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**Communication No 9/05
of the President of the Office
of 28 November 2005
concerning the designation of
Community design courts**

According to Article 80(1) CDR, the Member States shall designate Community design courts of first and second instance. Pursuant to Article 80(2) CDR, each Member State had to communicate to the European Commission, a list of Community design courts together with their names and their territorial jurisdiction.

The table in the annex to this Communication contains a list of the Community design of first and second instance which have been notified to the European Commission so far.

Wubbo de Boer
President

Lista de tribunales de dibujos y modelos comunitarios
Liste der Gemeinschaftsgeschmacksmuster
List of Community designs courts
Liste des tribunaux des dessins ou modèles communautaires /
Elenco dei tribunali dei disegni e modelli comunitari

Status: 24.11.2005

(1) de primera instancia / erster Instanz/ of first instance / de première instance / di prima istanza

(2) de segunda instancia / zweiter Instanz / of second instance / de deuxième instance / di seconda istanza

Česká republika

- (1) Městský soud v Praze
- (2) Vrchní soud v Praze

Landgericht Meiningen
Landgericht Mühlhausen

- (2) Oberlandesgericht München
- Oberlandesgericht Nürnberg
- Oberlandesgericht Karlsruhe
- Oberlandesgericht Stuttgart
- Kammergericht Berlin

Danmark

- (1) Sø - og Handelsretten, København
- (2) Højesteret, København

Hanseatisches Oberlandesgericht Bremen
Hanseatisches Oberlandesgericht Hamburg
Oberlandesgericht Frankfurt am Main
Oberlandesgericht Rostock
Oberlandesgericht Braunschweig
Oberlandesgericht Düsseldorf
Pfälzisches Oberlandesgericht Zweibrücken
Oberlandesgericht Koblenz
Saarländisches Oberlandesgericht Saarbrücken
Oberlandesgericht Dresden
Oberlandesgericht Naumburg
Schleswig-Holsteinisches Oberlandesgericht
Oberlandesgericht Erfurt

Deutschland

- (1) Landgericht München I
- Landgericht Nürnberg-Fürth
- Landgericht Mannheim
- Landgericht Stuttgart
- Landgericht Berlin
- Landgericht Bremen
- Landgericht Hamburg
- Landgericht Frankfurt am Main
- Landgericht Neubrandenburg
- Landgericht Rostock
- Landgericht Schwerin
- Landgericht Stralsund
- Landgericht Braunschweig
- Landgericht Düsseldorf
- Landgericht Bad Kreuznach
- Landgericht Frankenthal (Pfalz)
- Landgericht Kaiserslautern
- Landgericht Koblenz
- Landgericht Landau in der Pfalz
- Landgericht Mainz
- Landgericht Trier
- Landgericht Zweibrücken
- Landgericht Saarbrücken
- Landgericht Bautzen
- Landgericht Chemnitz
- Landgericht Dresden
- Landgericht Görlitz
- Landgericht Leipzig
- Landgericht Zwickau
- Landgericht Magdeburg
- Landgericht Flensburg
- Landgericht Itzehoe
- Landgericht Kiel
- Landgericht Lübeck
- Landgericht Erfurt
- Landgericht Gera

Eesti

- (1) Tallinna Linnakohus
- (2) Tallinna Ringkonnakohus

España

- (1) Juzgados de lo Mercantil de Alicante
- (2) Audiencia Provincial de Alicante

Ireland

- (1) The High Court
- (2) The Supreme Court

Italia

- (1) Tribunale di Bari
- Tribunale di Bologna
- Tribunale di Catania
- Tribunale di Firenze
- Tribunale di Genova
- Tribunale di Milano
- Tribunale di Napoli

Tribunale di Palermo
Tribunale di Roma
Tribunale di Torino
Tribunale di Trieste
Tribunale di Venezia

(2) Corte d'appello di Bari
Corte d'appello di Bologna
Corte d'appello di Catania
Corte d'appello di Firenze
Corte d'appello di Genova
Corte d'appello di Milano
Corte d'appello di Napoli
Corte d'appello di Palermo
Corte d'appello di Roma
Corte d'appello di Torino
Corte d'appello di Trieste
Corte d'appello di Venezia

Latvija

(1) Riga Regional Court
(2) Latvia Supreme Court - Chamber of Civil Cases

Lietuva

(1) Vilniaus apygardos teismas
(2) Apeliacinis Teismas

Magyarország

(1) Fővárosi Bíróság
(2) Fővárosi Ítéltábla

Nederland

(1) Arrondissementsrechtbank te ,s-Gravenhage
(2) Gerechtshof te ,s-Gravenhage

Österreich

(1) Handelsgericht Wien
(2) Oberlandesgericht Wien

Polska

(1) Sąd Okręgowy w Warszawie
(2) Sąd Apelacyjny w Warszawie

Portugal

(1) Tribunal do Comércio de Lisboa
(2) Tribunal da Relação de Lisboa

Slovenija

(1) Okrožno sodišče v Ljubljani
(2) Višje sodišče v Ljubljani

Slovensko

(1) Okresný súd v Bratislave I
Okresný súd v Banskej Bystrici
Okresný súd v Košiciach I

(2) Krajský súd v Bratislave
Krajský súd v Banskej Bystrici
Krajský súd v Košiciach

Suomi / Finland

(1) Helsingin käräjäoikeus
(2) Helsingin hovioikeus

Sverige

(1) Stockholms tingsrätt
(2) Svea hovrätt, Stockholm

United Kingdom

(1) The High Court
The Patents County Court
The Court of Session

(2) The Court of Appeal

**Communication No 10/05
of the President of the Office**

of 28 November 2005

**concerning the designation of
Community trade mark courts**

According to Article 91(1) CTMR, the Member States shall designate Community trade mark courts of first and second instance. Pursuant to Article 91(2) CTMR, each Member State had to communicate to the European Commission, a list of Community trade mark courts together with their names and their territorial jurisdiction.

Communications No 5/99, No 7/99, No 7/01, No 6/02 and No 14/04 contained lists of Community trade mark courts which have been notified to the European Commission by Austria, Belgium, Denmark, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Sweden and the United Kingdom, Spain, Greece, France, Finland, Italy, Estonia, Lithuania, Slovakia and the Czech Republic. Meanwhile the European Commission has received a notification of the change of Community trade mark courts in the United Kingdom.

The table in the annex to this Communication contains a new consolidated list of the Community trade mark courts of first and second instance which have been notified to the European Commission so far.

Wubbo de Boer
President

Lista de tribunales de marcas comunitarias
Liste der Gemeinschaftsmarkengerichte
List of Community trade mark courts
Liste des tribunaux des marques communautaires
Elenco dei tribunali dei marchi comunitari

Status: 24.11.2005

(1) de primera instancia / erster Instanz/ of first instance / de première instance / di prima istanza

(2) de segunda instancia / zweiter Instanz / of second instance / de deuxième instance / di seconda istanza

Belgique / België

- (1) Tribunal de Commerce de Bruxelles /
Rechtbank van Koophandel te Brussel
- (2) Cour d'appel de Bruxelles / Hof van Beroep
te Brussel

Oberlandesgericht Düsseldorf
Oberlandesgericht Koblenz
Pfälzisches Oberlandesgericht Zweibrücken
Saarländisches Oberlandesgericht Saarbrücken
Oberlandesgericht Dresden
Oberlandesgericht Naumburg
Schleswig-Holsteinisches Oberlandesgericht
Thüringer Oberlandesgericht

Česká republika

- (1) Městský soud v Praze
- (2) Vrchní soud v Praze

Eesti

- (1) Tallinna Linnakohus
- (2) Tallinna Ringkonnakohus

Danmark

- (1) Sø - og Handelsretten, København
- (2) Højesteret, København

Ellas / Ελλάς

(1) Tribunal de première instance d'Athènes
Tribunal de première instance de Thessaloniki

