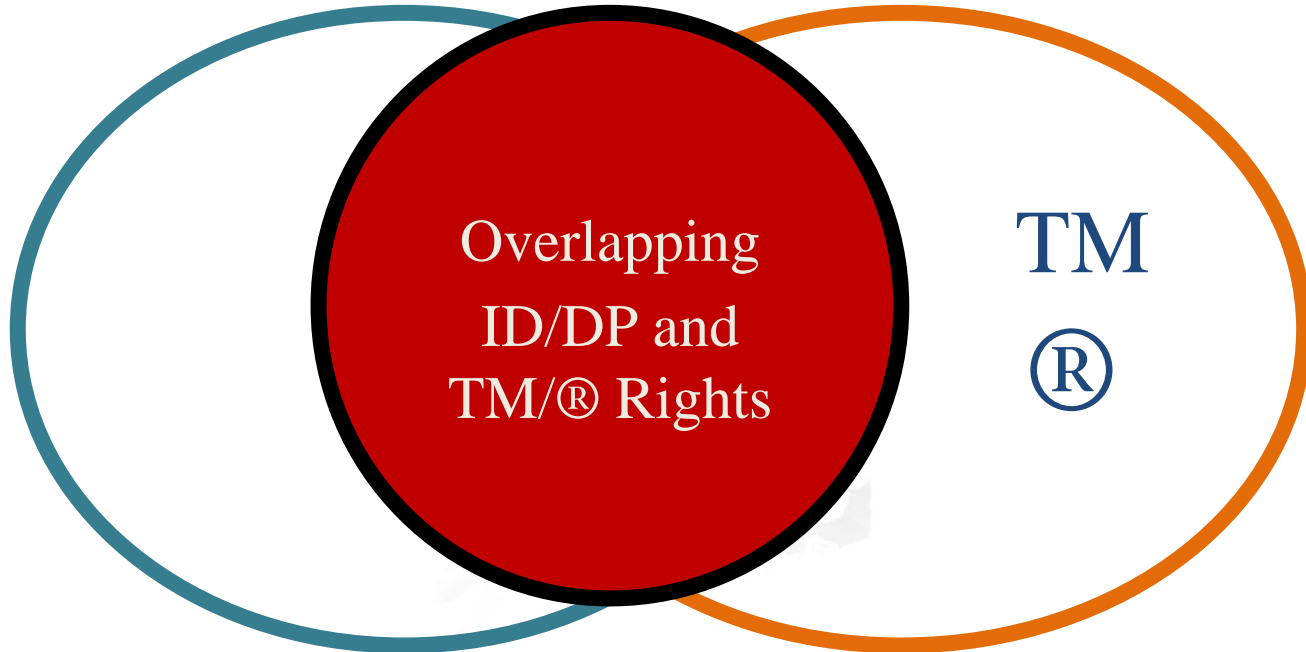
## U.S. Multimedia Registered Trademarks



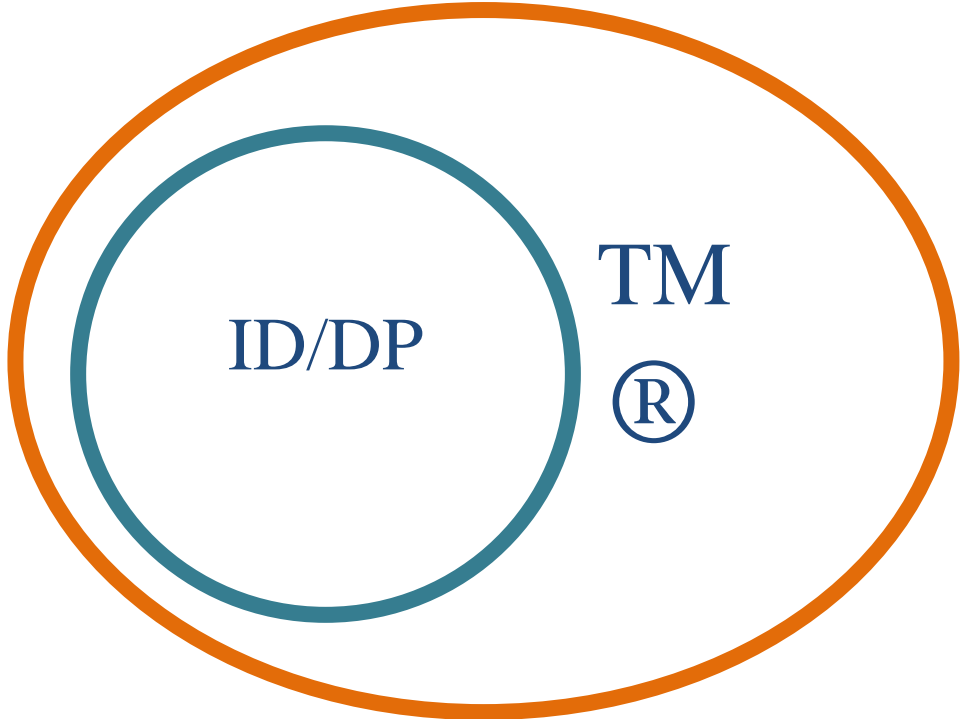
## Why Non Traditional Trademarks?



