

DECISION
of the Fourth Board of Appeal
of 11 October 2023

In case R 872/2023-4

Rigo Trading S.A.

Route de Trèves 6 EBBC, Building E
2633 Sennigerberg
Luxembourg

IR Holder / Appellant

represented by Alexander Behler, 6, Route de Trèves EBBC Building E, 2633 Senningerberg,
Luxembourg

APPEAL relating to International Registration No 1 660 878 designating the European Union

THE FOURTH BOARD OF APPEAL

composed of N. Korjus (Chairperson), A. Kralik (Rapporteur) and L. Marijnissen (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 On 26 October 2021, Rigo Trading S.A. ('the IR holder') designated the European Union in its international registration for the figurative mark



('the IR') for the following list of goods and services as amended on 21 June 2022:

Class 9: Scientific, research, navigation, surveying, photographic, cinematographic, audio, audiovisual, optical, weighing, measuring, calculating, signalling, detecting, monitoring, controlling, testing, inspecting, life-saving, teaching and simulating apparatus and instruments; cases, parts, accessories and peripherals specially made for scientific, research, navigation, surveying, photographic, cinematographic, audio, audiovisual, optical, weighing, measuring, calculating, signalling, detecting, monitoring, controlling, testing, inspecting, life-saving teaching and simulating apparatus and instruments; wearable technology devices namely smart watches, encoded wristbands, microphones, speakers and headphones; communications equipment; communications instruments; equipment for the reproduction of sound, images and data; data processing apparatus and instruments; cases, parts, accessories and peripherals specially made for the aforesaid communications and sound and image reproduction equipment; apparatus, instruments and cables for conducting, switching, transforming, accumulating, regulating or controlling the distribution or use of electricity; cases, parts, accessories and peripherals specially made for apparatus, instruments and cables for conducting, switching, transforming, accumulating, regulating or controlling the distribution or use of electricity; apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; cases, parts, accessories and peripherals specially made for apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; computers and computer peripheral devices; cases, parts, accessories and peripherals specially made for computers and computer peripheral devices; mouse pads; recorded and downloadable content; media content; computer software; blank digital or analogue recording and storage data carriers; animated cartoons; magnets, magnetizers and demagnetizers; protective and safety equipment and clothing against accidents, injury,

irradiation and fire; diving equipment; metronomes; automated teller machines [atm]; cash registers; mechanisms for coin operated apparatus.

Class 14: Gemstones, pearls [jewelry] and precious metals and their alloys and imitations thereof; coins; statues, figurines and ornaments made of or coated with precious or semi-precious metals, precious stones, pearls [jewelry], their alloys or imitations thereof; key rings and key chains [split rings with trinket or decorative fob] and charms thereof; medals; jewellery; precious and semi-precious stones; jewellery cases and boxes; horological and chronometric instruments; time instruments; boxes and cases for watches; watch chains; watch bands.

Class 16: Paper and cardboard; printed matter; engraving plates; book binding materials; money clips; photographs; photograph stands; stationery and office requisites, except furniture; adhesives for stationery or household purposes; arts and crafts clay and paint kits, modeling materials; paper party decorations; decorations of paper; decorative stickers; wall decorations of paper; drawing materials and drawing materials for artists; paintbrushes; instructional, educational and teaching materials [except apparatus]; activity books; filtering materials of paper; bags and films for wrapping, packaging and storage of paper, cardboard or plastics; printers' type; printing blocks; stickers; composing sticks; stamps; passport holders; hand labelling appliances; works of art and figurines of paper and cardboard, and architects' models; disposable paper napkins; disposable paper table runners.

Class 18: Leather and imitations of leather, pelts and hides; animal skins and hides; luggage, bags; brief cases; baby carriers; garment carriers; bags for carrying animals, wallets; backpacks; neck pouches [bags]; net bags for shopping; card cases [wallets]; key cases; pocket wallets; pouch baby carriers; straps for skates; vanity cases [empty]; umbrellas and parasols; walking sticks; whips, harness, saddlery and apparel for animals; collars, leashes and clothing for animals.

Class 20: Furniture; playground (indoor) mirrors; non-metal buoys; locks, other than electric, not of metal; plastic key cards, not encoded; rings, not of metal, for keys; bolts (door-) not of metal; door bells, not of metal; door fittings, not of metal; picture frames; containers and closures for containers, not of metal, for storage or transport; unworked or semi-worked bone, horn, whalebone or mother-of-pearl; shells; meerschaum; yellow amber; air cushions, not for medical purposes; cushions; pet cushions; pillows; air mattresses, not for medical purposes; baby changing mats; bedding, except linen; bins [not of metal]; fans for personal use, non-electric; animal housing and beds; honeycombs; infant walkers; inflatable publicity objects; interior textile window blinds; mats for infant playpens; mobiles (decoration); works of art, ornaments and decoration made of wood, wax, plaster or plastic; ladders and movable steps, non-metallic; showcases [furniture], display stands, and signboards of wood or plastics; name plates, not metallic; mannequins; vinyl appliques for attachment to windows, mirrors, and other solid surfaces; pet crates; carriers for transporting pets.

Class 21: Household or kitchen utensils and containers; flasks; coolers (non-electric containers); cosmetic utensils; cases adapted for cosmetic utensils; facial and body sponges; soap dispensers; potties; toilet utensils; dishes for soap; dental cleaning articles; cases for dental cleaning articles and utensils; dispensers for paper wipes; electric make-up removing appliances; facial buffing pads; scent sprayers; powder compacts; powder puffs; vanity cases, fitted; toiletry cases, fitted; combs; toothbrushes; hairbrushes; articles

for animals, namely, pet brushes, feeding and drinking bowls for animals, food containers for pet animals and pet litter trays; cages for household pets; indoor aquaria; disposable table plates; table plates; soap boxes; cookie jars; tea caddies; boxes of glass; lunch boxes; bread bins; candy boxes; fruit cups; trivets [table utensils]; bottles of glass; trays for domestic use; sugar boxes, candy boxes and cookie boxes [containers for household purposes]; cookware and tableware, except forks, knives and spoons; sponges for household purposes; brushes, except paintbrushes; brush-making materials; utensils for cleaning purposes, namely cleaning sponges, brushes, pads, mops, cloths; dustbins; basins; brooms; sweepers; carpet rakes; dusters; funnels; buckets; scrapers for household purposes; air fragrancing apparatus [perfume sprayers]; unworked or semi-worked glass, except building glass; glassware, porcelain and earthenware, not included in other classes; statues, figurines, plaques and works of art, made of ceramic, earthenware, porcelain, terra-cotta or glass; vases; plant pots; containers for flowers; garden hose sprayers; hose nozzles; gardening gloves; holders for flowers and plants; indoor terraria; sprinklers; jardinières; planters; seed trays; watering devices; articles for the care of clothing and footwear, namely brushes and polishing cloth; lint removers, electric or non-electric; clothes pegs; boot stretchers; clothes racks for drying; laundry baskets; shaped covers for ironing boards; shoe horns.