(2) Cour d'appel d'Athènes
Cour d'appel de Thessaloniki

Deutschland

- (1) Landgericht Mannheim
Landgericht Stuttgart
Landgericht Nürnberg-Fürth
Landgericht München I
Landgericht Berlin
Landgericht Bremen
Landgericht Hamburg
Landgericht Frankfurt am Main
Landgericht Rostock
Landgericht Braunschweig
Landgericht Düsseldorf
Landgericht Koblenz
Landgericht Frankenthal (Pfalz)
Landgericht Saarbrücken
Landgericht Leipzig
Landgericht Magdeburg
Landgericht Kiel
Landgericht Erfurt
- (2) Oberlandesgericht Karlsruhe
Oberlandesgericht Stuttgart
Oberlandesgericht Nürnberg
Oberlandesgericht München
Kammergericht Berlin
Hanseatisches Oberlandesgericht Bremen
Hanseatisches Oberlandesgericht Hamburg
Oberlandesgericht Frankfurt am Main
Oberlandesgericht Rostock
Oberlandesgericht Braunschweig

España

- (1) Juzgados de lo Mercantil de Alicante
- (2) Audiencia Provincial de Alicante

France

- (1) Tribunal de grande instance de Paris
- (2) Cour d'appel de Paris

Ireland

- (1) The High Court
- (2) The Supreme Court

Italia

- (1) Tribunale di Bari
Tribunale di Bologna
Tribunale di Catania
Tribunale di Firenze
Tribunale di Genova

Tribunale di Milano
Tribunale di Napoli
Tribunale di Palermo
Tribunale di Roma
Tribunale di Torino
Tribunale di Trieste
Tribunale di Venezia

(2) Corte d'appello di Bari
Corte d'appello di Bologna
Corte d'appello di Catania
Corte d'appello di Firenze
Corte d'appello di Genova
Corte d'appello di Milano
Corte d'appello di Napoli
Corte d'appello di Palermo
Corte d'appello di Roma
Corte d'appello di Torino
Corte d'appello di Trieste
Corte d'appello di Venezia

Lietuva

(1) Vilniaus apygardos teismas
(2) Apeliacinis Teismas

Luxembourg

(1) Tribunal d'Arrondissement de Luxembourg
(2) Cour Supérieure de Justice

Nederland

(1) Arrondissementsrechtbank te 's-Gravenhage
(2) Gerechtshof te 's-Gravenhage

Österreich

(1) Handelsgericht Wien
(2) Oberlandesgericht Wien

Polska

(1) Sąd Okręgowy w Warszawie
(2) Sąd Apelacyjny w Warszawie

Portugal

(1) Tribunal do Comércio de Lisboa
Tribunal do Comércio de Vila Nova de Gaia

(2) Tribunal da Relação de Coimbra
Tribunal da Relação de Evora
Tribunal da Relação de Faro
Tribunal da Relação de Guimarães
Tribunal da Relação de Lisboa
Tribunal da Relação de Porto

Slovenija

(1) Okrožno sodišče v Ljubljani
(2) Višje sodišče v Ljubljani

Slovensko

(1) Okresný súd v Bratislave I
Okresný súd v Banskej Bystrici
Okresný súd v Košiciach I

(2) Krajský súd v Bratislave
Krajský súd v Banskej Bystrici
Krajský súd v Košiciach

Suomi / Finland

(1) Helsingin käräjäoikeus
(2) Helsingin hovioikeus

Sverige

(1) Stockholms tingsrätt
(2) Svea hovrätt, Stockholm

United Kingdom

(1) England and Wales: The High Court
The Patents County Court
Birmingham County Court
Bristol County Court
Cardiff County Court
Leeds County Court
Liverpool County Court
Manchester County Court
Newcastle upon Tyne County Court

Scotland: The Court of Session
Northern Ireland: The High Court

(2) The Court of Appeal

**DECISION OF THE INVALIDITY
DIVISION**

of 20 June 2005

**in the proceedings for a declaration
of invalidity of a registered Community
design**

File number: ICD 000000172

(Language of the proceedings: English)

Applicant:

Grupo Promer Mon-Graphic, S.A.
(Spain)

Representatives:

Ruth Almaraz Palmero
(Spain)

against

CD proprietor:

Pepsico Inc.
(United States of America)

Representative:

ELZABURU
(Spain)

THE INVALIDITY DIVISION,

composed of Martin Schlötelburg (rapporteur), Paul Maier (member) and José Izquierdo Peris (member) took the following decision on 20/06/05:

1. The registered Community design No. 000074463-0001 is declared invalid.

2. The Holder shall bear the costs of the Applicant.

I. FACTS, EVIDENCE AND ARGUMENTS

(1) The Community design No. 000074463-0001 (in the following: 'the CD') has been registered in the name of the Holder with the date of filing of 09/09/03 and claiming the priority of the Spanish design application No. 157156 of 23/07/03. In the CD, the indication of products reads 'promotional item for games' and the design is represented in the following three views:



(2) On 04/02/04, the Applicant filed an application for a declaration of invalidity (in the following: 'the Application') contesting the validity of the CD. The fee for

the Application was paid by bank transfer with effect of 04/02/04.

(3) The Application is based on the ground of 'lack of novelty and individual character' and 'on prior right registered (Community design n° 53186-001): (art. 25.1 d)'.

(4) As facts the Applicant indicates that his design was shown in good faith to a subsidiary company of Pepsico Inc. before it was filed with the Spanish Trademark and Patent Office and at OHIM. 'Therefore, the Design n° 74463-001 is not new at all, but it is in fact a copy of Design n° 53186-001'. Furthermore, the Applicant states: 'The Community design n° 53186-001 on which the application for invalidity is based was made available to the public on the date of priority, that is, on 08.07.2003 and filed at OHIM on 17.07.2003, although as above explained it was disclosed confidentially to a third person, who was the subsidiary company of Pepsico Inc.'. Furthermore, the Applicant argues that 'concerning the priority the filing date and registration date before OHIM, it is clear that the design n° 53186-001 is prior to the contested Design registration'.

(5) As evidence the Applicant provided a number of documents, including

— An extract of the Community Designs Bulletin showing the publication of the registered Community design 000053186-0001 which has been registered in the name of the Applicant on the date of filing of 17/07/03 and claiming the priority of the Spanish design application No. 157098 of 08/07/03 (in the following: D1). The publication contains the following two views:



— Two 'copies of the data bases of the Spanish Trademark and Patent Office concerning Spanish designs n° 157156

and n° 157098' (in the following: D2). The copies indicate that the applications for the Spanish designs n° 157156 and n° 157098 have been published on 16/11/03 and 01/11/03, respectively.

— A letter dated 21/02/03 on behalf of the Applicant and addressed to 'Frito-Lay' referring to a meeting in Switzerland and an 'opportunity to work in partnership with Frito-Lay' as regards 'Metal Tazos (Our Rappers)' and various printed copies of web sites regarding the relation between the holder, Frito-Lay, the Matutano Company and the company 'Chipima Sociedade de Productos Alimentares S.A.' together with a sample of 'Chipicao' produced by the later and the 'Metal Rappers' (in the following: D3).

— A 'report made by the Expert Don Juan Antonio Morgades y Manomelles, Doctor Industrial Engineer and Official Industrial Property Agent which shows this lack of novelty and individual character of the contested Community design n° 74463-0001'.

— An 'asymmetrical view of both confronted design'.

(6) On 23/02/04 the Holder was notified of the Application and invited to submit observations.

(7) With his letter of 30/04/04 the Holder observes that novelty and the individual character of the contested CD are unaffected, because the registered Community design 000053186-0001 was not available to the public on 08/07/03, as alleged by the Applicant, but on 01/11/03 when the Spanish design application No. 157098 was published. Regarding the letter to Frito Lay, the Holder argues that it lacks value as evidence for the determination of novelty, because from the content of the letter 'it is not gathered what the object was like, an estimate of whose manufacture was referred in that letter'. Furthermore, the holder submits an 'expert opinion' wherein the prior Community design 000053186-0001 is compared with the contested CD arriving to the conclusion that the contested CD complies with the requirements of novelty and individual character.

(8) On 18/05/04 the Office communicated the observations of the Holder to the Applicant with an invitation to reply.

(9) On 15/07/04 the Applicant replies that the publications of the Spanish designs n° 157156 and n° 157098 are dated 16/11/03 and 01/11/03, respectively, 'however, it could have been possible because of administrative reasons that both designs could have been published the same date or even that model filed with a prior date could have been published later. In those cases, the priority date and the 'first to file' principle are the prevalent ones'. Further, the Applicant explains that 'in order to invalidate a Community design, we do not need to prove the date when the Design on which we base the invalidity has been made available to the public'. He insists that the subject matter of his registered Community design 000053186-0001 has been made available to the Holder 'on 21.03.2003, however, this availability of the design was made privately and confidentially to license or agreement on use of effect'. Furthermore, the Applicant submits evidence as regards the contacts between the two parties in February 2003.

