

INVALIDITY No ICD 105 019

Nikki.Amsterdam B.V., Mollerusweg 76, 2031BZ Haarlem, Netherlands (applicant),
represented by **Leeway B.V.**, Barbara Strozilaan 101, 1083HN Amsterdam,
Netherlands (professional representative)

a g a i n s t

Nomenta Technologies (Guangzhou) LTD., 5th Floor, Block A, Lianfeng Creative Park,
No 2 Jisheng Road, Huangge Town, Nansha District Guangzhou, Guangdong 511455
People's Republic of China (holder).

On 14/11/2019, the Invalidation Division takes the following

DECISION

1. The application for a declaration of invalidity is upheld.
2. International design No 1 of registration No DM/100 201 is declared invalid for the European Union.
3. The IR holder bears the costs, fixed at EUR 750.

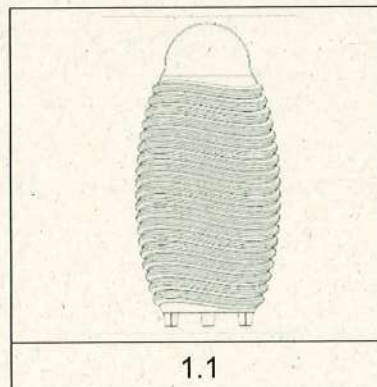
REASONS

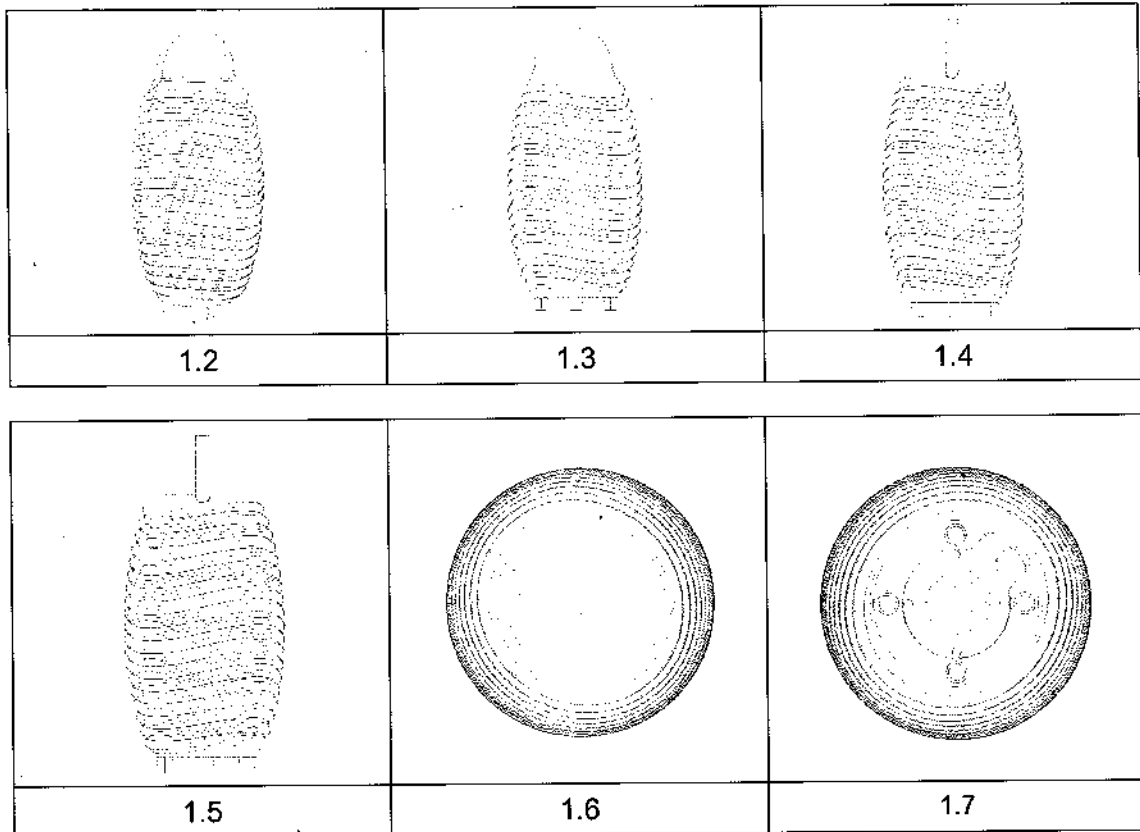
The applicant filed an application for a declaration of invalidity (the application) against international design No 1 of registration No DM/100 201, designating the European Union (the IR). The IR was applied for and registered in the holder's name on 06/11/2017. Chinese priority 201730162330.5 was filed on 05/05/2017. The IR was published in full in the *International Designs Bulletin* on 11/05/2018.

The following products are indicated in the registration:

26-05 *LED Bluetooth speaker lamps.*

The registration contains the following images:





Please note that the images in this document are not necessarily to scale.

The applicant invoked Article 25(1)(b) CDR in conjunction with Articles 5 and 6 CDR.

