

What's in a year in Luxembourg? Learning from recent case law on registered Community designs

1. Introduction

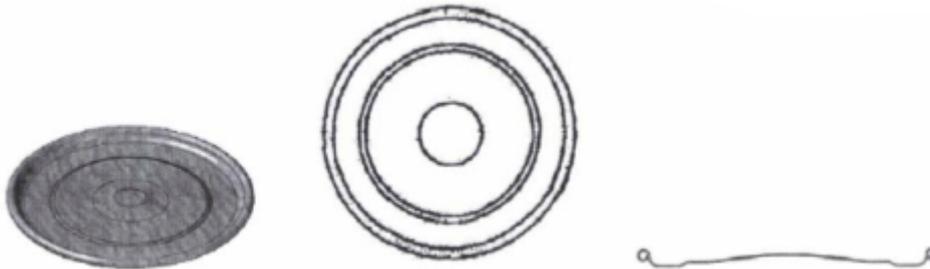
Although applicants were able to apply to register Community designs from 1 April 2003 onwards, it took nearly seven years before the first designs' judgment was handed down by the General Court on 18 March 2010¹. Despite this slow start to litigation, some five judgments² and two orders³ dealing with RCDs have emanated from the General Court in a nine-month period in 2010. One of those orders was even appealed to the Court of Justice and, in the space of nearly four months, it became, in turn, the subject of an order⁴ of the European Union's highest Court.

This presentation will look at what came out of those cases in matters ranging from admissibility issues to defining the informed user, designer's freedom, conflicts with earlier national figurative mark, proof of use, making available to the public, and overall impression. Consideration will be given to the practical implications of these judgments and why, not even the highest judicial instances of the European Union, can please all of the people all of the time.

2. Metal Rappers⁵

a) Judgment

PepsiCo Inc. obtained the following RCD for 'promotional items for games'.



An invalidity claim was subsequently filed by a Spanish company, based on the following prior RCD for 'metal plate[s] for games'.

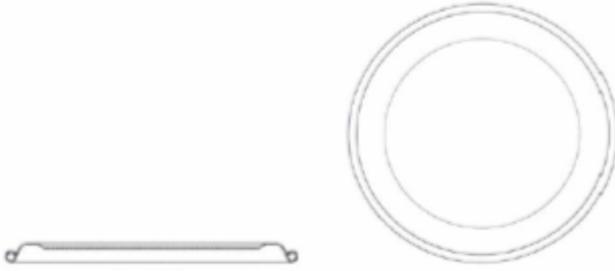
1 Case T-9/07 Grupo Promer Mon Graphic SA v OHIM ('Metal Rappers').

2 'Metal Rappers', cited above; Case T-148/08 of 12 May 2010, Beifa Group Co. Ltd v OHIM ('Instruments for writing'); Case T-153/08 of 22 June 2010, Shenzhen Taiden Industrial Co. Ltd v OHIM ('Communications equipment'); Case T-153/09 of 16 December 2010, Jose Manuel Baena Grupo, SA v OHIM ('Ornamentation').

3 Case T-98/10 of 10 May 2010, Fransson Verkstader AB v OHIM ('Chaff Cutters') and Case T-51/10 of 18 June 2010, Bell & Ross BV v OHIM ('Watches').

4 Case C-290/10 P of 9 September 2010, Fransson Verkstader AB v OHIM ('Chaff Cutters').

5 Cited in fn. 1.



The invalidity applicant invoked lack of novelty and individual character as well as the existence of a prior right⁶.

Although the Invalidity Division accepted the invalidity claim, that decision was reversed by the Board of Appeal⁷. For the Board, the goods covered by the contested design were in fact for ‘pogs’, ‘tazos’ and ‘rappers’. The freedom of the designer was thus severely restricted and, taking into account the different profile of the designs, the overall impression they produced on the informed user was different.

