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How Certain is Trademark Protection, Really?

A study on how trademark proprietors may lose trademark protection.

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Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Background	3
1.4 Delimitations	7
1.5 Disposition	7
2 EUTM	9
2.1 Application	9
2.2 Registerable Marks	16
2.2.1 <i>Traditional Marks</i>	16
2.2.2 <i>Non-Traditional Marks</i>	19
3 CANCELLATIONS	23
3.1 Surrender, Revocation and Invalidity	23
3.2 Cancellation Proceedings	24
3.3 Revocation	26
3.3.1 <i>Genuine Use</i>	26
3.3.2 <i>Generic</i>	32
3.4 Invalidity	37
3.5 Revocation vs. Invalidity	39
3.5.1 <i>Traditional Marks</i>	39
3.5.2 <i>Registration and Invalidity</i>	41
4 NON-TRADITIONAL TRADE MARKS AND CANCELLATION	44
4.1 General	44
4.2 Colour Marks	46
4.3 Shape Marks	47
4.4 Discussion	50
5 MEMBER STATE CHANGES	51
5.1 Brexit	51
5.2 Enlargement of the EU	54
6 ANALYSIS	56

BIBLIOGRAPHY	59
LEGISLATION	63
TABLE OF CASES	64
APPENDIX 1	66
APPENDIX 2	67
APPENDIX 3	68

Summary

Since its foundation, one of the main purposes of the European Union has been to create a single market where goods and services, as well as people, can move freely between Member States without internal borders nor other regulatory obstacles¹. Common intellectual property legislation is necessary as most goods and services indeed rely on intellectual property². This is particularly true for trade marks since their aim is to communicate the origin of the product to the consumer³. The maintenance of a EUTM should therefore be tremendously important for proprietors of a registered mark, as they are a vital asset for most companies, and a cancellation of a EUTM therefore result in devastating consequences for a company.

The focus of this thesis is therefore to analyse situations where registered marks have lost protection, e.g. been cancelled, in order to explore how such loss of protection and cancellations can be avoided. This thesis therefore seeks to answer how, and to what extent, registered EUTMs is cancelled. This is done through addressing the concepts of genuine use, the concept of 'generic' but also through analysing how registrations and invalidity claims may coexist to the extent they do. Further, the thesis elaborates on the correlation between non-traditional trade marks and EUTM cancellations. Lastly, and of importance for the present situation in the EU, the question of cancellations resulting from the enlargement or reduction of the Union is analysed including the ramifications of these scenarios.

¹ Emily Bolton, 'Defining Genuine Use Requirements of Community Trade Marks in Light of an Expanding European Union' (2012) 27(2) Conn J Int'l L 371, 373
<<https://heinonline.org/HOL/P?h=hein.journals/conjil27&i=380>> accessed May 25, 2019

² Ibid.

³ 'Trade Mark Protection in the EU' (*European Commission*)
<https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection_en>
accessed 25 May 2019

Abbreviations

CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
EGC	The General Court
EUTM	European Union trade mark
EUIPO	European Union Intellectual Property Office
IP	Intellectual Property
OHIM	Office for Harmonization in the Internal Market
TEU	Treaty on European Union
WIPO	World Intellectual Property Office

1 Introduction

1.1 Background

The European Union (EU) is one of the largest economies in the world and a global intellectual property hub.⁴ Reports have stated that 88 % of EU imports and 90 % of EU exports derives from products of intellectual property intensive industries as well as 26 % of EU employment and 39 % of EU gross domestic product (GDP) derives from intellectual property intensive sectors⁵.

Since its foundation, one of the main purposes of the European Union has been to create a single market where goods and services, as well as people, can move freely between Member States without internal borders nor other regulatory obstacles⁶. To ensure this, common intellectual property legislation is necessary as most goods and services indeed rely on intellectual property⁷. This is particularly true for trade marks since their aim is to communicate the origin of the product to the consumer⁸. In other words, for trade to work between Member States there is a need to have common regulations for trade marks within the EU. In conjunction with this, trade marks have become increasingly important for companies and an immense part of a company's value⁹.

⁴ Alexandra George, 'Restructuring Intellectual Property Jurisdiction Post-Brexit: Strategic Considerations for the European Union and Britain' (2017) 43(1) *Brook J Int'l L* 131, 134 <<https://heinonline.org/HOL/P?h=hein.journals/bjil43&i=139>> accessed May 25, 2019

⁵ *ibid*

⁶ Emily Bolton, 'Defining Genuine Use Requirements of Community Trade Marks in Light of an Expanding European Union' (2012) 27(2) *Conn J Int'l L* 371, 373

<<https://heinonline.org/HOL/P?h=hein.journals/conjil27&i=380>> accessed May 25, 2019

⁷ *ibid*

⁸ 'Trade Mark Protection in the EU' (*European Commission*)

<https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection_en> accessed 25 May 2019

⁹ Kurt Badenhausen, 'The World's Most Valuable Brands 2018' (*Forbes*, May 23, 2018) <<https://www.forbes.com/sites/kurtbadenhausen/2018/05/23/the-worlds-most-valuable-brands-2018/>> accessed May 25, 2019

To address the issue of non-harmonised trade mark legislation between Member States, the EU first passed Council Directive 89/104/EEC (now codified as Directive 2008/95/EC) to harmonise national trade mark legislation. Later, in 1994, parallel to national legislation the EU established community-wide trade marks through Council Regulation (EC) no.40/94 on the Community trade mark [1994] OJ L 11/1 (now codified as Council Regulation (EC) No. 207/2009 on the Community trade mark [2009] OJ L 78/1). The passing of the Regulation also established the Office for Harmonization in the Internal Market (OHIM, now EUIPO) for the registration and enforcement of European Union trade mark (EUTM)¹⁰. The formation of EUTMs simplified the application procedures for companies since one application may provide registered protection in all Member States. However, the facilitation provided by registering a EUTM also results in the risk of having the registered mark cancelled, resulting in the simultaneous loss of protection in all Member States. Therefore, it can be argued that the maintenance of a EUTM should be tremendously important for proprietors of a registered mark since a cancellation of the EUTM could result in devastating consequences for a company.

This recently became evident when the international fast food-chain McDonalds' EUTM for one of their main menu items, "Big Mac", was revoked due to McDonalds' failure to prove genuine use of the contested mark, when they accused Ireland based fast food-chain SuperMac for infringing in their right.¹¹

1.2 Purpose & Research Questions

Thus, the focus of this thesis will be to analyse situations where registered marks have lost protection, e.g. been cancelled, in order to explore how such

¹⁰ Justine Pila and Paul L.C. Torremans, *European Intellectual Property Law* (OUP 2016) 364

¹¹ *Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

loss of protection and cancellations can be avoided. This thesis therefore seeks to answer the following research questions:

- How, and to what extent are, EUTMs cancelled?
 - What constitutes genuine use?
 - When is a word generic, i.e. used as a common name in trade, and thus should be revoked?
 - Is EUIPO too generous when registering trade marks?

- Is there a correlation between non-traditional trade marks and EUTM cancellations i.e. is it more certain to retain protection for a common mark?

- What possible ramifications may there be for EUTM proprietors when a Member State leaves the EU, as in the upcoming Brexit, or joins the EU?

1.3 Methodology

To address the research questions EU legal method has been used as all sources derive from the EU, and the hierarchy between different EU sources is of importance during the course of the thesis¹². To the extent possible the legal analysis is based on this structural order: current law, case law, decisions by EUIPO, other EU sources and legal doctrine. As an ample part of the material used in the thesis originates from EUIPO including decisions made by the Office and Board of Appeals, this structure is important to keep in mind while reading the thesis. EUIPO applies current EU law by enforcing the law through its decision; however, they are not inclined to interpret EU law and must conform to the case law of the ECJ as well as the case law of the GC¹³. In situations where the GC and the ECJ has not yet established the

¹² Jörgen Hettne and Ida Eriksson Otken, *EU-rättslig metod: teori och genomslag i svensk rättstillämpning* (Nordstedts juridik 2011) p.40

¹³ Article 19 Consolidated version of the Treaty on European Union [2012] OJ C326/13

applicable law, the decisions made by EUIPO may be used as guidance but not as a substitution to case law or the current law established in the Regulation. The decisions by EUIPO can also be appealed to the GC, stating the decisions are not final, and may thus be subject to change. The decisions of the GC can only be appealed to the ECJ due to error of law.

To further develop the analysis data was collected to show the current situation for the EUTM system. All data was retrieved from the Register between the 10th and the 20th of May. This is of importance as the Register is constantly changing due to new entries as well as cancellations or expirations. The data used should therefore be viewed as a reflection of the current situation and may be analysed to the extent that is appropriate. The data concerning statistics on amount of registrations divided on different types of marks as well as amount cancelled and correlating data that can be viewed in Appendix 1 and 2 was retrieved from the EUIPO database eSearch plus and was collected by choosing the relevant type of marks together with the trade mark status. Regarding the data in Appendix 3, there was no choice available to divide the data between cancellations due to revocation and cancellations due to invalidity. The process of collecting the data was therefore (i) search for the relevant data by choosing type: word or figurative and status: cancelled (ii) go through all cancelled marks and divided the marks after viewing the cancellation procedure. All registration numbers for marks that was found to have been cancelled due to revocation was then added to Appendix 3. A few marks did not have any information regarding the cancellation and was marked as “other”. The amount of cancellations based on invalidity was calculated by taking all marks cancelled and extract the marks that have been revoked as well as the marks denoted “other”.

1.4 Delimitations

Instead of applying for a EUTM, the applicant may apply for trademark protection in individual Member States or in one specific Member State¹⁴, this will not be further elaborated on thus the Directive won't be explored supplementary. However, since the Directive and the Regulation is almost the same, case law which refers to the Directive will be used to explain the Regulation.

Trade marks are often international in scope and trade mark protection exists in most countries, but since this thesis aims at analysing EUTMs, national legislation outside the EU will not be discussed nor will international legislation, such as World Intellectual Property Offices (WIPO) rules be conferred.

A EUTM can lose protection through other means than cancellation, by the expiration or the surrendering of a mark. This will be mentioned but since it is not directly of importance for the purpose of this thesis, these instances will not be examined.

1.5 Disposition

The thesis begins, in chapter 2, with a short explanation of the foundations of EUTM. Thereafter, the thesis is structured in accordance with the research questions i.e. chapter 3 discuss the grounds for EUTM cancellations: revocation and invalidity as well as an analysis of the most common grounds for cancellation of EUTM. Chapter 4 examines the possible correlation between non-traditional marks and trade mark cancellations while chapter 5

¹⁴ Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark' COM (2013) 161 final, 1.1

concerns the ramifications of the enlargement, and the reduction, of the EU on EUTMs. The thesis ends with an analysis of all three research questions.

2 EUTM

2.1 Application

The EUTM is a stand-alone unitary and community-wide trade mark right of which the effect has equal footing throughout the EU, meaning that it will stand or fall concurrently in all Member States.¹⁵ The purpose of the EUTM is to enable consumers to distinguish the origin of goods and services and thus enable businesses to attract consumer loyalty and as a result create value and growth for the company¹⁶. A EUTM is obtained through an application for registration¹⁷ by the proprietor of the mark, who may be any legal or natural person,¹⁸ to the European Union Intellectual Property Office (EUIPO)¹⁹.

“An EU 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: ...being represented on the Register...”²⁰

Above is the wording of the new Regulation dating 14 June 2017, compared to the wording of the former Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (the older Regulation) below:

¹⁵ Eric P. Raciti, ‘The Harmonization of Trademark in the European Community’ (1996) 78(1) J Pat & Trademark Off Soc’y 51, 63
<<https://heinonline.org/HOL/P?h=hein.journals/jpatos78&i=77>> accessed May 25, 2019, and Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 1 and Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark’ COM (2013) 161 final, art 1.1

¹⁶ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark’ COM (2013), art 1.1

¹⁷ Regulation, art 6

¹⁸ Regulation, art 5

¹⁹ Regulation, art 30

²⁰ Regulation, art 4

*“A Community 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...”*²¹

The latter citation, from the older Regulation is precisely the same as the wording of the first regulation on Community trade marks, Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark. It includes the currently replaced part, which required that a sign could only be registered if it was capable of being represented graphically, as opposed to the wording of the current regulations requirement of being capable of being represented on the Register. This expands the scope of the Regulation to include more signs, and new forms of non-traditional marks. The requirement was deduced as it was found to be out of date, and thus created legal uncertainties in relation to some of the non-traditional marks, e.g. sound marks²². The current regulation also addresses more types of non-traditional marks than the older Regulation by including colours and sounds in the wording of the Article, which may be viewed as confirmation of the broadening of the Scope of the Regulation.

Albeit the requirement of graphical representation was excluded from the newer Regulation, parts of the requirement stand as recital 10 in the preamble, repeats the seven criteria from the ECJ judgement in *Sieckmann*²³, as is evident below:

“A sign should be permitted to be represented in any appropriate form using generally available technology, and thus not necessarily by graphic means,

²¹ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) [2009] OJ L78/24, Article 4

²² Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark’ COM (2013), 5.3

²³ Nedim Malovic, ‘Sieckmann Kicks in Once Again: When Is a Representation of a Sign an Acceptable Representation for the Sake of Registration?’ (*The IPKat*, March 3, 2018) <<http://ipkitten.blogspot.com/2018/03/sieckmann-kicks-in-once-again-when-is.html>> accessed May 25, 2019

as long as the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.^{24,25}

The necessary requirements, i.e. that the mark has to consist of a sign and that the sign has to be capable of distinguishing the goods and services from other undertakings, has remained the same during all three Regulations²⁶.

Any sign is inherently a broad definition and may be viewed as ‘everything which can transfer information’.²⁷ In conjunction with the other requirements, capability of being represented in the Register and distinctive character, the scope is narrowed. The absolute grounds of refusal also narrow the scope further.

The requirement of the sign being capable of distinguishing the goods and services of one undertaking from those of other undertakings is a fundamental requirement, like the scope of ‘any sign’, the requirement is defined further by the absolute grounds of refusal²⁸. Marks, which are devoid of any distinctive character, are an absolute ground for refusal according to Article 7.1(b) of the Regulation²⁹. Distinctive character is determined by the experience of the relevant public, which are regarded as reasonably well informed according to the ECJ³⁰. This means that the main objective of the criteria is that the mark should be able to inform the public on the origin of the goods or services. An exception to the literal meaning of the requirement of distinctive character may be found in Article 7(3) of the Regulation, stating

²⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), preamble 10

²⁵ Nedim Malovic, ‘Sieckmann Kicks in Once Again: When Is a Representation of a Sign an Acceptable Representation for the Sake of Registration?’ (*The IPKat*, March 3, 2018) <<http://ipkitten.blogspot.com/2018/03/sieckmann-kicks-in-once-again-when-is.html>> accessed May 25, 2019

²⁶ Regulation, art 4 and Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) [2009] OJ L78/24, art 4 and Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1 art 4

²⁷ Pila & Torremans (n 10) 368

²⁸ *ibid* 372

²⁹ Regulation

³⁰ Pila & Torremans (n 10) 372

that Article 7.1(b) is not applicable if a mark has become distinctive through use³¹.