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant claimed that its application for declaration of invalidity of the contested IR was based on Article 25(1)(b) CDR, as this design did not fulfil the requirements for design protection pursuant to Articles 4 to 9 CDR. The contested IR lacked novelty within the meaning of Article 5 CDR and individual character within the meaning of Article 6 CDR.

In support of its observations, the applicant submitted the following evidence:

- **Exhibit 1** – photos of 'The.Lampion' from the company Nikki.Amsterdam as shown on Facebook and Instagram in the period between February 2017 and April 2017 and produced by the applicant's supplier Foshan Baicai Electron Co., Ltd.
- **Exhibit 2** – photos of the 'Top Pot Hard' from the company Serralunga as shown on its website via the Wayback Machine and on Facebook in the period between March 2014 and February 2017.
- **Exhibit 3** – photos of the 'Honey outdoor lamp' from the company Serralunga as shown on Facebook in the period between March 2015 and October 2015.
- **Exhibit 4** – a WhatsApp conversation including a link to an advertisement on the website www.alibaba.com for a 'cheap modern round shape plastic' lamp and a photo of this lamp dated 15/05/2016.

- **Exhibit 5** – photos of the product 'Asserbo' from the Christmas catalogue of GaveFabrikken, which was sent, pursuant to the applicant, by email to customers on 21/09/2016.
- **Exhibit 6** – photos of 'The.Lampion' and the 'Honey outdoor lamp', as shown in Exhibits 1 and 2, in the same views as the contested IR.

The holder did not appoint a representative entitled to represent it before the Office and did not submit any observations in reply.

ARTICLE 25(1)(b) CDR IN CONJUNCTION WITH ARTICLE 4 AND ARTICLES 5, 6, AND 7 CDR

a) Disclosure pursuant to Article 7 CDR

For the purpose of applying Articles 5 and 6 CDR, the tests of novelty and individual character, a design will be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the RCD filing date or the RCD priority date, if a priority is claimed, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the EU.

The onus is on the invalidity applicant to prove the disclosure of the earlier designs. There are no provisions in the CDR or the CDIR as to the kind or specific form of evidence the invalidity applicant is required to submit to prove that the prior design on which the application for a declaration of invalidity is based has been made available to the public before the relevant date.

Article 28(1)(b)(v) CDIR only states that where the ground for invalidity is that the RCD does not fulfil the requirements set out in Article 5 or 6 CDR, the indication and the reproduction of the prior designs that could form an obstacle to the novelty or individual character of the registered Community design, as well as documents proving the existence of those earlier designs, must be contained in the application.

It follows that, on the one hand, the invalidity applicant is free to choose the evidence it considers useful to submit in support of its application for invalidity and that, on the other hand, the Office is required to examine the evidence in its entirety in order to establish whether there is sufficient proof of a prior disclosure within the meaning of Article 7(1) CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 21-23).

In this regard, the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be based on solid and objective evidence that proves that the earlier design was made available to the public within the meaning of Article 7 CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 24).

With reference to the evidential value of the individual documents, this means that regard should be had first and foremost to the credibility of the content. It is necessary to take account, in particular, of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 23-24, 26).

The case-law further specifies that the items of evidence submitted by the applicant for a declaration of invalidity must be weighed against each other. The reason for this is that,

although some of the items of evidence may be insufficient in themselves to demonstrate the disclosure of a prior design, the fact remains that, if they are combined or read in conjunction with other documents or information, they may contribute towards establishing proof of the disclosure (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 25).

One of the earlier designs invoked by the applicant was named 'The Lampion' (or 'The.Lampion'). The applicant showed that this design had been published a number of times on its Facebook and Instagram social media accounts. The dates shown therein pre-date the priority date of the contested IR and they all refer to the same design, bearing the same name. There are 'likes' and comments visible next to the images of the design.

Of the many posts and views shown therein, the applicant presented the design of 'The Lampion' published in the following views on the applicant's Facebook profile page:



Taking all these documents together, it becomes clear that they corroborate each other to demonstrate that the applicant disclosed the earlier design, 'The Lampion', on two social media accounts prior to the filing date of the contested IR.

Having said that, and in the absence of any objections from the IR holder, the Invalidity Division considers that the earlier design indicated above was disclosed for the purposes of the application of Article 7 CDR.

The Invalidity Division will assess this design to establish if the contested IR lacks novelty and/or individual character and will proceed to the analysis of the remaining evidence if necessary.

b) Individual character pursuant to Article 6 CDR

Under Article 6(1)(b) CDR, a registered Community design must 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 that has been made available to the public before the date of filing of the application for registration of the design for which protection is claimed or, if priority is claimed, the date of priority. Article 6(2) CDR states that, in assessing that individual character, the degree of freedom of the designer in developing the design must be taken into consideration.

Recital 14 CDR provides that, when assessing whether a design has individual character with respect to the existing design corpus, it is necessary to take into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs.

