



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

Examination Division

**Refusal of application for a Community trade mark
under Article 7 of the Regulation and Rule 11(3) of the Implementing Regulation**

Alicante, 18/12/2002

Name and address of applicant or representative
Robin Forsythe Browne
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Leeds LS2 8PA
REINO UNIDO

Application N° : **001807353**
Your reference : JM/P206068EM
Trade mark : **THE SMELL OF VANILLA** (Olfactory mark)
Applicant : The Aromacology Patch Co. Ltd.
Antrobus House
18 College Street
Petersfield, Hampshire GU31 4AD
REINO UNIDO

The Office refers to your facsimile dated 14 October 2002.

Decision of the Office

In the fax dated 14 October 2002, a limitation of goods and services to “*patches for application to the skin, adhesive patches for application to the skin*” is requested and it is submitted that the sign applied for “THE SMELL OF VANILLA” is unusual in respect of such goods. A quick search in Internet revealed 5430 results with the combination of the following words “vanilla patches with the smell of vanilla”. The sign applied for is not unusual, it is commonly used for various purposes (i.e. health, weight loss, aromatherapy).

Moreover, it is stated that the applicants are the proprietors of a granted European patent for such vanilla smelling patches and that they are the only party offering such goods for sale in Europe and have obtained this patent with a view to ensuring that this remains the case. This information shows that a patent can protect a “smell”, in some European countries it is also protected under copyright laws i.e. France. These types of protection are appropriate. Protecting “THE SMELL OF VANILLA” on vanilla patches as a trade mark is not possible since a smell is a characteristic applied to a product (such as a patent applied to a product to obtain a technical result) and it does not fulfill the function of guarantee of the origin of the marked product. The Office refers to the Opinion of the Advocate General M. Dámaso Ruiz-Jarabo Colomer, Case C-273/00 Ralf Sieckmann v Deutsches Patent-und Markenamt, 6 November 2001, page 5 paragraph 30 “*En réalité, la marque n’est pas tant l’odeur que le produit parfumé, indépendamment de son parfum*” (unofficial translation: *in reality, the mark is not the smell as much as the perfumed product independently from its perfume*).

The proof of use referred to (experimental study by ST. Georges Hospital in London) does not demonstrate that the sign has acquired distinctiveness through use and that it is seen as a trade mark. It is not proved by the applicant that persons in the European Union would associate use of this scent of vanilla with patches exclusively from this applicant (proof of acquired distinctiveness). Finally, the Office refers to the Opinion of the Advocate General M. Dámaso Ruiz-Jarabo (Case C-273/00, see reference above) *“la marque est un signe dont le but est de distinguer les produits ou services d’une entreprise de ceux d’une autre. C’est ce que prévoit, de manière très claire, l’article 2 de la première directive”* (unofficial translation: *a mark is a sign which serves to distinguish the products or services of one undertaking from those of other undertakings. This is clearly foreseen in Article 2 of the first directive*). In the present case, the sign is not capable of distinguishing the goods of one enterprise of the goods of another enterprise. Consequently, the sign is not eligible for registration under Article 7(1)(b) and (c).

Under Article 58 of the Community Trade Mark Regulation you have a right to appeal against this decision. Under Article 59 of the Regulation notice of appeal must be filed in writing at the Office within two months from the date of receipt of this notification and within four months from the same date a written statement of the grounds of appeal must be filed. The notice of appeal will be deemed to be filed only when the appeal fee of 800 Euro has been paid.

Claire DURANTON

Sent to fax number : 00 44-1132430446