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General Index

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Every design deposited must, in any proceedings for infringement, be considered as being in force and valid, unless it has been declared null as a result of formal proceedings based upon one of the grounds of nullity, as provided by law. The exception founded on the material grounds of nullity cannot take the place of a formal action for nullity, such formal proceedings being indispensable for the pronouncement of the nullity of an industrial design (Vienna, Ministry of Commerce, June 21, 1957)	67	The question whether articles which have been put into circulation before the deposit of an industrial design should be regarded as resembling the article protected by the deposit and which allegedly conflicts with the validity of the design is a question of law and consequently there is no occasion to require the production of proofs (Vienna, Administrative Court, March 30, 1960)	68
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Trademarks. Application. Lanham Act. Requirements of applications by foreigners under Art. 6 of the Paris Convention. Foreign applicants can rely on their home registration without any allegation of use whatsoever, and hence without complying with all the requirements of Section 1 (Washington, The Patent Office, May 27, 1955, 105 USPQ 392) 159

2. Symbols which may or may not be used as marks

(a) Constitutive elements (lay-out, packaging, bottles, shapes of containers, shapes of products, colours, letters, figures, etc.).

Austria. Slogans can be registered as trademarks if they have a distinctive character. Slogans consisting of phrases which are general in character and which lack any originality which might serve to fix them in the memory of a purchaser, must inevitably lack this characteristic (Vienna, Patent Office, December 17, 1956) 88

Newly created expressions cannot be protected as trademarks when they are only slightly distinguishable from known words in current usage, and to the extent that they cannot be considered in interested circles as invented names, capable of indicating the origin of the products of a specific enterprise (Vienna, Patent Office, February 27, 1957) 88

Groups of letters are deprived of distinctive character required by the law of trademarks, even if accompanied by a border in a simple form, if no proof is furnished as to the use of the marks in such form in the course of trade. Trademarks: K, SSW- VDF, h, v, M (Vienna, Patent Office, 1957-1961) 88

Foreign words cannot be registered if they are lacking in distinctive character, any more than corresponding German words can be so registered (Vienna, Patent Office, March 3, 1960) 88

Great Britain. Opposition to registration on grounds of likelihood of confusion. "Firemaster" not used by applicants themselves but by a subsidiary of applicants (London, Patent Office, August 5, 1964) 262

(b) Generic or qualitative descriptions.

Austria. Certain signs, even if inherently possessing descriptive character, can be protected as trademarks if proof is furnished that they are used as distinctive indication in the course of trade (Vienna, Patent Office, December 17, 1956) 88

Are not of descriptive character the following words: "Cloregal" (chemical products) (1957); "Terraload'r" (loading installations) (1959); "Multiion" (absorbent agents) (1959) (Vienna, Patent Office, October 14, 1957, and May 12, 1959) 89

Refusal to register as trademarks, because of lack of distinctive character: "Infracourt" (heating apparatus) (1957); "Anteuil" (motor vehicles) (1957); "Fluovaccin" (medicaments and chemical products) (1957); "Schokakola" (cocoa, chocolate, etc. containing cola) (1957); "Trienzym" (medicaments, chemical products) (1958); "Grandebär" (installation for coffee drinks) (1958); "Perfektin" (butchery and pork trade) (1959); "Aquastop" (water-refilling clothing) (1960); "Congo" (edible fats) (1960); "Supernova ultra" (sewing machines) (1961); "Eurobe" (footwear) (1951); "Chiquito" (tobacco) (1962) (Vienna, Patent Office) 88