(10) On 02/08/04 the Office communicated the observations of the Applicant to the Holder with an invitation to reply.

(11) On 08/10/04 in his reply the Holder insists that the contested CD is neither anticipated by the prior design of the Applicant in the meaning of Art. 5 and 6 CDR nor is it in conflict with the prior design, because the two opposing designs produce different overall impressions on the informed user.

(12) On 26/10/04 the Office communicated the observations of the Holder to the Applicant with an invitation to reply.

(13) On 04/11/04 the Applicant replied that he does not wish to file more observations.

(14) On 08/11/04 the Office informed both parties that the written proceedings are closed and that the Office will take a decision on the evidence before it.

(15) With letters of 18/11/04 and 03/12/04 the Holder submitted 'supplementary documents to our previous letter' regarding the registered Spanish design 157156. The Office communicated the let-

ters of the Holder to the Applicant who submitted comments in reply on 20/12/04. The Office forwarded the reply of the Applicant to the Holder indicating again that the written proceedings are closed and no further observations shall be submitted.

(16) On 24/02/05 the Applicant reminds the Office that the supplementary observations of the Holder should not be taken into account and that the written proceedings should be definitely concluded.

(17) For further details to the facts, evidence and arguments submitted by the Applicant and the Holder reference is made to the documents on file.

II. GROUNDS OF THE DECISION

A. Admissibility

(18) The request of the Applicant to declare the nullity of the CD on the ground of 'lack of novelty and individual character' and 'on prior right registered (Community design n° 53186-001): (art. 25.1 d))' is a statement of the grounds on which the Application is based. Therefore, the requirement of Art. 28(1)(b)(i) CDIR ⁽¹⁾ is fulfilled. The further requirements of Art. 28(1) CDIR are fulfilled as well. The Application is admissible.

B. Substantiation

B.1 Disclosure

(19) Where an applicant requests the declaration of invalidity of a Community design due to lack of novelty or lack of individual character, he has to provide facts and evidence for a prior design that could form an obstacle to the novelty or individual character of the Community design (Art. 28(1)(b)(v) CDIR). The Office shall examine whether the grounds for invalidity prejudice the maintenance of the contested Community design (Art. 53(2) CDR ⁽²⁾). In his examination, the Office is restricted to the facts and evidence provided by the parties (Art. 63(1) CDR). The Of-

⁽¹⁾ Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs

⁽²⁾ Council Regulation (EC) No 6/2002 on Community designs

fice may disregard facts or evidence which are not submitted in due time by the parties (Art. 63(2) CDR).

(20) A prior design is forming an obstacle to the novelty and individual character of the contested Community design only where it has been made available to the public before the priority date of the contested Community design. It shall not be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under the explicit or implicit conditions of confidentiality (Art. 7(1) CDR).

(21) In the present case, the Applicant provided D1 and D2 as evidence for the existence of a prior design which is the subject of the registered Community design 000053186-0001 and the Spanish design No. 157098. Furthermore, the Applicant provided D3 as evidence that the prior design has been disclosed to the Holder in February 2003, i.e. before the priority date of the contested CD. All observations filed by the parties after they were informed that the written proceedings are closed have been disregarded

(22) However, since the disclosure in February 2003 has been made under the condition of confidentiality - as it has been explicitly pointed out by the Applicant - the prior design is not deemed to have been made available to the public (Art. 7(1) CDR). Therefore, in examining the facts and evidence provided by the parties the Invalidity Division does not find that the ground for invalidity of Art. 25(1)(b) CDR prejudices the maintenance of the contested CD.

B.2 Prior design right

(23) The Applicant invoked as well the ground for invalidity of Art. 25(1)(d) CDR. D1 and D2 are evidence that the prior design has been made available to the public after the priority date of the CD and that the prior design is protected from a date prior to said date by a registered Community design and a registered design right of a Member State, i.e. Spain.

(24) The ground for invalidity of Art. 25(1)(d) CDR applies where the CD is 'in conflict' with a prior design. The conflict arises where the CD does not produce on the informed user a different overall impression than the prior design. The degree of freedom of the designer of the CD has to be taken into consideration.

(25) The informed user is familiar with promotional items for games. In particular, he is informed that they are marketed with their surfaces covered by graphical elements, as it is the case for the samples which have been submitted by the Applicant. The informed user is aware that the targeted consumers will pay more attention to these graphical elements than to small variations in the basic shapes of the items.

(26) The degree of freedom of a designer for promotional items is limited only in so far as these items are to be inexpensive, children safe and fit to be added to the promoted products.

(27) Where the design of such a promotional item comes close to a prior design despite the large degree of freedom of the designer, it will be taken into account in such a way that the overall impressions of the two opposing designs are considered the same where the two designs share the basic features.

(28) In the present case, the two opposing designs have all the basic features in common, i.e. both items are round in shape with an outer edge surrounding a central area. They differ only by minor deviations in the profile of the central area giving rise to small variations in the surface patterns.

(29) The contested CD does not produce a different overall impression on the informed user than the prior design disclosed in D1 and D2. Therefore, the CD is in conflict with the prior design.

C. Conclusion

(30) The invalidity Division finds that the ground for invalidity of Art. 25(1)(d) CDR prejudices the maintenance of the contested CD.

III. COSTS

(31) Pursuant to Article 70(1) CDR and Art. 79(1) CDIR, the Holder bears the costs incurred by him essential to the proceedings.

IV. RIGHT TO APPEAL

(32) An appeal shall lie from the present decision. Notice of appeal must be filed at the Office within two months after the date of notification of that decision. The notice is deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed (Art. 57 CDR).

DECISION OF THE INVALIDITY DIVISION

of 20 June 2005

in the proceedings for a declaration of invalidity of a registered Community design

File number: ICD 000000420

(Language of the proceedings: Spanish)

Applicant:

Sunstar suisse, S. A.
(Switzerland)

Representatives:

Backer & McKenzie
(Spain)

against

CD proprietor:

Dentaid, S. L.
(Spain)

Representative:

Oficina ponti
(Spain)

THE INVALIDITY DIVISION,

composed of José J. Izquierdo Peris (Rapporteur), Paul Maier (Member) and Martin Schlötelburg (Member) took the following decision on 20 June 2005:

1. The application for a declaration of invalidity of registered Community design No 000085311-0001 is rejected.

2. The applicant shall bear the costs of the proceedings.

I. FACTS, EVIDENCE AND ARGUMENTS

(1) Community design No 000085311-0001 (hereinafter the 'CD') was registered in the name of the holder, DENTAID, S.L., with the date of filing of 8 October 2003. It was published in the Community Designs Bulletin of 27 January 2004 (http://oami.eu.int/bulletin/rcd/2004/2004_005/000085311_0001.htm). The CD relates to 'toothbrushes'. The CD is represented in the following three views:



(2) On 13 September 2004, the applicant filed an application for a declaration of invalidity of the CD. The holder was notified

of the application for a declaration of invalidity on 27 September 2004 and invited to submit observations.

(3) The holder submitted its observations on 2 December 2004 and these were notified to the applicant, who submitted observations in reply on 24 February 2005. The Office notified the holder, who submitted its observations in reply on 13 May 2005. On 30 May 2005, the Office informed both parties that the written phase of the proceedings was deemed to have been concluded and that it would proceed to taking a decision.

(4) The applicant maintained that the CD should be declared invalid on account of its lack of novelty and lack of individual character, since it held a practically identical prior design (the small differences in detail would be insufficient to prevent the 'likelihood of association and confusion') registered in Japan under No 1052169, applied for on 22 June 1998 and published on 22 October 1999 in the official journal of the Japanese Patent Office (see reproduction below). It stated that the design had also been promoted and disclosed during the 'EUROPEIO 3' dentistry fair held in Geneva (Switzerland) from 8 to 11 June 2000 (a fair attended by both the applicant and the holder), and also disclosed on the applicant's website since 26 September 2000. The applicant based its application on the ground for invalidity contained in Article 25(1)(b) in connection with Articles 4 to 9 CDR⁽¹⁾. The applicant also maintained that it should be declared invalid owing to bad faith on the part of the CD holder at the time of filing the application, given that it was not possible for the latter to claim that it was not aware of the existence of the earlier design disclosed at the dentistry fair referred to above. The applicant submitted a number of documents aimed at proving disclosure of the earlier design, its disclosure at the said fair and attendance by the applicant and the holder at that fair, by means of notarial declarations on the part of a number of employees, photographs taken during the fair, an invoice, list of participants, a DVD, etc.