In the application for a EUTM, the goods and services for which the registration is sought should be clearly and precisely identified³² by the applicant in conformity with the system of classification established by the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Regulation of Marks of 15 June 1957 (the Nice Classification).³³ The EUTM will then be protected according to the literal meaning of the Nice Classification³⁴.

The application shall be published if the conditions for registration are satisfied³⁵. For a period of three months, after the application has been published, an opposition period follows during which third parties³⁶ as well as proprietors of EUTMs may file observations and oppositions towards the application³⁷. Observations by third parties may be filed on the grounds under Articles 5 and 7, i.e. absolute grounds for refusal, that the mark should not be registered³⁸. Oppositions by proprietors of earlier marks, which have effect in the EU or in a single Member State, may be filed on the grounds under Article 8, i.e. relative grounds for refusal³⁹. The mark should not be registered if it would infringe in an earlier mark's right⁴⁰.

The absolute ground of refusal maintains that the mark should not be registered if it describes the goods or services, for which the registration is sought. Signs consisting of indications on the quality, geographical origin or other characteristics that describe the goods or services are thus not

³¹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation)

³² Regulation, art 33.2

³³ Regulation, art 33.1

³⁴ Regulation, art 33.5

³⁵ Regulation, art 44.1

³⁶ Regulation, art 45

³⁷ Regulation, art 46

³⁸ Regulation, art 45.1

³⁹ Regulation, art 46

⁴⁰ Regulation, art 8.2

registerable⁴¹. The requirement of non-descriptiveness expands to include marks that are descriptive, for the specific goods or services, in any language of any Member State.⁴² The absolute grounds of refusal also entail marks that are contrary to public policy, deceiving to the public or are excluded from registration due to prior EU legislation, international legislation or international agreements to which the EU is party⁴³.

The application shall not be registered if the application is identical with the earlier mark and seeks protection for the identical Nice-classifications.⁴⁴ The same is true if the application is similar or identical to the earlier mark for the identical or similar Nice-classifications and there is a likelihood of confusion on the part of the public, including if there is a likelihood of association with the earlier mark.⁴⁵ Neither shall an application be registered if that application contravenes the legislation with regards to designation of origin and/or a geographical indication⁴⁶. Proprietors of marks that have an existing reputation in the Union also possess the legal right to prevent others from registering a mark, which is identical or similar to their mark, even for products, or services, which are dissimilar from the goods, and services for which the earlier reputed mark is registered⁴⁷, if that registration would be detrimental to the distinctive character or reputation of the reputed mark, and thus would take unfair advantage of that mark⁴⁸.

According to the case law of the ECJ, it appears that the scope of protection is also greater when the conflicting marks in question are accompanying the same products or services. This greater scope of protection results from the fact that the competitor is not allowed to have any resembling elements of the renowned mark as it may create an intended or unintended association

⁴¹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 7.1.(c-e)

⁴² Regulation, 7.1.(c-e)

⁴³ Regulation, 7.1.(f-m)

⁴⁴ Regulation, 8.1(a)

⁴⁵ Regulation, 8.1(b)

⁴⁶ Regulation, 8.6

⁴⁷ Regulation, 9.2(c)

⁴⁸ Regulation, 9.2(c)

between the new mark and the reputed mark⁴⁹. Trade mark rights takes a step away from other IP rights through the inclusion of the rights conferred by a mark with a reputation, as the protection inherently amounts to the proprietor of the mark as well as the possible goodwill connected to that mark, and therefore only amounts to a protection of the commercial value⁵⁰.

A proprietor of a registered EUTM has the exclusive right to the mark and is conferred the right to prevent all third parties from using that mark in the course of trade in relation to the goods and/or services for which it is registered⁵¹. The right is exhausted for goods when a proprietor has put the goods on the EU market, then third parties are allowed to use the EUTM in relation to that goods if it does not exist any legitimate reasons for the proprietor to oppose that use, for example a proprietor may oppose the use if the goods are changed or impaired⁵².

Thus, a mark is registered if it meets the fundamental requirements for registration and if it does not intervene with any of the grounds of refusal, absolute or relative⁵³. The mark is then registered in the Register in accordance with Article 51 of the Regulation and will be protected for 10 years from the date of filing, for the specific Nice Classifications. The mark may then be endlessly renewed every 10 years on payment of the proper fee by the proprietor⁵⁴, and can thus retain protection for as long as the proprietor of the mark may want.

⁴⁹ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P.184

⁵⁰ *ibid* 187

⁵¹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 9.1-9.2

⁵² Regulation, art 15

⁵³ Regulation, art 7.1

⁵⁴ Regulation, art 52-53

However, there is a difference in the likelihood of having a traditional mark registered as opposed to a non-traditional mark, which is clearly evident from the following chart built on data collected from the Register:



Chart 1: Likelihood of having an application refused divided between different types of marks⁵⁵.

The results of the data collected shows that it is a higher percentage of the applications for non-traditional marks that are rejected. This is especially true for colour marks, hologram marks and shape marks and may be evidence that these marks are not fully viewed in the same way as traditional marks. One of the main reasons for the high degree of rejection for non-traditional marks appears to be that these marks are non-distinctive by nature and may therefore require the proprietor to acquire distinctiveness through use. Even though Article 7.1(b) of the Regulation does not draw any distinction between different types of marks, the perception of what is distinctive may differ, as the relevant public may not perceive for example a colour as distinctive, for certain types of goods or services, to the same extent or in the same way as they would with more traditional marks⁵⁶. The same would be true for shape marks, or three-dimensional marks, as the relevant public generally does not

⁵⁵ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (Trade mark status: application refused)

⁵⁶ Case T-316/00 *Viking-Umwelttechnik GmbH v OHIM (Green & Grey)* EU:T:2002:225, [2002] ECR II-3715, 27

perceive shapes as clear indications of origin, and thus shape marks become more difficult to register as they often lack distinctiveness. Article 7(e) of the Regulation is also of importance when assessing whether a shape mark may be protectable, as it states that marks consisting of the shape that results (i) from the nature of the product, (ii) as a need to obtain a technical result or (iii) gives substantial value to the product are not to be protected⁵⁷. There are also fewer applications for non-traditional marks, which results in the fact that a rejection of a non-traditional mark will have a greater effect on the data than a rejection for a traditional mark⁵⁸.

While the number of applications for non-traditional marks have increased since the first regulations on EUTMs came into force, the number of rejections also tend to increase as well⁵⁹. Thus, even though the newer Regulation mentions more alternative marks by word than what the previous Regulation did, the Board of Appeal as well as the courts still tend to reject applications for non-traditional marks to a higher extent than it rejects traditional ones.

2.2 Registerable Marks

2.2.1 Traditional Marks

As stated before, marks can be divided into ‘traditional marks’ and ‘non-traditional marks’. Traditional marks include word marks and figurative marks. These types of mark may also be the general depiction of what constitutes a trade mark, which have been established by the ECJ, as the

⁵⁷ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation)

⁵⁸ Appendix 1

⁵⁹ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (Trade mark type: colour, Trade mark status: application refused), 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (Trade mark type: shape, Trade mark status: application refused) & 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (Trade mark type: sound, Trade mark status: application refused)

relevant public have a habit of using them to identify the origin of the product or services for which it is used⁶⁰. As evident from the amount of registered traditional marks compared to non-traditional marks, or comparing the amount of applications of different types of marks, companies tend to agree with the public depiction, as the traditional marks are immensely more popular⁶¹. It is also evident from charter 1 that the likelihood for an application being registered is higher for these type of marks, which may be an indication that companies are more familiar with the laws regulating traditional marks, as well as EUIPO having more experience administering these type of marks.

Word marks are thus the most registered type of mark with 664 020 registered marks⁶². They consist exclusively of either words or letters, including numerals and other typical typographic characters as well as a combination of them⁶³. One of the absolute grounds of refusal, namely the requirement of non-descriptiveness can be argued to be of particular importance when registering word marks as the focal subject of using words are to describe something. This becomes evident when common words are used as marks, which they regularly are, and may in some situations cause problems. In general, common words are used as company names and as registered trade marks, i.e. Apple. However, apple being a common word is not descriptive for the goods and services for which it is registered. Combining two common words that are descriptive for the product or service for which it seeks protection has been frequently discussed and the ECJ has stated that the combination may be registerable depending on whether the combination in question may be viewed as a ‘normal way’ of describing the goods or services in question⁶⁴. The case referred to addressed a situation where a producer of

⁶⁰ Case C-578/17 *Oy Hartwall Ab (Hartwall)* EU:C:2019:261 [29]

⁶¹ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019

⁶² 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: word)

⁶³ 'Trade Mark Definition' (EUIPO, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

⁶⁴ Case C-383/99 P *Procter & Gamble Co v OHIM (BABY-DRY)* EU:C:2001:461, [2001] ECR I-6251 [42]

nappies applied for a EUTM for the mark ‘Baby-Dry’⁶⁵. In the specific case the court determined that the mark was not descriptive as the mark as a whole lacked descriptive character⁶⁶. As the EUTM system is a unitary system and the EUTMs will stand or fall concurrently in all Member States, the requirement of non-descriptiveness expands to include non-descriptiveness in all languages of all Member States.

Figurative marks consist of marks that have a figurative element, as non-standard characters, graphic features and layout with or without colours⁶⁷. It is the second most common registered EUTM subsequently to word marks with 503 579 registrations⁶⁸. Figurative marks that includes emblems or badges, which are of particular importance for the public, and does not have the consent from the competent authority are not to be registered⁶⁹. The following mark was in fact registered for a short period before the European Commission applied for the mark to be cancelled, as the mark was using the European Emblem and the proprietor of the contested mark had not requested nor received consent from the competent authority to use the emblem⁷⁰.



The mark was cancelled by the Board of Appeal since there was a likelihood that the public would believe that the contested mark originated from the European Union as it contained all heraldic elements of the European

⁶⁵ Case C-383/99 P *Procter & Gamble Co v OHIM (BABY-DRY)* EU:C:2001:461, [2001] ECR I-6251

⁶⁶ *ibid* [43]-[44]

⁶⁷ Trade Mark Definition' (*EUIPO*, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

⁶⁸ 'eSearch Plus' (*EUIPO*, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: figurative)

⁶⁹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 7.1(i)

⁷⁰ 'eSearch plus entry: 008188955 - ROUND TOWN NEWS www.roundtownnews.co.uk EST 1999' (*EUIPO*, 2019)

<<https://euipo.europa.eu/eSearch/#details/trademarks/008188955>> accessed 26 May 2019

⁷¹ *ibid*

Emblem⁷². Even though not all the golden mullets present in the European Emblem were apparent in the mark, the missing mullets could be hidden behind the word ‘town’ in the contested mark⁷³. As the European Union is active in the same types of services as provided by the proprietor it would be misleading to the public⁷⁴.

2.2.2 Non-Traditional Marks

Non-traditional marks are marks that are used more seldomly, such as sound marks, position marks, motion marks and hologram marks. They do however serve the same purpose as traditional marks and should be able to inform the end-consumer about the origin of a specific good or service. As the marks are both newer and in some situations, require the applicant to have used the mark previously to fulfil the criteria of distinctiveness. As was apparent from chapter 1, there is a higher likelihood of having the application rejected when the application concerns non-traditional marks. There are also fewer applications submitted for the non-traditional marks than traditional marks⁷⁵. As Shape marks, or three-dimensional marks, colour marks and sound marks are the most applied for and registered non-traditional marks, the three are further discussed and serves as examples on non-traditional marks for the main purpose of this thesis. The other marks will be mentioned and discussed but not to the same extent as shape marks and colour marks.

Shape marks, or 3D marks, are marks which are three-dimensional in shape and extends especially to the packaging of the product, containers or the appearance of the product itself⁷⁶. It is the most commonly used mark of the

⁷² *The European Union v Geoffrey Angelo Gartland*, Decision on Cancellation No 4 264 C, OHIM Cancellation Division (28 June 2012) [54]

⁷³ *ibid* [43]

⁷⁴ *ibid* [53]

⁷⁵ Appendix 1

⁷⁶ 'Trade Mark Definition' (*EUIPO*, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

Non-traditional marks with 4 807 registered EUTMs⁷⁷. According to settled case law the criteria of assessing the marks ability to distinguish itself from competing mark is the same as for traditional marks⁷⁸. However, when applying the criteria, the average consumer does not necessarily perceive a shape mark that is independent from the appearance of the product itself, e.g. the packaging of the product, in the same way, as they perceive a word or figurative mark⁷⁹. This is due to that an average consumer does not normally make assumptions of the origin of the product based on the shape of a product in the same regularity as he would do with word or figurative trade marks⁸⁰. It can therefore be more difficult to establish distinctive character of a shape mark than a traditional mark⁸¹. Consistently, the more the shape mark in question resembles the shape most likely for the specific product it is less likely that the mark will be considered to acquire the degree of distinctiveness that is required in Article 7.1 b⁸².

In 1966, Philips developed an electrical shaver that consisted of three rotating heads that formed a triangle. In 1985, on the basis of use, they registered a shape mark based on the graphic representation of the electrical shaver. Remington, a competitor to Philips, started selling the DT 55, which was a similar shaver that also had three rotating heads that formed a triangle⁸³. Philips therefore brought claims against Remington for infringing in their rights. Remington responded with a counter-claim stating that Philips registered trade mark should be revoked⁸⁴. The ECJ stated that a shape mark may not be registered if the shape is necessary to obtain a technical result independent on whether there are other solutions that would attain the same technical result⁸⁵. The rationale being that if such marks were to be

⁷⁷ ⁷⁷ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: 3D shape)

⁷⁸ Case C-445/13 P *Voss of Norway ASA v OHIM (Voss bottle)* EU:C:2015:303, [90]

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² *ibid* [91]

⁸³ Case C-299/99 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd (Philips v Remington)* EU:C:2002:377, [2002] ECR I-5475 [11]-[12]

⁸⁴ *ibid* [13]

⁸⁵ *ibid* [79], [84]

registered the proprietor of the mark would maintain a monopoly indefinitely as trade mark rights may be subsequently renewed every tenth year⁸⁶.

A shape mark can only fulfil its essential function, i.e. indication of origin, if the mark departs significantly from the customs or norms for the product for which it seeks protection⁸⁷. Further, even though the assessment of distinctiveness does not vary between different types of marks, the relevant public may not necessarily view the shape of the product or the packaging of that product as an indication of origin to the same extent as they would do if the mark would be a traditional one. It can therefore be more difficult for proprietors to establish distinctiveness for the purpose of shape marks.