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its manufacture and its trademark (Brussels, Court of Appeals, December 18, 1950)	Pages 57	<i>Italy.</i> Transformation of a trademark into a generic term. The fact that an invented word, registered as a trademark, has become of common use to designate products of a certain kind is not, in itself, sufficient to dispossess the owner of his exclusive right (Supreme Court, May 15, 1935; the same view held by the Court of Appeals of Milan, June 26, 1956)	Pages 57
<i>United States of America.</i> Transformation of a trademark into a generic term. A defendant alleging invalidity of a trademark must show that to the consuming public as a whole the word has lost all its trademark significance. Where the possibility of some deception remains real and the need of competitors to satisfactorily describe their products is satisfied by the availability of several common nouns or adjectives suitable for that purpose, the Court will protect the interest of the owner in his trademark (Massachusetts Circuit Appeal Court, 1956)	54	Transformation of a trademark into a generic term. The only case of degeneration of a trademark into a generic term is when several manufacturers use the word mark and it has lost in the mind of the public any reference to the original product and has become a generic denomination. The owner of the trademark cannot invoke an exclusive right to it because he would be profiting from the reputation enjoyed by his competitors for their products (Rome, Supreme Court, August 2, 1956)	57
Transformation of a trademark into a generic term. The trademark owner has the negative duty not to use the trademark in a manner which may have the effect of educating the public to use the trademark as the name of the product and the affirmative duty to use an available generic term in association with the trademark and in any case to make all diligent efforts to prevent the general public from using the trademark as a generic term ("Thermos" trademark) (Court of Appeals, U. S. District Court, Connecticut, 1963)	52	<i>Sweden.</i> Symbols which may or may not be used as trademarks. "Bjorntrad" trademark. In spite of the fact that the word has been introduced into encyclopaedias and dictionaries the Court was not satisfied that the word has turned into a generic word (Stockholm, Administrative Court, 1957)	60
<i>France.</i> Transformation of a trademark into a generic term. The registered proprietor's right cannot be appropriated for public and general use so long as he has not renounced such right. Renunciation or abandonment cannot be measured and successive renewal of the registration is sufficient proof of the will of the registrant to maintain his right in the trademark (Nancy, Court of Appeal, June 12, 1963)	56	<i>Switzerland.</i> The development of a trademark into a generic term is not effected until all participating circles (manufacturers, merchant and the buying public) do no longer regard it as belonging to a particular manufacturer or trader (Lausanne, Federal Court, September 30, 1958)	58
<i>Great Britain.</i> Registrability. Registration of "Telemeter" (a coin-operated television receiver) refused as having a direct reference to the character of the apparatus and as being neither adapted to distinguish nor capable of distinguishing (London, Board of Trade, April 25, 1963)	261	(c) <i>Family and geographical names.</i>	
"Everglide" (pens). Use of mark likely to deceive or cause confusion (London, Chancery Division, November 7, 1963)	262	<i>Austria.</i> Marks liable to deceive. "Rimini-Ronds" cancelled, on the ground of its deceptive character. It could be interpreted as a simple geographical indication of origin. It becomes deceptive in character from the moment when the proprietor is established in Vienna (Vienna, The Patent Court, November 23, 1960)	94
Registrability. Registration of "Hold and Draw" refused as being directly descriptive of a coin-operated gambling machine (London, Board of Trade, March 18, 1964)	261	<i>Great Britain.</i> Rectification of Register. "Welsh Lady" held capable of becoming distinctive. Emblem used since 1900 but not registered until 1958. The applicants for rectification began to use a similar device in 1954. The application for rectification refused on the ground that the emblem was distinctive of the registered proprietor's goods (London, Chancery Division, March 13, 1964)	263
Registrability. "Ovulen", registration refused on the ground that, being the phonetic of "Ovulin" it had a direct reference to the character of the goods in respect of which it was sought to be registered (London, Chancery Division, May 5, 1964)	261	Registrability. Registration of "Santos-Dumont" in Part A of the Register refused on the grounds that it was not an invented word but merely a collocation of two surnames, albeit that one was a surname current in Spain and the other in France. Registration in Part B allowed because of surnames which were rare in England was "inherently capable of distinguishing" (London, Board of Trade, March 21, 1963)	261
Registrability. Registration of "Motor Lodge" in respect of foodstuffs refused on the ground that it was descriptive and a term in common usage (London, Board of Trade, November 24, 1964)	262	Registrability. Registration of "Luxmore" (small domestic utensils, etc.) refused. Luxmoore was a surname not infrequent in the West of England (London, Assistant Comptroller, Patent Office, November 28, 1963)	261
Registrability. Registration of "Chin Chin" (alcoholic beverages) not capable of registration in Part A. The words described are a form of salutation not necessarily confined to drinking occasions (London, Board of Trade, February 12, 1965)	262		

(e) Free marks (Freizeichen).

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Austria. Free signs. "Gervais" not registrable as a trademark, because considered in Austria, for more than 50 years, as a free sign, designating a particular kind of cheese (Vienna, The Patent Court, May 30, 1962) 93

2 A. Goods for which a mark may or may not be registered

Austria. Marks liable to deceive. The action for cancellation, by reason of the deceptive character of the mark, can only be admitted when the mark impugned contains, in itself, an inexact indication as regards the goods in respect of which it has been deposited, and is liable to deceive consumers, thus risking also to injure the interests of the said consumers (Vienna, Patent Office, September 27, 1955) 93

If the mark enjoys world reputation, the recollection of it which the consumer retains will be very keen and precise and the risk of confusion between the two marks in question will be correspondingly reduced (Vienna, Patent Office, October 16, 1958) 90

5. Termination of rights

(a) Conflicting marks, other than those classified under 2 B above.

