

Notification of *ex officio* provisional total refusal of protection (Article 5 of the Madrid Protocol, Rule 17(1) and (2) of the Common Regulations under the Madrid Agreement and Protocol, and Rule 113 EUTMR)

Alicante, 13/01/2017

International registration number: **1323354**

Name of the holder: **EOS PRODUCTS, LLC**

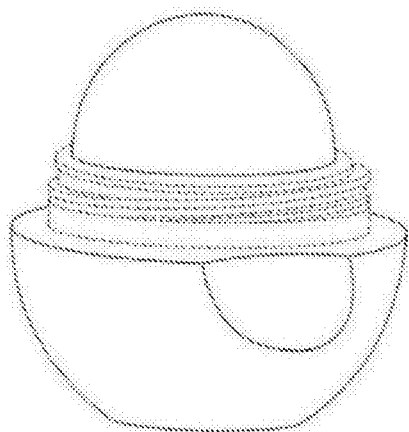
Trade mark:

Protection of the abovementioned mark is provisionally refused for the European Union for all the goods and services covered by the designation of the European Union.

I. Grounds

The trade mark you have applied for is not eligible for registration under Article 7(1) (b) EUTMR.

The mark applied for is the following three-dimensional sign:



It is considered objectionable for:

- 3 *Lip balm; non-medicated lip care preparations; non-medicated lip protectors.*
- 5 *Medicated lip balm.*

Signs that are subject to an objection under Article 7(1)(b) EUTMR '... are incapable

of performing the essential function of a trade mark, namely that of identifying the origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition' (30/04/2003, T-324/01 & T-110/02, Zigarrenform / Goldbarren, EU:T:2003:123, § 29).

Accordingly, the distinctive character of a trade mark must be assessed, first, in relation to the goods or services in respect of which registration of the sign is sought and, second, in relation to the perception of the section of the public targeted, which is composed of the consumers of those goods or services (27/11/2003, T-348/02, Quick, EU:T:2003:318, § 29).

In the present case, the objectionable goods covered by the mark applied for are everyday consumption goods and are mainly aimed at the average public whose awareness is that of the average consumer who is reasonably well-informed and reasonably observant and circumspect.

The criteria for assessing the distinctive character of three-dimensional trade marks consisting of the appearance of the product itself or its packaging are no different from those to be applied to other categories of trade mark (18/06/2002, C-299/99, Remington, EU:C:2002:377, § 48).

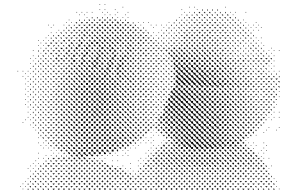
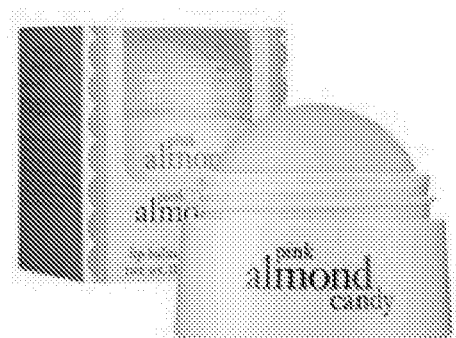
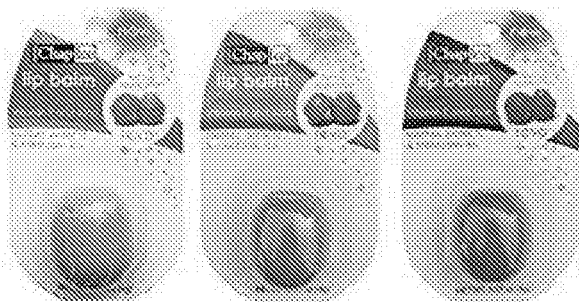
Nevertheless, when those criteria are applied, it must be taken into account that the perception of the relevant public is not necessarily the same in relation to a three-dimensional mark consisting of the appearance of the product itself or its packaging as it is in relation to a word mark, a figurative mark or a three-dimensional mark not consisting of that appearance. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so where the sign is indistinguishable from the appearance of the product itself or its packaging (see, by analogy, judgment of 08/04/2003, joined cases C-53/01, C-54/01, and C-55/01, 'Linde', paragraph 48).

The way in which the relevant consumer, in this case the average consumer, perceives a trade mark is influenced by that person's level of attention, which is likely to vary according to the category of goods or services in question. In the present case the level of attention paid by the average consumer to the appearance of the goods claimed is not high because lip balms are basic and cheap toiletries, like hand creams which can be applied quickly and easily without requiring the use of a mirror.

In order to ascertain whether the sign claimed may be perceived by members of the public as an indication of origin, the overall impression produced by that sign must be analysed. That is not incompatible with an examination of each of the sign's individual features in turn (19/09/2001, T-335/99, T-336/99 & T-337/99, Tabs, EU:T:2001:219, § 49).

The features of the shape of the mark applied for, taken alone or combined with each other, are not distinctive: the graphic representation depicts a half an ovoid shape containing a sphere.

Taken as a whole, the mark applied for only consists of a combination of presentational features that are typical of the shape and packaging of the goods in question. This shape and packaging is not markedly different from various basic shapes and forms of packaging commonly used in trade for the goods at issue, but is simply a variation thereof.



It follows that the shape and the packaging in question cannot be sufficiently distinguished from other shapes and forms of packaging commonly used for lip balms and will not enable the relevant public immediately and with certainty to distinguish the holder's goods from those of another commercial origin.

Therefore, the three-dimensional trade mark applied for is devoid of any distinctive character and is not capable of distinguishing goods for which registration is sought within the meaning of Article 7(1)(b) EUTMR.

If you have any observations, they should be submitted within two months from the notification of this communication. If you do not submit any observations, the application will be rejected.

The holder of the international registration is obliged to be represented before the EUIPO by a legal practitioner or professional representative that is entitled to represent third parties before the EUIPO (Articles 92(2) and 93(1) EUTMR). Protection of the international registration for the European Union will be refused in whole if a representative is not appointed within the time limit indicated under II.

II.

The holder of the international registration is hereby given a time limit of two months to overcome the ground for refusing protection indicated and to comply with the requirements indicated above. Failure to do so will mean that after expiry of the time limit, the EUIPO will render a decision in which it refuses the protection in whole or in part. Said decision may be appealed. The time limit of two months to reply to the present refusal will start on the day the present notification was issued by the EUIPO (Article 154(2), (3) and (4) EUTMR). Any such reply of the holder of the international registration shall be addressed to the EUIPO only.

Vinciane VAN DER MAESEN