It follows from the above that the assessment of the individual character of a Community design with respect to any earlier design disclosed to the public must, in essence, proceed from a four-step review:

- the sector of products in which the compared designs are incorporated or to which they are applied,
- the informed user of the products according to their purpose and, in reference to the informed user:
 - the degree of knowledge of the state of the art, and
 - the degree of attention in the comparison, direct if possible, of the designs,
- the degree of freedom of the designer in the development of the designs, and
- the result of the comparison of the designs, taking into account the overall impressions produced on the user by the contested design and any of the earlier designs. The assessment should not be simply an analytical comparison of a list of similarities and differences (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 54-84; 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 53-59; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 21).

The comparison should focus on the contested design as registered and must be based on the elements that are actually protected, without regard to the features excluded from the protection (14/06/2011, T-68/10, Watches, EU:T:2011:269, § 74; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The designer's degree of freedom in developing a design is established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied

to the product concerned (09/09/2011, T-10/08 & T-11/08, Internal combustion engine, EU:T:2011:447, § 32, 47; 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67).

The General Court has refused to allow a general design trend to be regarded as a factor that restricts the designer's freedom, since it is precisely that freedom on the part of the designer that allows him to discover new shapes and new trends or even to innovate in the context of an existing trend (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 95).

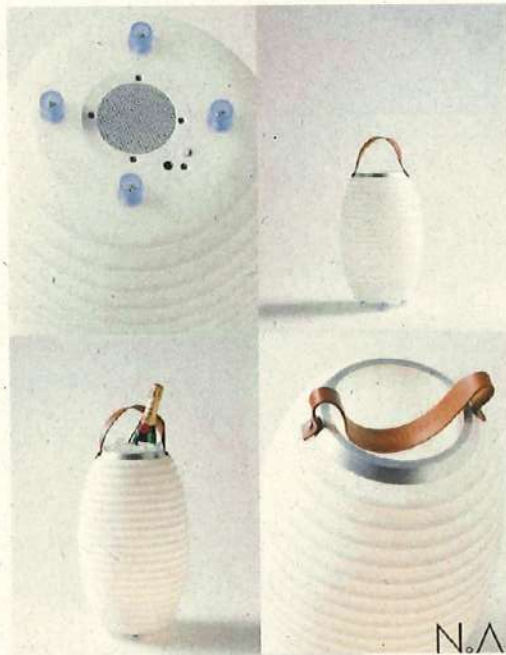
When assessing the individual character of a design taking into account the existing design corpus, the degree of freedom of the designer in developing the design may be such as to make informed users more sensitive to differences between the designs under comparison (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 81), as may the manner in which the product at issue is used, in particular the way it is usually handled (22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 66; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The informed user is a legal fiction that must be understood, depending on each case, as an intermediate concept between the average consumer, applicable in trade mark matters, of whom no specific knowledge is required and who, in general, does not perform a direct comparison between the marks, and the man of the art, applicable in the field of patents, an expert endowed with extensive technical skills and exhibiting a very high degree of attention when directly comparing conflicting inventions (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 53; 25/04/2013, T-80/10, Montres, EU:T:2013:214, § 100).

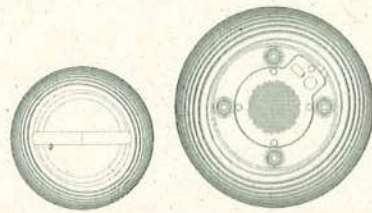
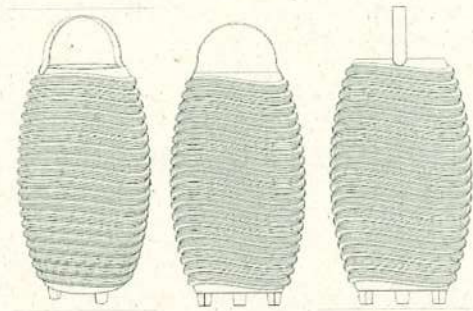
Pursuant to Article 63(1) CDR, in invalidity proceedings, the Invalidity Division is restricted to examining the facts, evidence and arguments submitted by the parties and the relief sought. The Invalidity Division therefore does not carry out its own research. This, however, does not preclude it from also taking into consideration facts that are well known, that is, that are likely to be known by anyone or can be learned from generally accessible sources.

The facts and arguments in a particular case, in principle, must have been known before the IR was filed; however, facts relating to the design corpus, the density of the market or the designer's freedom should precede the date of disclosure of the prior design.

The designs under comparison are shown below:



Prior design



Contested design

Before comparing the designs at issue, the Invalidity Division notes that it is the contested Community design that is the point of reference when assessing novelty and individual character in the comparison with the earlier design. Therefore, individual character has to be assessed solely on the basis of the features disclosed in the contested design (13/06/2017, T-9/15, Dosen [für Getränke], EU:T:2017:386, § 87).

The Invalidity Division notes that a number of similarities between the designs under comparison exist:

- the cylindrical shape of the lamp, being slightly broader in the middle, in both designs;
- the handle of a similar shape, placed in the same position on top of the lamp;
- the decorative surface of the lamp, showing horizontal protruding lines of approximately the same thickness;
- four legs of the same shape, placed in the same position on the bottom of the lamp.