Class 24: Textiles and substitutes for textiles; sleeping bags; household linen; curtains of textile or plastic; banners; coverings for furniture.

Class 25: Clothing; footwear; headwear; belts [clothing]; pockets for clothing; removable collars; cuffs; pullstraps for footwear; overshoes; fabric belts [clothing]; leather belts [clothing]; bra straps; shoulder straps for clothing [parts of clothing]; costumes.

Class 26: Laces, braids and embroidery; haberdashery ribbons and bows; buttons, hooks and eyes [haberdashery]; pins [other than jewellery]; needles; brooches and buckles [clothing accessories]; decorative charms [other than for jewelry, key rings or key chains]; heat adhesive patches for repairing textile articles; shoe ornaments, not of precious metals; charms [other than for jewelry, key rings or key chains]; artificial flowers; hair decorations; hair curlers, other than hand implements; false hair.

Class 27: Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings, not of textile; textile wallpaper; wallpaper.

Class 28: Games, toys and playthings; pet toys; inflatable swimming floats; inflatable toys; playground apparatus; slides; play houses; stress relief exercise balls; toy figurines; rattles [playthings]; billiard equipment; video game apparatus; arcade games; amusement machines; gymnastic and sporting articles and equipment, not included in other classes; swimming articles and equipment, namely flippers for swimming, swimming belts, swimming jackets; swimming floats; bathing floats; kickboards; play swimming pools; inflatable games for swimming pools; toys for use in swimming pools; bags especially designed for skis and surfboards; golf bags; artificial Christmas trees; decorations for Christmas trees, except lights, candles and confectionery; confetti; novelty toys for playing jokes; crackers [party novelties]; Christmas stockings; ornaments for Christmas trees, carnival masks; carnival hats [paper party hats]; costume masks; novelty fake teeth; party favors, novelties for Easter; party favors, novelties for Halloween; party favors, novelties for carnival; party balloons; paper party favors; novelties for parties and dance parties, except lights, candles and confectionery; paper party hats [party novelties].

- 2 On 22 June 2022, the examiner sent the IR holder a notification in accordance with Article 193 EUTMR of an *ex officio* partial refusal of protection, stating that the sign was ineligible for registration under Article 7(1)(b) EUTMR because it was devoid of distinctive character for part of the goods for which protection is sought, namely, for the following goods:

Class 9: Cases, parts, accessories and peripherals specially made for the aforesaid communications and sound and image reproduction equipment; Cases, parts, accessories and peripherals specially made for apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; Cases, parts, accessories and peripherals specially made for computers and computer peripheral devices; Mouse pads; Magnets magnetizers and demagnetizers.

Class 14: Gemstones, pearls [jewelry] and precious metals and their alloys and imitations thereof; Statues, figurines and ornaments made of or coated with precious or semi-precious metals, precious stones, pearls [jewelry], their alloys or imitations thereof; Key rings and key chains [split rings with trinket or decorative fob] and charms thereof; Jewellery; Precious and semi-precious stones; Jewellery cases and boxes; Boxes and cases for watches; Watch bands.

Class 16: Paper and cardboard; Printed matter; Stationery and office requisites, except furniture; Paper party decorations; Decorations of paper; Decorative stickers; Wall decorations of paper; Bags and films for wrapping, packaging and storage of paper, cardboard or plastics; Stickers; Stamps; Works of art and figurines of paper and cardboard, and architects' models; Disposable paper napkins; Disposable paper table runners.

Class 18: Luggage, bags; Baby carriers; Bags for carrying animals, wallets; Backpacks; Neck pouches [bags]; Card cases [wallets]; Pocket wallets; Pouch baby carriers; Vanity cases [empty]; Umbrellas and parasols.

Class 20: Playground (indoor) mirrors; Containers and closures for containers, not of metal, for storage or transport; Air cushions, not for medical purposes; Cushions; Pet cushions; Pillows; Air mattresses, not for medical purposes; Baby changing mats; Bedding, except linen; Animal housing and beds; Inflatable publicity objects; Interior textile window blinds; Mats for infant playpens; Mobiles (decoration); Works of art, ornaments and decoration made of wood, wax, plaster or plastic; Pet crates; Carriers for transporting pets.

Class 21: Household or kitchen utensils and containers; Flasks; Cosmetic utensils; Cases adapted for cosmetic utensils; Cases for dental cleaning articles and utensils; Vanity cases, fitted; Toiletry cases, fitted; Disposable table plates; Table plates; Cookie jars; Lunch boxes; Bread bins; Candy boxes; Sugar boxes, candy boxes and cookie boxes [containers for household purposes]; Glassware, porcelain and earthenware, not included in other classes; Statues, figurines, plaques and works of art, made of ceramic, earthenware, porcelain, terra-cotta or glass; Containers for flowers; Laundry baskets.

Class 24: Textiles and substitutes for textiles; Household linen; Curtains of textile or plastic; Coverings for furniture.

Class 25: Clothing; Footwear; Headwear; Costumes.

Class 26: *Brooches and buckles [clothing accessories]; Hair decorations.*

Class 27: *Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; Wall hangings, not of textile; Textile wallpaper; Wallpaper.*

Class 28: *Games, toys and playthings; Pet toys; Inflatable swimming floats; Inflatable toys; Toy figurines; Rattles [playthings]; Arcade games; Amusement machines; Swimming floats; Bathing floats; Kickboards; Inflatable games for swimming pools; Toys for use in swimming pools; Decorations for Christmas trees, except lights, candles and confectionery; Novelty toys for playing jokes; Party favors, novelties for Easter; Party favors, novelties for Halloween; Party favors, novelties for carnival; Party balloons; Paper party favors; Novelties for parties and dance parties, except lights, candles and confectionery.*

3 The examiner's reasoning can be summarised as follows:

- The appearance of the mark does not depart significantly from the norm or customs of the relevant sector and the consumer normally pays more attention to a label or name of a product than to its shape, packaging or decorative elements.
- The true to life portrayal of a gummy bear or its figurative representation is commonly used for decorative, artistic or aesthetic purposes. Therefore, the sign at issue is a mere variation of various shapes, forms of packaging or decorations commonly used in trade for the contested goods.
- Reference is made to internet extracts (dated 21 June 2022) showing the following images:

Class 9:



