



**Ex officio refusal of protection pursuant to Article 7, Article 92(2) and 93(1)  
CTMR and Rule 11(3) CTMIR**

Alicante, 30/07/2013

21st Century Survival LLC  
1115 Broadway,  
5th Floor  
New York NY 10010

*International Registration number:* **1154644**

*Your reference:*

*Trade mark:* **TRADEMARK**

*Holder:* **21st Century Survival LLC  
1115 Broadway,  
5th Floor  
New York NY 10010**

On examination of the abovementioned mark and regard being had to the holder's failure to appoint a representative or to submit observations to the Office's notification of 06/05/2013, protection is refused for the European Community because the international registration does not comply with Article 7(1) CTMR to the extent that:

- b) The mark is devoid of any distinctive character.

The grounds for refusal referred to above apply to all the goods and services covered by the designation of the European Community.

**I. FACTS AND PROCEDURE**

On 06/05/2013 the Office raised an objection, pursuant to Article 7(1)(b) and 7(2) CTMR, because it was found that this trade mark was devoid of any distinctive character. The objection was phrased as follows:

“I.

On examination of your application it has been found that the trade mark applied for is not eligible for registration under Article 7(1)(b) and 7(2) CTMR.

The mark applied for consists of the words **TRADEMARK** for the following goods and services:

**Class 3**

*Personal and home fragrances; color cosmetics; non-medicated skincare preparations; cosmetic preparations for bath; body cosmetics; non-medicated bath preparations; body care preparations, namely, body lotion, body oil, body mist, shower gel, hand lotion, cuticle cream, shampoo, conditioner, non-medicated lip balm, soap, body polish, body and foot scrub and non-medicated foot cream; pet*

*fragrances; pet shampoo.*

**Class 4**

*Candles.*

**Class 9**

*Eyewear, namely, sunglasses, eyeglasses and ophthalmic frames and cases therefor; electronics, namely, mp3 players and cases therefor, cell phones and cases therefor, cameras and cases therefor, audio headphones and cases therefor, DVDs featuring movies and music, and compact diskettes featuring movies and music.*

**Class 14**

*Jewelry, namely earrings, necklaces, bracelets, and watches; decorative boxes made of precious metal leather key chains.*

**Class 16**

*Stationery, namely, journals and note cards; paperweights; pens; temporary tattoos [printed matter]; prints and posters.*

**Class 18**

*Leather goods; casual sport bags; all-purpose athletic bags; sports bags; luggage; backpacks; duffle bags; fanny packs; book bags; messenger bags; purses; wallets; key cases; umbrellas; briefcase-type portfolios; cosmetic cases sold empty; luggage tags; hand bags; tote bags.*

**Class 20**

*Furniture for house, office and garden; residential and commercial furniture; picture frames; decorative boxes made of wood.*

**Class 25**

*Clothing, namely shirts, pants, sweaters, jackets, coats, hats, shoes, flip-flops, boots, sandals, sneakers, skirts, dresses, blouses, belts, scarves, and bathing suits.*

**Class 35**

*Retail store services featuring clothing, jewelry, leather goods and bags, and eyewear; online retail store services featuring clothing, jewelry, leather goods and bags, and eyewear.*

The distinctive character of a trade mark must be assessed, first, by reference to the goods or services in respect of which registration of the sign is sought and, second, by reference to the perception of the section of the public targeted, which is composed of the consumers of those goods or services (judgment of 27/11/2003, T-348/02, 'Quick', paragraph 29).

Further, it should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (judgment of 22/06/1999, C-342/97, 'Lloyd Schuhfabrik Meyer', paragraph 26).

Furthermore, regarding the assessment of the distinctive character of the mark for which registration is sought, it is necessary, in the case of a complex trade mark, to consider it as a whole. However, that does not preclude prior examination of each of the trade mark's individual features (judgment of 09/07/2003, T-234/01, 'Stihl', paragraph 32).

