



Selected topics of current EU design law: Gnomes, radiators and technical function

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C-101/11 P & C- 102/11 P of 18 October 2012, 'Ornamentation'

Challenged RCD

Earlier design



'T-shirts, caps, stickers, etc.' Classes 25, 28 and 32

- **GC held:** overall impression on the informed user (children, young people & users of printed matter) was largely created by the respective facial expressions of the two figures and was therefore different.



‘Ornamentation’ (continued)

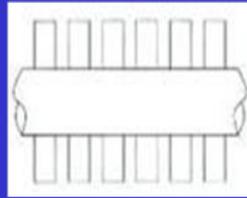
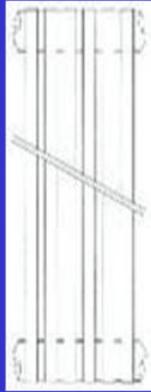
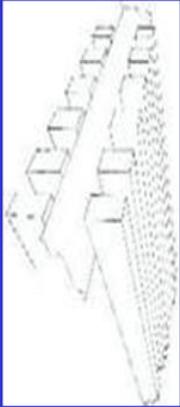
CJ confirmed and held:

- 1) The case is not so technical that the GC should only have reviewed manifest errors of assessment.
- 2) The informed user is ‘**particularly observant**’, lying between an average consumer and a sectorial expert.
- 3) **Direct comparison** is the norm unless impracticable or uncommon in the sector.
- 4) GC was correct in referring to ‘children and young people’; **overall impression** is a **question of fact**.
- 5) GC was not bound to examine Article 25(1)(e) CDR (**not a public policy issue**).

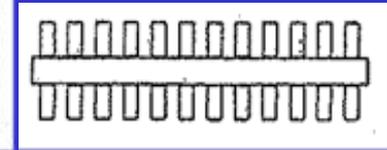
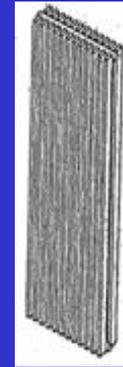


Cases T 83/11 & T 84/11 of 13 November 2012, 'Radiatori'

Contested RCDs



Earlier design



'Radiators for heating'

BoA decision finding contested RCD to be invalid => annulled



‘RADIATORI’ (continued)

- Particularly observant informed users cannot distinguish design elements dictated by technical function from arbitrary ones.
- Neither the product classification nor its actual size define an RCD’s scope of protection; only the product description in the application form counts.
- Broken lines indicate parts of the designs falling outside the scope of protection.
- Small differences between the designs may not create a different overall impression where the degree of freedom of design is high, but they may be enough where the degree is limited.
- General sectorial trends do not restrict freedom of design.
- Saturation (or crowding) of prior art displaying similar features in the particular field may affect the perception and overall impression of the informed user (particularly differences in internal proportions of the designs).



Technical function

‘A Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function’ (Article 8(1) CDR)

- *Rationale*: to avoid prolongation of patent or utility model rights.
- Little or no guidance from Luxembourg (*‘Radiator’* and A-G in *‘Phillips v Remington’* – ‘...a functional design may ... be eligible for protection if it can be shown that the same technical function could be achieved by another different form’).
- Diverse national interpretations.
- Decision of 22 October 2009 R 690/2007-3 ‘Chaff cutters’

‘Where aesthetic considerations are irrelevant...there is nothing to protect in design law’.





Technical Function (continued)

- **Criticisms:**
 - (1) How to know what the designer had in mind?
 - (2) A design does not need to have an ‘aesthetic quality’ - Section (10) of the Preamble to the CDR.
- **OHIM’s Manual** rejects the multiplicity-of-forms theory and evaluates on a case by case basis whether the technical function in question was the only or ‘sole’ relevant factor in the selection of that given feature.
- If a particular feature of a product’s appearance is denied protection by Article 8(1) CDR, it does not follow that the whole design must be declared invalid under Article 25(1)(b) CDR. The design as a whole will be invalid only if all the essential features of the appearance of the product in question were solely dictated by its technical function.
- Current diversity in national practice is addressed in OHIM’s Liaison Committee meetings. However, CJEU or GCEU needs to clarify at judicial level.



THE END

THANK YOU FOR YOUR ATTENTION!