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Comparison of UK-China systems shows UK takes hands-off approach to conflicts

Non-traditional marks face uphill battle in both jurisdictions

Burden of proof shifts in non-use cases

Chinese businesses have been increasingly seeking international trademark protection in recent years. In the UK, Chinese applicants accounted for over 50% of all trademark applications filed by foreign entities in 2024.

Understanding the differences between UK and Chinese trademark practices can help these applicants optimise their filing strategies and overall IP protection.

This article highlights four key areas where trademark practices differ, and which Chinese companies and entrepreneurs should consider, whether they have already filed or are planning to file trademarks in the UK.

Co-existence agreements and letters of consent

China has historically adopted a relatively open approach towards accepting co-existence agreements and letters of consent to approve junior trademark applications. A notable example comes from *Google LLC v TRAB* (2016), in which the Supreme People's Court permitted the co-existence of two NEXUS marks by recognising subtle differences between them and explicitly treating the submitted letter of consent as "an important factor" in its decision.

However, in recent years, Chinese authorities have increasingly prioritised public interest protection in trademark disputes. As a result, brand owners now face greater challenges in convincing both the China National IP Administration (CNIPA) and the courts to accept co-existence agreements or letters of consent as sufficient grounds for registration. This shift reflects a stricter scrutiny of potential consumer confusion and market fairness, even where parties have negotiated private agreements.

Unlike in China, the UK Intellectual Property Office (UKIPO) does not raise objections to UK trademark applications, nor Madrid Protocol international trademarks that designate the UK, based on the existence of earlier third-party registered marks or applications.

Instead, when the UKIPO examines an application, it carries out a search to see whether any earlier third-party marks exist that may conflict with the applied-for mark. The search looks for earlier marks, which:

- have either been registered or applied for in the UK;
- are identical or similar to the applied-for mark; and
- cover identical or similar goods and/or services.

If any marks are found, the applicant is notified of them via a UKIPO examination report.

The UKIPO does not prevent marks from being registered where earlier third-party marks have been found during the search. Instead, the applicant is given the opportunity to consider whether it wishes to proceed to publication of its application.

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If the applicant decides to proceed, the owners of any earlier marks uncovered by the search are notified of the application. They have two months from the publication date of the application to oppose it, or three months if they file a request to extend the deadline to oppose. If no opposition is filed, the mark will proceed to registration – even if it is identical to an earlier registered mark for identical goods or services.

If an applicant is notified by the UKIPO of an earlier third-party mark uncovered by the UKIPO's search, or if the owner of earlier rights opposes the application, the applicant can seek consent for the application from the third party and negotiate and agree to a co-existence agreement. If consent is given, or a co-existence agreement reached, it need not be filed with the UKIPO. All that is required is for the third party to withdraw its opposition to the application.

Often, in return for giving its consent to an application, or concluding a co-existence agreement, the third party will request amendments to be made to the specification of goods and services in the application.

It is important to ensure that any amendments result in a specification that is sufficiently clear and precise. For example, "all of the aforesaid being business and ancillary services" would not be acceptable, because the term 'ancillary services' is ambiguous in its scope.

Further, any amendment must not identify a characteristic of the goods or services. For example, "bags, all displaying images of cartoon characters" would not be acceptable. And any restrictions must make sense within the context of the specification. For example, "sunglasses; all of the aforesaid relating to music" would not be acceptable.

Failure to meet any of these requirements will result in the UKIPO rejecting the amendments and thus the application, until the specification is amended in accordance with such requirements.

Absolute grounds for refusal

Due to various policy considerations, absolute grounds – especially deceptive and non-distinctive grounds – have been increasingly applied when refusing Chinese trademark applications. The chances of overturning an initial refusal based on absolute grounds are also quite low.

As in China, UK trademark applications can be refused on absolute grounds (eg, because the mark in question is deceptive, non-distinctive or descriptive, or has been filed in bad faith).

Overall, it is uncommon for word or logo marks to result in absolute grounds objections being raised by the UKIPO.

An example of a bad-faith application would be where an applicant seeks to register its trademark for goods or services for which it has no intention of using the mark. Thus, when examining applications (including Madrid Protocol international registrations designating the UK), UKIPO examiners will consider whether the applied-for goods and services are so manifestly and self-evidently broad (eg, a request to register a mark for "all goods in Class 9") that a bad-faith objection should be raised.

If an objection is raised, the applicant will be given an opportunity to explain its commercial rationale for the goods or services at issue. The applicant can also apply to restrict the goods or services to a specification that more appropriately reflects its genuine intention to use the mark.

Trademarks are rarely refused because they are considered to be deceptive (ie, they are of such nature as to deceive the public, for instance, as to the nature, quality or geographical origins of the goods or services at issue). An objection will be raised only where there is a real potential for deception of the public. Examples of such marks include SWISSTEX for 'watches'. Switzerland has a recognised reputation for producing high-quality watches and thus the specification would need to be amended to "watches made in Switzerland only".

Examples of descriptive marks, which would be refused registration by the UKIPO, are BLUE (for 'cheese'), BROWN (for 'sugar') and RED (for 'wine'). Each describes a particular type of product and thus other traders should be free to use the same when describing their goods.

Non-traditional marks are often refused by the UKIPO because they are considered non-distinctive (see below).

