



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

DESIGNS DEPARTMENT- INVALIDITY DIVISION

**DECISION OF
THE INVALIDITY DIVISION
OF 01/12/05**

**IN THE PROCEEDINGS FOR A DECLARATION OF INVALIDITY
OF A REGISTERED COMMUNITY DESIGN**

FILE NUMBER	ICD 000000867
COMMUNITY DESIGN	000225073-0001
LANGUAGE OF PROCEEDINGS	English
APPLICANT	Ampel 24 Vertriebs-GmbH & Co KG Dorfsstrasse 27 D-24587 Fahrsdorf Germany
REPRESENTATIVE OF APPLICANT	Boehmert & Boehmert Niemannsweg 133 D-24105 Kiel Germany
HOLDER	Daka Research Inc. P.O. Box 957, Offshore Incorporations Centre Road Town, Tortola, BV1 Virgin Islands (British)
REPRESENTATIVE OF THE HOLDER	Klunker, Schmitt-Nilson, Hirsch Winzerstr. 106 D-80797 München Germany

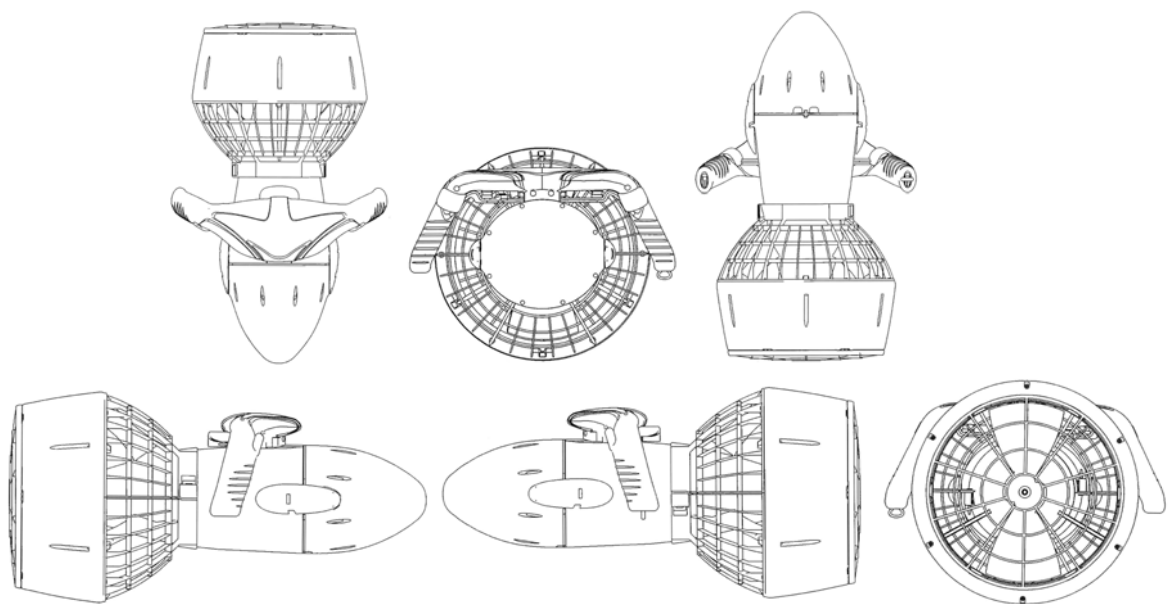
The Invalidity Division,

composed of Martin Schlötelburg (rapporteur), June Davies (member) and José Izquierdo Peris (member) took the following decision on 01/12/05:

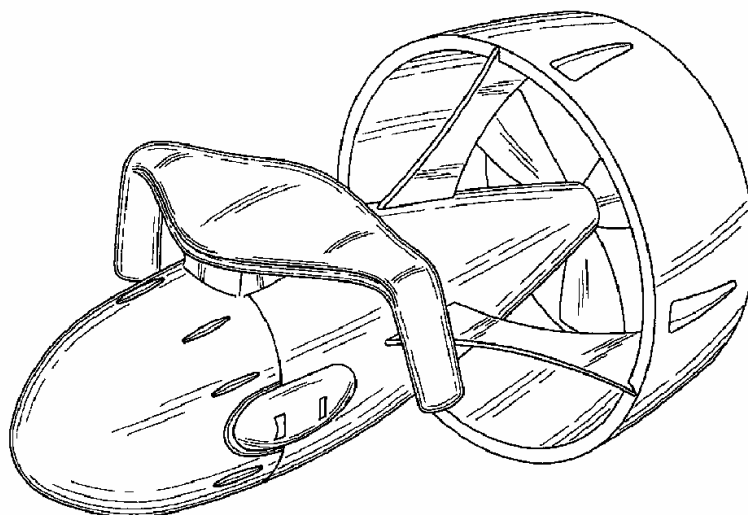
1. **The registered Community design No. 000225073-0001 is declared invalid.**
2. **The Holder shall bear the costs of the Applicant.**