(5) The holder argued that the application should be dismissed since prior disclosure of the earlier design No 1052169 was not proven, since such disclosure could not, in the normal course of business, have become reasonably known in specialist dentistry circles operating in the Community. Furthermore, it was not proven that the said design had been disclosed at the aforementioned fair in so far as the photographs supplied bore no date or place name, there were no supporting documents for the declarations and no proof was provided of the design having been promoted by means of leaflets at the said fair. Disclosure of the design via the Internet was also not proven.

(6) In any event, if the Invalidity Division were to deem disclosure proven, the holder considered that the requirements of novelty and individual character were indeed met by the CD. The holder argued that, although the general appearance of the CD derived from the 'L' shape of the brush was known prior to the filing of the CD (adducing evidence of earlier designs with that shape), there were specific new characteristics in the CD that made it suitable for protection. Although the CD and the earlier design coincide in terms of the form of the design (structured in two sections, one for the brush to be held by the user and the other, substantially perpendicular to the first section, for supporting the wire of the head), there are variations between the two in terms of the surface of the first section, the profile of both sections and the way the sections are joined together. In addition, it argued that the individual character of the CD lay in the aforementioned features, which were not determined by the functional nature of the design. In so far as the designer's freedom was limited by these functional aspects (the structure of the brush in the 'L' shape), the user would pay more attention to characteristics not conditioned by function (the profile and the surface of the brush). Lastly, the holder asserted that the ground of invalidity based on bad faith was inadmissible because no such ground is provided for in the Regulation, and, in any case, bad faith had not been proven.

(7) In reply to the holder's observations, the applicant argued that the holder itself accepted that the 'L' shape of the design was not new and was known. The differentiating elements or details were, however, merely fortuitous when it came to assessing novelty. The applicant considered that the publication in the official journal of the Japanese Patent Office was sufficient to prove disclosure, as was publication of the design on the Internet by the holder of the earlier design. It stressed that the act of disclosure did not have to take place within the European Union but that it sufficed for it to be reasonably known in the normal course of business amongst specialist circles. These specialist circles attended the dentistry fair in Switzerland and therefore proof of disclosure of the design at that fair should be sufficient. As regards the lack of novelty, the applicant was of the opinion that the average consumer would perceive the identity between the two designs as the differences pointed out were insignificant and not perceptible to the said consumer. The overall impression of the CD compared with the earlier design would be that they were identical and, in any event, the CD would not be deemed to have individual character. Lastly, regarding bad faith, the applicant reiterated that it deemed this to have been proven.

(8) By means of written observations to the reply, the holder requested that the application be dismissed. Regarding disclosure of the earlier design, it was of the opinion that publication outside the EU by an industrial property office was insufficient for specialist circles to be able to gain reasonable knowledge thereof. In addition, it pointed out that disclosure at the fair and on the Internet had not been proven as a number of the documents provided did not bear a date. The notarial declarations made by employees were mere party declarations without conclusive probative value. It continued to maintain that the CD displayed specific features deriving from the line, configuration and form, all of these being more than mere details. In any event, it argued that the point of reference for assessing the individual character of the CD was not the average consumer but the informed user, since the average consumer is not a valid reference in sectors such as the dental hygiene sector, where the number of designs of form has reached saturation point. In the present case, informed users are dentists and pharmacists, who are the type of person who would clearly appreci-

⁽¹⁾ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

ate the specific elements of the CD and would obtain a different overall impression of the CD. It reiterated that bad faith was inadmissible as a ground and not proven.

(9) For further information and details relating to the applicant's arguments and facts, reference is made to the file on the application for a declaration of invalidity.

II. GROUNDS OF THE DECISION

A. Admissibility

(10) The application for a declaration of invalidity is based on the grounds of Article 25(1)(b) in connection with the requirements of Articles 4, 5 and 6 CDR, owing to the lack of novelty and lack of individual character of the CD. Consequently, the requirements set forth in Article 28(1)(b)(i) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing the CDR ('CDIR') have been met. The ground invoked by the applicant regarding bad faith is not one of the grounds expressly set out in Article 25 and is therefore inadmissible.

(11) The fee for the application for a declaration of invalidity has been paid. The application complies with the remaining formalities laid down in Article 28(1) CDIR and is therefore admissible.

B. Substantiation

(12) The Invalidity Division considers it appropriate to examine the ground for invalidity invoked by the applicant due to lack of novelty and lack of individual character of the CD, given that the design cited and reproduced in paragraph 4 of this decision was disclosed by means of publication in the official journal of the Japanese Patent Office on 22 October 1999 and, therefore, prior to the date of filing of the CD (8 October 2003).

B.1. Novelty

(13) The Invalidity Division holds that disclosure of the design by means of its publication in the official journal of the Japanese Patent Office has been proven in accordance with Article 7 CDR, since the

design was made public after its registration at the Japanese office. The objection that this fact could not have been reasonably known in the normal course of business to specialist circles in the sector in question, and operating in the Community, has not been proven as publication was made in the official journal of one of the world's most important industrial property offices in terms of volume of applications and registrations of designs.

(14) Since disclosure of the earlier design has been proven, it is now appropriate to compare the two designs. The comparison is made exclusively on the basis of the graphic representations of the two designs. The Invalidity Division concludes that there is no identity between the earlier design and the CD. Although both share the external appearance deriving from the form of the product, they are distinguished by the following elements:

— the earlier design has (1) a grooved surface and two intercalated lateral planar surfaces; the CD has a smooth surface; there are, therefore, differences in the texture and colour of the surface of the two designs;

— the earlier design has (2) a section composed of two portions, a narrow portion and another, frustoconical portion; the CD consists of a single portion; in both cases, this portion ends in the wire;

— the earlier design has (3) another, longer section used for holding the brush, with a circular widening, which is not seen in the CD;

— the earlier design has (4) the join between both sections with a ridge or edge, whereas the CD does not have such elements;

— the earlier design has (5) the wire arranged at a more open angle than the wire arranged in the CD, such that the wire appears more perpendicular in the CD than in the earlier design;

— the earlier design has (6) the end of the section used to hold the brush in planar form; the CD has an end in rounded form.

(15) Therefore, the two designs differ in terms of various elements. It is concluded that the differences in the characteristics of the two designs are not immaterial, pursuant to Article 5(2) CDR, and therefore they are not identical.

(16) The ground for invalidity based on the lack of novelty of the CD by reason of the disclosure of the said design prior to 8 October 2003 must therefore be dismissed, given the lack of identity between the two designs.

B.2. Individual character

(17) It is now appropriate to determine whether the CD has an individual character. To that end, the degree of freedom of the designer in developing the CD should be taken into account. In the field of interdental brushes, that degree of freedom is not limited by the existence of a specific form or forms. Although the form of an interdental brush corresponds to a hygiene function, there are various basic forms which enable that function to be fulfilled. The designer is free to choose between them. In this case, the author of the CD chose a form which was already familiar, the specific 'L' form, as acknowledged by the holder itself since it provided a number of examples of earlier designs.

(18) The informed user is also familiar with the basic characteristics of interdental brushes. Specifically, he will be familiar with all designs that are known in the normal course of business in specialist circles in the sector in question. He will know that brushes of this type have a specific form on account of the function they are to fulfil, this form's configuration being determined by two elements (a head with the wire, plus a handle). There are various basic forms that may be used to configure the appearance of the brush. One of these is the 'L' form.

(19) In the present case, the general impression produced by the CD differs from the general impression produced by the earlier design. In paragraph 14, the differ-

ences between them were set forth. The 'L' form was known beforehand and corresponds to a basic form which meets a technical function. Therefore, an informed user will appreciate the differences that do not derive from the basic form dictated by the technical function, namely the different surface elements (texture and colour), the profile, the inter-section join, the angular arrangement of the wire and the form of the end of the handle. These differences are sufficient to give the informed user a different general impression of the CD as opposed to the earlier design in so far as, although the individual character of the CD should be assessed from a global perspective, the informed user - who is not the average consumer (contrary to the view put forward by the applicant) - perceives those different elements in the form of the design as specific elements producing an overall impression that is different from the earlier design.