The first substantive issue with which the General Court had to deal was whether the proprietor of the contested RCD had acted in bad faith by effectively copying the basic lines of the design, when it had – on a private and confidential basis – known of the invalidity applicant’s prior design. Rather than becoming embroiled in this issue, the Court simply noted that bad faith is not a ground for invalidity in RCD matters. Where, as in this case, novelty and individual character are at issue, the conduct of a party is irrelevant. This means that it did not matter whether the proprietor of the contested RCD intended to copy. Moreover, the fact that the design had been revealed on a private and confidential basis (in a letter), did not amount to ‘disclosure’ and therefore did not affect the invalidity applicant’s prior right.

Regarding the necessity of ‘conflict’ between the prior design and the contested RCD⁸, the Court observed that the notion of ‘conflict’ is not defined by the applicable legislation. Yet, only designs that have an application or priority date earlier than that of the contested RCD, and conflict with that contested right may invalidate it. Having considered various language versions of the CDR, the Court held that there is a ‘conflict’ where ‘taking into consideration the freedom of the designer in developing the Community design, that design does not produce on the informed user a different overall impression from that produced by the prior design relied upon’⁹.

The invalidity applicant claimed that the Board had been wrong to narrow down ‘promotional items for games’ to ‘pogs’, ‘rappers’ and ‘tazos’, since they are not a homogeneous category. The Court disagreed. Although the indication of products in the RCD application for registration is compulsory, it does not affect its scope of protection. Instead, the Court considered that regard must be had to whether, accounting for the design itself, it could be placed in a broader category

⁶ Article 25(1)(b) and (d) CDR.

⁷ R1001/2005-3.

⁸ Article 25 (1) (d) CDR.

⁹ Paragraph 30 of the judgment.

of goods than that indicated. This will impact on identifying the informed user and help establish the degree of design freedom available. In the Court's view, the contested design itself shows that it is for a particular category of promotional items. Moreover, Pepsi Co. had shown that it had been marketing 'tazos' since 1995.

The identity of the 'informed user' was also in dispute. First, the Court noted that the informed user is particularly observant and will have some awareness of the state of prior art. Next, the Court agreed with the Board that such a user could be a 5-10 year-old child or a marketing manager.

Regarding the degree of freedom of the designer, the Court confirmed that the technical functions of a product and the statutory requirements relating to it (e.g. health and safety or product liability considerations) determine its acceptance in the marketplace. Thus, the round shape of the contested RCD, its flat features and curves towards the centre are necessary for the products to be accepted on the marketplace. These features limit design freedom and thus, in this case, the Board was right to find that the designer's freedom was 'severely restricted'¹⁰.

Taking the foregoing into account, the overall impression on the informed user, with some knowledge of prior art, would be that the flat shape and size of the disks compared would not be remembered: these are common features to all such product designs. Neither would the rounded edges of the designs be remembered because these are simply product safety features and would not attract the informed user's attention. On the other hand, the raised rounded edge and that the central, raised part of both disks have a similar dimension and are features where there was considerable design freedom. These will attract the informed user's attention. This is also because those similar features are in the most visible parts of the design (unlike the differences in curvature in the designs compared that are slight and not easily perceived). Accordingly, the Court held that the Board had been wrong to find that the designs produce a different overall impression and annulled the contested decision.

b) Importance

That bad faith has no role to play in invalidity claims in RCD cases is almost certainly correct. It is not listed as one of the grounds for invalidity and its absence is purposeful rather than some sort of oversight.

The definition that the Court gives to the notion of 'conflict' in paragraph 52 of the judgment is undoubtedly useful. When features that are attributable to limitations in the freedom of design are eliminated from the equation, then two designs that give an overall impression on the informed user that do not differ from one another, are in conflict. However, determining who is the 'informed user' and the role of that person's awareness of the 'state of prior art' in the analysis are still somewhat unknown quantities. According to the Court, the informed user could be a professional (a marketing manager) or a child – but the Court was somewhat non-committal on this point. It seems it would not be a

¹⁰ Paragraph 70 of the judgment.

manufacturer or supplier. However, on any scenario, a high level of attention is assumed.

