



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

DESIGNS DEPARTMENT- INVALIDITY DIVISION

**DECISION OF
THE INVALIDITY DIVISION
OF 23/04/07**

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

FILE NUMBER	ICD 000002707
COMMUNITY DESIGN	000425608-0015
LANGUAGE OF PROCEEDINGS	English
APPLICANT	Andrzej Madrzyk Kielkoppelstr. 18a 22149 Hamburg Germany
REPRESENTATIVE OF THE APPLICANT	Kanzlei Kähler Kollegen Thielbek 6 20355 Hamburg Germany
HOLDERS	Władysław Binda ul. Wiśniowa 14/50 43-300 Bielsko Biala Poland
	Izabela Misterka ul. Antenowa 3 43-300 Bielsko Biala
REPRESENTATIVE OF THE HOLDERS	ABAPAT Biuro Patentowe Urszula Trawińska ul. Piasta 16/5 44-200 Rybnik Poland

The Invalidity Division,

composed of Martin Schlötelburg (rapporteur), Eva Vyoralova (member) and Eva Udovc (member) has taken the following decision on 23/04/07:

1. **The application for a declaration of invalidity of the registered Community design No. 000425608-0015 is rejected.**
2. **The Applicant shall bear the costs of the Holders.**

I. FACTS, EVIDENCE AND ARGUMENTS

- (1) The Community design No. 000425608-0015 (in the following: “the RCD”) has been registered in the name of the Holders with the date of filing of 31/10/05. In the RCD, the indication of products reads “Candles” and the design is represented in the following one view (published at http://oami.europa.eu/bulletin/rcd/2006/2006_013/000425608_0015.htm):

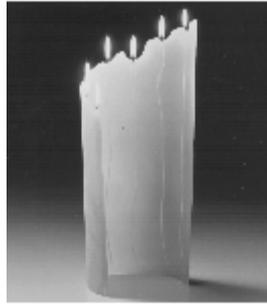


- (2) On 01/06/06, the Applicant filed an application for a declaration of invalidity (in the following: “the Application”) contesting the validity of the RCD. The fee for the Application was paid by bank transfer with effect of 01/06/06.
- (3) The Applicant requests the invalidation of the RCD “because of its lack of novelty and individual character”.
- (4) As evidence, the Applicant provided the following documents:
 - A copy of a publication of the International design registration no. DM/054915 (in the following: D1), registered on 30/03/2000 and published on 31/03/01, showing *inter alia* the following views:

3.1



3.2



- Various copies of a part of the catalogue of “ART-MILL” (in the following: D2)
- Various copies of a catalogue of “Elem Candle ®” (in the following: D3)
- A copy of a publication of the Polish design registration no. 2959 (in the following: D4), published on 31/10/03, showing the following view:

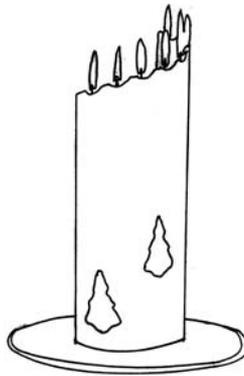


FIG. 1

- A copy of a printout of the website <http://web.archive.org> regarding the website www.belladecor.pl (in the following: D5)
 - A copy of a printout of the website www.belladecor.pl (in the following: D6) containing the remark “2003-2005 © Bella Decor”
 - A copy of a declaration of Mr. Filip Madrzyk (in the following: D7), containing views of a flyer showing candles, which should have been ordered in 2003; the affidavit also indicates that “about 1.500 (one thousand five hundred) pieces of the catalogue have been distributed, especially on the occasion of exhibitions, in 2003 and 2004.”
 - A copy of an excerpt from the Polish company register (in the following: D8) indicating the starting date and the liquidation date of the Company ART-MILL.
- (5) The Applicant claims that “the bodies of the candles have the shape of a trapezoid and are arcuated semi-cylindrical. The bottom line of the candles is right-angled and used as bearing area of the candle. The top line with protruding wicks is beveled. The wicks are arranged in parallel

lines". He holds that the RCD "contains exactly the candle" that is shown in D1. Additionally, he states that "the candle which is object of the design in is characterized by the highly individual and for candles unusual candle-body in the shape of a hollow cylinder with beveled upper edge". Furthermore, the Applicant holds that "the texture of the candles which are shown in the contested design is irrelevant" and "does not lead to an impression on the informed user which differs from the overall impression produced on such a user by any design". He claims that the RCD "shows a product which has been published by the opponent himself more than five years before the application of the contested Community design".