In the present case, the goods and services covered by the mark applied for are for mass consumption and are mainly aimed at the average consumer. In the light of the nature of the goods and services in question, the awareness of the relevant public will be that of the average consumer who is reasonably well-informed and reasonably observant and circumspect. Moreover, since the expression

**TRADEMARK** is an English word, the relevant public by reference to which the absolute ground for refusal must be examined is the English-speaking consumer in the Community ('Lloyd Schuhfabrik Meyer', op.cit., paragraph 26; and 'Quick', op.cit., paragraph 30).

The expression **TRADEMARK** has the following meanings: *a device (as a word) pointing distinctly to the origin or ownership of merchandise to which it is applied and legally reserved to the exclusive use of the owner as maker or seller; a distinguishing characteristic or feature firmly associated with a person or thing* (see <http://www.merriam-webster.com/dictionary/trademark> , consulted on 29/04/13).

The structure of this expression does not diverge from English grammar rules but rather complies with them. Therefore, the relevant consumer will not perceive it as unusual but rather as a meaningful expression: a word which indicates the origin of the merchandise or a distinguishing characteristic or feature associated with a particular person or entity.

In the present case, the relevant public would perceive the expression with its ordinary meaning and not as an indication of origin. Indeed, when faced with the word 'trademark' on the goods and services concerned, the consumer might be prompted to search around the place where that word appears on the goods and services for the actual sign, expression, graphic representation, combination thereof or other element which performs the function of the trademark as an indication of commercial origin. In the absence of such element, however, the word 'trademark' on its own is not inherently distinctive so as to enable the consumer to associate the specific characteristic of the goods and services with a particular person or entity and consequently to serve as indication of commercial origin.

Also, in order to come to the finding that there is no distinctive character, it is sufficient to note that the semantic content of the word mark indicates to the consumer a characteristic of the goods and services relating to their market value which, whilst not specific, comes from promotional or advertising information which the relevant public will perceive first and foremost as such rather than as an indication of the commercial origin of the goods and services (judgment of 30/06/2004, T-281/02, 'Mehr für Ihr Geld', paragraph 31).

In the case at hand, the relevant public would perceive the expression **TRADEMARK** as a promotional laudatory message, the purpose being to highlight the positive aspects of the goods and services concerned, namely that they are brand products and that they have a specific feature implying that they are well-known and established as opposed to products and services which do not bear a specific mark or do not possess any special feature (judgment of 20/11/2002, joined cases T-79/01 and T-86/01, 'Kit Pro', paragraph 26; judgment of 15/09/2005, T-320/03, 'LIVE RICHLY', paragraph 83).

Indeed there is nothing about the expression **TRADEMARK** that might, beyond its obvious promotional laudatory meaning, enable the relevant public to memorize the sign easily and instantly as a distinctive trade mark for the goods and services designated (judgment of 05/12/2002, T-130/01, 'REAL PEOPLE, REAL SOLUTIONS', paragraph 28).

Consequently, the mark applied for **TRADEMARK**, taken as a whole, is devoid of any distinctive character to distinguish the goods and services for which registration is sought within the meaning of Article 7(1)(b) and 7(2) CTMR.

## II.

The holder of the international registration is obliged to be represented before the OHIM by a legal practitioner or professional representative who is entitled to represent third parties before the OHIM (Article 92(2), Article 93(1) CTMR). Protection of the international registration for the European Community will be refused in whole if a representative is not appointed within the time limit indicated

under III.

**III.**

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 OHIM 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 shall start on the day the present notification was issued by the OHIM (Rule 112(1) CTMIR). Any such reply of the holder of the international registration shall be addressed to the OHIM only.”

**II. DECISION**

As seen from the above, the Office brought to the holder’s attention the requirements set out by Article 92(2) and Article 93(1) CTMR to appoint a legal practitioner or professional representative. However, the holder has failed to do so. Neither did it submit observations in reply to the notification of provisional refusal.

Pursuant to Article 75 CTMR, it is up to the Office to take a decision based on reasons or evidence on which the holder has had an opportunity to present its comments.

After giving due consideration to the international registration, the Office has decided to maintain the objection.

Consequently, protection of the international registration for the European Community is refused in whole because a representative has not been appointed before the OHIM.

According to Article 59 CTMR, you have a right to appeal against this decision. According to Article 60 CTMR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to be filed only when the appeal fee of EUR 800 has been paid.



**Orlin DENKOV**