Sound marks are also marks, which are viewed as non-traditional marks, and has less registered EUTMs than shape marks with only 207 registered marks⁸⁸. A sound mark is defined as being simply a sound or a combination of sounds⁸⁹.

Colour marks consist exclusively of a single colour or a combination of colours without any contours or other figurative elements⁹⁰ and is used to the same extent as sound marks, as there is 277 registered colour marks⁹¹. For colours to be registered as EUTMs they need to comply with the criteria of distinctiveness as all other marks. Since colours are inherently not distinctive it is highly unlikely, without prior use of the colour for the specific goods or services, for a colour mark to be registered. The possibility to register a colour mark without any prior use is reserved for exceptional circumstances, in

⁸⁶ Case C-136/02 P *Mag Instrument Inc v OHIM (Mag Instrument)* EU:C:2004:592, [2004] ECR I-9165 [30]

⁸⁷ Case T-28/08 *Mars, Inc v OHIM (Bounty)* EU:T:2009:253, [2009] ECR II-00106 [28]

⁸⁸ 'eSearch Plus' (*EUIPO*, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: sound)

⁸⁹ 'Trade Mark Definition' (*EUIPO*, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

⁹⁰ 'Trade Mark Definition' (*EUIPO*, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

⁹¹ eSearch plus (status: registered, type: colour)

particular situations where the goods or services are very restricted and the relevant market very specific⁹².

Aside from shape marks, colour marks and sound marks: position marks (20 registered marks⁹³), pattern marks (13 registered marks⁹⁴), motion marks (23 registered marks⁹⁵), multimedia marks (14 registered marks⁹⁶) and hologram marks (5 registered marks⁹⁷) are included in the definition of non-traditional marks and may be registered as EUTMs. Position marks are used for marks when the specific position of the mark on the product is of importance⁹⁸. Pattern Marks consist of marks, which is a set of regularly repeated features⁹⁹. Marks, which consist of a movement or positional change of the elements in the marks, are registered as motion marks¹⁰⁰. Multimedia marks are marks that have a combination of images and sounds¹⁰¹. The newest category of protectable marks are Hologram marks, and are used for marks consisting of elements with holographic characteristics¹⁰².

⁹² Case C-104/01 *Libertel Groep BV v Benelux-Merkenbureau (Libertel)* EU:C:2003:244, [2003] ECR I-3793 [66]

⁹³ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: position)

⁹⁴ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: pattern)

⁹⁵ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: motion)

⁹⁶ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: multimedia)

⁹⁷ 'eSearch Plus' (EUIPO, 2019) <<https://euipo.europa.eu/eSearch/>> accessed 25 May 2019 (status: registered, type: hologram)

⁹⁸ 'Trade Mark Definition' (EUIPO, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

⁹⁹ 'Trade Mark Definition' (EUIPO, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

¹⁰⁰ 'Trade Mark Definition' (EUIPO, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

¹⁰¹ 'Trade Mark Definition' (EUIPO, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

¹⁰² 'Trade Mark Definition' (EUIPO, 2017) <<https://euipo.europa.eu/ohimportal/en/trade-mark-definition>> accessed 25 May 2019

3 Cancellations

3.1 Surrender, Revocation and Invalidity

A registered EUTM may be cancelled prior to the 10-year period of protection that it is given when the application fulfils the conditions for registration through three different ways. The first way is if the proprietor of a mark surrenders the mark, for all or some of the goods and services for which it is registered¹⁰³. To surrender a mark the proprietor of the mark needs to file a written declaration of the surrender to EUIPO and in situations where the mark is being licensed the proprietor also needs to prove that the licensee is informed of his intention to surrender the EUTM¹⁰⁴. The other two situations are if the mark is revoked or declared invalid¹⁰⁵.

As opposed to the proprietor surrendering the mark, revocation and invalidity of a mark is not done by request of the proprietor but on application to EUIPO or based on a counterclaim in infringement proceeding¹⁰⁶. In general a mark is revoked due to how the mark has been used, or not used, for the particular goods and services¹⁰⁷ whereas a mark is declared invalid if the mark has been registered contrary to the provisions set down in Article 7 or Article 8 of the Regulation¹⁰⁸, this will be discussed further in this chapter. There is also an important difference following the consequences of having the mark revoked or declared invalid as a revocation of a mark has the same effect as if the

¹⁰³ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 57.1

¹⁰⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 57.2-3

¹⁰⁵ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 58-60

¹⁰⁶ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 50-60

¹⁰⁷ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 58

¹⁰⁸ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 59-60

proprietor surrenders the mark (*ex nunc*) whereas invalidity of a mark amounts to an absolute legal nullity of the mark (*ex tunc*)¹⁰⁹.

3.2 Cancellation Proceedings

Cancellation proceedings cannot be initiated by EUIPO but needs to be initiated by the submission of an applicant, any legal or natural person or other group or body that has the capacity in its own name to sue and be sued under the terms of the law governing given that the application is based on the absolute grounds or Articles 81, 82, 91 or 92 of the Regulation¹¹⁰. Cancellation applications based on the relative grounds are however reserved for the persons mentioned in Article 46 of the Regulation, foremost the proprietor of an earlier trade mark or a licensee of an earlier trade mark or equal¹¹¹. EUIPO will inform the proprietor of the cancellation application and once the admissibility checks has been completed; the status of the contested mark will be changed to ‘pending cancellation’ in the register, so that other can retain the information¹¹². When proprietors of earlier marks are applicants and invoke proceedings on the grounds of an earlier right, the proprietor of the contested EUTM may request evidence of use by the earlier mark if it is filed together with the first reply to the cancellation application¹¹³. An

¹⁰⁹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, art 62, see also: Pila (n 10) 432

¹¹⁰ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.5

¹¹¹ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.5

¹¹² European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.4

¹¹³ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-

observation period follows, in which the parties may file evidence to support their claims¹¹⁴. The burden of proof varies depending on what grounds the proceedings are based, as it is up to the applicant to provide the evidence in all cases except cases concerning genuine use¹¹⁵. In cases relating to genuine use the burden of proof instead lies with the proprietor of the EUTM as it is considered too problematic for the applicant to prove non-use. In situations where a EUTM is subject to both revocation proceedings and invalidity proceedings, EUIPO has the power of discretion to decide in what order the proceedings is decided¹¹⁶. Regards to the costs of the proceedings as well as the administrative efficiency has to be taken into account¹¹⁷. If the contested mark is decided invalid, the revocation proceeding will be automatically closed as opposed to if the revocation decision is decided before as the applicant, if he can demonstrate a sufficient legal interest, can continue with the invalidity proceedings¹¹⁸. This is expected due to the different effects *ex nunc* and *ex tunc* may have on both the proprietor and the applicant. In the first instance, the decision will be decided by the Cancellation Division¹¹⁹.

2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.27

¹¹⁴ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.21

¹¹⁵ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.21-22

¹¹⁶ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, Point 47.4

¹¹⁷ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, Point 47.4

¹¹⁸ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, Point 47.4

¹¹⁹ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <<https://euipo.europa.eu/tunnel->

The decision may be appealed to the Board of Appeal by any of the parties of the proceeding within two months after the decision¹²⁰. The decision of the Board of Appeal may be appealed further to the General Court (EGC) within two months after the date of notification of the decision¹²¹. The Appeal to the EGC can only be brought on the grounds of “*lack of competence, infringement of an essential procedural requirement, infringement of the TFEU, infringement of this Regulation or of any rule of law relating to their application or misuse of power.*”¹²²

3.3 Revocation

3.3.1 Genuine Use

The first ground for revocation of a EUTM is the lack of genuine use¹²³. This requirement of use can also be found in Article 18 of the Regulation, which states that the proprietor of a EUTM is obliged to put the mark to genuine use within the EU in connection to the goods and services for which it is registered within five years¹²⁴. The use is not allowed to be paused during a consecutive period of five years, if there are no proper reasons for non-use¹²⁵. The requirement of use should also be considered sufficient if others than the proprietor use the mark with consent from the proprietor¹²⁶. The same is true if the proprietor uses the mark in a form differing in elements if it does not

[web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf](https://web.secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf)> accessed 26 May 2019, P.4

¹²⁰ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 67

¹²¹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 72

¹²² Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 72.2

¹²³ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 58.1(a)

¹²⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 18.1

¹²⁵ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 18.1

¹²⁶ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 18.2

alter the distinctive character of the registered mark or if the mark is attached in the EU to export goods, or their packaging¹²⁷. The use is also required to be upheld in the course of trade. The course of trade is primarily distinguished from private use but also from purely internal use¹²⁸. The requirement of use also entails that the use of the mark has to be usage of the mark as a sign, i.e. distinguishing the goods or services from other undertakings¹²⁹. The use also has to be in conjunction with the goods and services for which it is registered, using the mark for similar or dissimilar goods and services in not sufficient¹³⁰.

In revocation proceedings, the proprietor of the EUTM has the burden of proof and is therefore required to submit evidence of genuine use or proper reasons for non-use¹³¹. The rationale behind the fact that it is the proprietor of the EUTM and not the applicant that needs to provide the evidence stems from the fact that the applicant cannot prove negative evidence. Meaning that the applicant cannot put forward evidence that would guarantee that the proprietor of the contested mark failed to use the mark¹³². Albeit the rationale behind the burden of proof is comprehensive, as it appears to be the only way to actually provide the necessary material to evaluate, the obligation also puts liabilities on the proprietor of a EUTM beyond what may be viewed as fair.

¹²⁷ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 18.1(a)-(b)

¹²⁸ Directorate-General for the Internal Market and Services and Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System* (Kur A, Knaak R and Hilty R (eds), Publications Office of the European Union 2013) <<https://publications.europa.eu/en/publication-detail/-/publication/5f878564-9b8d-4624-ba68-72531215967e>> accessed 25 May 2019, P.80

¹²⁹ Directorate-General for the Internal Market and Services and Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System* (Kur A, Knaak R and Hilty R (eds), Publications Office of the European Union 2013) <<https://publications.europa.eu/en/publication-detail/-/publication/5f878564-9b8d-4624-ba68-72531215967e>> accessed 25 May 2019, P.80

¹³⁰ Directorate-General for the Internal Market and Services and Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System* (Kur A, Knaak R and Hilty R (eds), Publications Office of the European Union 2013) <<https://publications.europa.eu/en/publication-detail/-/publication/5f878564-9b8d-4624-ba68-72531215967e>> accessed 25 May 2019, P.81

¹³¹ European Union Intellectual Prop. Office, *Guidelines for Examination of European Union Trade Marks, Part D Section 1* (EUIPO 2017) <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/43_part_d_cancellation_section_1_proceedings_tc_lr2_en.pdf> accessed 26 May 2019, P.22

¹³² *Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

As the material put forward as evidence may not be viewed sufficient to ensure genuine use independent of whether or not the mark has actually been genuinely used or not. Although the courts have stated that, the standard of proof is not excessively high and that evidence can be provided through any method that the proprietor chooses¹³³. It also enables and practically provides the infringer of a EUTM with a tool that can be easily used as he will only need to put forward the claim and hope that the proprietor will fail to provide sufficient evidence.

A EUTM that is used only as a placeholder, or a token, does not have ‘genuine use’, as it is only registered in order to preserve the rights. Genuine use must guarantee consumers and/or end users the ability to clearly distinguish the origin of the goods or services from other goods or services that have a different origin¹³⁴.

Thus, ‘genuine use’ of a mark necessitates public usage of the mark on the relevant markets for the goods and services for which the mark has protection, and the undertaking’s internal use does not suffice.

The inherent protection of the mark and the enforceability of the mark unto other parties is lost if the trade mark fails to deliver on its commercial purpose, namely to create or preserve a market for the goods or services of other undertakings. The usage of the mark must be relatable to goods or services marketed or soon to be marketed for which the undertaking uses or is about to use advertising or other means to secure customers. This use may be either by the proprietor or by third parties authorized to use the mark, as per Article 10(3) of the Directive¹³⁵.

¹³³ Case T-427/09 *centrotherm Clean Solutions GmbH & Co. KG v OHIM (CENTROTHERM)* EU:T:2011:480, [2011] ECR II-6207, § 46

¹³⁴ Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV (Ansul)* EU:C:2003:145, [2003] ECR I-2439, §36

¹³⁵ Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV (Ansul)* EU:C:2003:145, [2003] ECR I-2439, §37

In the assessment of if, there has been genuine use of the trade mark, concern must be had to whether there is actual commercial use or exploitation of the mark. Concern must especially be had on whether that use is justified in the protection or creation of a market share in the market for which the goods or services are protected by the trade mark. In the assessment, all underlying facts and circumstances that are regarded of importance must be investigated¹³⁶. The consideration of the case's circumstances may include assessment, inter alia, of the nature of the relevant goods or services, the relevant market's characteristics and the measure and regularity of which the mark is used. Thus, the required use of the mark for genuine use does not necessitate a quantitative significance, as it may be dependable upon the characteristics of the goods or services for which the mark is relevant on the applicable market¹³⁷.

The global fast-food chain McDonalds recently lost a revocation proceeding against the Irish based fast-food chain Supermac, as Supermac claimed that the contested mark 'Big Mac' had not been put to genuine use during a continuous period of five years¹³⁸. The claims that McDonalds had failed to use the mark originated from an earlier proceeding where McDonalds had claimed that Supermac was infringing in their rights. The mark was registered for three Nice Classifications, namely classes 29, 30 and 42, which were all decided by the Cancellation Division to be revoked in their entirety¹³⁹. As the application for revocation of the contested mark was filed on the 11th of April 2017, McDonalds had to prove genuine use during the five-year period forgoing the date of the request¹⁴⁰. The overall assessment of the evidence provided by McDonalds was found by the Cancellation Division to be

¹³⁶ Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV (Ansul)* EU:C:2003:145, [2003] ECR I-2439, §38

¹³⁷ Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV (Ansul)* EU:C:2003:145, [2003] ECR I-2439, §39

¹³⁸ *Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹³⁹ *Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴⁰ *Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

insufficient to establish genuine use¹⁴¹. The affidavits, which may be submitted as evidence are generally viewed to be less heavy evidence as personal interest from the parties involved in the proceeding may affect the outcome of the affidavits and they need to be followed with objective evidence that emphasise the view of the affidavits¹⁴². The Cancellation Division further stated that even though printouts from web pages may provide evidence of genuine use, in the present case they failed to do so as neither prices nor information on how to purchase the product was available on the web pages although the EUTM was present¹⁴³. Moreover, no connection between items sold and the web pages could be done¹⁴⁴. As evidence McDonalds had also included a printout of the Wikipedia site for ‘Big Mac’, this evidence was not considered as a reliable source by the Cancellation Division as all users of Wikipedia can amend the information on that webpage and thus the information needs to be supported by other evidence¹⁴⁵. The revocation date for all goods and services for which the mark was registered was set to the date of the application for revocation although Supermac had requested an earlier date, as Supermac had failed to show any legal justification¹⁴⁶. McDonalds have appealed the decision by the Cancellation Division¹⁴⁷.