However, the following material differences between the designs under comparison can be identified:

- The decorative surface of protruding lines is slightly 'wavy' in the contested design, whereas the lines are straight in the earlier design.
- The handle of the contested IR is plain, whereas in the earlier design it features a bolt. In addition, a slight difference in the thickness of the handle can be noted, being slightly broader in its middle part in the earlier design and of uniform width in the contested IR. The handle also has square endings in the earlier design and rounded endings in the contested design.
- There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

The sector concerned and the informed user

From the representations of the designs and the parties' submissions, it is apparent that the prior design serves as an ice bucket that can be illuminated and that the contested IR has Bluetooth speakers built in. However, both still serve as illuminating devices and are incorporated in lamps; the informed user is therefore a person who is familiar with the basic features attributable to these products.

Such products usually have a light bulb or light-emitting diode and an energy source, be it an electric plug or a battery.

The designer's freedom

Although the presence of an electricity source and a light source, functional features that limit the designer's freedom, is necessary in this type of product, this does not mean that there is a limited degree of freedom for the designer in other respects, given that there are infinite possibilities for altering the form of the elements mentioned above and their positioning and also the shape, material, decorations and general appearance of the actual product, in particular the shape of the lamp shade.

Consequently, the designer's freedom within the meaning of Article 6(2) CDR is broad. In accordance with the case-law cited, only minor differences between the prior and the contested designs will be insufficient to produce different overall impressions on the informed user.

The overall impression

The contested design presents a feature that has no counterpart in the earlier design, namely that the protruding lines of the decorative surface are slightly 'wavy' in the contested design, whereas they are straight in the earlier design. In addition, the handle of the contested IR is plain, whereas in the earlier design it features a bolt and is slightly wider in the middle. There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

However, this small number of differences is considerably less striking than the overall impression created by the numerous features in common, described above.

In particular, the designs have in common the cylindrical shape of the lamp, a handle of a similar shape, placed in the same position on the top of the lamp, the decorative surface of the lamp showing horizontal protruding lines of approximately the same thickness and four legs of the same shape, placed in the same position at the bottom of the lamp.

Owing to those similar features, it can be concluded that the contested IR does not possess individual character.

This conclusion is reinforced by the quite considerable freedom of the designer and the fact that the shape and decorations of the design are arbitrary. The contested IR could have had many different shapes and forms.

In light of the foregoing, it is concluded that the challenged design does not produce a different overall impression from that of the prior design. It reproduces features of the prior design that are arbitrary and not subject to any technical necessity obliging a designer to adopt a particular shape and size.

As a result, the Office considers that the challenged design lacks individual character in the sense of Article 6(1)(b) CDR and must be invalidated.

CONCLUSION

The facts and evidence submitted by the applicant support the grounds for invalidity under Article 25(1)(b) CDR in conjunction with Article 6 CDR; therefore, the application is upheld and the IR is declared invalid.

As the invalidity action has been fully upheld on the basis of the earlier design assessed in the present decision, there is no need to examine the other earlier design invoked in the rest of the evidence. Equally, there is no need to examine the remaining ground for invalidity, foreseen in Article 5 CDR.

COSTS

According to Article 70(1) CDR, the losing party in invalidity proceedings must bear the fees and costs incurred by the other party.

Since the holder is the losing party, it must bear the invalidity fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 70(1) CDR and Article 79(7)(f) CDIR, the costs to be paid to the applicant are the costs of representation, which are to be fixed on the basis of the maximum rate set therein, and the costs of the invalidity fee.

**The Invalidity Division**

Ludmila ČELIŠOVA

Gailė SAKALAITĖ

Benjamin VAN BAVEL

According to Article 56 CDR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 57 CDR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 800 has been paid.

The amount determined in the fixing of costs may only be reviewed on request. According to Article 79(4) CDR, such a request must be filed within one month from the date of notification of this fixing of costs and will be deemed to have been filed only when the review fee of EUR 100 has been paid (Annex to CDFR, paragraph 24).

INVALIDITY No ICD 106 282

Nikki.Amsterdam B.V., Mollerusweg 76, 2031BZ Haarlem, Netherlands (applicant),
represented by **Leeway B.V.**, Barbara Strozilaan 101, 1083HN Amsterdam,
Netherlands (professional representative)

a g a i n s t

Nomenta Technologies (Guangzhou) LTD., 5th Floor, Block A, Lianfeng Creative Park,
No 2 Jisheng Road, Huangge Town, Nansha District Guangzhou, Guangdong 511455
People's Republic of China (holder).

On 14/11/2019, the Invalidation Division takes the following

DECISION

1. The application for a declaration of invalidity is upheld.
2. International design No 2 of registration No DM/100 201 is declared invalid for the European Union.
3. The IR holder bears the costs, fixed at EUR 750.