Gummy Bears

€47.99 - Free Shipping (VAT included)



Select Device:

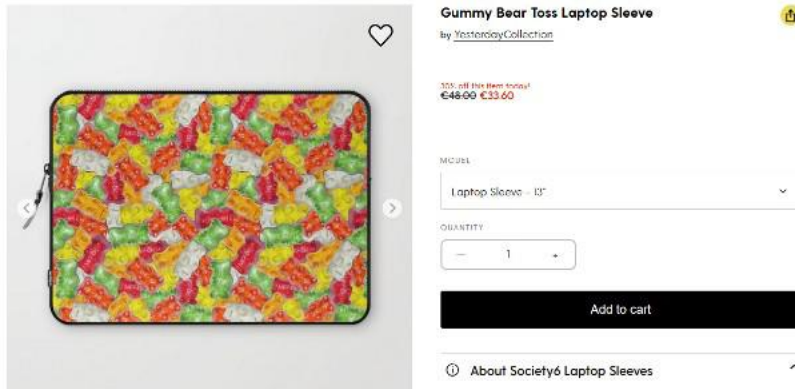
Apple iPhone 13

Select Case : Liquid Case

Protect: Basic

Weight: Heavy





https://society6.com/product/gummy-bear-toss_laptop-sleeve;



<https://www.vat19.com/item/gummy-bear-magnets;>

Class 14:



[https://www.1stdibs.com/jewelry/necklaces/pendant-necklaces/pendant-necklace-gummy-bear-green-unisex-18k-gold-plated-silver-greek-jewelry/id-j_9184272/;](https://www.1stdibs.com/jewelry/necklaces/pendant-necklaces/pendant-necklace-gummy-bear-green-unisex-18k-gold-plated-silver-greek-jewelry/id-j_9184272/)



Pop arte artesanía resina de fibra de vidrio escultura de oso estatua
1 comprador

FOB Reference Price: [Get Latest Price](#)

766,96 € - 2.491,65 € / Unidad | 1 Unidad/Unidades (pedido mínimo)

Beneficios: Reembolsos rápidos en pedidos de menos de 1000 USD [Reclamar ahora](#)

Talla:

Lead Time:

Cantidad(Unidades)	1 - 1	>1
Hora del Est. (días)	25	Se negociará

Personalización: Logotipo personalizado (Min. Order: 1 Unidades)
Embalaje personalizado (Min. Order: 1 Unidades)
More >

<https://spanish.alibaba.com/p-detail/pop-1600139761763.html?spm=a2700.7724857.0.0.677b7dceHFOAwa>



Listo para enviar En stock Envío rápido

100 piezas caramelos Oso de simulación lindo resina oso encantos pendientes llavero collar de colgante de joyería decoración accesorio

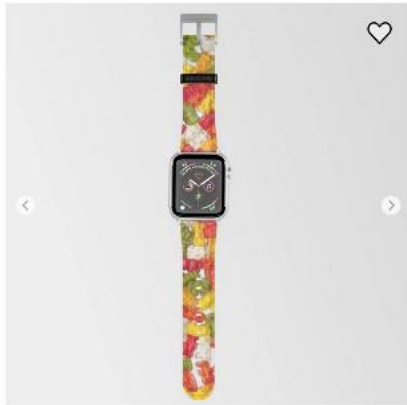
2,37 € - 7,11 € / Bolsa | 1 Bolsa/Bolsos (Min. Order)

Personalización:
Logotipo personalizado (La orden mínima: 100000 Piezas)
Embalaje personalizado (La orden mínima: 100000 Piezas) Más >

Proveedor de contacto

Chat ahora

Ver detalles del producto



Gummy Bears Apple Watch Band
by NewburyBoutique

30% off this item today!
C48.00 C33.60

Model:

Color:

Quantity:

Add to cart

https://society6.com/product/gummy-bears2527444_apple-watch-band;

Class 16:



Colorful Jewel Toned Fruity Gummy Bears Candy Wrapping Paper

by Gift Wrapper
★★★★★ 4.7 (164)

\$36.10

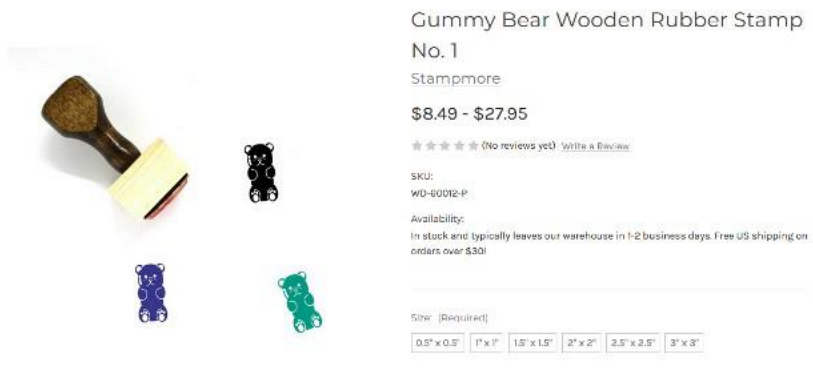
per roll
15% Off with code: PERSONALIZED

[View Product Details](#)

[https://www.zazzle.com/colorful_jewel_toned_fruity_gummy_bears_candy_wrapping_paper-256221152271233427;](https://www.zazzle.com/colorful_jewel_toned_fruity_gummy_bears_candy_wrapping_paper-256221152271233427)



<https://stationerystash.com/gummy-bear-paper-clips/?setCurrencyId=2;>



<https://stampmore.com/products/gummy-bear-wooden-rubber-stamp-no-1;>

Class 18:



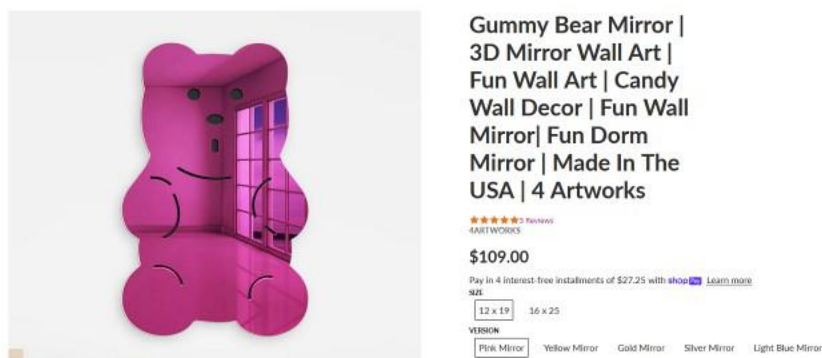


<https://pixels.com/featured/life-without-me-is-un-bearable-cute-gummy-bear-pun-dogboo.html?product=tote-bag;>



[https://www.amazon.com/Candy-Themed-Cosmetic-Gummy-Bears/dp/B01HOIT8MG;](https://www.amazon.com/Candy-Themed-Cosmetic-Gummy-Bears/dp/B01HOIT8MG)

Class 20:



<https://4artworks.com/products/gummy-bear;>



GUMMY BEAR PILLOW THROW PILLOW ~~\$24.99~~ \$33.99

★★★★★ (4.8) 16 Reviews

Snuggle up with this sweet and squishy pillow! Gummy bears are a colorful and delicious candy product that is very popular in the United States. They are good to eat and lovely to behold. Perfect for those who demand high quality treats that sparkle with all the colors of the rainbow.