However, the contested mark ‘Big Mac’, registration number 62 638, was registered on the 22nd of December in 1998 for Nice Classifications 29, 30 and 42 and the application for revocation was filed on the 11th of April

¹⁴¹ *Supermac’s (Holdings) Ltd v McDonald’s International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴² *Supermac’s (Holdings) Ltd v McDonald’s International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴³ *Supermac’s (Holdings) Ltd v McDonald’s International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴⁴ *Supermac’s (Holdings) Ltd v McDonald’s International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴⁵ *Supermac’s (Holdings) Ltd v McDonald’s International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴⁶ *Supermac’s (Holdings) Ltd v McDonald’s International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴⁷ Acknowledgement of receipt of an appeal from the Registry of the Boards of Appeal to McDonald’s International Property Company, Ltd (8 March 2019)

<<https://euipo.europa.eu/copla/trademark/data/000062638/download/6-160293268/incoming>> accessed 26 May 26, 2019

2017¹⁴⁸. The 6th of October 2017, McDonalds registered the exact same mark 'Big Mac', registration number 17 305 079 for Nice Classifications 29, 30 & 43¹⁴⁹. This implies that McDonalds, after being faced with revocation claims, filed a new registration for an identical mark for the same and similar goods and services for which the contested mark was registered before the proceedings were initiated and any decision by EUIPO was made. As duplication is one of the relative grounds for refusal¹⁵⁰, the new identical mark should not have been registered by EUIPO especially as the contested mark was revoked and thus McDonalds was found not to have the right to the mark 'Big Mac'. The rationale behind McDonalds trying to circumvent the decision is probably that it is excessively important for the company to keep the rights to the mark, as it is one of their signature items and as McDonalds is a franchising company. As a franchising company they need to obtain protection for their trade marks since they are part of the franchising benefits provided by the franchisors to the franchisees¹⁵¹.

As a respond to the outcome of the decision by the Cancellation Division of EUIPO, Burger King's Swedish operation changed the names for their menu items featured as 'Not Big Mac's' to e.g. 'like a Big Mac, but actually big' and 'burger Big Mac wished it was'¹⁵². This was obviously done as a mockery or joke of the outcome of the proceeding but it becomes relevant if McDonalds could still rely on the newer registration as that registration could prohibit Burger King from using their mark.

¹⁴⁸ *Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd*, Decision on Cancellation No 14 788 C, EUIPO Cancellation Division (11 January 2019)

¹⁴⁹ 'eSearch plus entry: 017305079 – Big Mac' (EUIPO, 2019)

<<https://euipo.europa.eu/eSearch/#details/trademarks/017305079>> accessed 26 May 2019

¹⁵⁰ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 8

¹⁵¹ Mahmood Khan, 'Lessons From McDonald's Global Trademark Battles' (*Forbes.com*, 2019) <<https://www.forbes.com/sites/mahmoodkhan1/2019/02/02/lessons-from-mcdonalds-global-trademark-battles/>> accessed 26 May 2019

¹⁵² Matthew Cantor, 'Like A Big Mac But Juicier': Burger King Renames Sandwiches To Troll McDonald's' (*the Guardian*, 2019)

<<https://www.theguardian.com/business/2019/jan/31/like-a-big-mac-but-juicier-burger-king-renames-sandwiches-to-troll-mcdonalds>> accessed 26 May 2019

Even though it would be hard for McDonalds to claim the right to the new mark in infringement proceedings against other undertakings, as the counter argument would be that the mark should be declared invalid as it was registered contrary to the relative grounds of refusal the fact that there is still a registered identical mark may still have effects. McDonalds might for instance use the registration in cease and desist letters to intimidate others from using the mark, especially taking into account the fact that McDonalds is the 255th biggest company in the world¹⁵³.

It is evident from the McDonalds case that the requirement of genuine use extends beyond actual use as the burden of proof lies with the proprietor when charged with revocation claims and thus the genuine use needs to be demonstrable. For proprietors to be able to prove genuine use, the McDonalds case highlights the importance of actually documenting the use as the EUTM as it is being used to ensure that the proprietor maintains a strong position and a strong claim to the mark and thus avoids situations where the right to the EUTM may be questioned.¹⁵⁴

3.3.2 Generic

If a EUTM becomes the common name, in trade, for a product or service for which it is registered through the activity or inactivity of the proprietor, the mark is to be revoked¹⁵⁵. Marks are required to be distinctive and a generic name by nature is not. This ground for revocation is rational since the impact on trade would be vast, as generic names are incapable of performing the essential function of a trade mark, the likelihood that the end-consumer is able

¹⁵³ 'McDonald's Company Profile' (Forbes.com, 2019)

<<https://www.forbes.com/companies/mcdonalds/>> accessed 26 May 2019

¹⁵⁴ Graeme Murray, 'Why Campbell's Succeeded Where McDonald's Failed' (*The Chartered Institute of Trade Mark Attorneys*, 2019)

<<https://www.citma.org.uk/resources/why-campbells-succeeded-where-mcdonalds-failed.html>> accessed 28 May 2019

¹⁵⁵ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 58.1(b)

to identify the origin of the product by using the EUTM¹⁵⁶. However, the fact that the mark is only to be revoked if it has become generic through the actions or inactivity, of the proprietor he will never lose his right if he can prove that he has actively tried to prevent others from using the mark¹⁵⁷. That the proprietor of a mark initiate infringement proceedings against competitors and intermediaries that are using the mark as a generic name for the products for which it is registered has proven, by practice and doctrine, to be the only tool to prevent the mark from being revoked as a result of it becoming generic¹⁵⁸. Today, an email or equivalent, which contains a cease-and-desist may be enough to show activity by the proprietor¹⁵⁹. This reasoning is also at hand with Article 12 of the Regulation. The article attends to marks which are close to being used as the generic name for the specific product or service. It gives the proprietor of the mark the right to request a publisher of a dictionary, encyclopaedia or similar reference work to change the next edition if the mark is used in a way that can give the impression that it is a generic name for the product or service and add an indication that it is a registered mark¹⁶⁰. The problem of having a mark registered if it is used as the generic name for the specific product is that the cost for the public and for the competitor would be too great. Thus, consumer looking to buy a specific product under the generic name X will search to look where to buy X and the only supplier would be the proprietor of the registered mark X. Trade mark law will then

¹⁵⁶ Case T-79/00 *Rewe Zentral AG v OHIM (Lite)* EU:T:2002:42, [2002] ECR II-00705, § 26

¹⁵⁷ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P. 125

¹⁵⁸ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P. 125

¹⁵⁹ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P. 125

¹⁶⁰ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1

have given the proprietor an unjustified monopoly for supplying the product in question¹⁶¹.

In cases where new products are launched there is usually a combination of intellectual property covering the product, mainly patent and trade mark law. As a result the proprietor of the mark, the company owning the patent, has a monopoly to supply the product to the consumers. When the patent expires and competitors are free to produce and sell the product they have used the trade mark to promote their version of the 'new product'. As the product in question does not exist before it is introduced by the proprietor the common name for the product typically becomes the trade mark, i.e. the trade mark is generic. Historically the European courts have ruled that the entrants can not freely use the registered mark and that the trade mark can not be viewed as generic as it is only used by one producer¹⁶².

Björnekulla claimed that the mark 'Bostongurka', owned by Procordia, should be revoked as the word had lost its distinctive character as the word was used in trade, and thus was considered to be generic, for chopped pickled gherkins¹⁶³. The applicant and the proprietor both relied on market services conducted but made in different stages of the product line¹⁶⁴. The refereeing court therefore pursued to determine whose views that should be taken into account regarding if the mark is the common name for the product, when the product in question goes through different stages before the end-consumer by referring the question to the CJEU¹⁶⁵. The CJEU stated that all consumers and end users as well as all undertakings that deal with

¹⁶¹ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P. 128-129

¹⁶² Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P. 130

¹⁶³ Case C-371/02 *Björnekulla Fruktindustrier AB v Procordia Food AB (Björnekulla)*
EU:C:2004:275, [2004] ECR I-5791, § 6

¹⁶⁴ *ibid* [7]-[8]

¹⁶⁵ *ibid* [11]

the product in trade comprise the relevant classes of persons whose views should be taken into account when assessing whether a mark is generic for the specific product for which it is rfacegistered in situations where intermediaries participate in the distribution¹⁶⁶.

Backaldrin had the word mark KORNSPITZ registered in Nice-classification 30¹⁶⁷. The mark was used on baking mixes supplied primary to bakers¹⁶⁸. The mixes was then turned into oblong shaped bread rolls¹⁶⁹. A competitor to Backaldrin, Pfahnl filed an application of revocation of the mark KORNSPITZ as the mark was used as a common name in trade and the cancellation division of Austria granted the application¹⁷⁰. Inactivity by the proprietor may be held if the proprietor of a mark fails to encourage the sellers of the product to make more use of it¹⁷¹. How it differs from Björnekulla is that in Kornspitz the court said that it was enough with the end consumer, as compared to all undertakings and end consumers that deal with the product. An argument can be put forward that the court changed its mind in Kornspitz as the features are not that different between the two markets¹⁷². The reasoning behind the shift is neither surprising nor hard to approve as the essential function of a trade mark is to assure the end consumer of the origin of the product. The second judgement, i.e. Kornspitz, is therefore more in line with the function of a trade mark, if the majority of the end users would consider the mark to be the generic name for a specific product then a limited group of peoples', mainly competitors and intermediaries, opinion of the mark should not change the outcome of a possible revocation¹⁷³. As the

¹⁶⁶ *Björnekulla* [26]

¹⁶⁷ Case C-409/12 *Backaldrin Österreich The Kornspitz Company GmbH v Pfahnl Backmittel GmbH (Kornspitz)* EU:C:2014:130, § 8

¹⁶⁸ *ibid* [9]

¹⁶⁹ *ibid*

¹⁷⁰ *ibid* [11]-[12]

¹⁷¹ *ibid* [36]

¹⁷² Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P.135

¹⁷³ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P.135

proprietor of a mark cannot, as a matter of law, make infringement claims against consumers for using the mark the Kornspitz ruling makes it harder for the proprietor to protect the right to his mark. How can a proprietor actively control what consumers are calling the products for which they have a protected mark? Di Cataldo offers one interesting way imaginable which would be through advertisement where the proprietor reminds the consumers of the common name for the product. For more expensive goods it can be done through suppliers whereas for cheaper goods, where the consumer may not have any contact with the seller, it can only be done through campaigns such as billboard ads. These campaigns are highly expensive and the costs prevails the costs of making infringement claims by far¹⁷⁴. This suggestion might therefore not be suitable for all companies.

As described when referring to marks becoming generic it is evident that the marks in question are word marks. However, one might wonder if the same would be true for other types of marks as well. Suggesting that a shape mark, that is the shape of the specific product, becomes the general perception of the appearance of a specific product. Would that shape then be perceived as if it has become generic? As pictures are used more frequently than before and images are used in communication, in the form of emojis, GIFs and Memes, not only words are used in communication and a picture may serve as an interchangeable communication tool. Thus, if a registered shape mark would become the standardised emoji for the goods for which it is registered and used by the relevant public in the same sense as a generic word, would that shape then be viewed as a generic shape for the specific product?

If the proprietor of a EUTM has done what can be reasonably asked of him, the EUTM may not be revoked. If there are indications that the mark is used

¹⁷⁴ Gustavo Ghidini, *Innovation, Competition And Consumer Welfare In Intellectual Property Law* (Edward Elgar 2010)
<<https://ebookcentral.proquest.com/lib/lund/detail.action?docID=534821>> accessed 26 May 2019, P. 139

in dictionaries or other forms of encyclopaedias, the proprietor can request the publisher to change it in accordance with Article 12 of the Regulation¹⁷⁵.

3.4 Invalidity

Invalidity proceedings may be brought against a proprietor of a EUTM on the absolute ground for invalidity or the relative ground for invalidity¹⁷⁶. If the applicant is successful in the cancellation proceeding, the contested mark will be cancelled and the cancellation date will be the same as the registration date, meaning that the mark would ex post be deemed to never have enjoyed protection.

A EUTM shall be declared invalid if it has been registered contrary to the provisions in Article 7 of the Regulation or if the proprietor has registered the mark as an act of bad faith¹⁷⁷. If the breach of article 7 is connected to a lack of distinctiveness, the mark should not be declared invalid if the mark has acquired distinctiveness through use in relation to the products or services for which it is registered¹⁷⁸. A mark may also be declared invalid if the mark was registered in bad faith¹⁷⁹. The ECJ has ruled that the mere fact that the applicant had knowledge or must have had knowledge that the identical or similar mark which he sought protection for was used by third parties for the identical or similar goods and services at the time of the application is not sufficient to establish bad faith¹⁸⁰. The intentions of the applicant at the time of application must also be considered and as it is a subjective factor, the intentions must be supported with objective circumstances¹⁸¹. Applying for a

¹⁷⁵ 'Trade Mark Guidelines — 2.3.5 Defence for the proprietor' (*EUIPO Guidelines*, 2017) <<https://euipo01app.sdlproducts.com/1004922/909501/trade-mark-guidelines/2-3-5-defence-for-the-proprietor>> accessed 25 May 2019

¹⁷⁶ Regulation, art 59-60

¹⁷⁷ Regulation, art 59

¹⁷⁸ Regulation, art 59.2

¹⁷⁹ Regulation, art 59.1(b)

¹⁸⁰ Case C-529/07 *Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH (Lindt)* EU:C:2009:361 [2009] ECR I-4893 [40]

¹⁸¹ *ibid* [41]-[42]

mark to prevent third parties from marketing their product may be considered to qualify as bad faith by the applicant in some circumstances¹⁸². The ECJ has also stated that in situations, as the one described above, that involve a shape mark of the discussed product, it may be viewed as bad faith to a higher extent than traditional marks as a shape mark would restrict the competitors' abilities to design their products and thus give the proprietor of the shape mark a monopoly¹⁸³. The reasoning of the ECJ indicates that it might be easier for a non-traditional mark to be declared invalid on the grounds of it being registered in bad faith.

A EUTM should be declared invalid if the mark infringes the rights of an earlier mark, unitary or national¹⁸⁴. The same is true if there is an earlier right under EU legislation or national law which the mark infringe, e.g. copyright protected rights or right to a name¹⁸⁵. If however the proprietor of an earlier right gives consent to the mark prior to registration, the mark cannot be declared invalid later¹⁸⁶. If the conflicting mark is identical with the earlier mark, and is registered for the identical goods and services, the mark is a copy of the earlier one, may not coexist, and thus should be declared invalid. In situations where the conflicting mark is identical with the earlier mark and registered for similar goods and services, or the conflicting mark is similar to the earlier mark and registered for the identical or similar goods and services, there is a risk of confusing the consumers, and the mark may be declared invalid. To assess whether such a likelihood of confusion exists between an earlier right and a conflicting mark, factors including similarities between the marks and the similarities of the goods and services for which it is protected must be taken into account¹⁸⁷. As well as the distinctiveness of the earlier

¹⁸² *ibid* [43]

¹⁸³ *ibid* [50]

¹⁸⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 60.1

¹⁸⁵ Regulation, art 60.2

¹⁸⁶ Regulation, art 60.3

¹⁸⁷ *Unilab LP v GP Hellenic Soil Ltd*, Decision on Cancellation No 15 320 C, EUIPO Cancellation Division (23 January 2019)

mark together with the distinctive and dominant elements of the conflicting mark and the perception of the relevant public¹⁸⁸.