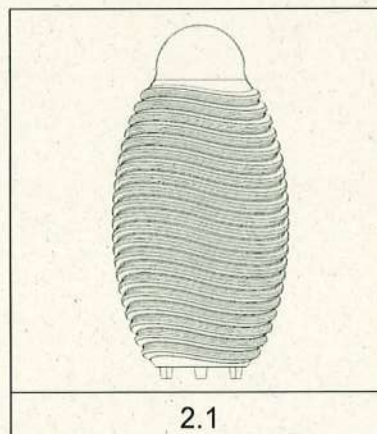
REASONS

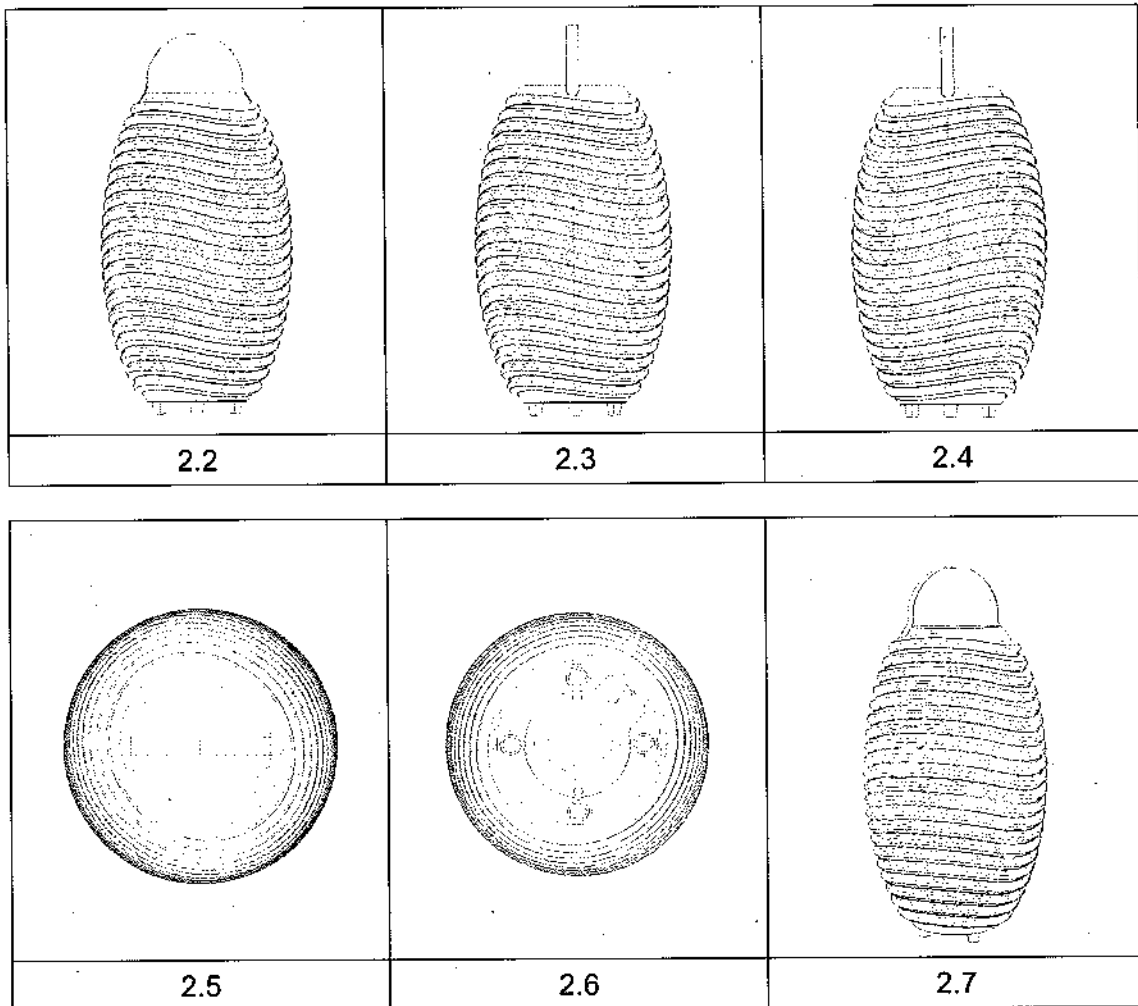
The applicant filed an application for a declaration of invalidity (the application) against international design No 2 of registration No DM/100 201, designating the European Union (the IR). The IR was applied for and registered in the holder's name on 06/11/2017. Chinese priority 201730162330.5 was filed on 05/05/2017. The IR was published in full in the *International Designs Bulletin* on 11/05/2018.

The following products are indicated in the registration:

26-05 *LED Bluetooth speaker lamps.*

The registration contains the following images:





Please note that the images in this document are not necessarily to scale.

The applicant invoked Article 25(1)(b) CDR in conjunction with Articles 5 and 6 CDR.

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant claimed that its application for declaration of invalidity of the contested IR was based on Article 25(1)(b) CDR, as this design did not fulfil the requirements for design protection pursuant to Articles 4 to 9 CDR. The contested IR lacked novelty within the meaning of Article 5 CDR and individual character within the meaning of Article 6 CDR.