Determining the product covered by the contested design, when considering the overall impression, was crucial in this case. If the contested design had not been confined to pogs, rappers and tazos, but had remained subject to the wider category of 'promotional items for games', this would have had a significant impact on considerations of design freedom and thus on the significance of common features. In short, it would have been much easier to establish that the designs were in conflict. The Court was instead prepared to consider that while the indication given of the product was to be taken into account, of paramount importance was the nature of the design, which could, as in this case, justify using a much narrower product category as a basis for analysis.

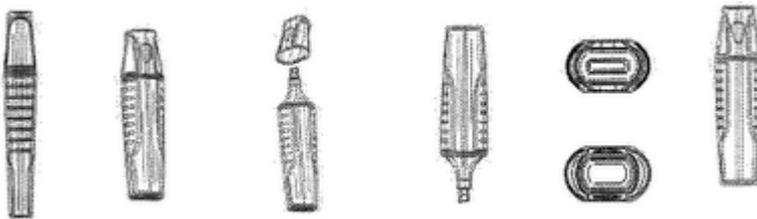
It is interesting to note that the General Court completely agrees with the main reasoning given by the Board: the category of goods, the limited degree of freedom of the designer for these types of goods, the high level of information that the users of those goods have and fashion and tendencies of the market. In the end, features that arguably would require a very high level of attention even to notice were enough to justify the finding that the Board erred in finding that the designs compared gave a different overall impression.

In view of this last comment, it is perhaps not surprising that OHIM appealed the judgment to the Court of Justice. The oral hearing has been held and judgment is expected shortly.

3. Instruments for writing¹¹

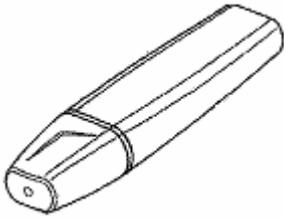
(a) Judgment

Beifa Group obtained an RCD in respect of 'products for writing' for the following design:



Stabilo sought a declaration of invalidity, based on its earlier German mark (below) registered for Class 16 products.

¹¹ Cited in fn. 2.



The Board of Appeal¹² dismissed the RCD proprietor's appeal from the decision of the Invalidity Division¹³. First, the Board found that, since the earlier mark is a valid national trade mark under the relevant provisions of the German Trade Mark Law¹⁴, it had to be regarded as a distinctive sign within the meaning of Article 25(1)(e) CDR¹⁵. Second, it was not necessary for the distinctive sign to have been reproduced identically in the subsequent design; it was enough for it to have been incorporated, as such, in that design. Third, although there were some differences between the contested RCD and the earlier mark, it was possible to discern the characteristic features of that mark in the design, which meant that use of the contested design would be in breach of the exclusive rights conferred on the proprietor of the earlier mark.

The RCD proprietor appealed this decision to the General Court, first, by claiming that the comparison of the earlier mark and the contested sign was incomplete and inaccurate and that the Court should refer the case back to the the Invalidity Division for it to consider the other evidence submitted by Stabilo that had previously not been considered, second, by challenging genuine use of the earlier mark and, third, by arguing that 'use' within the meaning of Article 25 (1) CDR requires use of the earlier distinctive sign itself.

The Court recognized that its 'jurisdiction to annul or alter the contested decision'¹⁶ would include, if necessary, the possibility of referring the case back to OHIM. It is for the Office to draw the appropriate inferences from the Court's judgment but the Court has no jurisdiction to issue directions to the OHIM.

Regarding the contested RCD proprietor's argument that, for Article 25(1)(e) CDR to apply, the sign used in the design would have to be identical to the earlier mark to constitute 'use' of it, the Court held that a 'full and detailed' reproduction of the earlier distinctive sign was not necessary. It is enough for the signs to be similar¹⁷. The public will not necessarily notice omitted or additional features, particularly where they are of secondary importance and especially in

12 R1352/2006-3.

13 The Invalidity Division is consistently referred to in the English version of the judgment as the Cancellation Division. This is simply an error of translation.

14 *Merkengesetz*.

15 'If a distinctive sign is used in a subsequent design, the Community law or the law of a Member State governing that sign confers on the right holder of the sign the right to prohibit such use'.

16 Article 61 CDR.

17 Para. 52.

the case of an earlier mark where the imperfect recollection principle would operate¹⁸.