- (6) In his reply the Holders argue that the design meets the requirements of Article 5 and 6 CDR¹. He states that the RCD and the design presented in D1 "differ in shape of a product as the whole, texture, presence of the base and colouring". Furthermore, the Holders observe that D2, D3 and D5 are not dated. He even holds that D2 has never been brought into circulation. Therefore, the Holders request the rejection of the Application.
- (7) On 15/03/07 the Office informed both parties that the written proceedings were closed and that a decision concerning the invalidity would be taken.
- (8) For further details to the facts, evidence and arguments submitted by the Applicant and the Holders 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) CDIR². 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.

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

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

B. Substantiation

B.1 Evidence

- (10) D1 and D4 are evidences showing that the indicated designs have been made available to the public before the priority date of the RCD within the meaning of Article 7(1) CDR. In contrast, D2, D3, D5 and D6 are not evidence for such a disclosure because none of them bears any indication of a date. The copyright remark of D6 and the indication of the liquidation date of the company ART-MILL in D8 are not considered suitable to prove any disclosure of a prior design to the public. D7 does not prove any distribution of the mentioned catalogue because it does not bear any indication regarding to the specific time, the place or the name of a person who would have received such a catalogue.

B.2 Novelty

- (11) According to Article 5 CDR the RCD lacks novelty when an identical design has been made available to the public prior to the date of filing of the RCD. Designs shall be deemed to be identical if their features differ only in immaterial details.
- (12) The RCD and the designs disclosed in D1 and D4 all concern the design of candles. The RCD consists of a longish hollow cylinder which is not closed completely. The upper edge is inclined, the line is ascending each semi-circle, and bears a lot of wicks. The cylinder has a textured surface and is situated on a circular base plate. The candle as a whole is divided in a green and a yellow half. In contrast, the design disclosed in D1 consists of a trapezoid shaped body which is bent semi-circularly, the upper edge is inclined and bears a lot of wicks. However, the candle body has a plain surface and no base plate. These differences are not only immaterial details. Therefore, the two designs are not identical within the meaning of Article 5 CDR.
- (13) The design disclosed in D4 also consists of flat body which is bent semi-circularly and bears a lot of wicks on the inclined upper edge. The candle body is located on a circular base plate. Its surface is plain and shows a pattern. In contrast, the body of the RCD is not only semi-circularly shaped but cylindrical and fully textured. Due to these differences, which are not immaterial details, the two designs are not identical within the meaning of Article 5 CDR.

B.3 Individual character

- (14) A design has an individual character if the overall impression it produces on the informed user differs from the overall impression

produced on such a user by any prior design which has been made available to the public.

- (15) The informed user is familiar with the design of candles. He is aware that the degree of freedom of a designer concerned with candles is limited only in so far as there must be at least one wick surrounded by wax or similar material.
- (16) In the present case, the overall impression produced on the informed user by the RCD differs from the overall impressions produced by the mentioned prior designs. The designs disclosed in D1 and D4 show only a flat, semi-circularly bent candle body whereas the RCD represents an almost closed hollow cylinder. Furthermore, the RCD has a textured surface whereas the surface of the candles in D1 and D4 is flat. This surface combined with a totally different form as a whole is a very important feature and leads to different overall impressions produced on the informed user. And finally, the RCD comprises two colours whereas the prior designs do not disclose any specific colour.
- (17) Therefore, the prior designs raised do not form any obstacle to the individual character of the RCD.

C. Conclusion

- (18) None of the facts and evidence provided by the Applicant supports the invoked ground for invalidity of Article 25(1)(b) CDR. Therefore, the Application has to be rejected.

III. Costs

- (19) Pursuant to Article 70(1) CDR and Art. 79(1) CDIR, the Applicant shall bear the fees and the costs of the Holders.

IV. RIGHT TO APPEAL

- (20) 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 this 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

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