



A selective review of year 2 of OHIM design cases before Luxembourg

Gordon Humphreys

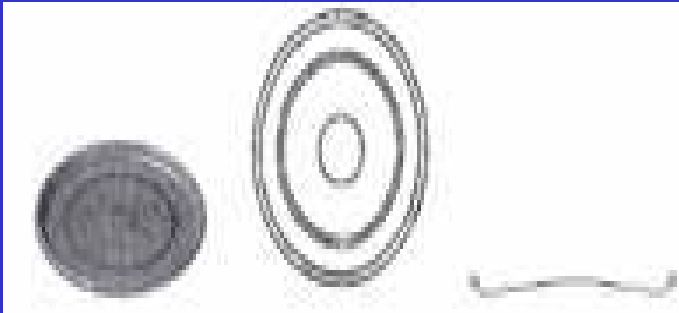
**Member, Board of Appeal
Office for Harmonization in the Internal Market**

Fordham IP Conference, New York, 11-13 April 2012



C-281/10 of 20 October 2011, 'POG'

Challenged RCD



Earlier design

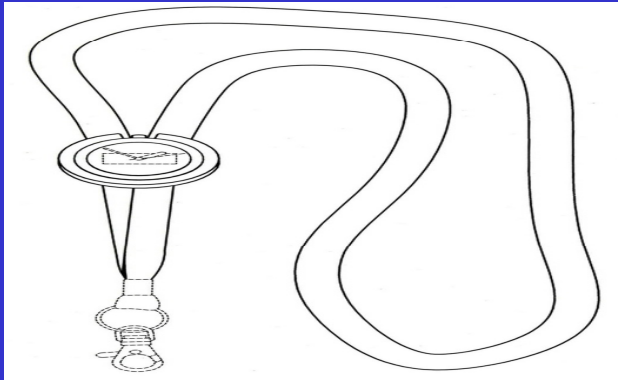


- **Informed user:** between average consumer and sectorial expert; Not a designer or technical expert
- **Level of attention:** relatively high degree of attention; knows designs in the sector.
- **Imperfect recollection:** direct comparison is the rule except when impracticable or uncommon.
- GC may give some latitude to OHIM in highly technical assessments.
- Comparison of the actual goods for illustrative purposes.



T-68/10 of 14 June 2011, WATCHES

Challenged RCD



Earlier design

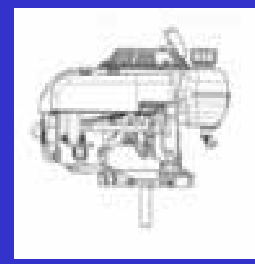
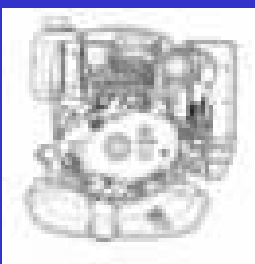
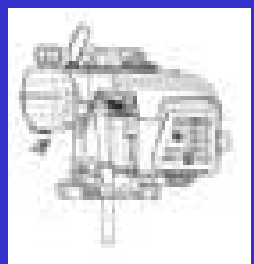
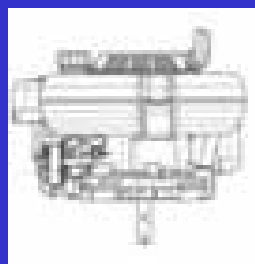
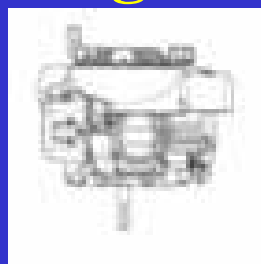


- A manufacturer's invoice can evidence disclosure.
- One group of informed users is sufficient.
- Disclaimers and design freedom.
- Product use determines the impression on the informed user.