(20) In the light of the foregoing, having examined the evidence contained in the file, the ground invoked by the applicant, namely lack of individual character of the CD on the basis of the earlier publication of the design on 22 October 1999 in the official journal of the Japanese Patent Office, should be dismissed.

C. Conclusion

(21) The application for a declaration of invalidity must be dismissed since the lack of novelty and lack of individual character of the CD pursuant to Article 25(1)(b) CDR in connection with the requirements demanded in Articles 4 and 6 CDR have not been proven.

III. COSTS

(22) Pursuant to Article 70(1) CDR and Article 79(1) CDR, the losing party shall bear the costs incurred by the other party as well as all costs incurred by him essential to the proceedings. In the present case, the applicant is ordered to bear the costs.

IV. APPEAL

(23) Notice of appeal must be filed in writing at the Office within two months after the date of notification of the decision appealed from. The notice shall be deemed to have been filed only when the fee for appeal has been paid. Within four months af-

ter the date of notification of the decision, a written statement setting out the grounds of appeal must be filed (Article 55 et seq. CDR).

DECISION OF THE INVALIDITY DIVISION

of 30 August 2005

in the proceedings for a declaration of invalidity of a registered Community design

File number: ICD 000000271

(Language of the proceedings: Italian)

Applicant:

Rodi Comercial S.A.
(Portugal)

Representatives:

Soldatini Andrea c/o Società Italiana Brevetti S.p.A.
(Italy)

against

CD proprietor:

ISCA S.p.A.
(Italy)

Representative:

BUGNION S.p.A.
(Italy)

THE INVALIDITY DIVISION,

composed of Eva Udovc (rapporteur), Harri Salmi (member) and Cécile Barrio (member) took the following decision on 30/08/05:

1. The application for a declaration of invalidity of the registered Community design No. 000037189-0010 is rejected.
2. The Applicant shall bear the costs of the Holder.

I. FACTS, EVIDENCE AND ARGUMENTS

(1) The Community design No. 000037189-0010 (in the following: 'the CD') has been registered in the name of the Holder with the date of filing of 28/05/2003. In the CD, the indication of products reads 'Wheels for bicycles' ('Ruote per bicicletta') and the design is represented in the following view (published at http://oami.eu.int/bulletin/rcd/2003/2003_028/000037189_0010.htm):



(2) On 26/05/2004, the Applicant filed an Application for a declaration of invalidity (in the following: 'the Application')

contesting the validity of the CD and the fee for the Application was paid on the same date.

(3) The Applicant requests a declaration of invalidity of the CD 'based on the grounds of lack of novelty and individual character, Articles 52(1), 25(1)(b), 4, 5, 6, 7(1) of Regulation 6/2002 (¹).' The Applicant states that the CD lacks novelty, because 'the advertising and distribution of Remerx and Campagnolo wheels in Italy and Germany (and other European countries) destroys the novelty of the CD', since the 'Remerx and Campagnolo wheels are practically identical to the CD' and 'no substantial difference can be detected by comparing the pictures of the front wheels and the CD'. The applicant states that 'wheels with a design as claimed by the CD were, for example, produced, marketed and distributed by Remerx s.r.o., a company based in Slavcin in the Czech Republic, in 1999 and subsequent years' and that 'Remerx distributed these wheels in various European countries including Germany.' He adds that 'independently of the fact that the CD claims a '7x4', '8x4' or '9x4' spoke system, the documents appended to this statement show that all these designs were known, published, produced and distributed within the European Union long before the filing date of the CD.'

(4) With regards to individual character the Applicant further states that the CD lacks individual character, because 'even supposing that in assessing the degree of novelty, importance were attributed to some perhaps insignificant differences between the CD and the earlier wheels, it is evident that the CD would still lack individual character compared with the bicycle wheels with grouped spokes which were known before the filing date'. He argues that 'the general impression of the groups of four with spokes intersecting each other near the hub could produce a particular impression on the informed user', wherein 'the impression would be solely due to the use of spokes grouped in fours because the wheel shown in the CD possesses no other

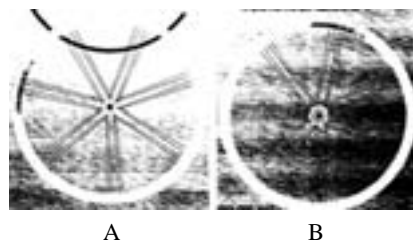
significant feature' and 'the general impression of the CD is thus the same whether the bicycle wheel shows one or two groups more or less' and 'the exact positioning of the groups within the wheel or the individual spoke within the group' does not affect the overall impression, since the 'informed user can discern no difference between two wheels each with spokes arranged in groups of four, but at slightly different angles with respect to the diameter of the wheel.'

(5) As evidence, the Applicant submits the following documents:

— a copy of a catalogue titled 'Remerx Ráfky Felgen Rims' designated as 'Katalog 99, Prospekt von Remerx', a catalogue in the Czech and English language of a company Remerx s.r.o. based in Slavcin in the Czech Republic' (in the following: 'D1');

— a copy of an invoice, dated 13/12/1999, addressed to a company RACO in Kerspleben in Germany and issued in the Czech and English language by the Remerx s.r.o., the same company as stated above (in the following: 'D2');

— a copy of a catalogue in the Czech and English language of the company Remerx titled 'Rims 2002 2003, Remerx' with the name and address of a distributor in Germany (in the following: 'D3'), which discloses two designs of wheels with bundle spoking, herewith referred to as designs A and B;



— a copy of an advertisement of a Campagnolo Zonda G4 front wheel produced by a company Compagnolo on a bicycle by a company Liyang and a cover page of an Italian magazine 'Bicicletta' with number 219 of March

2002, in which this advertisement was published (in the following: 'D4');



and

— a copy of a 'Letter of notice' sent to a company Rodi LDA in Portugal by a company ISCA S.p.A in Italy (in the following: 'D5').

(6) On 16/06/2004 the Holder was notified of the Application and invited to submit his observations within a time limit set.

(7) On 22/07/2004 the Applicant applied for a rapid conclusion of the proceedings.

(8) On 26/07/2004 the Applicant submitted a correction of a part of the text of the initial Application referring to the exhibit 5.

(9) On 27/07/2004 the Holder was notified of the correction of the initial Application referring to the exhibit 5.

(10) The Holder did not submit any observations to the Application.

(11) On 14/09/2004 the Office informed both parties that the written proceedings were closed and that a decision concerning the invalidity would be taken.

(12) On 27/09/2004 the Office invited the Applicant to submit the original catalogues of the Remerx, namely originals of D1 and D3, within the time limit set, because the images of the prior designs that were originally submitted by fax were not clear.

(13) On 04/10/2004 the Applicant submitted colour copies of the original catalogues.

(14) On 29/10/2004 the Office communicated the submitted copies of D1 and D3 to the Holder with an invitation to submit his observations in the time limit set stating that the Office would take a decision based on the documents received should no further observations be received.

(15) The Holder did not submit any observations within the time limit set.

⁽¹⁾ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

(16) On 20/12/2004 the Office informed both parties that the written proceedings were closed and that a decision concerning the invalidity will be taken based on the documents provided.

(17) For further details to the facts, evidence and arguments submitted by the Applicant and the Holder reference is made to the documents on file.

II. GROUNDS OF THE DECISION

A. Admissibility

(18) The request of the Applicant to declare the invalidity of the CD 'based on the grounds of lack of novelty and individual character, Articles 52(1), 25(1)(b), 4, 5, 6, 7(1) of Regulation 6/2002' is a statement of the grounds on which the Application is based. Therefore, the requirement of Art. 28(1)(b)(i) CDIR ⁽²⁾ is fulfilled. Furthermore, the Application complies with the Art. 28(1)(b)(v)(vi) CDIR, since it contains an indication of the facts, evidences and arguments submitted in support of those grounds, in particular indications and reproductions of prior designs. The other requirements of Art. 28(1) CDIR are fulfilled as well. The Application is thus admissible.