Austria. The manner in which the same figurative device is depicted, from a graphic point of view, allows for several perceptible differences, with the result that the marks showing the same device need not be regarded as being similar (Vienna, Patent Office, October 9, 1956) 94

The following marks are considered as similar and capable of causing confusion: "Nervaletsen" — "Nervan" (1956); "Acesella" — "Acella" (1956); "Okal" — "Togal" (1956); "Lalvos" — "Leevos" (1957); "Dephloxan" — "Perphloxan" (1957); "Lysoforte" — "Leysol" (1957); "Koladin" — "Cordalin" (1957); "Quintine" — "Quittin" (1957); "Felux" — "Felix" (1957); "Permanit" — "Permutit" (1957); "Teka" — "Dexa" (1958); "Isodine" — "Isoptin" (1958); "Eco" — "Erco" (1958); "Butylon" — "Butolan" (1959); "Charmina" — "Charmella" (1959); "Unita" — "Unixa" (1959); "De Lindeboom" — "Linde" (1959); "Vita" — "Gelvita" (1959); "Vegominal" — "Veganin" (1959); "Vegoman" — "Veganin" (1959); "Novadrin" — "Novalgin" (1959); "Metafol-Noxol" — "Metafol" (1958); "Loramin" — "Laramin" (1960); "Tussiletten" — "Perbussetten" (1960); "Graziella" — "Graziosa" (1960); "Dormanal" — "Dominal" (1960); "Lano Wax" — "Lino" (1961); "Alderton" — "Atergon" (1960); "Orodiur" — "Oricur" (1961); "OKs" — "Vox" (1961); "Bri-lon" — "Phrilon" (1961); "Nezon" — "Zeezon" (1961); "Bonita" — "Bolvita" (1961); "Marcel Guerlain, maison fondée en 1923, Paris" — "Guerlain" (1961); "Hesotin" — "Helkodin" (1962) (Vienna, Patent Office, Patent Court) 91

Two compound marks are not of such a nature as to cause confusion when the sole element which they have in common is not capable of protection. The danger of confusion must always be assessed according to the overall impression that

the two marks in question produce upon the average purchaser (Vienna, The Patent Court, March 23, 1957) 90

Trading styles incorporated in mixed marks are of less interest to the average buyer than the other elements included in the marks, except in the case of very well known trade names, additions serving to identify the proprietor of the mark are accordingly not determining when it is a matter of deciding whether the mixed marks are of such a nature as to lead to confusion (Vienna, The Patent Court, May 14, 1957) 90

The question of the resemblance of products under consideration must be appreciated in the light of the way in which these products are seen by interested parties (Vienna, The Patent Court, May 16, 1957) 92

Only common elements, if they are characteristic, create the overall impression produced by the two marks in question, which, from that point of view, can be confused (Vienna, The Patent Court, May 24, 1957) 90

Within the framework of an application for cancellation it is only necessary to know whether the marks concerned have been deposited in respect of products which are identical or of a similar nature, and not whether the same products are effectively manufactured or put into circulation by the parties in dispute (Vienna, The Patent Court, December 13, 1957) 92

The following designations have not been regarded as similar: "Pyrabutol" — "Pyramidon" (1958); "Unitas" — "Unixa" (1959); "Perdilaton" — "Dilatol" (1960); "Aco" — "Axo" (1961); "Taxi-Kola" — "Afri-Cola" (1961) (Vienna, Patent Office) 92

Trademarks "La vache qui rit" (The cow which laughs) and "La vache sérieuse" (The serious cow), accompanied by representations of a cow and of the head of a cow, similarity not recognized, with an observation that the Austrian law of trademarks has no provision for the protection of figurative devices (Vienna, The Patent Court, May 31, 1958) 94

The trade name "Robba Rocco" and the trademark "Roba" must be considered as being of such a nature as to lead to confusion from the moment when the initial name "Rocco" is deprived of distinctive character (Vienna, The Patent Court, September 16, 1958) 92

If the mark enjoys world reputation, the recollection of it which the consumer retains will be very keen and precise and the risk of confusion between the two marks in question will be correspondingly reduced (Vienna, Patent Office, October 16, 1958) 90

The circumstances in which a mark has been created do not have to be taken into account when it is a matter of assessing whether such mark possesses a sufficiently distinctive character, or if it is more or less capable of confusion with other marks (Vienna, Patent Office, November 18, 1958, confirmed by the Patent Court) 91