A mark may be declared partially invalid if the criteria under either Article 59 or Article 60 of the Regulation only is true for one or some of the goods and services for which the mark is registered¹⁸⁹.

3.5 Revocation vs. Invalidity

3.5.1 Traditional Marks

As previously stated there is a difference following the consequences for the proprietor of a EUTM from having the mark revoked or declared invalid as the date of the cancellations are *ex nunc* for revoked marks and *ex tunc* for marks that are declared invalid¹⁹⁰. However, an argument can be made that the biggest difference between the two is in the way of how they can occur, as invalidity proceedings mainly attend to marks which should not have been registered in the first place, as they fall under the absolute or relative grounds of refusal¹⁹¹, whereas marks are revoked due to use or non-use of the registered mark. Given that no marks are registered contrary to Article 7 & 8 of the Regulation, the majority of the cancelled marks should be cancelled due to the use or non-use made of the mark subsequent to the registration. Thus, if the registration process is successful the majority of the cancelled marks should be a result of revocation applications and not applications for invalidity. To address this, all cancellations of traditional marks were examined in order to establish as to what extent the different types of cancellations occurred.

¹⁸⁸ *ibid*

¹⁸⁹ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 60.4 & 59.3

¹⁹⁰ Regulation, art 62, see also: Pila & Torremans, p.432

¹⁹¹ Regulation, art 7-8

The following two tables provides data on how the distribution between different forms of cancellations, essentially marks that has been revoked compared to marks which has been declared invalid. The first table presents the distribution between figurative marks whereas the second presents the distribution between word marks. The data has been collected from the Register of EUIPO. If a mark is subject to both revocation and invalidity applications, EUIPO determines in what order the proceedings will take place. In situations where the mark was first partially revoked or declared invalid and later fully revoked or declared fully invalid the latter form of cancellation was chosen. In situations where the revocation proceedings were decided on first and then later, on request of the other applicant, invalidity proceedings were held and the mark was declared invalid, invalidity has been chosen, as invalidity has a bigger effect for the Proprietor due to ex tuca.

FIGURATIVE MARKS		
	Amount	Percent
Revoked	665	53%
Invalid	555	44%
Other*	33	3%
Total cancellations	1253	

Table 1: shows the distribution between different forms of cancellations for figurative marks.¹⁹²

WORD MARKS		
	Amount	Percent
Revoked	1078	55%
Invalid	824	42%
Other*	68	3%
Total cancellations	1970	

Table 2: shows the distribution between different forms of cancellations for word marks¹⁹³.

¹⁹² eSearch plus (Trade mark type: Figurative, Trade mark status (EUTM): Cancelled)

¹⁹³ eSearch plus (Trade mark type: Word, Trade mark status (EUTM): Cancelled)

It is evident from the table for both figurative and word marks that revocations are the main cause of cancellations. However, more than two out of five cancellations are results of invalidity proceedings for both figurative marks and word marks. The result may be explained in part by the fact that EUIPO is not free to initiate proceedings against proprietors of EUTMs as proceedings can only be brought on the basis of an application submitted to EUIPO, and applicants may attempt to have the mark declared invalid to a higher degree than they attempt to have it revoked. Nevertheless the marks included in the data have been cancelled and have thus been viewed by the Cancellation Division or in some cases by the Board of Appeal, GC or ECJ to be invalid.

However, this should not be viewed as hard criticism towards EUIPO, the research rather sheds light on a fact that has room for improvements. Information ought to be key when progressing the EUTM system further and time for reflection must be made as there is a need to decide in what direction the system is going.

3.5.2 Registration and Invalidity

The result stated in tables 1 and 2 question whether the registration process of EUIPO is successful in rejecting marks which should not be registered as to the high level of marks being declared invalid. It is clear that marks may need to be cancelled on the basis of the proprietors wish to surrender the mark or due to revocation on the grounds of the lack of genuine use of the contested mark, as well as if the mark has become generic. The high degree of mark being cancelled on the basis of invalidity claims are not clear and point to the fact that the EUIPO registration process fails to uphold the mandatory requirements presented in the Regulation.

Given the numbers presented in the charts, 555 figurative marks and 824 word marks has been declared invalid by EUIPO as a result from invalidity

applications or on the basis of counterclaims in infringement proceedings in accordance with Articles 59 and 60 of the Regulation. These 1379 traditional marks should therefore not have been registered but successfully were. As EUIPO lacks the opportunity to address marks, which may have been registered contrary to these provisions, they are not in a position where they can take action but must await an application for invalidity by a party who has the right to claim that the contested mark should be cancelled. The question that arises is whether a system that requires monitoring by others than EUIPO is efficient enough. As marks would only be questioned if they (i) claimed their rights and as a counterclaim the mark was questioned, (ii) a proprietor of an earlier mark after the opposition period (as these marks have been registered) started monitoring the Register and thus noticed the mark or (iii) a third party monitored the Register and discovered an invalid mark which that person found to be upsetting enough to commence an application of having the mark declared invalid.

Marks that are registered for products or services in markets that enjoy a high level of competition would probably be more monitored than marks registered for products or services in markets that lack competition. As a result, it is likely that proprietors of the latter type of marks may have registered marks that should not have been registered and thus should be declared invalid. Even though they cannot successfully use the rights in proceedings, they may serve as a barrier to entry for competitors trying to enter the specific market. Correspondingly, a mark can become distinctive through use and thus may not be declared invalid even if the mark should have been cancelled for several years before it acquired distinctiveness¹⁹⁴.

Further, it is also problematic for the proprietors of marks which should not have been registered, as they should be able to rely on their registered rights and may be surprised to find that they cannot when entering into an

¹⁹⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 59.2

infringement proceeding and the mark is declared invalid as of counterclaims by the 'alleged infringer'.

4 Non-Traditional Trade Marks and Cancellation

4.1 General

It is apparent from chart 2 that non-traditional trade marks only account for a small portion of the registered marks on the Register.

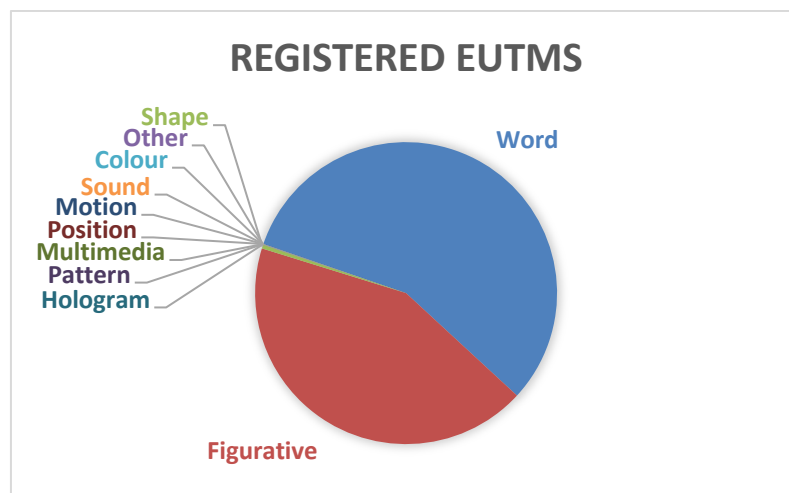


Chart 2: Presents the allocation of different types of marks that has the trade mark status registered in the Register

There are multiple possible arguments that may explain the low accounts of non-traditional marks registered on the Register. From the proprietors perspective it is likely that the main reasons using traditional marks may be that they have been used by the company for decades and is therefore well known to consumers and valuable sources that needs protection from being used by others then the proprietor. Correspondingly, non-traditional mark have not been introduced in all countries and thus makes it problematic for global actors as they would probably prefer to have the marks protected in all countries were they are active to the extent possible as marks needs to be

genuinely used and thus requires investments¹⁹⁵. Further, it should also be pointed out that some companies may not view non-traditional marks as appropriate for their business as they may only be working in a business-to-business sector and an argument can be made that the non-traditional marks rather function as an appeal to end-consumers. Finally, as was evident from chart 1 there is a higher likelihood of having the application rejected if applying for a non-traditional mark and even though the case law concerning non-traditional marks is evolving, non-traditional marks may be viewed by potential proprietors to be less safe from a legal stand point. Correspondingly, charter 3 provides evidence that the uncertainty is apparent after registration as well as the likelihood of having the mark cancelled is higher shape marks and colour marks.

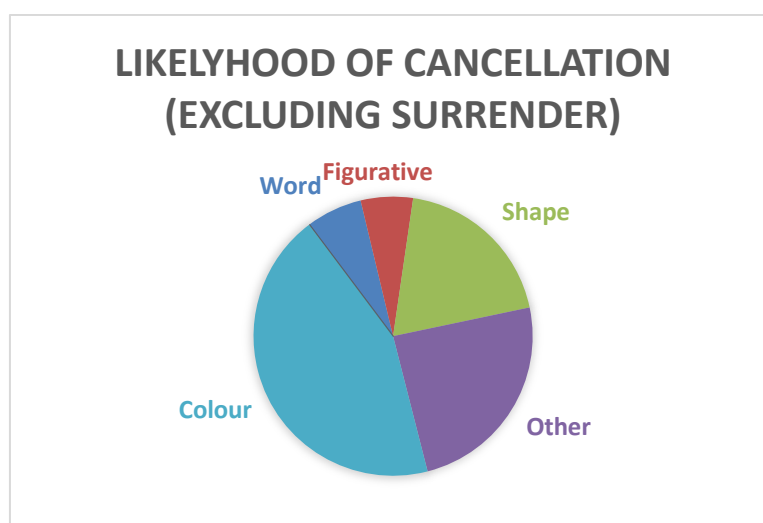


Chart 3: Demonstrates the likelihood of having a mark cancelled divided by the different types of marks (only the type of marks which have had cancellations are included in the chart, for other type of marks see Appendix 2)

Observing chart 3 gives the impression that non-traditional marks are more likely to be cancelled than traditional marks, which may be the case. However, the marks not apparent in the chart have not had any cancellation

¹⁹⁵ Roberto Carapeto. 'A Reflection About the Introduction of Non-Traditional Trademarks' (2016) 34(1) Waseda Bull of Comparative L 25, 59
<<https://www.waseda.jp/foLaw/icl/assets/uploads/2016/02/c35688e10d1c61201172065546b98301.pdf>> accessed May 27, 2019

implicating that no registered sound marks, motion mark, position marks, multimedia marks, pattern marks nor hologram marks have been cancelled. Nevertheless, there is a low amount of registered marks for all lacking types of marks and that may be partly why there has been no cancellations. As the number of marks registered for these types are such low¹⁹⁶ it is also unlikely that the marks would be declared invalid as of the relative grounds of refusal as there are hardly any earlier trade mark rights and the only rights that may be relevant would be other national or unitary rights¹⁹⁷. Speculating, it may also be that colour marks and shape marks are more commonly used of the non-traditional marks and therefore the registering of these marks are not as thorough as for example the registering of a hologram mark.

4.2 Colour Marks

As for colour marks, the data in Appendix 2 testifies that five marks have been cancelled and six marks are pending cancellation. All five cancelled marks were declared invalid¹⁹⁸. EUTM 9 121 815 was found to be non-distinctive for the goods and services for which it was registered¹⁹⁹. As the colour green was not sufficiently unusual and the protection would not only give the proprietor of the mark a monopoly of using the specific shade of colour on the products but also similar shades of green and thus prohibit competitors from using the colour green, thus the mark was declared invalid²⁰⁰. Red Bulls registered colour mark 4 381 554 was also found to be invalid as the registration was not only colours but also included words and

¹⁹⁶ Appendix 2

¹⁹⁷ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 60

¹⁹⁸ *Bahag Baus Handelsges. AG Zweigniederlassung Mannheim v Hozelock Ltd*, Decision on Cancellation No 11 106 C, OHIM Cancellation Division (16 February 2016), *Optimum Mark Sp. z.o.o. v Red Bull GmbH*, Decision on Cancellation No 5938 C, OHIM Cancellation Division (9 October 2013)

& Correspondence from EUIPO Operations Department to Glaxo Group Ltd, 'Entry on the Register of a Decision on an Application for a Declaration of Invalidity' No 12 204 C (7 December 2017)

¹⁹⁹ *Lenzing Gerber Stute v Framacad Solutions Ltd*, Decision on Cancellation No 5485 C, OHIM Cancellation Division (16 November 2010) [20]

²⁰⁰ *ibid*

figurative elements which resulted in that the registration failed to provide a representation of the mark²⁰¹.

As previously stated one of the main problems concerning colour marks have been the requirement of distinctiveness and thus it is not surprising that all cancellations were decided on the basis of invalidity. Albeit colours are capable of arousing feelings or convey certain associations of ideas, they are inherently non-distinctive or have a very low level of distinctiveness as they are used widely without any specific message for different goods and services²⁰². That does not conclude that colour per se is incapable of distinguishing goods and services between undertakings rather that it is more unlikely that any colour would be found distinctive for any goods and services protection is sought²⁰³.

An argument can therefore be made, together with the results of charter 1, that the barrier to receive a registered colour mark is much higher than for word or figurative marks. Thus, the fact that it is a higher likelihood of having a register colour mark cancelled indicates that a register colour mark may not be relied on to the same extent as proprietors of traditional marks may rely on the rights conferred by their mark.