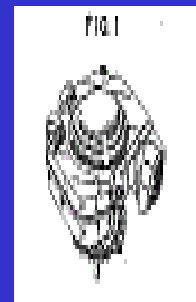
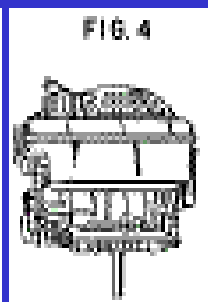
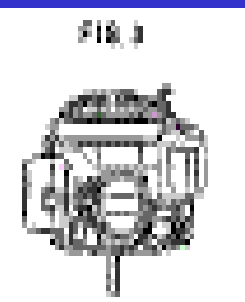
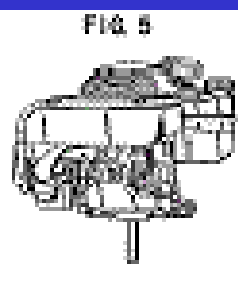
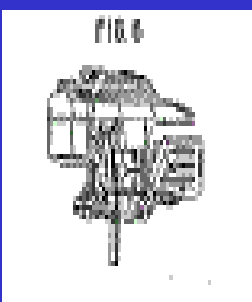
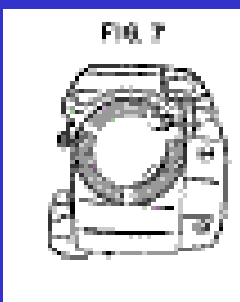


Case T-10/08 and Case T-11/08 of 9 September 2011, 'Internal combustion engine'

Challenged RCD



Earlier design





‘Internal combustion engine’ (continued)

- Visibility of component parts during normal use.
- Informed user: someone who needs to purchase a mower and has become informed on the subject.
- Relatively high attention but will not necessarily distinguish technical functions from arbitrary ones.
- Designer’s freedom: the greater it is the less likely it is that minor differences produce a different overall impression.
- Overall impression on the informed user is shaped by basic structures and not differences in details.

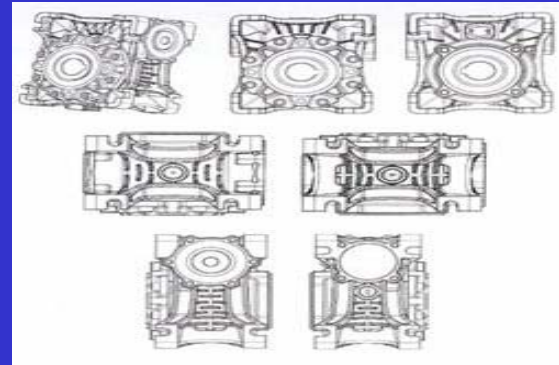


T-246/10 of 6 October 2011, 'REDUCERS'

Challenged RCD



Earlier RCD

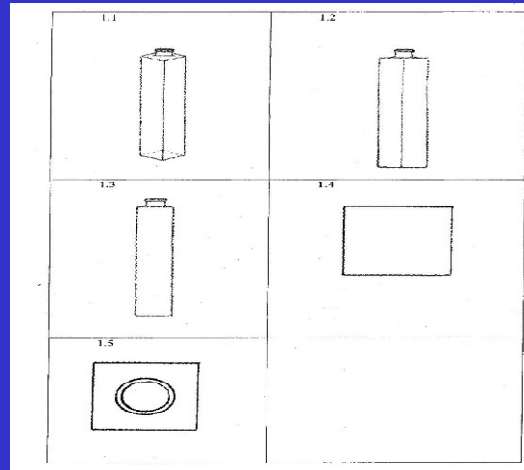


- Informed user = someone using this kind of product in his work
- Designer's freedom not proved to be limited (no discussion of technical functions)
- No denial that designs shared most characteristics
- Orientation of cooling fins = insignificant detail (location)
- Board entitled to take the whole shape into account.



Judgment of 9 March 2012, T-450/08, 'FLASK'

Challenged RCD



- Evidence of disclosure
- Form of evidence is at the discretion of the invalidity applicant
- Overall assessment of the evidence
- No proof by probabilities or suppositions; solid and objective evidence required
- Affidavits
- No role for bad faith



THE END

THANK YOU FOR YOUR ATTENTION!