The RCD proprietor argued that the Board had been wrong to ignore its request for proof of use of the earlier mark because Article 25(1)(e) CDR would only operate where the applicable German law prohibited use of the earlier mark in a subsequent design. That would only be the case if the earlier mark had been used. The Court agreed that, in principle, the RCD proprietor would have the right to call for proof of genuine use of the earlier mark. However, such a request should have been made in due time (i.e. within the period set by the Invalidity Division) and could not be made for the first time before the Board. It would be ‘unacceptable [for] the Board of Appeal [to] be put in the position of having to rule on a dispute which is different from the dispute brought before the Cancellation Division’¹⁹.

The RCD proprietor went on to argue that, in applying Article 25(1)(e) CDR, the Board should have made an assessment of the likelihood of confusion between the earlier mark and the contested RCD (given that the right to prohibit use of the contested design depended, under the applicable German law, on the design as a whole being confusingly similar to the earlier mark). Had it done so, it would have accounted for the low distinctiveness of the earlier mark and the differences between the two rights, thereby reaching a finding of no likelihood of confusion.

The Court noted that there was indeed a similarity between the mark examined and the contested design²⁰ and that since the Board had ratified the Invalidity Division’s decision, it had also endorsed the reasons that led that Division to conclude that there was a likelihood of confusion. However, the Court noted that the earlier mark was a figurative mark and not a three dimensional one. The Invalidity Division had referred to a three-dimensional mark without identifying it in its decision²¹ (In fact, the invalidity claim was also based on an earlier German three-dimensional mark). However, the Board had not recognized this discrepancy and had thus based its conclusions on the wrong earlier mark, contenting itself to merely repeat what the Invalidity Division had found. Since the relevant public’s perception of a three-dimensional mark is not necessarily the same as that of a figurative mark, and a similarity between the marks that should have been compared ‘cannot simply be presumed’²² the Board had erred in law. The Court could not ‘rule on issues the merits of which were not examined by OHIM’²³. In other words, the Court could not be ‘the first to examine’²⁴ and could not ‘be bound by an incorrect assessment of the facts by th[e] Board’²⁵. Thus, the Board’s decision was annulled.

¹⁸ Paras 50-51.

¹⁹ Para. 72.

²⁰ Para. 90.

²¹ Para. 114.

²² Para. 123.

²³ Para. 124.

²⁴ Para. 131.

²⁵ Para. 129.

(b) Importance

For the Board, this case is a reminder that extreme vigilance is necessary when reviewing a contested decision. Take nothing for granted. Do not even assume that the Invalidity Division has necessarily compared the correct earlier right. Check everything.

It is undoubtedly correct that the General Court cannot be the first to examine an earlier right. The Court is a judicial review body rather than an examining authority. On the other hand, the debatable point here is whether a figurative mark and a three-dimensional sign of 'writing instruments' really are so different. Even the Court seems to have had doubts on this point, noting that 'the possibility cannot be ruled out, of course, that where two three dimensional objects are similar, a comparison of one of those objects with an image of the other might also lead to a finding that they are similar'²⁶

Just as the Court considered in this case that the Board cannot be called upon to consider a request for proof of use that should have been made before the first instance department and was thus out of time (because this would alter the subject-matter of the Board's review of the lower instance's decision), so the Court cannot review what has never been examined. On the other hand, there are considerations of economy of procedure. If the Board made a mistake in the earlier right it used as a basis for comparison, it can draw the inference from the judgment that it must re-examine using the correct earlier mark. If that examination ends in the same result, this would suggest that the differences in perception of a three-dimensional mark and a figurative mark are of no significance. Would the Board's error then have been de minimis? Should the Court be less formalistic in such cases and take more the view that 'the end justifies the means'?

These are difficult questions of legality and natural justice. At the moment, the Court seems to prefer the security that a more formalistic approach offers.