4.3 Shape Marks

As is evident from looking at the statistics from EUIPOs database, shape marks have a high degree of cancellations. This is not surprising as shape marks are also one of the most discussed marks. Critics are mainly focused on the fact that a shape marks, especially marks which take the form of the product, should not be protectable as the shape may harm the development of

²⁰¹ “*Optimum Mark*” *Spólka z.o.o. v Red Bull GmbH*, Decision on Cancellation No 5905 C, OHIM Cancellation Division (30 April 2013) [27]-[29]

²⁰² Case C-104/01 *Libertel Groep BV v Benelux-Merkenbureau (Libertel)* EU:C:2003:244, [2003] ECR I-3793 [40]

²⁰³ *ibid* [41]

the product²⁰⁴ and as Gustavo Ghidini expresses in Innovation, Competition and Consumer Welfare in Intellectual Property Law. “*The European approach represents an arduous interpretative slalom, based on the assumption that the distinctive character may not interfere or overlap with either the functional or the ornamental*”²⁰⁵. Agreeing with Ghidini, as trade marks are indefinite the protection of shapes and foremost three dimensional shapes is not the intent of trade mark law nor does it benefit the public as the options for consumers decrease as well as the ability to develop the product decreases for the competitors. With time the however, shape marks, as described earlier, can not be registered if it is constructed for the functional purpose of the product nor can it be registered if it results from the nature of the product itself. Another approach to shape marks is that they could be registered as Community Designs instead given that the shape of the product possesses individual character which would be essentially the same criteria as the distinctive character²⁰⁶. The difference in time protection for the different IP rights are of importance in this situation as the trade mark protection may last in perpetuity whereas the Community design protection only gives the proprietor a fix period of 25 years of protection²⁰⁷. Having shape marks registered as trade marks instead of Community designs however may also result in the fact that the Community design protection, or other related IP rights becomes meaningless as the protection is shorter then the protection given by the EUTM²⁰⁸.

The Court of first instance decided in the case T-28/08 Mars whether the shape mark for the chocolate bar Bounty could be protected as a EUTM. The applicant stresses that the mark is distinctive as the round edges of the rectangular chocolate bar in combination with the arrows or chevrons on the top makes the shape distinctive, as they are the only undertaking that produces chocolate bars in that specific shape²⁰⁹. Further, the applicant holds that the

²⁰⁴ Ghidini (n 49) 164-165

²⁰⁵ *ibid* 165

²⁰⁶ *ibid* 166-167

²⁰⁷ *ibid* 168

²⁰⁸ *ibid*

²⁰⁹ Case T-28/08 *Mars, Inc v OHIM (Bounty)* EU:T:2009:253, [2009] ECR II-00106 [21]

evidence of similar shapes put forward by the other party is merely copies of the mark at issue²¹⁰. The court discussed these three elements of the bar that the applicant found to be distinctive. In regards to the shape the court pointed out that the rectangular shape was intrinsic to chocolate bars²¹¹, that the rounded edges were used by other undertakings and that the applicant had failed to prove that the use by others is copies of the contested mark²¹². Finally, the court agreed with the Board of Appeal in the finding that the average consumer to be merely a decorative element of the chocolate bar rather than an indication of origin would view the arrows or chevrons²¹³. The shape in its entirety was therefore found to be devoid of any distinctive character, as it did not permit the relevant public to identify the origin without conducting an analytic examination²¹⁴. I would go further than the court and argue that the criteria for assessing distinctive character in the case at hand is not necessary. As the mark fails to allocate the function of a EUTM, making the end-consumer aware of the origin. The reasoning being that a shape mark which the packaging of the product, especially products as chocolate bars or other groceries, conceals when consumers make the buy or not buy decision by looking at the packaging of the product. The mark therefore fails to inform the consumer of the origin through what is underneath the packaging. The only way a product of that sort would be able to function as a trade mark through its shape would be if the packaging of the product was transparent, i.e. concealed in see-through plastic or likewise.

Only three of the cancelled shape marks were cancelled as a result of the mark being revoked. In two of the situations the mark had not been used during a five year period after the registration whereas one mark was used albeit the proprietor failed to show genuine use which resulted in revocation.

²¹⁰ *Bounty* (n 209) [21]

²¹¹ *ibid* [31]

²¹² *ibid* [32]

²¹³ *ibid* [33]

²¹⁴ *ibid* [34]

The fact that 22 of the cancellations of shape marks was declared invalid is problematic, as the marks should not have been registered in the first place. During the time of wrongful protection the fact that a mark enjoys the status of registered may harm the development of the goods especially when the marks are just to prolong exclusive rights first granted through other IP rights.

4.4 Discussion

It is indisputable from the foregoing that non-traditional marks are less certain as to their validity even subsequent to being registered since there are a higher likelihood that the marks are cancelled, at least when the non-traditional marks referred to are colour or shape marks. The fact that there tends to be a higher degree of legal uncertainty associated with non-traditional mark inevitably provoke the question whether these type of marks should be protectable marks under the Regulation and thus equally protectable through the Directive²¹⁵. The result is that the Register, in its entirety, will be less successful in communicating to third parties which rights that are already owned and thus occupied. In conjunction with the fact that some marks, traditional and non-traditional, may be viewed by some Member States to enjoy protection although they are not registered²¹⁶. Resulting in a weakening of the applications possible from reviewing the Register.

There has been a lot of controversies concerning the trade mark legislation, the attitudes are mainly divided between pro-branders and branding-sceptics²¹⁷. Pro-branders have a more liberal view of the trade mark system and argues for a broader more including system whereas the branding-sceptics argue for a more limited system²¹⁸.

²¹⁵ Directive (EU) 2015/2436 of 16 December 2015 to approximate the laws of the Member States relating to trade marks [2015] OJ L336/1

²¹⁶ William Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (OUP 2004) 76

<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199263073.001.0001/acprof-9780199263073-chapter-3?fbclid=IwAR3HQBnWw2h7-ZFUkkuTZ39K_zdAcplrni7fNijH3RG0_h8WFKT0x6reZul> accessed 27 May 2019

²¹⁷ *ibid* 77

²¹⁸ Cornish (n 216) 77

5 Member State Changes

5.1 Brexit

In the history of the EU only two countries have exit the Union, Algeria in 1962 as a result of its independence from France and Greenland in 1985, as both of these events occurred prior to the introduction of the EUTM none of them are relevant for the purpose of this thesis. The thesis therefore consider Brexit and the upcoming consequences of their exit from the Union as an example of what ramifications Member States exiting the Union may have on the EUTM system.

The UK voted to leave the EU, with a 52% majority, on the 23rd of June 2016²¹⁹. Prime Minister Theresa May invoked article 50 of the Treaty on European Union (TEU) within a year after the referendum, commencing the process of formally withdraw from the EU²²⁰. The process of negotiating the ‘withdrawal agreement’ commenced and was supposed to be finalised within two years from the invocation of article 50. However, as there has been difficulties to agree on the forms of the withdrawal, the UK submitted a request to prolong the period provided for in Article 50(3) TEU until 30 June 2019²²¹. The European Council agreed to extend the period until the 31 October 2019²²², given that the UK holds elections to the European Parliament, between the 23-26 of May²²³, in accordance with applicable EU law²²⁴. The expiry date is otherwise set to be the 31 May 2019²²⁵.

²¹⁹ George (n 1) 132

²²⁰ *ibid* 132-133

²²¹ European Council Decision (EU) 2019/584 of 11 April 2019 extending the period under Article 50(3) TEU [2019] OJ L101/1 (Brexit extension), (5)

²²² Brexit extension, art 1

²²³ Brexit extension, (10)

²²⁴ Brexit extension, art 2

²²⁵ Brexit extension, art 2

The UK like the EU is an economy, which is dependent on intellectual property rights as the intellectual property intensive industries accounts for 37.4 percent of GDP and provide 26.7 percent of employment compared to 39 percent and 26 percent in the EU²²⁶. Consequently, intellectual property jurisdiction should not be left unaddressed at the final Brexit day, as that would create an ambiguous situation for proprietors and users of intellectual property²²⁷. The economic importance and value of intellectual property assets in both the EU and the UK means that the outcome of not addressing the intellectual property jurisdiction would be tremendous for both parties²²⁸.

Even if Brexit results in so called ‘hard Brexit’ UK national legislation may not be too far from the EU legislation as both are parties of the World Trade Organizations’ (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)²²⁹. The lowest degree of similarity between UK domestic IP law would therefore be the TRIPS-standards²³⁰. UK is also part of the Madrid System which allows users to apply for UK protection together with other territories with one fee and one application in one language²³¹.

If the deal between the UK and the EU results in the UK being part of EEA, which is highly unlikely, the trade mark directive will still be in force in the UK, meaning that the national trade mark rules will be based on the directive and thus be the same as in the other member states. However, they will not be part of the unitary trade mark rights and thus not be part of the Regulation²³². Accordingly, the rights conferred to the proprietors of a EUTM will cease to apply in the UK²³³. The scope of the Regulation will therefore be narrowed, as the geographical protection will be diminished. The

²²⁶ George (n 1) 134

²²⁷ *ibid* 136

²²⁸ *ibid*

²²⁹ *ibid* 142

²³⁰ *ibid* 143

²³¹ ‘IP and Brexit’ (*GOV.UK*, April 2, 2019)

<<https://www.gov.uk/government/publications/ip-and-brex-it-the-facts/ip-and-brex-it#trade-marks>> accessed May 25, 2019

²³² Trevor Cook, “‘BREXIT’ and Intellectual Property Protection in the UK and the EU” (2016) 21 *Journal of Intellectual Property Rights* 355, 357

²³³ *ibid*

proprietors therefore needs to apply for national protection in the UK to guarantee that their mark will have protection, including in the UK, before they exit as they can not rely on unitary protection given by the EUTM²³⁴. The United Kingdom Intellectual Property Office (UK IPO) has declared that all registered EUTMs will be recorded on the UK register prior to the final exit day²³⁵. The marks comparable to the EUTMs that will be registered as comparable UK rights will literally be copies of the EUTMs and thus inherit any priority and/or seniority as well as retaining the recorded filing dates²³⁶. Nevertheless, once registered the UK mark will be fully independent from the EUTM and may be challenged, licenced and cancelled autonomously from the EUTM²³⁷.

Even though UK IPO has testified that they will construct UK trade marks from the registered EUTMs, they will be separated from the EUTM and may be subject for cancellation in the UK independent on the assessment of EUIPO. This means that a mark may fall or stand if questioned differently in the UK and in the EU. A contested mark may therefore still be registered in the UK where it has been revoked in the EU or reversed. This will create more confusion amongst competitors and consumers as the systems may be differentiated through time and as the legal framework regulating the UK register may be subject to change these differences are likely to increase with time.

As the language of the UK is English, the scope of the Regulation will not be changed as one of the official languages of the EU is English and Ireland will still remain a Member of the EU. The requirement of being non-descriptive could have been of importance if it would have been another country leaving the Union that had a language differing from other Member states. In the case *Matrazen* the court stated that the fact that the word was similar to the English

²³⁴ Cook (n 232) 357

²³⁵ 'IP and Brexit' (GOV.UK, April 2, 2019)

<<https://www.gov.uk/government/publications/ip-and-brex-it-the-facts/ip-and-brex-it#trade-marks>> accessed May 25, 2019

²³⁶ *ibid*

²³⁷ *ibid*

word mattress the mark was not viewed to be descriptive as the relevant public primarily spoke Spanish²³⁸.

5.2 Enlargement of the EU

As new Member States joins the EU the EUTM system has to be enlarged as well, this has occurred three times since 2004²³⁹. The first enlargement covered ten new Member States and was done in 2004, the second covered two Member States, Bulgaria and Romania, and was done in 2007 and the third covering Croatia in 2013²⁴⁰.

The scope of the EUTM system is both narrowed and broadened by the enlargement of the EUTM system. A register EUTM or a pending application for a EUTM may not be contested on the basis of absolute grounds of refusal that would only apply due to the enlargement, i.e. if the EUTM is descriptive in the language of the new member State²⁴¹. Meaning that all registered and applied for EUTMs will only benefit from the enlargement as the scope of the protection will be broadened as to the inclusion of the new Member State, where the mark will enjoy protection. However if there is an earlier right in the new Member State which was registered prior to the accession of the new Member State, and that right was acquired in good faith, the EUTM equivalent will not be protected in the new Member State²⁴². As for marks which are registered after the enlargement the scope will in somewhat be

²³⁸ Case T-6/01 *Matratzen Concord GmbH v OHIM (Matratzen)* EU:T:2002:261, [2002] ECR II-4335 [38]

²³⁹ Matthias Leistner, "Harmonization of Intellectual Property Law in Europe: The European Court of Justice's Trade Mark Case Law 2004–2007" (2008) 45 *Common Market Law Review* 69, 1 <<https://www.kluwerlawonline.com/document.php?id=COLA2008004>> accessed May 25, 2019

& 'From 6 To 28 Members' (*European Commission*, 2017) <https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-28-members_en> accessed 25 May 2019

²⁴⁰ *ibid*

²⁴¹ 'Enlargement Of EU' (*EUIPO*, 2019) <<https://euipo.europa.eu/ohimportal/en/faq-enlargement-of-eu>> accessed 28 May 2019

²⁴² Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1 (Regulation), art 209.3

narrowed since the new mark, mainly a word mark, will need to be non-descriptive in the additional language which is spoken in the new Member State. If the additional language is similar to or equivalent to a language already acknowledged in the EU the scope will remain the same in the context of the absolute grounds of refusal.

6 Analysis

Firstly, albeit the ramifications from the upcoming Brexit, given a no deal Brexit, may be regarded as not to sever from the point of current EUTM proprietors, since their marks will be translated to equal rights on the UK register. I would argue that they are greater than they appear as there is no guarantee what that protection will entail in the future, after the marks are granted the initial registration. Problems may also occur as the UK trade mark system will be an autonomous parallel system to the EUTM system. None of the systems will likely view a decision by the other as sufficient evidence to follow that same decision, it may therefore be situations where a mark is cancelled in one system and stays registered in the other which may cause confusion in the trade between the UK and the EU. Another problem arising from the two parallel system will be the difference in the attitude towards trade mark legislation as one of the system is likely to be more pro-branding and the other more branding-sceptical compared to each other. This difference in attitude may cause a higher likelihood of having a mark cancelled in one of the systems over the other and thus make the system more reluctant to cancellations more popular with the proprietors. Albeit, as previous stated, the improbability that the systems will adopt after the other the proprietor may scare others from using their rights in the system more beneficial for them and thus may be less alarmed of possible counterclaims challenging their rights. For future proprietors, the UK leaving the EU will have consequences as well especially as trade between the EU and the UK is intensive and for a company looking to access both markets an assessment of whether the mark will be registerable in both the UK and as a EUTM must be done.

As for the enlargement of the EU, it is easy to see the benefits. A register mark will in most cases be granted a larger protection without any demands of counteracts by the proprietor. In the unlikeliness that it exist a mark in the new Member State that has an earlier national right, the rights conferred to

the proprietor of the EUTM will be unchanged. I would therefore argue that the main ramifications of enlargements of the EU extends mostly to proprietors applying for EUTMs after the enlargements, as earlier rights or language barriers, as to the requirements of distinctive and non-descriptive, may block some marks from being registrable.

Secondly, as for the cancellations of EUTMs it is evident from this thesis that most of the registered marks will remain registered and not be cancelled. However, the implications of having a EUTM cancelled may be sever for the proprietor and thus should the maintenance of the EUTM be of higher importance than what the case law and the decisions suggest it is. This is essentially mostly important for the requirement of genuine use as it appears to be difficult proving genuine use if no evidence of use has been kept by the proprietor. The fact that the burden of proof lies with the proprietor when the mark is challenged for not being used further underlines that the maintenance should be more significant. As for marks becoming generic, the fact that if the proprietor of a EUTM has done what can be reasonably asked of him, the EUTM may not be revoked is sufficient enough to support the argument that EUTMs can only be relied on by the proprietor if they are maintained to the degree required by the Regulation.