B. Substantiation

(19) From the request of the Applicant to declare the invalidity of the CD due to 'lack of novelty and individual character, Articles 52(1), 25(1)(b), 4, 5, 6, 7(1) of Regulation 6/2002' in conjunction with the facts and evidences submitted with the Application, it is obvious that the Applicant seeks the declaration of invalidity of the CD on the ground that the requirements for protection are not fulfilled in view of earlier disclosures. The requirements for protection affected by an earlier disclosure are novelty and individual character (Art. 4, 5 and 6 CDR). Therefore, in the examination of the Application, novelty and individual character of the CD have to be assessed.

(20) When considering the facts, arguments and evidence, D1 and D2 were disregarded as evidence. D1 was disregarded, because there was no information in the copy of the printed Remerx catalogue about the date of its publication or disclosure, except for the information on the first page of this copy stating 'Katalog 99, Prospekt von Remerx', which clearly appears to be handwritten on it and which casts doubt on the veracity despite the referral to this publication in the Applicant's 'Statement containing the arguments'. As can be derived from the Applicant's statements in the Application and as is common in the sector concerned, catalogues of such specific sports articles, namely of wheels for bicycles and in particular for racing bicycles, the catalogues of such products very often state at least the season, if not also the year of catalogue issue. Even though the Applicant stated in the Application that he is prepared to make witness testimony and to provide evidence if necessary and as required by the Invalidity Division, the Division decided not to request it in respect of D1, because the design as disclosed in it would not affect the decision on the invalidity. D2 was disregarded, because it states a sale of one piece of a 'Grand-set' model with specification 'Miche 8x4, Ot Aero' to a company RACO in Kerspleben in Germany, but contains no image of the appearance of this product and no other evidence submitted contains this product name and its image.

(21) Other evidence affecting the invalidity decision, namely D3 and D4 was taken into consideration. D3 was taken into consideration despite the fact that it was not submitted in the language of the proceedings (Italian) pursuant to Art. 98(4) CDR, but in the Czech and English language. The Invalidity Division also did not notify the Applicant requesting him to file a translation of that evidence pursuant to Art. 29(5) CDIR and Sections 4.1 and 4.7 of the Invalidity guidelines ⁽³⁾, because the information in D3 could be clearly understood as it is mainly numerical and figurative and its contents were provided in the language of the proceedings in the Applicant's 'Statement containing the argu-

ments'. In D3 and D4 only designs that were relevant for assessment of the novelty and individual character of the CD were taken into consideration, namely designs with bundle spoking, having bundles of four spokes, i.e. designs A and B in D3 and design of the front wheel in D4. Other designs in D3 (i.e. designs of wheels with pair and standard spoking) and D4 (i.e. design of the back wheel with bundle spoking having bundles of three spokes) were not taken into consideration due to differences in substantial design features and the overall impressions in comparison to those of the CD.

B.1 Novelty

(22) According to Art. 5 CDR the CD lacks novelty when an identical design has been made available to the public prior to the date of filing of the CD. Designs shall be deemed to be identical if their features differ only in immaterial details. When assessing novelty, the CD must be compared with each prior design individually.

(23) The prior designs in D3, referred to as spoked wheels with special spoking or bundle spoking, and the CD consist of wheels including a rim with two bands, a hub in the centre and spokes with nipples, wherein the spokes in each design are arranged in seven separate groups or bundles consisting of four spokes each and these bundles are evenly distributed within the wheel. However, the prior designs and the CD differ in the pattern of distribution of the spoke bundles in the wheel and of the spokes in the bundle and in the ratios among the wheel components, in particular:

— in the prior designs the width of the bundles and the distances between the spokes in the bundle are smaller than the width of the bundles and such distances in the CD, so that the empty spaces between the subsequent bundles are larger in the prior designs than in the CD, namely in the prior designs the width of the bundle at the rim represents only $\frac{1}{4}$ of the length of the arch of the

⁽²⁾ Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs.

⁽³⁾ Decision No EX-04-1 of the President of the Office of 26 April 2004 adopting Guidelines for the proceedings relating to a declaration of invalidity of a registered Community design.

empty space between the two subsequent bundles, whereas in the CD such a width of the bundle represents $\frac{1}{2}$ of the length of the arch of the empty space;

— in the prior designs the spokes of one bundle are crossed by the spokes of the next bundle two times to form a so called ‘two-cross’ pattern very close to or almost at the edge of the hub or the hub flange, so that the crossings can hardly be observed, whereas in the CD the spokes are crossed two times away from the hub at around a distance of the hub radius, so that all the crossings form an isosceles seven pointed star around the hub, the sides of which start at the edge of the hub;

— in the prior designs the spokes never radiate from the same point of the hub, whereas in the CD the two left or the two right spokes of the bundle always come out as a pair from the same point of the hub as do the two right spokes of one bundle and the two left spokes of the 2nd subsequent bundle;

— in the prior designs in D3 the width of the rim side wall represents around $\frac{2}{3}$ of the bundle width at the rim and around $\frac{2}{3}$ of the hub diameter, whereas in the CD the width of the rim side wall represents around $\frac{1}{3}$ of such a bundle width and around $\frac{1}{2}$ of the hub diameter.

An additional difference is in the colours of the designs, because in the CD there are no colours specified, whereas the rims in both prior designs A and B in D3 have a wider internal circular band in yellow colour and a narrower external band in white and design B has a central part of the hub in yellow colour.

(24) The prior design in D4 is a part of the whole product, namely a bicycle front wheel within a complete bicycle. This front wheel consists of a rim, a hub, spokes with nipples, wherein the spokes are arranged in five separate bundles consisting of four spokes each, and additionally

contains a tyre and is incorporated into the bicycle via a fork and other components of the complete bicycle. This front wheel design in D4 differs from the CD, because:

— it contains only five bundles of spokes and altogether 20 spokes in the wheel, whereas in the CD there are seven bundles of spokes and altogether 28 spokes;

— the width of the bundle at the wheel rim is almost equal to the length of the arc of the empty space between the two subsequent bundles, whereas in the CD such a width of the bundle represents only $\frac{1}{2}$ of the length of the arch of the empty space;

— the lacing pattern of spokes is not the same all around the hub, because in the three subsequent bundles the two left spokes cross each other away from the hub flange at a distance of around three to four hub radiuses as do the two right spokes of these bundles and in the two remaining subsequent bundles such spokes cross each other almost at the hub flange, whereas the lacing pattern in the CD is the same all around the hub as described in paragraph 23 above;

— the width of the rim side wall represents around $\frac{1}{3}$ of the bundle width at the rim and around $\frac{1}{2}$ of the hub diameter, whereas in the CD the width of the rim side wall represents around $\frac{1}{3}$ of such a bundle width and around $\frac{1}{2}$ of the hub diameter.

(25) Therefore there are clear differences in the features of the prior designs in D3 and D4 on one side and of the CD on the other which cannot be considered as immaterial details. None of the designs disclosed in D3 and D4 is thus identical to the CD. The submission of the Applicant that the CD lacks novelty is therefore not founded.

B.2 Individual Character

(26) According to Art. 6 CDR the CD shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user

by any design which has been made available to the public prior to the date of filing. When assessing individual character the degree of freedom of the designer in developing the design has to be taken into consideration.

(27) The informed user is familiar with the spoked bicycle wheels of the type to which the CD relates. In particular, he is aware of the requirements that bicycle wheels must fulfil in order to perform their function and of the prior art known in the normal course of business to the circles specialized in the sector concerned. He takes into account that the degree of freedom of the designer is limited by the requirement, that such a wheel has to be laced with the spokes between the hub and the rim in order to support the rim and to transfer the weight of the rider to the rim. In consequence, the informed user will pay more attention to the features where the designer was not limited in his creativity, such as the pattern of distribution of the spokes around the hub and between the hub and the rim, including among others the distances and angles among the spokes, the angles among the spokes and the hub flange and among the spokes and the rim, the crossings of spokes, the grouping of spokes in the bundles, the distances among the bundles, the number of spokes that can vary above a certain minimum number and the ratios among the wheel components.

(28) Pursuant to Art. 6 CDR the overall impression produced on the informed user by the CD must be assessed by comparison with the overall impression produced on such a user by each individual prior design cited, wherein the attention is focused on the shape of the spoked wheel as a whole.

(29) The differences in the pattern of distribution of the spokes and in the ratios among the wheel components in the CD and in the prior designs in D3 as mentioned in paragraph 23 above, result in the different overall impressions of these designs. The CD produces an overall impression of a complex wheel, filled with many spokes that imply a rotating movement in the spokes and the weight concentrated in the spokes, whereas each of the two prior designs in D3 produces an overall impression of a simple wheel with empty space inside and an impression of fewer spokes that imply an almost motionless wheel and a con-

centration of the weight in the rim due to its width and coloration.