Our Throw Pillow is made from 100% spun polyester fabric from recycled material. Each pillow cover is hand sewn and features a double-sided print with a concealed zipper. Printed in the USA.

SELECT STYLE

14 Inch Indoor Pillow With Insert

ADD TO CART

<https://www.lookhuman.com/design/37390-gummy-bear-pillow/throw-pillow>

Class 21:



AVIUS

Glass Bear Shaped Jar in Clear with Gold Metal Plastisol Lid - 9 oz / 270 ml

★★★★★ (5.0) 1 Review

\$31.04

Add to cart

Count: 4 Pack

4 Pack \$31.04

Free shipping, arrives by Tue, Jun 28 to Sacramento, 95820


Want it faster? Add an address to see options. [More options](#)

Sold and shipped by AVIUS | S3B CAPITAL LLC

★★★★★ 43 seller reviews

Free 30-Day returns [Details](#)

<https://www.walmart.com/ip/Glass-Bear-Shaped-Jar-in-Clear-with-Gold-Metal-Plastisol-Lid-9-oz-270-ml/467483090>



Rainbow Gummy Bears Water Bottle

by XOOXOO

25% off this item today! ~~€48.20~~ €36.72

SIZE

18 oz (532 ml)

LID TYPE

Handle Lid

QUANTITY

1

Add to cart

https://society6.com/product/rainbow-gummy-bears_water-bottle;

Class 24:



https://www.amazon.com/Ambesonne-Tablecloth-Colorful-Playroom-Rectangular/dp/B071CX6TPD?language=es_US¤cy=EUR;

Class 25:



ADULT INFLATABLE GUMMI BEAR COSTUME ONE

\$31.00 ~~\$51.00~~ 40% OFF
ONE DAY ONLY!

SIZE SIZE GUIDE

One size - default in the photo

QUANTITY

1

ADD TO BAG

AUTHENTICITY GUARANTEED

IN STOCK & READY TO SHIP

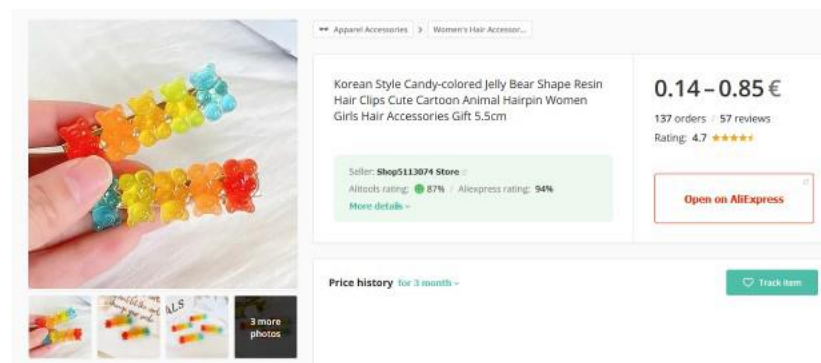
RETURNS ACCEPTED

https://www.snmstore.com/?product_id=130660764_31;

Class 26:

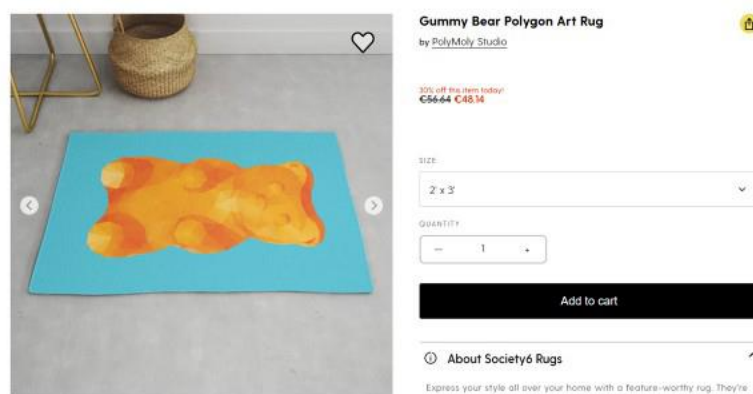


<https://www.paulaguzman.com/products/pingummy-bear-1>



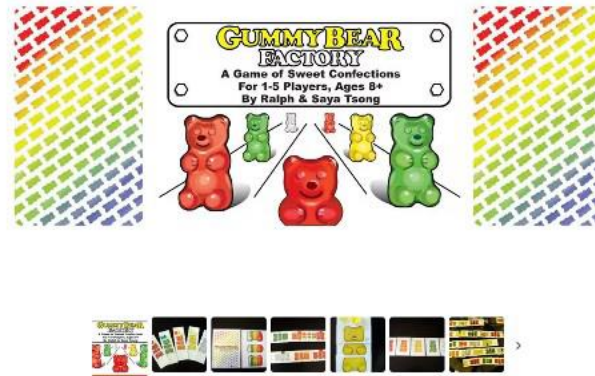
<https://alitools.io/en/showcase/korean-style-candy-colored-jelly-bear-shape-resin-hair-clips-cute-cartoon-animal-hairpin-women-girls-hair-accessories-gift-5-5cm-4001226868782;>

Class 27:



https://society6.com/product/gummy-bear-polygon-art_rug;

Class 28:



<https://boardgamegeek.com/image/881943/gummy-bear-factory;>



<https://www.chewy.com/frisco-zoomies-chill-gummybear-plush/dp/268185>



<https://www.amazon.com/Swimline-Inflatable-Gummy-Float-Assortment/dp/B083HTV2ZQ>

- The sign is therefore devoid of any distinctive character within the meaning of Article 7(1)(b) EUTMR for the contested goods.
- 4 The IR holder maintained its request for the designation notwithstanding the *ex officio* provisional partial refusal of protection issued by the examiner and, on 19 October 2022, it submitted the following arguments:
- Purely figurative trade marks are registrable with the exception of simple geometric devices that are unable to convey any message that can be remembered by consumers.