In support of its observations, the applicant submitted the following evidence:

- **Exhibit 1** – photos of 'The.Lampion' from the company Nikki.Amsterdam as shown on Facebook and Instagram in the period between February 2017 and April 2017 and produced by the applicant's supplier Foshan Baicai Electron Co., Ltd.
- **Exhibit 2** – photos of the 'Top Pot Hard' from the company Serralunga as shown on its website via the Wayback Machine and on Facebook in the period between March 2014 and February 2017.
- **Exhibit 3** – photos of the 'Honey outdoor lamp' from the company Serralunga as shown on Facebook in the period between March 2015 and October 2015.

- **Exhibit 4** – a WhatsApp conversation including a link to an advertisement on the website www.alibaba.com for a 'cheap modern round shape plastic' lamp and a photo of this lamp dated 15/05/2016.
- **Exhibit 5** – photos of the product 'Asserbo' from the Christmas catalogue of GaveFabrikken, which was sent, pursuant to the applicant, by email to customers on 21/09/2016.
- **Exhibit 6** – photos of 'The.Lampion' and the 'Honey outdoor lamp', as shown in Exhibits 1 and 2, in the same views as the contested IR.

The holder did not appoint a representative entitled to represent it before the Office and did not submit any observations in reply.

ARTICLE 25(1)(b) CDR IN CONJUNCTION WITH ARTICLE 4 AND ARTICLES 5, 6, AND 7 CDR

a) Disclosure pursuant to Article 7 CDR

For the purpose of applying Articles 5 and 6 CDR, the tests of novelty and individual character, a design will be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the RCD filing date or the RCD priority date, if a priority is claimed, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the EU.

The onus is on the invalidity applicant to prove the disclosure of the earlier designs. There are no provisions in the CDR or the CDIR as to the kind or specific form of evidence the invalidity applicant is required to submit to prove that the prior design on which the application for a declaration of invalidity is based has been made available to the public before the relevant date.

Article 28(1)(b)(v) CDIR only states that where the ground for invalidity is that the RCD does not fulfil the requirements set out in Article 5 or 6 CDR, the indication and the reproduction of the prior designs that could form an obstacle to the novelty or individual character of the registered Community design, as well as documents proving the existence of those earlier designs, must be contained in the application.

It follows that, on the one hand, the invalidity applicant is free to choose the evidence it considers useful to submit in support of its application for invalidity and that, on the other hand, the Office is required to examine the evidence in its entirety in order to establish whether there is sufficient proof of a prior disclosure within the meaning of Article 7(1) CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 21-23).

In this regard, the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be based on solid and objective evidence that proves that the earlier design was made available to the public within the meaning of Article 7 CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 24).

With reference to the evidential value of the individual documents, this means that regard should be had first and foremost to the credibility of the content. It is necessary to take account, in particular, of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 23-24, 26).

The case-law further specifies that the items of evidence submitted by the applicant for a declaration of invalidity must be weighed against each other. The reason for this is that, although some of the items of evidence may be insufficient in themselves to demonstrate the disclosure of a prior design, the fact remains that, if they are combined or read in conjunction with other documents or information, they may contribute towards establishing proof of the disclosure (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 25).

One of the earlier designs invoked by the applicant was named 'The Lampion' (or 'The.Lampion'). The applicant showed that this design had been published a number of times on its Facebook and Instagram social media accounts. The dates shown therein pre-date the priority date of the contested IR and they all refer to the same design, bearing the same name. There are 'likes' and comments visible next to the images of the design.

Of the many posts and views shown therein, the applicant presented the design of 'The Lampion' published in the following views on the applicant's Facebook profile page:



19/03/2017 ; and on 02/03/2017. This design was also shown on the applicant's Instagram account on 06/04/2017 with the following view:



Taking all these documents together, it becomes clear that they corroborate each other to demonstrate that the applicant disclosed the earlier design, 'The Lampion', on two social media accounts prior to the filing date of the contested IR.

Having said that, and in the absence of any objections from the IR holder, the Invalidity Division considers that the earlier design indicated above was disclosed for the purposes of the application of Article 7 CDR.

The Invalidity Division will assess this design to establish if the contested IR lacks novelty and/or individual character and will proceed to the analysis of the remaining evidence if necessary.

b) Individual character pursuant to Article 6 CDR

Under Article 6(1)(b) CDR, a registered Community design must 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 that has been made available to the public before the date of filing of the application for registration of the design for which protection is claimed or, if priority is claimed, the date of priority. Article 6(2) CDR states that, in assessing that individual character, the degree of freedom of the designer in developing the design must be taken into consideration.

Recital 14 CDR provides that, when assessing whether a design has individual character with respect to the existing design corpus, it is necessary to take into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs.