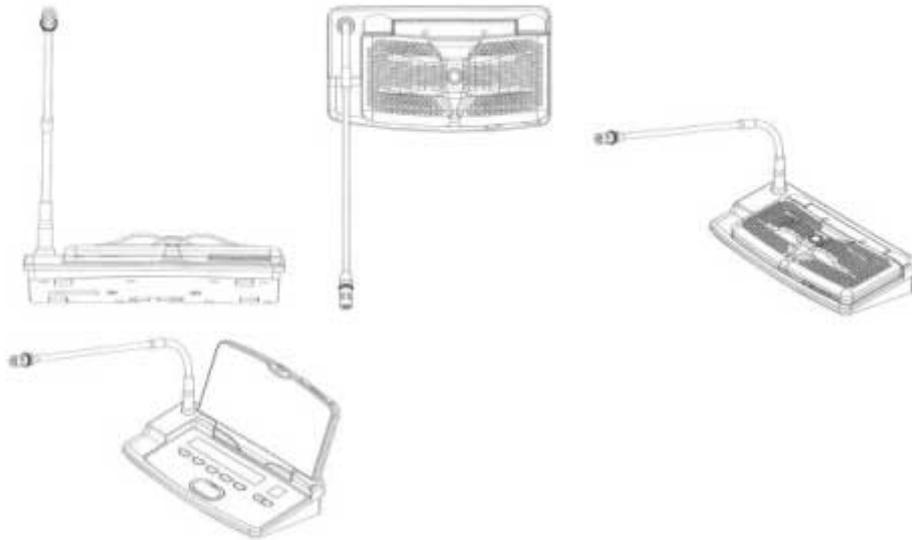
4. Communications equipment²⁷

(a) Judgment

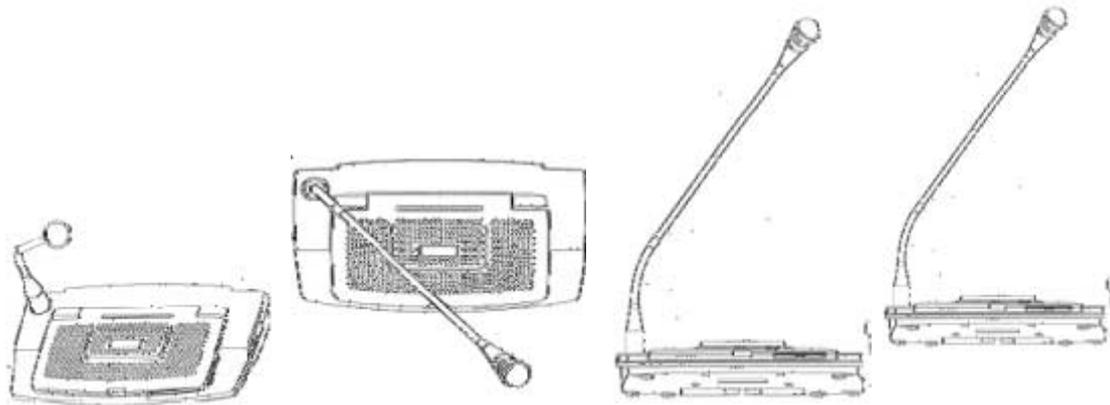
Shenzhen registered the following RCD for 'communications equipment':

²⁶ Para. 122 of the judgment. In the UK, it would appear that the courts have been willing to go further. In the UK Philips shaver litigations related to figurative marks which were consistently interpreted as shape marks starting from Jacob J's judgment reported at [1998] R.P.C. 283 . He proceeded on the basis that the registration of the 208 mark covered a three-dimensional shape, because it 'would be quite artificial to regard a straight picture of a thing, and the thing itself, as significantly different under a law of trade marks which permits shapes to be registered' (p.290) – see IPKat archives <http://ipkitten.blogspot.com>.

²⁷ Cited in fn. 2.



Bosch applied to invalidate Shenzhen's RCD under Article 25(1)(b) CDR on the basis that the design was not new and lacked individual character under Articles 4, 5 and 6 of the Community Designs Regulation. For these purposes, Bosch relied on its earlier international registered design for 'units for conference systems' shown below:



Bosch also submitted the following photographs taken from a brochure, press cuttings and advertisements showing a conference unit which it argued was identical to its international design:



The Invalidity Division rejected the invalidity application. On appeal, that decision was overturned by the Board. Although considering that the contested design was new (because the designs compared were not identical and the

differences between them were not immaterial), the Board nonetheless held that, accounting for the wide degree of design freedom, the differences between the designs were insufficient to conclude that the contested design had individual character.