- The sign applied for has at least a minimum degree of distinctive character. It does not consist of a simple geometric device and is also not a common decorative element or representation of the contested goods.
 - The sign applied for is not a 3D-mark consisting of the shape of a product but a mere figurative one (2D-mark). It is nothing else than a logo consisting of the outline of the famous HARIBO Goldbear. Applied to goods such as T-shirts, jewelry etc., it is clear that the sign will be perceived by the public as an indication of origin and not as mere decoration.
 - The sign applied for is not a real-life version of a bear but a stylised, linear and abstract version thereof. Gummy candy products from competitors look very different and usually they try to imitate the round and knobby appearance of a real bear. The internet extracts displayed in the decision of the Office show products with ‘normal’ bear shaped gummy candies but not the original HARIBO Goldbear, which is very well known amongst the relevant trade circles in the European Union.
 - No clear distinction has been made between the goods that were objected to and the goods that have been allowed to proceed to publication, for example, the distinction between *bags* and *brief cases* in Class 18 and between *watch bands* and *watch chains* in Class 14. The distinctiveness should be assessed specifically in relation to the goods for which protection is sought.
 - The same sign has also been registered as a trade mark in the Benelux.
- 5 On 20 December 2022, the IR holder clarified that it claimed acquired distinctiveness of the contested mark under Article 7(3) EUTMR as a subsidiary claim pursuant to Article 2(2) EUTMIR.
- 6 On 3 April 2023, the examiner took a decision (‘the contested decision’) partially refusing protection of the IR for the goods specified above in paragraph 2, under Article 7(1)(b) EUTMR. The decision was based on the following main findings:
- The relevant consumers’ level of attention for the goods at issue will be average.
 - It is not against established case-law, nor against current Office practice that even signs consisting of somewhat more elaborated devices (as compared to simple geometric figures) can be found non-distinctive, as is the case with the sign applied for.
 - The shape of a gummy bear or a figurative depiction of the same are commonly used for decorative, artistic or aesthetic purposes. Therefore, the goods objected to can commonly either extend to the shape of a gummy bear, their packaging can extend to the shape of a gummy bear, or the goods are commonly marketed with the depiction of a gummy bear applied on them directly. Contrarily, the goods *brief cases* in Class 18 mentioned by the IR holder, do not usually contain the depiction of a gummy bear as a decoration, as they are directed as professionals. Similarly, *watch chains* in Class 14 normally do not depict a gummy bear as a decoration because they do not have the necessary surface to attach such a decoration motif to them.

- The unique features listed by the IR holder will not be perceived as unusual in comparison with other gummy bears on the market. The sign contains all the typical extremities, such as ears, nose, arms and legs. It is also commonplace to include a smiling mouth to convey a positive impression. Consequently, the features of the sign do not depart significantly from the norm of how gummy bears appear and therefore, do not add any distinctive character to the sign as a whole.
 - The fact that the sign has been used on the market for shoes, clothing, phone cases and key rings says nothing about its inherent distinctiveness or how it will be understood by the relevant consumer.
 - The fact that the sign is not applied for in relation to gummy bears does not, per se, make it distinctive. The sign will be perceived as a mere decorative element and/or the shape of the goods themselves or their packaging in the form of a simplistic stereotypical depiction of a gummy bear and this has been proven by the internet extracts.
 - The sign does not have any characteristic element or eye-catching features likely to confer a minimum degree of distinctive character to the sign that would enable the consumer to perceive it as an indication of commercial origin, without the relevant consumer being prompted beforehand, or by means of intensive use, in order to establish a link between the goods and the company of the IR holder. In the absence of any arbitrary or fanciful elements, the sign will be perceived as a mere decorative element and/or the shape of the goods themselves or their packaging in the form of a simplistic stereotypical depiction of a gummy bear.
 - There is no doubt that the relevant public would perceive the sign as a gummy bear. There is no doubt either that the internet references show (variations) of a gummy bear.
 - The fact that the same mark has been registered in the Benelux is irrelevant to the present proceedings.
 - Therefore, the sign is partially rejected for the goods mentioned in paragraph 2 above and allowed to proceed for the remaining goods. Once the decision has become final, the proceedings will be resumed for the examination of the subsidiary claim based upon Article 7(3) EUTMR and Article 2(2) EUTMIR.
- 7 On 25 April 2023, the IR holder filed an appeal against the contested decision, requesting that it be partially set aside, namely, to the extent that the examiner refused protection for part of the goods. The statement of grounds of the appeal was received on 17 July 2023.

Grounds of appeal

- 8 The IR holder's statement of grounds can be summarised as follows:
- The examiner reasoned in the contested decision on case-law referring to marks combining figurative and word elements, which is not the case of the mark at issue, which is purely figurative.

- Only in exceptional cases can purely figurative trade marks be found non-distinctive. The mark applied for is neither a simple geometric device nor a commonplace figurative element, typographical symbol, pictogram or common, non-distinctive label. Rather it is an iconic and unique figurative sign that serves as a source identifier and enables the consumer to conclude that the products marked with the sign originates from a specific entity.
- The mark applied for is characterised by the following distinctive elements: it has pointed and straight forward tapering extremities; a nose tapering forward, ears tapering diagonally upwards from the head; a happy smiling mouth and the chest hairs indicated by oval notches. Candy and sweets from competitors of gummy bears look very different and try to imitate the round and knobby appearance of a real bear:



Other bear shapes used for decorative purposes, show products with the normal shaped gummy candies but not the original HARIBO Goldbear :



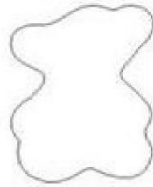
- As regards the sign's distinctiveness in relation to the specific goods, the internet examples provided by the examiner refer to very different signs, i.e. bears with very different shapes and not to the iconic HARIBO Goldbear device. Moreover, the mere fact that a figurative sign can be applied to the goods in a decorative manner could be true for any kind of goods. The iconic HARIBO Goldbear device will not be perceived by the targeted consumer as a mere decoration, but as an indication of origin to the IR holder and the HARIBO Group.
- The mark is not a real-life version of a gummy bear, as reasoned by the examiner. The first version of a fruit gum product in the shape of stylised bears was invented by HARIBO in the year 1978 and has become since then a famous and iconic device element. Meanwhile, other bear-shaped fruit gum products exist on the market, but their shape is always very different.