It follows from the above that the assessment of the individual character of a Community design with respect to any earlier design disclosed to the public must, in essence, proceed from a four-step review:

- the sector of products in which the compared designs are incorporated or to which they are applied,
- the informed user of the products according to their purpose and, in reference to the informed user:
 - the degree of knowledge of the state of the art, and
 - the degree of attention in the comparison, direct if possible, of the designs,
- the degree of freedom of the designer in the development of the designs, and
- the result of the comparison of the designs, taking into account the overall impressions produced on the user by the contested design and any of the earlier designs. The assessment should not be simply an analytical comparison of a list of similarities and differences (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 54-84; 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 53-59; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 21).

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The designer's degree of freedom in developing a design is established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied

to the product concerned (09/09/2011, T-10/08 & T-11/08, Internal combustion engine, EU:T:2011:447, § 32, 47; 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67).

The General Court has refused to allow a general design trend to be regarded as a factor that restricts the designer's freedom, since it is precisely that freedom on the part of the designer that allows him to discover new shapes and new trends or even to innovate in the context of an existing trend (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 95).

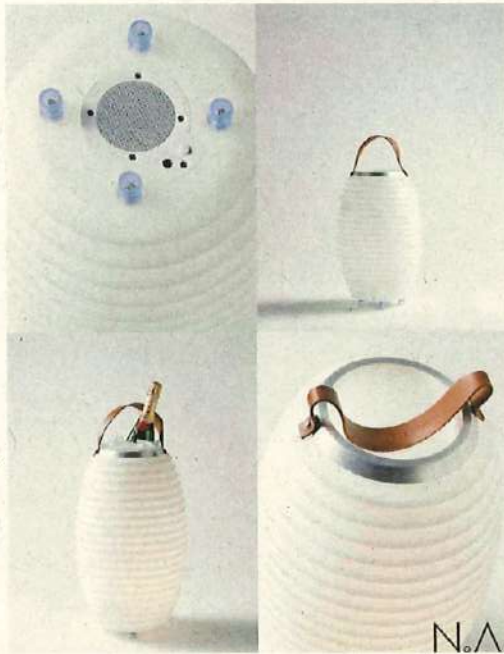
When assessing the individual character of a design taking into account the existing design corpus, the degree of freedom of the designer in developing the design may be such as to make informed users more sensitive to differences between the designs under comparison (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 81), as may the manner in which the product at issue is used, in particular the way it is usually handled (22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 66; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The informed user is a legal fiction that must be understood, depending on each case, as an intermediate concept between the average consumer, applicable in trade mark matters, of whom no specific knowledge is required and who, in general, does not perform a direct comparison between the marks, and the man of the art, applicable in the field of patents, an expert endowed with extensive technical skills and exhibiting a very high degree of attention when directly comparing conflicting inventions (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 53; 25/04/2013, T-80/10, Montres, EU:T:2013:214, § 100).

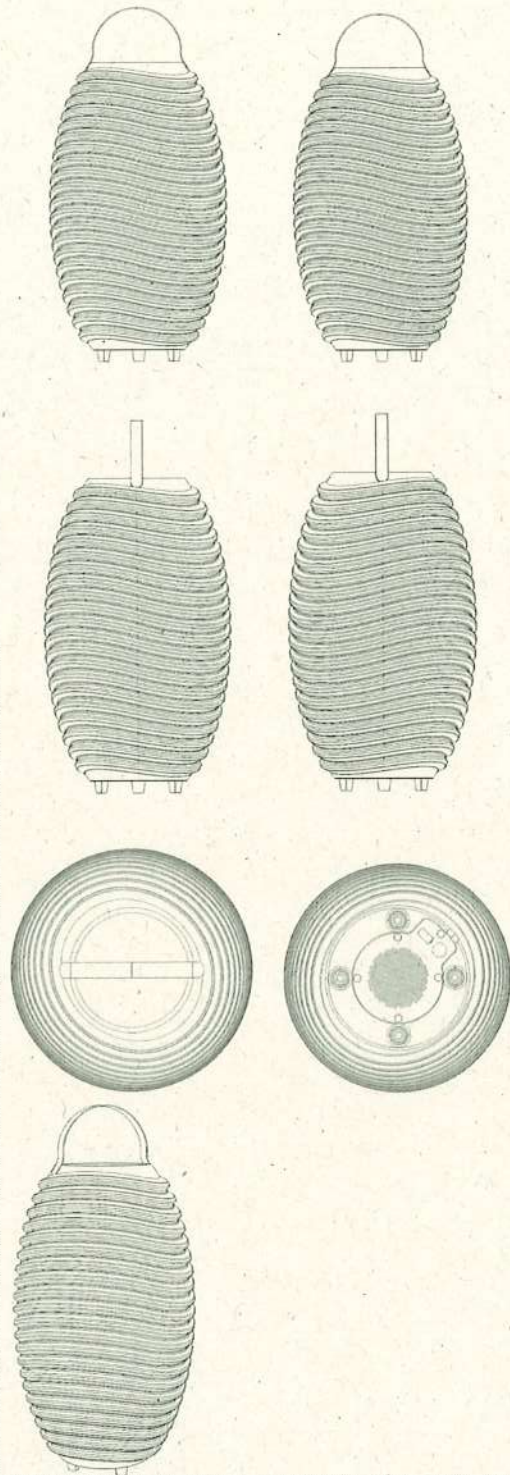
Pursuant to Article 63(1) CDR, in invalidity proceedings, the Invalidity Division is restricted to examining the facts, evidence and arguments submitted by the parties and the relief sought. The Invalidity Division therefore does not carry out its own research. This, however, does not preclude it from also taking into consideration facts that are well known, that is, that are likely to be known by anyone or can be learned from generally accessible sources.