The General Court upheld the Board's decision.

By featuring photographs of the conference unit in a specialized Spanish telecommunications magazine and presenting it at a trade fair in Madrid, the Court considered that Bosch had proved that the design featured in the photographs above had been made available to the public before the priority date of the contested design.

The Court agreed with the Board that the international design and the photographs referred to above were different representations of one and the same design, despite the fact that the international design does not feature any representations of the unit with its cover raised.

With regard to the informed user, the Court considered that the Board was right in this case to define that person as 'anyone who regularly attends conferences or formal meetings at which the various participants have a conference unit with a microphone on the table in front of them'²⁸. Such a person would, through regular attendance at conferences, be aware of the different models of conference units and their usual features. Because informed users would need to familiarize themselves with conference units and their functions and interfaces, they would also show a relatively high degree of attention in relation to the products

Similarly, the Court held that the Board had not erred in finding that the degree of freedom of the designer of a conference unit was relatively wide. While conference units undoubtedly require certain essential features such as a speaker, a microphone and buttons, those elements do not significantly impact on the apparatus' form and general appearance. This conclusion was supported by the design corpus submitted by Bosch which showed a variation in shapes and configurations which differed perceptibly from the contested design. Shenzhen's submission that there was a general trend for small, flat, rectangular devices, often including hinged elements, was noted as being unsubstantiated and of dubious plausibility given the design corpus submitted by Bosch. In any event, that submission was held only to be relevant to the aesthetic perception of the design and not to consideration of its individual character.

In the Court's view, the contested design and the earlier design produced the same overall impression as determined by the rectangular body of the unit with its upper surface sloping towards the user, the large, hinged rectangular speaker incorporating a card slot, the panel under the speaker and the microphone on a stem placed on the left side. The differences between the two designs which Shenzhen had relied on mostly related to features which would not attract the attention of the informed users and were not sufficiently pronounced for them to distinguish between the two devices. Features that are minor elements and are

²⁸ Para. 49 of the judgment.

not in the user's immediate field of vision will not have a 'major impact' on his or her perception²⁹.

(b) Importance

This is the first (and so far only) RCD decision on substance of the Board to be confirmed by the General Court. Not having been appealed, it has now become final.

The Court was prepared to accept the Board's rather broad definition of the informed user as essentially a conference participant and has agreed that such a person would have a 'relatively high level of attention'. It must therefore be presumed that it is that same relatively high attention level that would enable such a consumer to have a reasonable knowledge of the state of prior art (and thus be aware of the shapes of competing designs submitted in the corpus by Bosch).

It is noteworthy that the Court gives 'short shrift' to mere assertions made by a party. It is not enough to merely assert that there are particular market trends, these assertions must be substantiated³⁰. In fact, the corpus submitted by Bosch seems to have played an important role in this case, since it allowed the Court to draw conclusions on market trends, design freedom and overall impression. There is a valuable lesson to be learnt that nothing serves a case so well as practical (preferably independent) examples drawn from market reality. All too often in proceedings before the OHIM and the Court, parties are content to make unsubstantiated assertions. In so doing, they run the risk of receiving 'rough justice' or simply application of the principle that 'he who asserts must prove'³¹. The Court's statement must therefore be welcome for intellectual property authorities and courts facing litigants on a daily basis.

Finally, the Court's willingness to consider that the photograph of the earlier design and the design itself were the same represents a refreshingly practical approach³². Without that willingness, it is by no means certain that the same result would have been achieved. The photographic medium provides a much more vivid and clear representation of a design than any drawing or diagram can achieve. In this case, it was fundamental in drawing attention to similarities between the designs. From a litigant's perspective, it may well be worth adducing photographic evidence of the product design in proceedings.