- A consumer survey carried out in Germany in 2019 in relation to the white version of the HARIBO Goldbear resulted in the sign having a reputation of 92.6% of the relevant trade circles. Furthermore, 74.5% of the trade circles perceived the sign as a source identifier, 73.1% being able to identify HARIBO as the source. The German courts also confirmed in several decisions the uniqueness of the shape of the Goldbears and refer to it as ‘the classic GOLDBEARS product shape’.
- There are many EUTMs showing the figurative depiction of a stylised animal or consisting of a very simple geometric shape, as e.g.:

EUTM No 11 299 427



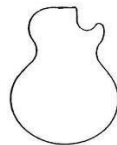
EUTM No 8 127 144



EUTM No 18 504 402



EUTM No 18 504 398



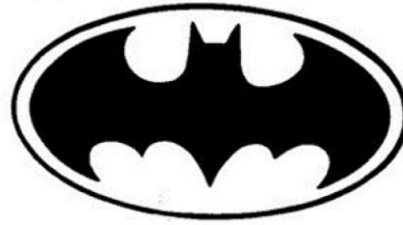
EUTM No 18 740 653



EUTM No 15 808 694



- In a very recent judgment (07/06/2023, T-735/21, DEVICE OF A STYLISTED DEPICTION OF A BLACK BAT INSIDE A WHITE OVAL FRAME (fig.), EU:T:2023:304), the General Court confirmed the registration of EUTM No 38 158 for goods in Classes 25 and 28 showing a depicted device of a batman:



- Reference is also made to EUTM No 18 124 599 showing the shape of a cookie which is registered for similar goods in Classes 9, 14, 16, 18, 20, 21, 24, 25 and 28:




The Office registered this mark on the basis of inherent distinctiveness. Even if the Office is not bound by these prior registrations, it may not arbitrarily deviate from the established decision-making practice for reasons of equal treatment and sound administration. Many of the cited marks have been registered quite recently, in 2022 or later.

- In line with the commercial practice on the relevant market, it is perfectly possible to use depictions in the form of an animal not only as a decoration but also as a trade mark and this is common on the relevant market. The mark here at issue in the present case is used as a distinctive sign in relation to several licensed goods :





- Annex 2 contains printouts showing that the goods are or have actually be used in the market in the EU. From these examples, it is clear that the sign applied for  is used not for decorative purposes but as a source indicator to the company HARIBO and to the IR holder. The consumer buys the licensed goods because they are original licensed goods, and the licensee pays a license fee to the IR holder.
- The targeted consumer is totally accustomed to seeing the use of more than one mark on a product, namely in case of two trade marks of one owner or in the event of co-branding when two trade marks of different owners are used for one product (e.g. HARIBO and PUMA). Consequently the mark applied for enables the consumer to distinguish the goods from other goods and to link them to a specific undertaking, namely to the HARIBO Group.
- It is also common to use the depiction of an animal in relation to the goods at issue here not for decorative purposes but as a trade mark and a source identifier (Annex 3):



- Furthermore, it is also common practise when licensing goods of famous confectionery and snacks or drinks, for manufacturers to use animal logos on merchandised goods (Annex 4):



- These examples prove undoubtedly that the targeted consumers will perceive the signs not as a mere decoration but as an indication of origin of the manufacturer of the goods.
- Even if the Office is not bound by previous national decisions, decisions of other Offices do have a certain indicative effect on how a sign will be perceived by the public. The GOLDBEAR shape or figurative sign (3D or 2D) is protected as a trade mark in various EU Member States (see Annex 5).

Reasons

- 9 All references made in this decision should be seen as references to the EUTMR (EU) No 2017/1001 (OJ 2017 L 154, p. 1), codifying Regulation (EC) No 207/2009 as amended, unless specifically stated otherwise in this decision.
- 10 The appeal complies with Articles 66, 67 and Article 68(1) EUTMR. It is admissible.

Scope of the appeal

- 11 The IR holder has appealed the examiner's decision to the extent that the EU designation of the IR was refused for the following goods ('the contested goods'):

Class 9: Cases, parts, accessories and peripherals specially made for the aforesaid communications and sound and image reproduction equipment; Cases, parts, accessories and peripherals specially made for apparatus and instruments for recording, transmitting, reproducing or processing sound, images or data; Cases, parts, accessories and peripherals specially made for computers and computer peripheral devices; Mouse pads; Magnets magnetizers and demagnetizers.

Class 14: Gemstones, pearls [jewelry] and precious metals and their alloys and imitations thereof; Statues, figurines and ornaments made of or coated with precious or semi-precious metals, precious stones, pearls [jewelry], their alloys or imitations thereof; Key rings and key chains [split rings with trinket or decorative fob] and charms thereof; Jewellery; Precious and semi-precious stones; Jewellery cases and boxes; Boxes and

cases for watches; Watch bands.

Class 16: Paper and cardboard; Printed matter; Stationery and office requisites, except furniture; Paper party decorations; Decorations of paper; Decorative stickers; Wall decorations of paper; Bags and films for wrapping, packaging and storage of paper, cardboard or plastics; Stickers; Stamps; Works of art and figurines of paper and cardboard, and architects' models; Disposable paper napkins; Disposable paper table runners.

Class 18: Luggage, bags; Baby carriers; Bags for carrying animals, wallets; Backpacks; Neck pouches [bags]; Card cases [wallets]; Pocket wallets; Pouch baby carriers; Vanity cases [empty]; Umbrellas and parasols.

Class 20: Playground (indoor) mirrors; Containers and closures for containers, not of metal, for storage or transport; Air cushions, not for medical purposes; Cushions; Pet cushions; Pillows; Air mattresses, not for medical purposes; Baby changing mats; Bedding, except linen; Animal housing and beds; Inflatable publicity objects; Interior textile window blinds; Mats for infant playpens; Mobiles (decoration); Works of art, ornaments and decoration made of wood, wax, plaster or plastic; Pet crates; Carriers for transporting pets.

Class 21: Household or kitchen utensils and containers; Flasks; Cosmetic utensils; Cases adapted for cosmetic utensils; Cases for dental cleaning articles and utensils; Vanity cases, fitted; Toiletry cases, fitted; Disposable table plates; Table plates; Cookie jars; Lunch boxes; Bread bins; Candy boxes; Sugar boxes, candy boxes and cookie boxes [containers for household purposes]; Glassware, porcelain and earthenware, not included in other classes; Statues, figurines, plaques and works of art, made of ceramic, earthenware, porcelain, terra-cotta or glass; Containers for flowers; Laundry baskets.

Class 24: Textiles and substitutes for textiles; Household linen; Curtains of textile or plastic; Coverings for furniture.

Class 25: Clothing; Footwear; Headwear; Costumes.

Class 26: Brooches and buckles [clothing accessories]; Hair decorations.

Class 27: Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; Wall hangings, not of textile; Textile wallpaper; Wallpaper.