A word-mark should be considered as resembling a device, and liable to cause confusion, when the image of the device cannot be designated other than by the word constituting the verbal portion of the mark (Vienna, Patent Office, January 22, 1959)	Pages 90	<i>Great Britain</i> . Infringement. Termination of distributorship agreement. Injunction refused on the ground that the use of the trademark in a circular letter was not likely to deceive or cause confusion (London, Chancery Division, May 26, 1964)	Pages 263
In a mark composed of a word and a device, the verbal element is more often preponderant as regards the overall impression produced by the mark since, apart from exceptions, use is more frequently made of the word, in the course of trade, in order to designate such a mark (Vienna, The Patent Court, April 27, 1960)	91	Carl Zeiss Foundation in German Democratic Republic and Carl Zeiss Foundation in Federal Republic of Germany. In the absence of recognition no effect could be given to the statute of the German Democratic Republic which established the Council of Gera and that accordingly the latter was not-existent for the purpose of proceedings in the English Courts. A further appeal lodged in the House of Lords (London, Court of Appeal, December 17, 1964)	264
When the two word-marks in question are brief, the risk of confusion must be assessed in exactly the same manner as if more lengthy marks were involved (Vienna, Patent Office, October 25, 1960)	91	7. International law in trademark matters	
As to whether two groups of products are of a similar nature is a question of law (Vienna, Patent Office, February 1, 1961)	92	(b) International Law under Conventions. Union Convention of Paris (assimilation to nationals, right of priority, "telle quelle" protection). Madrid Agreement for the International Registration of Trademarks.	
To what extent a foreign enterprise can, by virtue of its trading name, request cancellation of a mark with which it comes into conflict. One of the conditions essential to the success of such an application is the justification, on behalf of the person making application, of some form of legal interest (Vienna, The Patent Court, March 22, 1961)	93	<i>Austria</i> . Article 6 ^{bis} of the Convention of the Paris Union: Protection of well-known unregistered marks. The aforesaid provision does not permit a claim for special protection in favour of well-known, but registered marks (Vienna, Patent Office, October 9, 1956)	94
An exception claiming the dismissal of the application for cancellation on the ground that the proprietor of the earlier mark must lose his right to sole action if there had been prolonged tolerance of the later mark, is not recognized (Vienna, The Patent Court, July 5, 1961)	91	Article 6 A of the Convention of the Paris Union: "Telle quelle" trademarks. The principle of the protection of the mark "telle quelle" only relates to the form not the contents of the mark (Vienna, Patent Office, January 30, 1957)	94
From the legal point of view, it is of little importance, for the purpose of answering the question whether or not in a given case, confusion has already effectively arisen. Two marks are not similar and do not lend themselves to confusion if the sole element they have in common is not itself capable of protection (Vienna, The Patent Court, September 13, 1961)	91	The deposit of an international mark effected after the expiration of the term of protection of 20 years which the same mark previously enjoyed does not have the same effect as a renewal. In such a case, the mark in question is submitted (in <i>Austria</i>) to fresh examination as to its admissibility (Vienna, Patent Office, May 8, 1959)	94
In order to judge the resemblance of a mark in three dimensions with a mixed mark, account should be taken of the overall impression produced on the purchaser by the first mark, and to ascertain whether this impression can be confused with the recollection of the mixed mark (Vienna, The Patent Court, May 2, 1962)	91	Madrid Agreement (Trademarks). Article 5 (1) of the Madrid Agreement relates solely to the refusal of protection which national authorities are entitled to withhold from an international mark, on one of the grounds specified in Article 6 of the Convention of the Paris Union. The refusal of protection as regards an international mark does not have an effect which is absolute and unlimited in time (Vienna, Patent Office, December 14, 1960, confirmed by the Patent Court)	94
<i>Great Britain</i> . Infringement. "Steiner" v. "Willy Steiner". An interlocutory injunction to certain passing off refused on the ground that there was not sufficient likelihood of confusion (London, Chancery Division, May 12, 1964)	262	Madrid Agreement (Trademarks). Objections against protection pronounced in the form of a "notice of provisional refusal", a "notice of final refusal". From the point of view of the rules of procedure, this practice cannot give rise to any criticism, provided the purport of the objections arose clearly from the text of the notice (Vienna, Patent Office, December 15, 1961)	94
6. Civil and penal sanctions		The Nullity Section can, within the framework of an action brought before it, re-examine the admissibility of an international mark when this examination had not been carried out in <i>Austria</i> within the specified period (Vienna, The Patent Court, May 30, 1962)	95
Infringement, procedure, power to sue, confiscation, seizure, etc.			
<i>Austria</i> . An exception claiming the dismissal of the application for cancellation on the ground that the proprietor of the earlier mark must lose his right to sole action if there had been prolonged tolerance of the later mark, is not recognized (Vienna, The Patent Court, July 5, 1961)	91		