5. Ornamentation

(a) Judgment³³

29 Paragraph 65 of the judgment.

30 Paragraph 59 of the judgment.

31 *ei incumbit probatio qui dicit*.

32 Arguably, it is an approach which sits uncomfortably with that taken in the 'Instruments for Writing' judgment, discussed above, in which a two-dimensional and a three-dimensional image were considered completely different.

33 Cited in fn. 2.

The RCD proprietor obtained registration of the design below, as ornamentation for ‘T-shirts, caps, stickers, printed matter, including advertising materials’.



That RCD was declared invalid by the Invalidity Division on the ground specified in Article 25(1)(e)³⁴, based on the following earlier CTM No 1312651, registered for goods in Classes 25, 28 and 32 of the Nice Classification:



The Board³⁵ dismissed the design proprietor’s appeal. The Board, applying Article 25(1)(e) CDR, decided that the wording of this norm is very concise and leaves little room for argument as to whether the sign is an identical or similar distinctive sign, and thus whether there is a likelihood of confusion. The Board considered that the Invalidity Division had carried out a detailed comparison of the design with the trade mark as if, in fact, it were examining the likelihood of confusion within the context of Article 8(1)(b) CTMR. The Board considered that what had to be decided was whether the prior distinctive sign is ‘used’, that is to say, whether it features or not in the design. In the Board’s opinion it was not so ‘used’. None the less, the differences between the two designs, when applied as ornamentation to the products, led to a situation in which the subsequent design does not produce, on the informed user, an overall impression that differs from that produced by the design disclosed earlier. Thus, the Board declared the RCD to be invalid.

34 ‘ A Community design may be declared invalid ...If a distinctive sign is used in a subsequent design, and Community law or the law of the Member State governing that sign confers on the right holder of the sign the right to prohibit such use’.

35 R1323/2008-3.

Before the General Court, the RCD proprietor claimed infringement of Article 6 CDR³⁶. The design proprietor argued that the differences between the CTM invoked in support of the application for invalidity and the design challenged are such that the overall impression on the informed user by each of these figures (goblins) is different³⁷.

The Court decided that a comparison should be made between the overall impression of the contested RCD and the overall impression on the informed user created by the earlier CTM. In the Court's view, the overall impression on the informed user (which included children and young people) is largely created by the respective facial expressions of the two figures compared. Even if the designer of this kind of silhouettes has significant freedom in terms of the technique for drawing them, the fact remains that the difference in the facial expression of the two designs is a fundamental characteristic which will be remembered by the user³⁸ ().

Agreeing with the RCD proprietor, the Court held that in the earlier CTM, the facial expression combined with the forward leaning body posture gives the impression of an angry person. In contrast, the overall impression created by the contested design is not characterized by the expression of any feeling either through the face or the body (which is leaning back). The difference in the expression of the faces will be clear to young people buying T-shirts and caps and to children using stickers³⁹.

The Court concluded that the differences highlighted by the contested RCD proprietor in respect of the two silhouettes are enough to create a different overall impression on the informed user, despite some similarities in other aspects and the degree of freedom enjoyed by the designer. Therefore, the Board was found to have erred in concluding that the contested RCD did not produce on the informed user a different overall impression from that produced by the design included in the previous CTM⁴⁰. Consequently, the appeal was upheld and the decision of the Board annulled.

(b) Importance

The Court has been sparing in its definition of the informed user. It considers that young people will buy tee-shirts and caps and will notice the facial expression of the earlier mark. Similarly, children using stickers will be even

36 6.1. A design 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:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

6.2. In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.

37 Paragraph 12 of the judgment.

38 Paras. 20-22 of the judgment.

39 Paras.23-24 of the judgment.

40 Paras.25-26 of the judgment.

more inclined to pay particular attention to the feelings displayed by the particular character drawn on the sticker. However, it must surely be the case that not only young people and children buy and use tee-shirts, caps and stickers. No mention has been made by the Court of who the informed users of 'advertising material' may be and why facial expressions would be so important to them.