## Possible Competition Concerns for National IP Offices



## Possible Competition Concerns for National IP Offices





# Possible Competition Concerns for National IP Offices

## Distinctive Signs of Trade?



## Distinctive Designs?



## Distinctive Products?

## 3D Trademark in Indonesia



Ritter GmbH



Gambar 1



Gambar 2



Gambar 3



Gambar 4



Gambar 5



Gambar 6



Gambar 7

RN-Lubricants LLC



## 3D Trademark in Indonesia



FERRERO S.p.A.



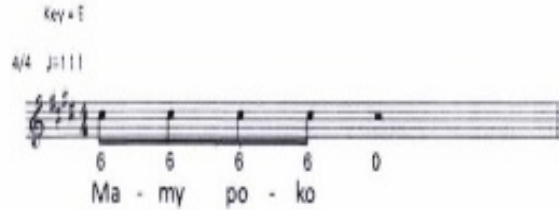
Allied Domecq Spirits & Wine Limited

# 3D Trademark in Indonesia



PT. LASALLEFOOD INDONESIA

## Sound Mark in Indonesia



JINGLE MAMY POKO



JINGLE MAMY POKO tetap kering

UNI-CHARM CORPORATION



## Sound Mark in Indonesia



JINGLE



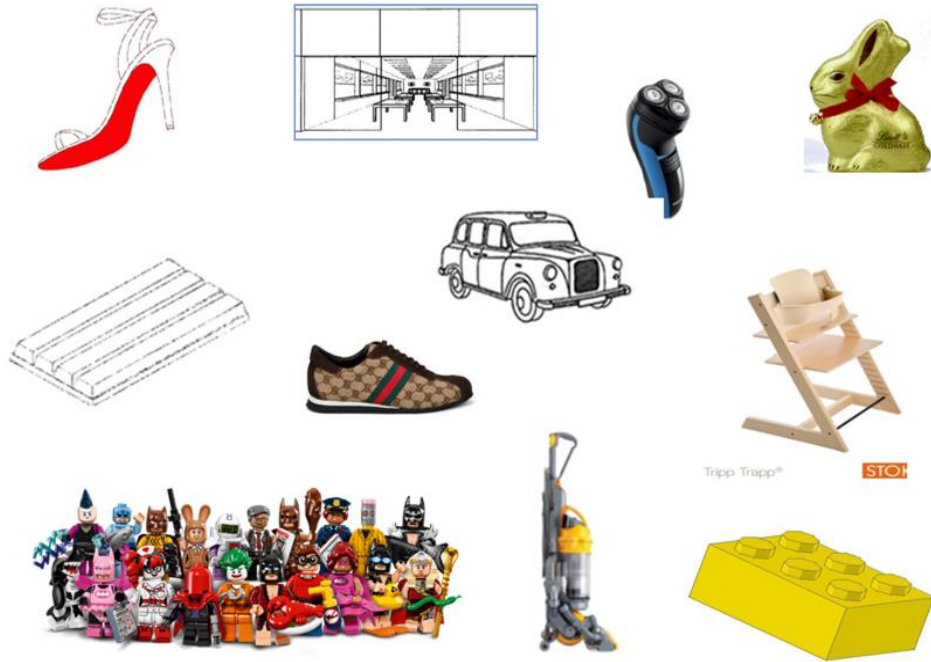
JINGLE MATAHARI + LOGO

HISAMITSU PHARMACEUTICAL CO., INC

PT. MATAHARI DEPARTMENT STORE, TBK



## Conclusion?



**THANK YOU**

**Irene.Calboli@gmail.com**



**@IPKey\_EU**