Class 28: Games, toys and playthings; Pet toys; Inflatable swimming floats; Inflatable toys; Toy figurines; Rattles [playthings]; Arcade games; Amusement machines; Swimming floats; Bathing floats; Kickboards; Inflatable games for swimming pools; Toys for use in swimming pools; Decorations for Christmas trees, except lights, candles and confectionery; Novelty toys for playing jokes; Party favors, novelties for Easter; Party favors, novelties for Halloween; Party favors, novelties for carnival; Party balloons; Paper party favors; Novelties for parties and dance parties, except lights, candles and confectionery.

- 12 Accordingly, the scope of the appeal is limited to the assessment of whether the examiner correctly refused the EU designation of the IR for the above listed contested goods.

Article 7(1)(b) EUTMR

- 13 Article 7(1)(b) EUTMR provides that trade marks which are devoid of any distinctive character must not be registered.
- 14 For a trade mark to possess distinctive character for the purposes of Article 7(1)(b) EUTMR, it must serve to identify the goods in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 33 and the case-law cited).
- 15 It should be recalled that, in order to assess whether or not a trade mark has any distinctive character, the overall impression it gives must be considered (30/06/2005, C-286/04 P, *Botella Corona*, EU:C:2005:422, § 22 and the case-law cited; 04/10/2007, C-144/06 P, *Tabas (3D)*, EU:C:2007:577, § 39 and the case-law cited).
- 16 It is apparent from well-established case-law that the distinctive character of a mark must be assessed, first, by reference to the goods or services covered by the mark and, secondly, by reference to the relevant public's perception of the mark (21/01/2010, C-398/08 P, *Vorsprung durch Technik*, EU:C:2010:29, § 34 and the case-law cited).
- 17 In the case at hand, the examiner considered that the contested goods were directed at the average consumer with an average degree of attention, and the Board sees no reason to depart from said finding. Moreover, since the mark at issue is a figurative sign without any word elements, the perception of the public in the entire EU territory needs to be taken into account (12/09/2007, T-141/06, *Glaverbel*, EU:T:2007:273, § 41; 15/11/2007, T-71/06, *Windenergiekonverter*, EU:T:2007:342, § 44).
- 18 The concept of general interest underlying Article 7(1)(b) EUTMR is manifestly indissociable from the essential function of a trade mark, which is to guarantee the identity of the origin of the product or service covered by the mark to the consumer or end-user by enabling him or her, without any possibility of confusion, to distinguish that product or service from others which have another origin (29/04/2004, C-457/01 P, *green-white squared washing tablet (fig.)*, EU:C:2004:258, § 48).
- 19 To this effect, a minimum degree of distinctive character is sufficient to render the absolute ground for refusal set out in Article 7(1)(b) EUTMR inapplicable (06/10/2021, T-254/20, *DEVICE OF A LOBSTER (fig.)*, EU:T:2021:650, § 116 and the case-law cited).
- 20 In particular, the finding that a mark has distinctive character within the meaning of Article 7(1)(b) EUTMR is not subject to a finding of a specific level of linguistic or artistic creativity or imaginativeness on the part of the proprietor of the trade mark. It suffices that the trade mark would enable the relevant public to identify the origin of the goods which it covers and to distinguish them from those of other undertakings (29/09/2009, T-139/08, *Smiley*, EU:T:2009:364, § 27 and the case-law cited; 05/04/2017, T-291/16, *Device of two drawn lines (fig.)*, EU:T:2017:253, § 29; 04/07/2017, T-81/16, *POSIZIONE DI DUE STRISCE SU UN PNEUMATICO (posit.)*, EU:T:2017:463, § 49).

Distinctiveness of the contested sign

- 21 In this case, the sign at issue is purely figurative, without any verbal elements. It consists of the image of what has been defined by the examiner as a ‘stereotypical depiction of a gummy bear’. As also explained by the IR holder, it is well known that gummy bears are bear-shaped fruit gums or soft sweets made with gelatine, presented in different colours to match the flavours. Gummy bears are generally small (not more than 2 cm), so that they may be easily eaten.
- 22 Having consideration of its particular features, i.e. the compact shape showing a head with straight ears, eyes, a nose, and a smile, the paws stretched out as two arms and two legs, as well as its shiny surface, the sign at issue may indeed be perceived by a non-negligible part of the public as the representation of a gummy bear, which, as also shown by the IR holder, has been a popular sweet in the EU for the last decades. However, it cannot be excluded that a non-negligible part of the public does not recognise a sweet, a bear, or a particular material in the sign at issue, but just a humanised characterisation of an animal.
- 23 The examiner based the refusal of protection of the sign partly on the consideration that it would be perceived, by the relevant public, as the shape of some of the contested goods themselves or of their packaging, and provided examples from various internet sites.
- 24 In this regard, it is true that, although the sign for which protection is sought was requested as a figurative (2D-mark), it cannot be excluded that it is perceived as a three-dimensional shape. The case-law developed in the context of three-dimensional marks consisting of the appearance of the product may therefore be applicable in this case (22/06/2006, C-25/05 P, *Bonbonverpackung*, EU:C:2006:422, § 29; 13/09/2011, C-546/10 P, *Device of stringed instruments (fig.)*, EU:C:2011:574, § 59; 05/02/2020, T-331/19, *REPRÉSENTATION D’UNE TÊTE DE LION ENCERCLÉE PAR DES ANNEAUX FORMANT UNE CHAÎNE (fig.)*, EU:T:2020:33, § 25; 29/03/2023, T-199/22, *RAPPRESENTAZIONE DI UN CONTENITORE CILINDRICO DALLE LINEE ONDULATE (fig.)*, EU:T:2023:173, § 21, 27).
- 25 It is noted that average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element. It may therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (22/06/2006, C-25/05 P, *Bonbonverpackung*, EU:C:2006:422, § 27; 05/02/2020, T-331/19, *REPRÉSENTATION D’UNE TÊTE DE LION ENCERCLÉE PAR DES ANNEAUX FORMANT UNE CHAÎNE (fig.)*, EU:T:2020:33, § 23).
- 26 The more closely the shape resembles the shape most likely to be taken by the product, the greater the likelihood of the shape being devoid of any distinctive character. It is apparent from those considerations that only a three-dimensional mark, consisting of the appearance of the product itself, which significantly departs from the norm or customs of the sector concerned and, therefore, is capable of fulfilling its original essential function, is not devoid of distinctive character within the meaning of Article 7(1)(b) EUTMR (07/10/2004, C-136/02 P, *Torches*, EU:C:2004:592, § 31; 12/01/2006, C-173/04 P, *Standbeutel*, EU:C:2006:20, § 31; 22/06/2006, C-25/05 P, *Bonbonverpackung*, EU:C:2006:422, § 28; 20/10/2011, C-344/10 P & C-345/10 P, *Botella esmerilada II*, EU:C:2011:680, § 47).