I. FACTS, EVIDENCE AND ARGUMENTS

- (1) The Community design No. 000225073-0001 (in the following: “the CD”) has been registered in the name of the Holder with the date of filing of 25/08/04. In the CD, the indication of products reads “underwater motive devices” and the design is represented in the following six views (published at http://oami.eu.int/bulletin/rcd/2004/2004_094/000225073_0001.htm):



- (2) On 08/04/05, 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 08/04/05.
- (3) Using the Office’s form for an application for a declaration of invalidity of a registered Community design, the Applicant indicated the grounds “challenged Community design does not fulfill the requirements of Articles 4 to 9 CDR” and argues that the CD is invalid “since it does not fulfill the requirements of novelty with respect to Art. 4 CDR in view of Art. 25 b) CDR. Most features are necessary for technical function (cf. Art. 8 CDR).”
- (4) As evidence, the Applicant provides *inter alia* a copy of US design patent 471,506 filed on 01/03/02 and published on 11/03/03 for a “underwater motive device” (in the following: D1). D1 discloses the following design:



- (5) Furthermore, the Applicant submits a letter from the Holder wherein the Holder warns the Applicant not to copy his design for an underwater motive device. In the letter, the Holder writes that the device has been “first put on the market in June 2002 in the EU and worldwide”.
- (6) In reply to the submissions of the Applicant, the Holder requests the rejection of the Application as being unfounded. In his reply, the Holder confirms that a “product named ZS01 has been on the market since June 2002 also in Europe.” Furthermore, the Holder provides “a photograph of the respective underwater motive device ZS01” (in the following D2) as follows:



- (7) The Holder explains that “the main differences between the CD (= ZS05) and D2 (= ZS01) are with the handle element”, the CD having “a more pronounced appearance of the handle element”.
- (8) 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

- (9) 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) CDIR¹. 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. The other requirements of Art. 28(1) CDIR are fulfilled as well. The Application is admissible.

B. Substantiation

B.1 Disclosure

- (10) Both parties provided evidence for the fact that the design shown in D2 has been made available to the public in 2002, notably “at the occasion of the ISPO fair in Munich in August 2002”. Therefore, the prior design disclosed in D2 is considered as having been made available to the public prior to the date of filing of the CD in accordance with Article 7(1) CDR

B.2 Novelty

- (11) All the features of shape and contours specified in the drawings representing the CD are anticipated by the prior design shown in D2 except as regards the handle elements which are contoured in the CD and flat in D2. Furthermore, the handle elements of the CD comprise switches which are not present in D2.
- (12) The shape of the handle element, the difference in color and in the use of signs are not immaterial details in the design of an underwater motive device. Therefore, the CD and the prior design are not identical in the meaning of Article 5 CDR. It follows that the prior design shown in D2 does not form an obstacle to the novelty of the CD.

B.3 Individual Character

- (13) The informed user is familiar with underwater motive devices. When assessing the overall impression, the informed user takes into account that the degree of freedom of the designer is limited in so far as these devices necessarily comprise a body having an overall shape of a longitudinal extension and handle elements attached to the body.
- (14) However, the CD does not subsist in features of appearance solely dictated by the technical function of the underwater motive device. The device would still fulfill its function with a body of different shape. For instance, the designer could have chosen a more symmetrical shape for the body of the device such as a cylinder instead of the asymmetrical form realized in the CD. Likewise, the handle element could have

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

been formed by two separated grips on the sides of the body instead of the unique piece attached on top of the body of the CD. Therefore, the informed user will take all features of appearance into account when assessing the overall impression of the prior design and CD, respectively.

- (15) Since the differences between the two opposing designs are limited to minor deviations in the shapes of the handle elements, the colour and the use of signs, the CD and the prior design both produce the same overall impression on the informed user. Therefore, the CD lacks individual character in view of the prior design.

C. Conclusion

III. COSTS

- (16) 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

- (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).

THE INVALIDITY DIVISION

Martin Schlötelburg

June Davies

José Izquierdo Peris