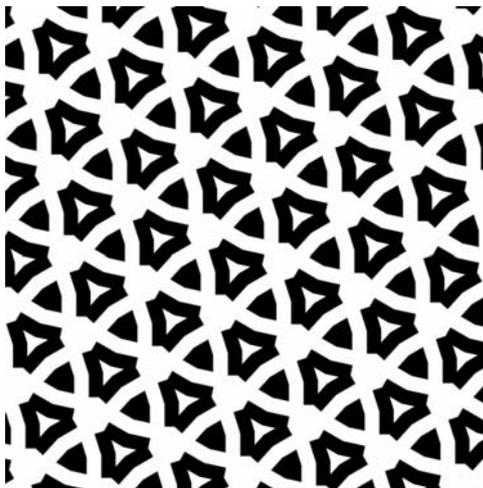


Pattern marks

Marks consisting of a pattern which are capable of identifying the goods or services as originating from a particular undertaking, and thus distinguishing it from those of other undertakings are registrable as trade marks (section 3(1) and (2)). The test for assessing distinctiveness of pattern marks is no different than that for other types of marks. Pattern marks that are descriptive or customary in the trade, or otherwise indistinctive are objectionable because they are incapable of serving as an identifier of trade source and they would not be accepted for registration without evidence of acquired distinctiveness. *Prima facie* objection should be raised under section 11(1)(b), (c) or (d) as appropriate.

Pattern marks for goods

Repeating patterns consisting of simple geometric shapes or designs are commonly applied to the surface of goods or their packaging to make the goods attractive. Such repeating patterns, *prima facie*, serve a mere decorative purpose in relation to the goods and are therefore not capable of guaranteeing the trade origin to the average consumer. These marks are likely to be objectionable for registration under section 11(1)(b). See the example below in respect of the applied-for goods of “bags”:

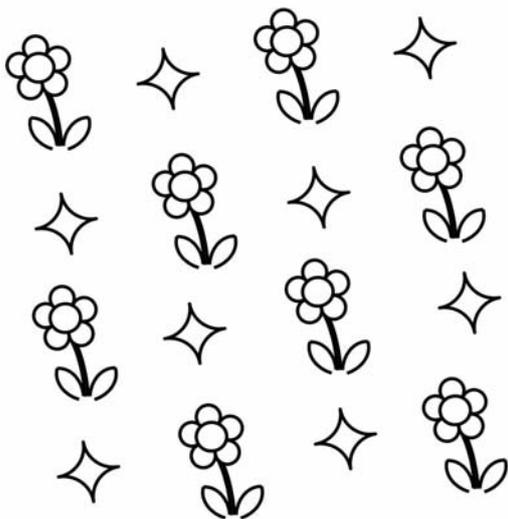


In addition to a section 11(1)(b) objection, where the applied-for mark serves exclusively to designate the characteristics of the applied-for goods, objection should also be raised under section 11(1)(c). See the following example in respect of the applied-for goods of “diamonds”:



Pattern marks for services

If a pattern mark for services is on immediate impression merely perceived as a decoration, it is devoid of any distinctive character and thus objectionable under section 11(1)(b). See the following example in respect of the applied-for services of “flower arranging”:



Like pattern marks for goods, objection under section 11(1)(c) should also be taken if the applied-for mark merely describes the characteristics of the applied-for services. See the following example in respect of the applied-for services of “foot massage”.



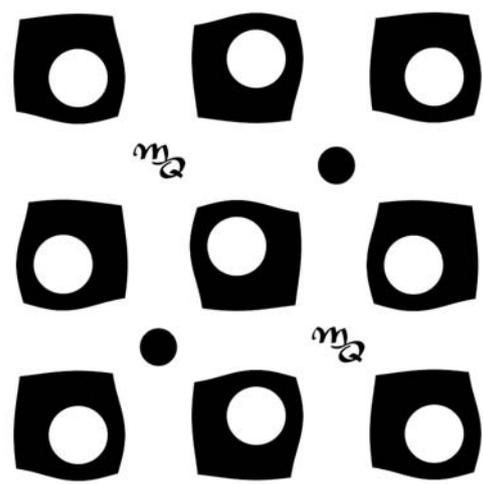
Presence of a registered mark

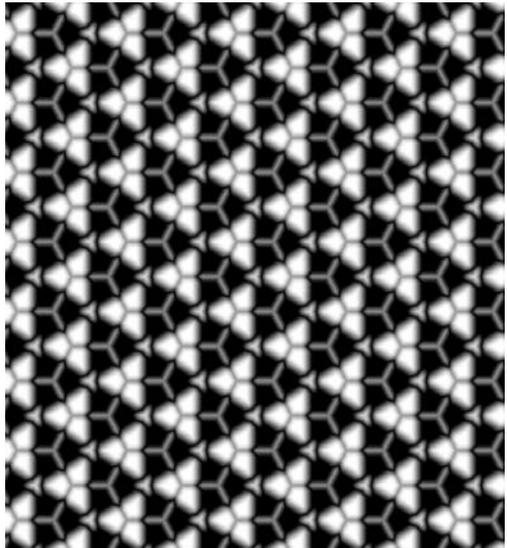
The presence of a registered mark in the pattern may render the applied-for mark as a whole distinctive if that registered mark can on immediate impression stand out from other elements of the mark, for example because of its prominent size or position. See the following examples:

Applied-for mark	Registered mark

Applied-for mark	Registered mark
	

On the other hand, if the distinctiveness of the registered mark in the applied-for mark is subsumed (for example because of its insignificant size, position or presentation in relation to other elements of the mark) so that the applied-for mark is on immediate impression merely perceived as a repeating pattern for decorative purposes, the objection under section 11(1)(b) will likely remain. See the following examples:

Applied-for mark	Registered mark
	

Applied-for mark	Registered mark
	

Acquired distinctiveness through use

Evidence of acquired distinctiveness filed to overcome objections must be capable of demonstrating that, before the date of the application for registration, the pattern mark has in fact become identified in the minds of the public with a particular undertaking's goods or services. A pattern mark which is objectionable *prima facie* would not be saved by evidence of extensive use or promotion alone if its primary meaning has not been displaced in relation to the goods or services, i.e. it has not come to denote the goods or services as those of the applicant, e.g. where evidence merely shows a pattern design for bags, shoes or clothing has been used on the goods themselves or their packaging as a decorative element. Evidence showing how the trader has endeavoured to educate the public that the pattern mark is as much a badge of origin as the brand name would be of high relevance. See the section "Section 11(2) - acquired distinctiveness through use" of the chapter on "Absolute grounds for refusal".

* * *