Why are the facial expressions so significant? If one goblin has absolutely no expression and the other has a down-turned mouth and frown, is the difference so great? If one goblin were happy and the other sad, that would be a complete contrast. But here the difference is not so marked. Why is a forward leaning posture considered indicative of anger? Angry people (presumably including goblins) tend to stand up rather than sit on the floor when roused.

If the informed user is wider than the Court intimates, then his or her level of attention might not be so high as suggested. The fact that the Court is willing to accept that both figures depict goblins is already a significant overlap. Moreover, the Court does not deny that there is considerable design freedom. That both figures are in the form of silhouettes sitting on the floor, with one hand bent at the wrist and touching the floor and one bent knee (with the other outstretched), seems to add up to an awful lot of coincidences.

The Office has appealed this decision.

6. Inadmissibility

Two orders have been handed down by the General Court dealing with inadmissibility.

The shorter of the two cases⁴¹ - in terms of completed overall procedure⁴² - involved an appeal to the Court against a decision of the Board declaring the design of a watch to be invalid. The appeal was deemed to be out of time because the appellant's letter certifying that the copies of the appeal request were true copies was not sent within the 10-day time limit foreseen under the Court's Rules of Procedure. The Court therefore rejected the appeal as inadmissible.

The other case⁴³ also involved an appeal action that was lodged late at the Court. However, the appellant had sent the necessary documents to the OHIM within the appeal time limit in accordance with the established practice in Sweden. The Court dismissed the appellant's arguments based on Swedish procedural law and practice as not constituting an unforeseeable or force majeure circumstance that could justify derogating from the Statute of the Court of Justice.

The appellant in that case sought relief from the Court of Justice. The Court not only completely confirmed the order of the General Court but also dismissed the appellant's argument that the General Court, in ruling its application

41 Order of 18 June 2010 in Case T-51/10, Montres.

42 The case has, in fact, been appealed to the Court of Justice.

43 Order of 10 May 2010 in Case T-98/10, Chaff Cutters.

inadmissible, had denied it the right to effective judicial protection. The Court of Justice pointed out that the application of strict procedural time limits is designed to provide legal certainty and avoid discrimination or arbitrary treatment in the administration of justice⁴⁴. Thus, such a strict approach in no way undermines effective legal protection.

These cases merely confirm what is already known: the Court is strict in the application of missed time limits for appeals brought before it. Litigants should be aware of this fact and should be extremely diligent in the way that they prosecute appeals before both the General Court and the Court of Justice. Failure to observe the correct procedure can result in an appeal considered as not having been lodged and will thus have catastrophic results for the appellant.

7. Conclusion

The results of litigation in 2010 before the General Court have not been particularly encouraging for the Board. On substance, the Court has found that the Board acted correctly in only one case. However, the three inadmissibility orders have somewhat sweetened this bitter pill. Whether the Office will be successful in the two appeals it has lodged remains to be seen. What is certain is that the body of Court case law in designs is set to grow steadily over the coming year⁴⁵ and this can only be a good thing for those who seek judicial guidance from the top.

Gordon Humphreys⁴⁶

Alicante, 5 April 2011

44 Paragraph 20 of the judgment.

45 Pending design cases before GC and EC:

Case T-10/08, Internal-combustion engine

Case T-11/08, Internal-combustion engine

Case T-450/08, FLACONS

Case T-53/10 STAPELKISTEN (CAGEOTS, STEIGEN) UND KÖRBE

Case T-68/10, WATCHES

Case T-80/10, MONTRES

Case T-231/10, SPIELE

Case T-246/10, REDUCTORES

Case T-302/10, FOOTWEAR

Case C-281/10P, METAL RAPPERS (T-9/07)

Case C-426/10P, MONTRES (T-51/10)

Case T-68/11, Watch-dials

Case T-83/11, RADIATORI PER RISCALDAMENTO

Case T-84/11, RADIATORI PER RISCALDAMENTO

Case C-101/11P, ORNAMENTACION (T-513/09)

Case C-102/11P, ORNAMENTACION (T-513/09)

46 Member of the OHIM Boards of Appeal. The views expressed in this paper are those of the author and do not necessarily reflect those of the Office.