It is evident from this thesis that my opinion is that EUIPO is to generous when registering EUTMs as almost half of the cancellations results from invalidity and thus should not have been registered in the first place. The reason behind this opinion is first of all that it makes the Register less reliable and thus may affect how registered marks are viewed and what standing they will enjoy on the market. If the system were to be too weak problems may arise when proprietors tries to prevent others from using their rights if those others believe that the mark will not hold if it is challenged independent from the requirements stated in the Regulation. Secondly, it is important for the trade mark system to work that proprietors of marks believes in they have the rights conferred to them by the register if the mark is registered and that they do not question these rights as they otherwise might be reluctant to invest in

that mark and marks that are less invested in may be less distinctive which in the end will make it harder for consumers to identify the origin of the goods.

Lastly, it appears to be a correlation between non-traditional marks and the cancellation of such marks. However, as it is less non-traditional marks registered the data for the traditional marks are more certain and thus it is hard to make proper estimates of how much more likely it is that non-traditional marks will be cancelled. Since the new regulation is more favourable towards these types of marks it is likely that the application for non-traditional marks will increase and that such estimates will become more accurate with time. It is still important that if marks such as hologram marks or colour marks are viewed in law to be protectable as trade marks that these rights are not questioned to a degree where they become uncertain to the extent that it is not worth investing in the mark. The ability to register this types of marks has to be based on the fact that they do serve as information barriers to the end-consumers and not just because they may be capable of distinguishing goods or services in some situations.

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- C-578/17 *Oy Hartwall Ab (Hartwall)* EU:C:2019:261
- T-79/00 *Rewe Zentral AG v OHIM (Lite)* EU:T:2002:42, [2002] ECR II-00705
- T-316/00 *Viking-Umwelttechnik GmbH v OHIM (Green & Grey)* EU:T:2002:225, [2002] ECR II-3715
- T-6/01 *Matratzen Concord GmbH v OHIM (Matratzen)*, EU:T:2002:261, [2002] ECR II-4335
- T-28/08 *Mars, Inc v OHIM (Bounty)* EU:T:2009:253, [2009] ECR II-00106
- T-427/09 *centrotherm Clean Solutions GmbH & Co. KG v OHIM (CENTROTHERM)* EU:T:2011:480, [2011] ECR II-6207

Decisions by EUIPO

Supermac's (Holdings) Ltd v McDonald's International Property Co Ltd, EUIPO Cancellation Division 14788C (11 January 2019)

Unilab LP v GP Hellenic Soil Ltd, EUIPO Cancellation Division 15320C (23 January 2019)

Lenzing Gerber Stute v Framacad Solutions Ltd, OHIM Cancellation Division 5485 C (16 November 2010)

The European Union v Geoffrey Angelo Gartland, Decision on Cancellation No 4 264 C, OHIM Cancellation Division (28 June 2012)

"Optimum Mark" Spółka z.o.o. v Red Bull GmbH, OHIM Cancellation Division 5905 C (30 April 2013)

Optimum Mark Sp. z.o.o. v Red Bull GmbH, OHIM Cancellation Division 5938 C (9 October 2013)

Bahag Baus Handelsges. AG Zweigniederlassung Mannheim v Hozelock Ltd, OHIM Cancellation Division 11 106 C (16 February 2016)

Correspondence from EUIPO Operations Department to Glaxo Group Ltd, 'Entry on the Register of a Decision on an Application for a Declaration of Invalidity' No 12 204 C (7 December 2017)

Appendix 1

Application

Trade mark type	Applications	Application withdrawn	Application Refused	Likelihood of having an Application Refused
<i>Word</i>	11 009 525	79 045	43 008	0,4%
<i>Figurative</i>	803 845	38 985	16 600	2,2%
<i>Shape</i>	10 083	1 158	1 902	21,3%
<i>Colour</i>	1 080	185	394	44,0%
<i>Hologram</i>	11	3	2	25,0%
<i>Motion</i>	56	1	11	20,0%
<i>Multimedia</i>	25	0	0	0%
<i>Pattern</i>	35	5	0	0%
<i>Position</i>	110	13	8	8,2%
<i>Sound</i>	341	16	37	11,4%
<i>Other</i>	991	182	322	39,8%
Total:	11 826 102	119 593	62 284	15,7%

Appendix 2

Cancellations

Trade mark type	Registered	Cancellations (revoked & invalidity)	Cancellation Pending
<i>Word</i>	664 841	1 970	1 834
<i>Figurative</i>	504 277	1 253	1 366
<i>Shape</i>	4 805	25	58
<i>Other</i>	391	4	4
<i>Colour</i>	277	5	6
<i>Sound</i>	207	0	0
<i>Motion</i>	23	0	0
<i>Position</i>	20	0	0
<i>Multimedia</i>	14	0	0
<i>Pattern</i>	13	0	0
<i>Hologram</i>	5	0	0
Total:	1 174 873	3 257	3 268

Trade mark type	Registration Surrendered	Likelihood of cancellation (excluding surrender)	Registration Expired
<i>Word</i>	3 100	0,5%	142 153
<i>Figurative</i>	1 840	0,4%	97 005
<i>Shape</i>	21	1,4%	1 077
<i>Other</i>	1	1,7%	60
<i>Colour</i>	2	3,1%	62
<i>Sound</i>	0	0,0%	22
<i>Motion</i>	0	0,0%	0
<i>Position</i>	0	0,0%	0
<i>Multimedia</i>	0	0,0%	0
<i>Pattern</i>	0	0,0%	0
<i>Hologram</i>	0	0,0%	1
Total:	4 964	0,7%	240 380

Appendix 3

Registration numbers:		Revoked cancellations:			
Revoked cancellations:		Word marks:	Figurative marks:		
	Word marks:	Figurative marks:			
1	000001454	000016634	38	000201913	000700823
2	000002907	000026195	39	000206508	000744482
3	000003848	000030007	40	000206508	000747840
4	000005272	000082354	41	000217869	000788315
5	000006247	000089193	42	000217869	000796375
6	000007252	000102434	43	000225565	000829655
7	000021451	000110239	44	000226472	000847624
8	000026161	000170985	45	000238832	000850586
9	000029769	000171017	46	000250506	000850628
10	000041228	000173740	47	000250977	000852905
11	000041590	000194993	48	000252130	000867556
12	000051458	000217877	49	000253062	000869966
13	000052050	000258236	50	000262659	000872507
14	000057265	000272104	51	000272336	000877019
15	000058735	000289678	52	000281881	000877779
16	000064014	000306183	53	000296186	000877910
17	000066845	000310318	54	000301531	000879916
18	000073593	000340091	55	000306159	000880310
19	000093906	000350181	56	000310797	000891267
20	000098863	000375345	57	000311241	000907675
21	000101204	000400804	58	000313304	000919449
22	000102905	000406132	59	000315366	000923599
23	000117127	000424226	60	000324442	000931667
24	000120766	000427336	61	000325712	000939629
25	000123406	000443440	62	000326694	000940809
26	000134338	000490094	63	000344861	000952952
27	000145631	000497594	64	000362871	000959726
28	000150466	000509968	65	000369942	000965459
29	000154062	000516799	66	000374850	000980995
30	000171850	000517557	67	000393843	000989830
31	000172478	000528240	68	000402388	000991133
32	000172478	000539411	69	000405514	001005578
33	000172791	000554311	70	000406082	001014885
34	000172791	000572826	71	000406777	001025212
35	000186213	000589853	72	000412759	001029123
36	000186213	000617316	73	000413336	001029396
37	000201913	000632232	74	000453324	001046622
			75	000469064	001050905
			76	000472803	001067040
			77	000480731	001078690

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
78	000488627	001097518	118	000837021	001615004
79	000489591	001105907	119	000837534	001665579
80	000491142	001110527	120	000839316	001677343
81	000506279	001123520	121	000856880	001683986
82	000510099	001141571	122	000877829	001690742
83	000515619	001147057	123	000878959	001691294
84	000520486	001148717	124	000890848	001716638
85	000526293	001156835	125	000898841	001716703
86	000529891	001159243	126	000907600	001743111
87	000535088	001160696	127	000912428	001747880
88	000554105	001170349	128	000913723	001753631
89	000581116	001181874	129	000933549	001762731
90	000597401	001207554	130	000933770	001765205
91	000614461	001211366	131	000958397	001777424
92	000618918	001250836	132	000962746	001782218
93	000619593	001253798	133	000964874	001815893
94	000653626	001254911	134	000967653	001838614
95	000656298	001284793	135	000968768	001852060
96	000657718	001297365	136	000970723	001856079
97	000659326	001298744	137	000974394	001871896
98	000675371	001326990	138	000984732	001874254
99	000693010	001330919	139	000984872	001883354
100	000693895	001348721	140	000987685	001907849
101	000715284	001354927	141	001000736	001921840
102	000727990	001360593	142	001002443	001927011
103	000742734	001361070	143	001014125	001933522
104	000768028	001366749	144	001024876	001961358
105	000770446	001382829	145	001026335	001970243
106	000774422	001416544	146	001026442	001983410
107	000776526	001425099	147	001028869	001987189
108	000776864	001429232	148	001030584	001992510
109	000780478	001433465	149	001030626	001995356
110	000780783	001444405	150	001032838	002033074
111	000781153	001479765	151	001041342	002042984
112	000792507	001485200	152	001055151	002068252
113	000794172	001492032	153	001059211	002073625
114	000802090	001492040	154	001070473	002087039
115	000817577	001521160	155	001085752	002122141
116	000824045	001545268	156	001088624	002127603
117	000835264	001613702	157	001095975	002161370

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
158	001096742	002178226	198	001381995	002942639
159	001111871	002183804	199	001396068	002960979
160	001121748	002193795	200	001396837	002991115
161	001123595	002220952	201	001401470	003012739
162	001126614	002223600	202	001406586	003012747
163	001140508	002260578	203	001411214	003060704
164	001142678	002262269	204	001425446	003075306
165	001143254	002282846	205	001425529	003095197
166	001153899	002287423	206	001438605	003112133
167	001157999	002302248	207	001439256	003125432
168	001158252	002305712	208	001449503	003127099
169	001175918	002305795	209	001465418	003127602
170	001176882	002319499	210	001483262	003127611
171	001176932	002324697	211	001491190	003127636
172	001179977	002381861	212	001492420	003137098
173	001182476	002388270	213	001494269	003151503
174	001183896	002415263	214	001495100	003161445
175	001188796	002423234	215	001511666	003191046
176	001188812	002423705	216	001531987	003209541
177	001191410	002433415	217	001537315	003232841
178	001203843	002568145	218	001586825	003236528
179	001211903	002583888	219	001588854	003252699
180	001219955	002644540	220	001594514	003259728
181	001223494	002651636	221	001607001	003307337
182	001232719	002655512	222	001611425	003325883
183	001236165	002688133	223	001618982	003348927
184	001244870	002692457	224	001619006	003349008
185	001250794	002740553	225	001623842	003366259
186	001263011	002749877	226	001642925	003439262
187	001281245	002783835	227	001656701	003451358
188	001287119	002801165	228	001686732	003465515
189	001305234	002801173	229	001698976	003471992
190	001318492	002804300	230	001702562	003512134
191	001343300	002804326	231	001706225	003513421
192	001351030	002842680	232	001708296	003526936
193	001354851	002844033	233	001724574	003536745
194	001357524	002851822	234	001729375	003568391
195	001358688	002857159	235	001730779	003570991
196	001368299	002871069	236	001732833	003584315
197	001369396	002898302	237	001739812	003599859

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
238	001742105	003605731	278	002002723	004264735
239	001756998	003615457	279	002005346	004264751
240	001762186	003626462	280	002009967	004280392
241	001767896	003648771	281	002017390	004307914
242	001772714	003672276	282	002017549	004318051
243	001773621	003693108	283	002018109	004345856
244	001780857	003696028	284	002026524	004355764
245	001786391	003699841	285	002037174	004359279
246	001787316	003718616	286	002043552	004359303
247	001787670	003729522	287	002043578	004398939
248	001790773	003733961	288	002050789	004432548
249	001792498	003747094	289	002054864	004453361
250	001800358	003766292	290	002061380	004506473
251	001827518	003776739	291	002081149	004509618
252	001837707	003787397	292	002088938	004510541
253	001839141	003898327	293	002090462	004512083
254	001841691	003908621	294	002101244	004523106
255	001842376	003916509	295	002103513	004527792
256	001852128	003916533	296	002113181	004560157
257	001857853	003918687	297	002120244	004569216
258	001865351	003949294	298	002122729	004570271
259	001870880	003949741	299	002133577	004574976
260	001873017	003952124	300	002142735	004603106
261	001875749	003982352	301	002143774	004621521
262	001883776	004035441	302	002145910	004623955
263	001908078	004064796	303	002151751	004639662
264	001910371	004071676	304	002153542	004667192
265	001922822	004094926	305	002161073	004670626
266	001934207	004109971	306	002174936	004681946
267	001943273	004117917	307	002182343	004684973
268	001949072	004129052	308	002198638	004694287
269	001961861	004173118	309	002202505	004722278
270	001965060	004191425	310	002206605	004725206
271	001966225	004199907	311	002213825	004743217
272	001969450	004213666	312	002234110	004799961
273	001977941	004218913	313	002235943	004847811
274	001984707	004220612	314	002245306	004873956
275	001986462	004225447	315	002247831	004884111
276	002001030	004225728	316	002251981	004923629
277	002001469	004255031	317	002259711	004953196

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
318	002263663	004977948	358	002615532	005479266
319	002309581	004993341	359	002617405	005482369
320	002315968	004998721	360	002627230	005491329
321	002318905	005012604	361	002631612	005497441
322	002329977	005018585	362	002633535	005498068
323	002335834	005022678	363	002635860	005507546
324	002358497	005031687	364	002650406	005512157
325	002366466	005039748	365	002651727	005517347
326	002366797	005053426	366	002653319	005525456
327	002371383	005062021	367	002658573	005539978
328	002377208	005073176	368	002666188	005569082
329	002401743	005102678	369	002680098	005569959
330	002402717	005102686	370	002691400	005575601
331	002407153	005109079	371	002708360	005578885
332	002413706	005120753	372	002712719	005587225
333	002416725	005168745	373	002716066	005592241
334	002434124	005169727	374	002719490	005608849
335	002436426	005172408	375	002733822	005614037
336	002457190	005181672	376	002742831	005622345
337	002462588	005182911	377	002747293	005628011
338	002475473	005183256	378	002774578	005657671
339	002486769	005205125	379	002780294	005666921
340	002492429	005210398	380	002786820	005679725
341	002494136	005212725	381	002804292	005699178
342	002511517	005212782	382	002820439	005708706
343	002512192	005218573	383	002820504	005715149
344	002519569	005231972	384	002829224	005733514
345	002533933	005236492	385	002829711	005738554
346	002548964	005236500	386	002831816	005742374
347	002549459	005284104	387	002838316	005751557
348	002552784	005324421	388	002850766	005763578
349	002553451	005331954	389	002856185	005767686
350	002559078	005391222	390	002862100	005769096
351	002569192	005408612	391	002869816	005784715
352	002573863	005409685	392	002883437	005799374
353	002576759	005430251	393	002909554	005803168
354	002579118	005446539	394	002919306	005803796
355	002587541	005456744	395	002920981	005832654
356	002588911	005468475	396	002928653	005843859
357	002601789	005475363	397	002937076	005933131