(30) The differences in the pattern of distribution of the spokes and in the ratios among the wheel components in the CD and in the prior design in D4 as mentioned in paragraph 24 above result in the different overall impressions of these designs. The CD produces an overall impression of a complex regular wheel with symmetrical and regular distribution of the spokes with a regular star pattern of the spoke crossings around the centre, whereas the prior design in D4 produces an overall impression of a complex irregular wheel with empty space inside and without symmetry and with irregular distribution of the spokes in the bundles in one half of the wheel and with no regular shape of spoke crossings around the centre.

(31) The overall impression produced by the CD is therefore different from that produced by the prior designs taken individually. Therefore, the submission of the Applicant that the CD lacks individual character is not founded.

C. Conclusion

(32) The CD is considered to be new and to have individual character in comparison to the designs disclosed in D3 and D4. The submissions of the Applicant that the CD lacks novelty and individual character are not founded. Therefore, the Application is to be rejected.

III. COSTS

(33) Pursuant to Article 70(1) CDR and Art. 79(1) CDIR, the Applicant bears the costs incurred by him essential to the proceedings.

IV. RIGHT TO APPEAL

(34) An appeal shall lie from the present decision. Notice of appeal must be filed at the Office within two months after the date of notification of that decision. The notice is deemed to have been filed only when the fee for appeal has been paid. Within four

months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed (Art. 57 CDR).

DECISION OF THE INVALIDITY DIVISION

of 15 September 2005

in the proceedings for a declaration of invalidity of a registered Community design

File number: ICD 000000529

(Language of the proceedings: English)

Applicant:

WS Teleshop International Handels GmbH
(Austria)

Representatives:

Dr. Volker Vossius
(Germany)

against

CD proprietor:

Homeland Housewares, LLC.
(USA)

Representative:

Dennemeyer & Associates
(Luxemburg)

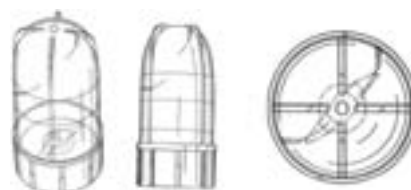
THE INVALIDITY DIVISION,

composed of Martin Schlötelburg (rapporteur), Paul Maier (member) and José Izquierdo Peris (member) took the following decision on 15/09/05:

1. The registered Community design No. 000129515-0001 is declared invalid.
2. The Holder shall bear the costs of the Applicant.

I. FACTS, EVIDENCE AND ARGUMENTS

(1) The Community design No. 000129515-0001 (in the following: 'the CD') has been registered in the name of the Holder with the date of filing of 02/02/04. In the CD, the indication of products reads 'blenders' and the design is represented in the following three views (published at http://oami.eu.int/bulletin/rcd/2004/2004_035/000129515_0001.htm):



(2) On 23/09/04 the Applicant filed an application for a declaration of invalidity (in the following: 'the Application') contesting the validity of the CD. The fee for

the Application was paid by current account with effect of 23/09/04.

(3) The Applicant requests the invalidation of the CD on the basis of Article 25(1)(b) insofar as it does not fulfil the requirements of novelty and individual character, that is, the requirements laid down in Article 5 and 6 CDR ⁽¹⁾. The Applicant provided as evidence images and supporting documentation of a number of designs emanating from various sources, including *inter alia* evidence concerning a blender denominated the *Kiss Mixer*. The evidence submitted relating to the *Kiss Mixer* consists of the following:

— copies of two user's manuals of the *Kiss Mixer* in English and Czech, not dated (in the following: 'D1');

— a copy of a facsimile from *Hestia* to Applicant's Czech subsidiary indicating that a product sample will be sent, dated 02/01/01 (in the following: 'D2');

— a copy of a mail delivery order for a package from the Czech company *Hestia* to the Applicant's Czech subsidiary and, post stamped 04/01/01 (in the following: 'D3');

— copies of product carton mailed from *Hestia* to the Applicant's Czech subsidiary bearing a post stamp of 04/01/01 on one side (in the following: 'D4'). On the same side, on the bottom right corner an image of part of the *Kiss Mixer* can be discerned and on the top left corner the trade name of the producer, 'Iljin', appears. Another side of the carton shows the following image:



⁽¹⁾ Council Regulation (EC) No 6/2002 on Community designs

— print outs from the *Way Back Machine* (www.archive.org), indicating that a website 'www.kissmixer.com' has been available on the internet since at least July 2001 and included the image below (in the following: 'D5'):



(4) In regard to the *Kiss Mixer*, the Applicant claims that 'the product was produced by a Korean company called *Iljin Precision Ind. Co.* in order to sell the product in Europe'. This is supported by the Applicant's Czech subsidiary's receipt of the package containing the *Kiss Mixer* with post stamp of 04/01/01. The Applicant further argues that the information obtained from the *The Way Back Machine* shows that the design of the *Kiss Mixer* was made available to all third parties on a worldwide basis as of 2001, considering that the Internet web page was stored in the Internet archive on 30 November 2001.

(5) The Holder replies that 'there is no evidence that the designs shown in these documents have been made available to the public before the date of filing of the present Community design'. More specifically the Holder argues that D4, containing an alleged post stamp of 04/01/2001, does not mention the content of the package, and that this document should be refuted as evidence as it could contain any paper or object.

(6) For further details to the facts, evidence and arguments submitted by the Applicant and the Holder reference is made to the documents on file.

II. GROUNDS OF THE DECISION

A. Admissibility

(7) The request of the Applicant for invalidation of the CD is based on 'the lack of novelty, Article 5, para 1, b of the EC Design Directive and lack of individual character, Article 6, para 1 of the EC Design Directive'. The reference to the 'EC Design Directive' is deemed to be an obvious mistake and does not affect the admissibility of the Application. The statement of lack of novelty and individual character of the CD is a statement on the grounds on which the Application is based. Therefore, the requirement of Article 28(1)(b)(i) CDIR ⁽²⁾ is fulfilled. The legal basis for a declaration of invalidity of a registered Community design due to lack of novelty and/or individual character is constituted by Article 25(1)(b) CDR. The further requirements of Article 28(1) CDIR are fulfilled as well. The Application is admissible.

B. Substantiation

B.1 Disclosure

(8) The document D2 through D4 provided by the Applicant are evidence that the *Kiss Mixer* as shown in D4 was used in trade and therefore the appearances of its component parts are prior designs which have been made available to the public prior to the date of filing of the CD in accordance with Article 7(1) CDR.

(9) The observations by the Holder as regards are limited to D4 and do not prevail, because the prior design is disclosed on the carton box. It is not relevant for the fact of the disclosure whether the box actually included a mixer at the time when the mail was sent.

B.2 Novelty

(10) The CD and the prior design both concern the cup of a mixer. D4 discloses a mixer comprising a base and a cup mounted on top of the base. Next to the mixer, an

⁽²⁾ Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs.

assortment of three additional cups is shown.

(11) When comparing the CD with the prior design of the cup mounted on the base, the following can be noted: both cups are cylinder-shaped, transparent, with rounded tops and practically identical proportions. Moreover, both designs have four outside rims going from the bottom to the top, which are located apart from one another at angles of 90 degrees.

(12) In D4 the lower portion of the cup mounted on the mixer is not visible. However, it is evident from the display of the cups positioned next to the mixer that the cups of CD and the prior design are identically shaped in their lower portions, too.

(13) A close comparison of the evidence submitted does not show any immediately apparent difference. Furthermore, the Holder has not provided any argument that would allow considering that such difference exists.

(14) The two opposing designs are identical. Therefore, the CD lacks novelty in view of the prior design.

C. Conclusion

(15) The CD does not fulfil the requirement of novelty as stated in Article 5 CDR. Therefore, the CD is to be declared invalid according to Article 25(1)(b) CDR.

III. COSTS

(16) Pursuant to Article 70(1) CDR and Art. 79(1) CDR, the Holder bears the fees and costs of the Applicant.

IV. RIGHT TO APPEAL

(17) An appeal shall lie from the present decision. Notice of appeal must be filed at the Office within two months after the date of notification of that decision. The notice is deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the decision, a written statement setting out the grounds of appeal must be filed (Art. 57 CDR).