Securing a non-traditional trademark registration

The Chinese Trademark Office has historically approved a variety of non-traditional marks. Notable examples have included:

Duracell's colour combination mark for batteries;
Ferrero Rocher's 3D packaging shape; and
Nokia's registered sound mark for its iconic ringtone.

These cases demonstrate that, in principle, Chinese trademark law does not outright prohibit the registration of non-traditional marks, provided that they meet the necessary legal criteria.

However, in recent years, the approval rate for such marks has significantly declined, with very few high-profile non-traditional marks successfully making it onto the register.

The primary reason for rejection in most cases is a lack of inherent distinctiveness. Non-traditional marks (eg, single colours, product shapes or sounds) are often viewed as functional or decorative elements, rather than indicators of commercial origin. Chinese examiners frequently argue that consumers do not naturally perceive these features as trademarks unless the applicant can prove otherwise.

Beyond distinctiveness concerns, broader policy considerations also play a role in the authorities' restrictive approach. Chinese authorities are cautious about granting monopolies over basic product features (eg, a single colour or a common shape), as this could unfairly limit competition.

There is also an emphasis on public interest, with regulators taking the view that certain elements should remain available for all market participants to use.

This perspective aligns with the general principle that trademark protection should not extend to features that:
are essential to the product's use; or
other competitors may need to use in the ordinary course of trade.

The case of Christian Louboutin's red-sole trademark exemplifies these challenges. Despite its global recognition, the mark was ultimately rejected in China not because colour marks are inherently unregistrable, but because the evidence was deemed insufficient to prove that Chinese consumers exclusively associated the red sole with Louboutin. This outcome underscores the high threshold for non-traditional marks in China, where even well-known brands face an uphill battle in securing protection. The trend reflects a cautious and competition-driven approach in China's trademark system, prioritising market fairness over the expansion of exclusive brand rights for unconventional signs.

In the UK, it is again possible to register non-traditional marks (eg, the shape and appearance of goods, 3D packaging designs, colours, sounds, holograms and motion marks).

However, such marks will not be registered unless they comply with various criteria, including that the mark is 'distinctive' (ie, it is capable of distinguishing the goods or services of one undertaking from those of other undertakings).

Experience has shown that it is particularly difficult to register colour marks per se. This is because the UKIPO considers such marks to be inherently devoid of any distinctive character.

The UKIPO's Manual of Trade Marks Practice states:

...consumers are not in the habit of making assumptions about the origin of goods and services based solely on their colour or the colour of their packaging. It therefore follows that single colours will only be deemed capable of denoting the origin of a product or service in exceptional circumstances.

In some cases, single colours may also be rejected if the colour is customary in the relevant trade (eg, the colour red for fire-fighting services).

If a colour mark is refused, it is possible to file evidence to try to convince the UKIPO to allow the mark to be registered because, through use, the mark has acquired distinctive character. In other words, through extensive use over several years, a significant proportion of the relevant public has come to see and regard the colour per se as a trademark, identifying the goods or services of one undertaking only. This is not easy to prove and obtaining such evidence can be a costly exercise.

It is also difficult to register the shape of goods as a UK trademark. Again, this is because the UKIPO considers such marks to be inherently devoid of any distinctive character. The courts have consistently held that average consumers are not in the habit of making assumptions about the origin of goods based on their shape, in the absence of any graphic or word mark.

To overcome such an objection, it is necessary to file evidence that, through extensive use over several years, a significant proportion of the relevant public has come to see and regard the shape as a trademark, identifying the goods or services of one undertaking only.

Shape marks can also be rejected pursuant to Section 3(2) of the Trade Marks Act 1994, which states:

A sign shall not be registered as a trade mark if it consists exclusively of – (a) the shape or another characteristic which results from the nature of the goods themselves, (b) the shape or another characteristic of the goods which is necessary to obtain a technical result, or (c) the shape or another characteristic which gives substantial value to the goods.

Finally, at present, it is not possible to register smells or tastes as trademarks in the UK.

Non-use cancellation actions

In China, there has been a significant shift in the practice of filing non-use cancellations since last year. Previously, any party could apply to revoke a trademark registration if the mark had not been used for three consecutive years after registration, with the burden of proof resting entirely on the trademark owner.

However, due to the increasing number of non-use actions initiated by shell companies – many of which were used to harass legitimate trademark owners whose marks were clearly in use – the CNIPA has taken steps to curb these weaponised cancellations.

The CNIPA has introduced two key requirements to address this issue.

First, suspicious shell companies filing a high volume of non-use actions must now justify their filings.

Second, challengers now share the burden of proof and must demonstrate that the targeted trademarks are genuinely unused in commerce.

In the UK, anyone can apply to revoke a registered mark if:

the mark has not been put to genuine use by the owner – or with its consent – in the UK for at least five years (not three years, as under Chinese law), in relation to the goods or services for which it is registered; and there are no proper reasons for non-use.

Use in the UK includes affixing the trademark to goods or the packaging of goods solely for export purposes.

Before it can apply for the mark to be revoked, it is not necessary for the party seeking revocation to obtain and file evidence to show that the disputed mark does not appear to have been put to genuine use. If an application is made to revoke a registration based on an allegation of five years' non-use, the burden is solely on the trademark owner to prove genuine use within the relevant period. If it fails to do so, or to provide proper reasons for non-use, the registration will be revoked for the goods or services at issue.