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
398	002946358	005933312	438	003364833	006630362
399	002948719	005952858	439	003368751	006649719
400	002957686	005980883	440	003368751	006652424
401	002980563	005990841	441	003369246	006684914
402	002983583	005998349	442	003369246	006710883
403	002983658	006005599	443	003398377	006727549
404	002983674	006013692	444	003401338	006732069
405	002983971	006015408	445	003404341	006748867
406	002993525	006067375	446	003411667	006760607
407	002999514	006070981	447	003412277	006807697
408	003005972	006082226	448	003438348	006826291
409	003031408	006091631	449	003471299	006833834
410	003058245	006101191	450	003483138	006858435
411	003075298	006124325	451	003488004	006876072
412	003094828	006129241	452	003511508	006876131
413	003102118	006144067	453	003513488	006892228
414	003136355	006157069	454	003522927	006892228
415	003136652	006165435	455	003543766	006905392
416	003139482	006172035	456	003545341	006905392
417	003146941	006179089	457	003559986	006915607
418	003149961	006232219	458	003568235	006915607
419	003151826	006241962	459	003572377	006932941
420	003192481	006292213	460	003582046	006932941
421	003193679	006330658	461	003622412	006935175
422	003205961	006334651	462	003635885	006935175
423	003215365	006346341	463	003641917	006938765
424	003216439	006368187	464	003648946	006946263
425	003222544	006395164	465	003649555	006957666
426	003236759	006401228	466	003661758	006959911
427	003242286	006408645	467	003666691	006975361
428	003272416	006440473	468	003666732	006978894
429	003278249	006446835	469	003673274	006983217
430	003287794	006458285	470	003674116	006985601
431	003308665	006468797	471	003681418	006997753
432	003325222	006548663	472	003698594	007014211
433	003342052	006551618	473	003701828	007053531
434	003350758	006552608	474	003706157	007056427
435	003357613	006579908	475	003711108	007075856
436	003357613	006592927	476	003727054	007076243
437	003364833	006595193	477	003746724	007078322

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
478	003747003	007078355	518	004232682	007505101
479	003751609	007135817	519	004248472	007533607
480	003781051	007147151	520	004256806	007561327
481	003781366	007157233	521	004258513	007594278
482	003783206	007158165	522	004272159	007600711
483	003791399	007163777	523	004273116	008151938
484	003805611	007179302	524	004276176	008173321
485	003809761	007197353	525	004284923	008193849
486	003816402	007207962	526	004310141	008201221
487	003830932	007223209	527	004310462	008201402
488	003835519	007230501	528	004323788	008260961
489	003842358	007262306	529	004328051	008262156
490	003859048	007263643	530	004331302	008270688
491	003866142	007276471	531	004340907	008274557
492	003869435	007294259	532	004352076	008282865
493	003899821	007309669	533	004389417	008306078
494	003899853	007326771	534	004392411	008312563
495	003908878	007347321	535	004425542	008328304
496	003929478	007358971	536	004426573	008346033
497	003945334	007360068	537	004432852	008362519
498	003955861	007361331	538	004441689	008375503
499	003973468	007368889	539	004460192	008382889
500	003981503	007378987	540	004460234	008384604
501	003985033	007383292	541	004465555	008408858
502	003985496	007386535	542	004466991	008409427
503	003990074	007415789	543	004486171	008419475
504	003992393	007423064	544	004506515	008419798
505	004009254	007423098	545	004510152	008423386
506	004033676	007435167	546	004526935	008461337
507	004034351	007452097	547	004537171	008461378
508	004063996	007454259	548	004539458	008498412
509	004078341	007454895	549	004546438	008498834
510	004096962	007471873	550	004553335	008520595
511	004102687	007471899	551	004553459	008599144
512	004105599	007474299	552	004560082	008618597
513	004139812	007484471	553	004565107	008620932
514	004167839	007487143	554	004566725	008649105
515	004194478	007487771	555	004571469	008649196
516	004205696	007493257	556	004574844	008678419
517	004216701	007493273	557	004593844	008682783

Revoked cancellations:		Revoked cancellations:			
Word marks:	Figurative marks:	Word marks:	Figurative marks:		
558	004593869	008691453	598	004902532	009217357
559	004595435	008721607	599	004910841	009226945
560	004600243	008721664	600	004923942	009252156
561	004605119	008721888	601	004936291	009286436
562	004614533	008733421	602	004940078	009292327
563	004616777	008742272	603	004944691	009309147
564	004633426	008742702	604	004952412	009353947
565	004645552	008748832	605	004960852	009361239
566	004656451	008752231	606	004980587	009412032
567	004666475	008768301	607	005016159	009413139
568	004669982	008777765	608	005037452	009438805
569	004678975	008779688	609	005053616	009451535
570	004684502	008788085	610	005054747	009462128
571	004693701	008824203	611	005068739	009463381
572	004694063	008824765	612	005070181	009475071
573	004706651	008840233	613	005073663	009482522
574	004707204	008867004	614	005077508	009506701
575	004712535	008879959	615	005085584	009519026
576	004717484	008887671	616	005088265	009539701
577	004740155	008915399	617	005108329	009555145
578	004757605	008925191	618	005110911	009578477
579	004785895	008925208	619	005110978	009601006
580	004791571	008932519	620	005115911	009627472
581	004806949	008932717	621	005137328	009632779
582	004809281	008936221	622	005139662	009651464
583	004810065	008936882	623	005144341	009655564
584	004811105	008956146	624	005154067	009661919
585	004811626	009013831	625	005168638	009661935
586	004812913	009020702	626	005170964	009714131
587	004823738	009070301	627	005187992	009714131
588	004833612	009082546	628	005200845	009750291
589	004839072	009106543	629	005205562	009750291
590	004844098	009132309	630	005209201	009786013
591	004846911	009136714	631	005209648	009786013
592	004847877	009138181	632	005218482	009805235
593	004877783	009143538	633	005225503	009854159
594	004881645	009177064	634	005231808	009895343
595	004882361	009196866	635	005231949	009947714
596	004890752	009208315	636	005239223	009969064
597	004891552	009213935	637	005255922	010028678

		Revoked cancellations:				Revoked cancellations:	
		Word marks:	Figurative marks:			Word marks:	Figurative marks:
638		005261599	010087682	678		005570874	
639		005273867	010096196	679		005573407	
640		005276894	010144012	680		005577549	
641		005285796	010284107	681		005579776	
642		005291133	010292241	682		005589189	
643		005295472	010301117	683		005595574	
644		005296884	010302768	684		005599014	
645		005298047	010311512	685		005601901	
646		005312269	010407641	686		005601943	
647		005319851	010533602	687		005605555	
648		005324801	010589521	688		005623251	
649		005326822	010597573	689		005634597	
650		005331632	010676971	690		005638473	
651		005358511	010699114	691		005641741	
652		005365077	010699411	692		005642715	
653		005365242	010712644	693		005662788	
654		005371191	010744092	694		005662796	
655		005372594	010762144	695		005672522	
656		005375613	010956431	696		005681879	
657		005379839	010987477	697		005705769	
658		005382461	011014545	698		005706726	
659		005388161	011263753	699		005725759	
660		005390505	011299591	700		005730114	
661		005390893	011345311	701		005750096	
662		005394201	011387594	702		005751417	
663		005397351	011419124	703		005752241	
664		005397997	011468907	704		005767538	
665		005419908	017894255	705		005767595	
666		005425962		706		005770011	
667		005436365		707		005771837	
668		005446497		708		005772975	
669		005447164		709		005776679	
670		005458261		710		005785555	
671		005460531		711		005811741	
672		005493853		712		005823737	
673		005501762		713		005824941	
674		005518691		714		005826409	
675		005543616		715		005829081	
676		005546726		716		005858857	
677		005561279		717		005867023	

Revoked cancellations:		Revoked cancellations:	
Word marks:	Figurative marks:	Word marks:	Figurative marks:
718	005870142	758	006432751
719	005875414	759	006451141
720	005875703	760	006467146
721	005885744	761	006468061
722	005890538	762	006470447
723	005912291	763	006491278
724	005923917	764	006494488
725	005926647	765	006499909
726	005928288	766	006500037
727	005951454	767	006512834
728	005954201	768	006514244
729	005966924	769	006539662
730	005968979	770	006550065
731	005974498	771	006564645
732	005982756	772	006579882
733	005984117	773	006583439
734	005990213	774	006605761
735	006044127	775	006614564
736	006047757	776	006633226
737	006060958	777	006665947
738	006065511	778	006683841
739	006078422	779	006684047
740	006096739	780	006697809
741	006103998	781	006702914
742	006126528	782	006711171
743	006145254	783	006718324
744	006166532	784	006720197
745	006195242	785	006731988
746	006198527	786	006741649
747	006207369	787	006753041
748	006213029	788	006759997
749	006242408	789	006760342
750	006262976	790	006763783
751	006325344	791	006763858
752	006351449	792	006765234
753	006355309	793	006778179
754	006360465	794	006785786
755	006371835	795	006812606
756	006392047	796	006814503
757	006431167	797	006816987

Revoked cancellations:		Revoked cancellations:	
Word marks:	Figurative marks:	Word marks:	Figurative marks:
798	006818793	838	007090194
799	006818819	839	007092992
800	006824296	840	007102081
801	006834543	841	007125271
802	006835011	842	007127806
803	006835664	843	007138481
804	006839955	844	007140247
805	006884241	845	007142871
806	006892442	846	007150162
807	006896195	847	007151087
808	006902951	848	007151731
809	006911432	849	007153604
810	006914469	850	007154024
811	006920318	851	007170913
812	006920987	852	007190391
813	006928147	853	007191513
814	006931943	854	007204159
815	006944731	855	007217623
816	006962104	856	007222169
817	006969794	857	007227201
818	006979827	858	007227358
819	006986954	859	007237001
820	006995013	860	007237134
821	007010697	861	007238579
822	007018501	862	007248107
823	007019292	863	007250855
824	007022742	864	007253263
825	007022775	865	007257371
826	007022809	866	007257603
827	007022866	867	007261738
828	007030208	868	007276009
829	007030612	869	007297435
830	007069594	870	007301302
831	007071301	871	007305361
832	007082951	872	007321185
833	007083371	873	007348477
834	007084114	874	007350671
835	007088586	875	007368591
836	007089378	876	007388028
837	007089841	877	007397698

		Revoked cancellations:				Revoked cancellations:	
		Word marks:	Figurative marks:			Word marks:	Figurative marks:
878	007409601			918	008444564		
879	007416159			919	008464191		
880	007421175			920	008464471		
881	007443765			921	008479222		
882	007456692			922	008487951		
883	007462351			923	008498453		
884	007466253			924	008505307		
885	007475692			925	008505431		
886	007481625			926	008513137		
887	007542368			927	008522484		
888	007550511			928	008526642		
889	007556426			929	008536237		
890	007558265			930	008541005		
891	007578297			931	008545329		
892	007578313			932	008571499		
893	007591753			933	008589483		
894	007603368			934	008600934		
895	008114423			935	008602658		
896	008124307			936	008612335		
897	008130593			937	008622573		
898	008140675			938	008639072		
899	008157497			939	008640906		
900	008173312			940	008646317		
901	008186173			941	008672041		
902	008202971			942	008672594		
903	008232993			943	008672751		
904	008238289			944	008683435		
905	008244485			945	008699498		
906	008256711			946	008725681		
907	008262065			947	008729683		
908	008265399			948	008729766		
909	008294464			949	008754913		
910	008302275			950	008755845		
911	008314981			951	008788903		
912	008321812			952	008790008		
913	008377079			953	008804999		
914	008383572			954	008805137		
915	008385189			955	008808784		
916	008425878			956	008810855		
917	008427452			957	008813495		

Revoked cancellations:		Revoked cancellations:	
Word marks:	Figurative marks:	Word marks:	Figurative marks:
958	008832917	998	009329376
959	008833014	999	009332231
960	008836058	1000	009376674
961	008847311	1001	009380213
962	008888505	1002	009394438
963	008889751	1003	009395732
964	008909129	1004	009422023
965	008911281	1005	009426396
966	008913279	1006	009462251
967	008918542	1007	009462268
968	008923922	1008	009493958
969	008960387	1009	009494055
970	008985673	1010	009521642
971	008992901	1011	009527961
972	008993073	1012	009546151
973	009012121	1013	009550252
974	009029802	1014	009554271
975	009031394	1015	009561234
976	009073008	1016	009601063
977	009078916	1017	009616401
978	009083916	1018	009634254
979	009086414	1019	009674946
980	009087792	1020	009705146
981	009112541	1021	009719171
982	009126319	1022	009739236
983	009139379	1023	009779299
984	009179524	1024	009826595
985	009194267	1025	009841099
986	009209586	1026	009850355
987	009216383	1027	009886102
988	009222233	1028	009904517
989	009224676	1029	009905357
990	009232513	1030	009923061
991	009234551	1031	009936501
992	009272246	1032	009951682
993	009281841	1033	009952789
994	009294729	1034	010001329
995	009302233	1035	010029205
996	009303637	1036	010040665
997	009312042	1037	010050847

Revoked cancellations:		Revoked cancellations:	
	Word marks:	Figurative marks:	
1038	010082899		1078
1039	010085264		015571714
1040	010140176		
1041	010149433		
1042	010149482		
1043	010200806		
1044	010210375		
1045	010241958		
1046	010292167		
1047	010297406		
1048	010312551		
1049	010341758		
1050	010378421		
1051	010488914		
1052	010494649		
1053	010527422		
1054	010549889		
1055	010665743		
1056	010689156		
1057	010712131		
1058	010823441		
1059	010829638		
1060	010882835		
1061	010895084		
1062	010964567		
1063	010984731		
1064	011117314		
1065	011162716		
1066	011177029		
1067	011193323		
1068	011259728		
1069	011368255		
1070	011450749		
1071	011528973		
1072	011533759		
1073	011572252		
1074	011674207		
1075	012650503		
1076	014057376		
1077	015442700		