DECISION OF THE INVALIDITY DIVISION

of 20 September 2005

in the proceedings for a declaration of invalidity of a registered Community design

File number: ICD 000000396

(Language of the proceedings: English)

Applicant:
Servicios de Distribución e Investigación, S.L.
(Spain)

Representatives:
Antonio Donaque Sola
(Spain)

against

CD proprietor:
Parmandand (H.K.) LTD.
(HONG KONG)

Representative:
BOTTI & FERRARI
(Italy)

THE INVALIDITY DIVISION,

composed of Martin Schlötelburg (rapporteur), Paul Maier (member) and José Izquierdo Peris (member) took the following decision on 20/09/05:

- 1. The registered Community design No. 000039847-0001 is declared invalid.**
- 2. The Holder shall bear the costs of the Applicant.**

I. FACTS, EVIDENCE AND ARGUMENTS

(1) The Community design No. 000039847-0001 (in the following: 'the CD') has been registered in the name of the Holder with the date of filing of 10/06/03 and the date of priority of 07/03/03. In the CD, the indication of products reads 'radio receivers' and the design is represented in the following seven views (published at http://oami.eu.int/bulletin/rcd/2003/2003_026/000039847_0001.htm):



(2) On 04/08/04, the Applicant filed an application for a declaration of invalidity (in the following: 'the Application') contesting the validity of the CD. The fee for the Application was paid by bank transfer with effect of 04/08/04.

(3) Using the Office's form for an application for a declaration of invalidity of a registered Community design, the Applicant marked the grounds 'challenged Community design does not fulfil the requirements of Articles 4 to 9 CDR' and the grounds 'other(s) according to Article 25(1)(c), (d), (e), (f) or (g) CDR'. He argues that the 'design contested does not fulfil the novelty requirements established in art. 4 and should, therefore, be declared invalid'. With letter of 18/04/05 the Applicant submits that 'it should be noted that the previous design was protected from a date prior to that of the community design' and observed that 'in conclusion, pursuant to section b and d of article 25.1, it is clear and evident that the community design no. 39847-0001 is null and void and therefore, it should be declared invalid.'

(4) As evidence, the Applicant provided *inter alia* a copy of the registration certificate of the Spanish design registration 156309 (in the following: D1) and documents showing that on 25/02/03 the Applicant has filed an application for the registration with the Spanish Patent and Trademark Office; the indication of products reads 'radio casing'. The Spanish design application has been published on 16/07/03 and registered on 10/10/03. The registration regards the following design (in the following: prior design):



(5) In reply the Holder observes that the CD has been filed prior to the date of publication of the Spanish design and therefore, the novelty and individual character of the CD are not affected. Furthermore, the Holder submits that the Spanish design includes only one drawing showing the contour of a man-shaped radio casing. 'Although there is no doubt that said contour is very similar to the contested design, the later has however some own features which would confer to it not only the novelty but also the required individual character over the above Spanish design.'

(6) For further details to the facts, evidence and arguments submitted by the Applicant and the Holder reference is made to the documents on file.

II. GROUNDS OF THE DECISION

A. Admissibility

(7) The indication of the grounds for invalidity on the form of the Office is a statement of the grounds on which the Application is based in the meaning of Art. 28(1)(b)(i) CDIR⁽¹⁾. Furthermore, the Application complies with Art. 28(1)(b)(vi) CDIR, since the attachment contains an indication of the facts, evidence and arguments submitted in support of those grounds. In particular as regards the ground of Art. 25(1)(d) CDR, the Application contained a representation and particulars identifying the prior design and showing that the applicant is entitled to invoke the earlier design as a ground for invalidity pursuant to Art. 25(3) CDR. The other requirements of Art. 28(1) CDIR are fulfilled as well. The Application is admissible.

B. Substantiation

(8) The ground for invalidity of Art. 25(1)(d) CDR applies where the CD is in conflict with a prior design which is protected by a registered design right of a Member State. Therefore, where the prior

design is used in the CD, the latter is invalid pursuant to Art. 25(1)(d) CDR.

(9) D1 gives evidence that the Applicant is entitled to a prior design right in the meaning of Art. 25(1)(d) CDR. The prior design has been filed for registration in Spain on 25/02/03, i.e. prior to the date of filing of the CD. The ground for invalidity of Art. 25(1)(d) CDR is rightfully invoked.

(10) It thus remains to evaluate whether the CD falls in the scope of protection of the earlier design. The representations do not show important differences. The man-shaped contour of the radio casing of D1 is identical to the contour of the radio receiver of the CD. The 'hand' of the stylized person and the control wheel on the right-hand side of the casing seem to mark a difference. However, such elements constitute immaterial details. The Holder states that there are 'new features' in the CD, but does not substantiate this claim. The Invalidity Division does not see 'new features' and must therefore declare the CD invalid pursuant to Art. 25(1)(d) CDR.

C. Conclusion

(11) The CD is in conflict with the prior Spanish design right of the Applicant. Therefore, the CD is invalid pursuant to Article 25(1)(d) CDR.

III. COSTS

(12) Pursuant to Article 70(1) CDR and Art. 79(1) CDIR, the Holder bears the costs incurred by him essential to the proceedings.

IV. RIGHT TO APPEAL

(13) An appeal shall lie from the present decision. Notice of appeal must be filed at the Office within two months after the date of notification of that decision. The notice is deemed to have been filed only when the fee for appeal has been paid. Within four months after the date of notification of the

decision, a written statement setting out the grounds of appeal must be filed (Art. 57 CDR).

⁽¹⁾ Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs.

LISTA DE LOS REPRESENTANTES AUTORIZADOS ANTE LA OFICINA
DE ARMONIZACIÓN DEL MERCADO INTERIOR
(MARCAS, DIBUJOS Y MODELOS)

LISTE DER ZUGELASSENEN VERTRETER BEIM
HARMONISIERUNGSAMT FÜR DEN BINNENMARKT
(MARKEN, MUSTER UND MODELLE)

LIST OF PROFESSIONAL REPRESENTATIVES BEFORE THE OFFICE
FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

LISTE DES MANDATAIRES AGRÉÉS AUPRÈS DE L'OFFICE
DE L'HARMONISATION DANS LE MARCHÉ INTÉRIEUR
(MARQUES, DESSINS ET MODÈLES)

ELENCO DEI MANDATARI ABILITATI PRESSO L'UFFICIO
PER L'ARMONIZZAZIONE NEL MERCATO INTERNO
(MARCHI, DISEGNI E MODELLI)

*(Véanse también las comunicaciones del Presidente de la Oficina / Siehe auch die
Mitteilungen des Präsidenten des Amtes / See also the communications of the
President of the Office / Voir aussi les communications du président de l'Office /
Vedi anche le comunicazioni del presidente dell'Ufficio)*

*n° 1/95, DO/ABI./OJ/JO/GU n° 1/95, p. 16
n° 2/99, DO/ABI./OJ/JO/GU n° 7-8/99, p. 1003
n° 10/02, DO/ABI./OJ/JO/GU n° 9/02, p. 1636
n° 12/02, DO/ABI./OJ/JO/GU n° 3/03, p. 525*

PARTE A: / TEIL A: / PART A: / PARTIE A: / PARTE A:

**Lista de representantes autorizados contemplada en el artículo 89
del Reglamento sobre la marca comunitaria
Liste der zugelassenen Vertreter gemäß Artikel 89
der Gemeinschaftsmarkenverordnung
List of professional representatives according to Article 89
Community Trade Mark Regulation
Liste des mandataires agréés conformément à l'article 89
du règlement sur la marque communautaire
Elenco dei mandatari abilitati ai sensi dell'articolo 89
del regolamento sul marchio comunitario**

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**Lista especial de representantes autorizados contemplada en el artículo 78
del Reglamento sobre los dibujos y modelos comunitarios
Besondere Liste zugelassener Vertreter gemäß Artikel 78 der
Gemeinschaftsgeschmacksmusterverordnung
Special list of professional representatives according to Article 78
Community Designs Regulation
Liste spécifique des mandataires agréés conformément à l'article 78
du règlement sur les dessins ou modèles communautaires
Elenco speciale di mandatari abilitati ai sensi dell'articolo 78
del regolamento sui disegni e modelli comunitari**

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