V. COMMERCIAL OR TRADE NAME

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| <i>Austria.</i> It is not equitable to recognize, in favour of a small enterprise located in some quite insignificant place, the right to oppose another enterprise, of incomparably greater importance, in the use of its trade name as a trademark (Vienna, The Patent Court, December 31, 1957) | 92 | the absence of any evidence of actual confusion the grant of an interlocutory injunction refused (London, Chancery Division, February 18, 1964) | 263 |
| The trade name "Robba Rocco" and the trademark "Roba" must be considered as being of such a nature as to lead to confusion from the moment when the initial name "Rocco" is deprived of distinctive character (Vienna, The Patent Court, September 16, 1958) | 92 | Injurious falsehood. Interlocutory injunction granted against the defendants who, in order to promote the sales, advertised that they would sell to re-established customers "at cost price plus a small handling charge", which was falsely stated in a sum below that at which the plaintiffs sold such goods to their wholesale customers (London, Chancery Division, June 28, 1964) | 265 |
| To what extent a foreign enterprise can, by virtue of its trading name, request cancellation of a mark with which it comes into conflict. One of the conditions essential to the success of such an application is the justification, on behalf of the person making application, of some form of legal interest (Vienna, The Patent Court, March 22, 1961) | 93 | Passing off by similar get up. Medicated sweets sold in orange coloured wrappers by the plaintiffs (under the name in Roman characters "Hacks") and by the defendants (under the name "Pecto") in Singapore: In the circumstances of the present case, where purchasers were unable to read Roman characters, the difference in words could not be said to be sufficiently distinguishing (London, Privy Council, November 16, 1964) | 264 |

VI. INDICATIONS OF SOURCE

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| <i>Great Britain.</i> "Harris Tweed". Held that, in order to qualify as "Harris Tweed", the cloth must not only be hand-woven in the Outer Hebrides but all the other manufacturing processes must likewise be carried out there (Scotland, Court of Session, July 17, 1964) | 265 | Carl Zeiss Foundation in German Democratic Republic and Carl Zeiss Foundation in Federal Republic of Germany. In the absence of recognition no effect could be given to the statute of the German Democratic Republic which established the Council of Gera and that accordingly the latter was not-existent for the purpose of proceedings in the English Courts. A further appeal lodged in the House of Lords (London, Court of Appeal, December 17, 1964) | 264 |
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VII. UNFAIR COMPETITION

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| <i>Australia.</i> A passing off action will lie once damage and misrepresentation have been shown whether or not the parties are engaged in a common field of activity (Supreme Court of New South Wales, 1960) | 130 | <i>Belgium.</i> Legislation against monopolies. Common Market Treaty. Article 85. Restriction of trade between Member States are prohibited agreements, restrictions or distorted competition within the Common Market, because it violates the Common Market anti-trust policy. Territorial restrictions amount to the customs barriers which are gradually abolished (Commission of the European Economic Community, October 20, 1964) | 15 |
| <i>Great Britain.</i> "Associated Booking Corporation" and "Associated Booking Agency". Held there was a likelihood of confusion and interlocutory injunction granted (London, Chancery Division, March 17, 1963) | 263 | <i>Great Britain.</i> Restrictive covenants. A covenant which for a period of two years after termination of a contract of employment seeks to restrain an employee from canvassing such persons as during the employee's period of employment were customers of the employer, is valid. A geographical limitation in such a case is not necessary (London, Court of Appeal, March 2, 1964) | 266 |
| Passing off. "Walls Super Whip" and "Wells Whip". Interlocutory injunction refused, but passing off injunction allowed (London, Chancery Division, June 21, 1963) | 263 | Restrictive covenants. Restrictive covenant to bar employee from seeking alternative employment after termination of contract. Such a covenant is void and unenforceable if it has no geographical limitation and extends beyond the specialized field of activity of the plaintiffs (London, Court of Appeal, July 17, 1964) | 266 |
| Passing off. Sheraton Corporation of America v. Sheraton Motels. Interlocutory injunction granted (London, Chancery Division, July 12, 1963) | 263 | | |
| Use of similar advertising display service. "Guards" v. "Guardman" (London, Chancery Division, November 1, 1963) | 265 | | |
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