- 27 The sign at issue represents, as stated above, a gummy bear or a characterised figure of an animal, which has no connection with the contested goods in Classes 9, 14, 16, 18, 20, 21, 24, 25, 26, 27 and 28. None of the contested goods belongs to the market sector of confectionery or sweets. Further, having regard of the nature, materials and characteristics of the contested goods, the Board observes that the sign at issue conveys an overall impression that is unrelated to the likely or customary appearance of these goods.
- 28 The fact that some of the contested goods may take the shape of a gummy bear, as mentioned by the examiner in relation to *magnets* in Class 9, *jewellery* items in Class 14, *cases* in Class 18, *mirrors* in Class 20, *containers* in Class 21, *clothing accessories* and *hair decorations* in Class 26 or *inflatable swimming floats* in Class 28, is not in itself sufficient to establish that the contested mark consists of a representation of the shape of the goods at issue (26/07/2023, T-591/21, DEVICE OF THE OUTLINE OF A BEAR (fig.), EU:T:2022:756, § 45).
- 29 The contested goods – and specifically those for which the examiner found examples – may take a variety of shapes, including that of a gummy bear. However, it cannot be established that the relevant public will associate the motif of a gummy bear with the contested goods, as they are totally unrelated (26/07/2023, T-591/21, DEVICE OF THE OUTLINE OF A BEAR (fig.), EU:T:2022:756, § 47, 54).
- 30 The public recognising a gummy bear in the sign at issue, is aware that such sweets are small and generally not larger than 2 cm, which is considerably smaller than most of the contested goods. The public is also aware that they are made of gum or gelatine, a soft edible material that does not correspond to the material in which jewellery, hair pins, mirrors or containers are usually made from, since they are not destined to human consumption. The part of the public not recognising a sweet or gummy bear in the sign will not see the customary shape of the contested goods either, as it misses the features that would correspond to said goods (e.g. an earring hook, a clip for a hair pin, a lid for a container, etc.).
- 31 Further, it must be noted that, even if the IR holder’s objective with the mark was to use it as the shape of such goods, this would not influence the examination as to the sign’s absolute grounds for refusal, which cannot be dependent on commercial intentions (26/07/2023, T-591/21, DEVICE OF THE OUTLINE OF A BEAR (fig.), EU:T:2022:756, § 55 and the case-law cited).
- 32 The examples provided by the examiner are not sufficient to demonstrate that it is an established practice on the relevant market sectors of the contested goods in Classes 9, 14, 16, 18, 20, 21, 24, 25, 26, 27 and 28 to offer gummy bear shaped items, or that the relevant public would perceive a gummy bear as a common motif for any of the contested goods. Moreover, the bear-shaped items shown by the examiner are in a different colour, made of different materials and have overall different features to those of the sign at issue.
- 33 Indeed, the sign at issue, as argued by the IR holder, includes distinct characteristics, such as the position of the ears or the nose, its smile etc., which will create a visual impact on the relevant consumers displaying an average degree of attention with regard to the contested goods. The sign also conveys the impression of consisting of a material – gum – which is not the usual material the contested goods are made of. Although it cannot be excluded that part of the public does not recognise a gummy bear but rather a humanised animal in any other material, such as glass or plastic, it in any case, departs significantly

from the norm or from the customs of the sector concerned in order for the public to perceive it as a distinctive sign for the contested goods.

- 34 Since the sign does not resemble the shape that the contested goods are most likely to take and it has not been demonstrated that it is a commonplace motif for these goods, it must be held that the sign has at least the minimum degree of distinctive character necessary to be protected as a trade mark in the European Union.
- 35 Further, contrary to the examiner's findings, there is no indication in the representation of the sign that could lead to the conclusion that it will be perceived as a form of packaging or as a container by the average consumer.
- 36 Regarding the examiner's consideration that for some of the contested goods, the sign at issue would be perceived as a mere decorative element, and therefore incapable of identifying the origin of those goods or services, it must be recalled that, as stated by the General Court, there is nothing to prevent a distinctive sign from also serving other purposes, in particular a decorative purpose (04/05/2022, T-117/21, DEVICE OF TWO CROSSED STRIPES PLACED ON THE SIDE OF A SHOE (fig.), EU:T:2022:271, § 59 and the case-law cited). In this case, the sign at issue is not an excessively simple and banal sign. It presents a series of characteristics, amply referred to above, which grant the mark, overall, at least, a minimum degree of distinctive character.
- 37 The examples provided by the examiner showing the image of a gummy bear used for decorative purposes are insufficient to prove or justify that the representation of this figure on the contested goods in Classes 9, 14, 16, 18, 20, 21, 24, 25, 26, 27 and 28, which are entirely unrelated to candy and sugar confectionery, is common. It cannot be affirmed that the relevant market sectors of the contested goods are 'saturated' by this image to an extent that the public would no longer perceive the figure of a gummy bear on the contested goods as a distinctive sign. The fact that gummy bears have been used on some occasions is irrelevant, as originality and novelty are not relevant criteria when assessing the distinctive character of a mark (26/03/2020, T-570/19, FORM EINES KÄSESTRANGS (3D) III, EU:T:2020:127, § 33; 25/11/2020, T-862/19, Forme d'une bouteille (3D), EU:T:2020:561, § 39; 29/07/2022, T-51/22, FORME DE PRESSE AGRUMES (3D), EU:T:2022:490, § 50-51).
- 38 Therefore, it must be held that the examiner's finding that the sign at issue is devoid of distinctive character is an erroneous assessment. There is no reason to assume that there is an established practice on the market sectors of the contested goods in Classes 9, 14, 16, 18, 20, 21, 24, 25, 26, 27 and 28 with regard to gummy bear shaped items or decorations, in order to consider it as a common motif.
- 39 In light of the above, the Board finds that the sign at issue diverges sufficiently from the norm or custom in the corresponding sectors for it to retain a minimum degree of distinctive character with respect to the contested goods, to enable consumers to distinguish them from others on the marketplace.

Conclusion

- 40 The appeal is well founded, and the contested decision must be annulled.

- 41 The annulment of the contested decision results in the withdrawal of the provisional refusal pursuant to Article 33(2)(a) EUTMIR.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision.**
- 2. Orders the Office to inform the International Bureau of the World Intellectual Property Organisation that the ex officio provisional partial refusal of protection of International Registration No 1 660 878 designating the European Union is withdrawn.**

Signed

N. Korjus

Signed

A. Kralik

Signed

L. Marijnissen

Registrar:

Signed

H. Dijkema