The facts and arguments in a particular case, in principle, must have been known before the IR was filed; however, facts relating to the design corpus, the density of the market or the designer's freedom should precede the date of disclosure of the prior design.

The designs under comparison are shown below:



Prior design



Contested design

Before comparing the designs at issue, the Invalidation Division notes that it is the contested Community design that is the point of reference when assessing novelty and individual character in the comparison with the earlier design. Therefore, individual character has to be assessed solely on the basis of the features disclosed in the contested design (13/06/2017, T-9/15, Dosen [für Getränke], EU:T:2017:386, § 87).

The Invalidity Division notes that a number of similarities between the designs under comparison exist:

- the cylindrical shape of the lamp, being slightly broader in the middle, in both designs;
- the handle of a similar shape, placed in the same position on top of the lamp;
- the decorative surface of the lamp, showing horizontal protruding lines of approximately the same thickness;
- four legs of the same shape, placed in the same position on the bottom of the lamp.

However, the following material differences between the designs under comparison can be identified:

- The decorative surface of protruding lines is slightly 'wavy' in the contested design, whereas the lines are straight in the earlier design.
- The handle of the contested IR is plain, whereas in the earlier design it features a bolt. In addition, a slight difference in the thickness of the handle can be noted, being slightly broader in its middle part in the earlier design and of uniform width in the contested IR. The handle also has square endings in the earlier design and rounded endings in the contested design.
- There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

The sector concerned and the informed user

From the representations of the designs and the parties' submissions, it is apparent that the prior design serves as an ice bucket that can be illuminated and that the contested IR has Bluetooth speakers built in. However, both the earlier and the contested designs still serve as lamps; the informed user is therefore a person who is familiar with the basic features attributable to these products.

Such products usually have a light bulb or light-emitting diode and an energy source, be it an electric plug or a battery.

The designer's freedom

Although the presence of an electricity source and a light source, functional features that limit the designer's freedom, is necessary in this type of product, this does not mean that there is a limited degree of freedom for the designer in other respects, given that there are infinite possibilities for altering the form of the elements mentioned above and their positioning and also the shape, material, decorations and general appearance of the actual product, in particular the shape of the lamp shade.

Consequently, the designer's freedom within the meaning of Article 6(2) CDR is broad. In accordance with the case-law cited, only minor differences between the prior and the contested designs will be insufficient to produce different overall impressions on the informed user.

The overall impression

The contested design presents a feature that has no counterpart in the earlier design, namely that the protruding lines of the decorative surface are slightly 'wavy' in the

contested design, whereas they are straight in the earlier design. In addition, the handle of the contested IR is plain, whereas in the earlier design it features a bolt and is slightly wider in the middle. Finally, there is a rim shown in the earlier design, not present in the contested RCD.

However, this small number of differences is considerably less striking than the overall impression created by the numerous features in common, described above.

In particular, the designs have in common the cylindrical shape of the lamp, a handle of a similar shape, placed in the same position on the top of the lamp, the decorative surface of the lamp showing horizontal protruding lines of approximately the same thickness and four legs of the same shape, placed in the same position at the bottom of the lamp.

Owing to those similar features, it can be concluded that the contested IR does not possess individual character.

This conclusion is reinforced by the quite considerable freedom of the designer and the fact that the shape and decorations of the design are arbitrary. The contested IR could have had many different shapes and forms.

In light of the foregoing, it is concluded that the challenged design does not produce a different overall impression from that of the prior design. It reproduces features of the prior design that are arbitrary and not subject to any technical necessity obliging a designer to adopt a particular shape and size.

As a result, the Office considers that the challenged design lacks individual character in the sense of Article 6(1)(b) CDR and must be invalidated.

CONCLUSION

The facts and evidence submitted by the applicant support the grounds for invalidity under Article 25(1)(b) CDR in conjunction with Article 6 CDR; therefore, the application is upheld and the IR is declared invalid.

As the invalidity action has been fully upheld on the basis of the earlier design assessed in the present decision, there is no need to examine other designs invoked in the rest of the evidence. Equally, there is no need to examine the remaining ground for invalidity, foreseen in Article 5 CDR.

COSTS

According to Article 70(1) CDR, the losing party in invalidity proceedings must bear the fees and costs incurred by the other party.

Since the holder is the losing party, it must bear the invalidity fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 70(1) CDR and Article 79(7)(f) CDIR, the costs to be paid to the applicant are the costs of representation, which are to be fixed on the basis of the maximum rate set therein, and the costs of the invalidity fee.

**The Invalidity Division**

Ludmila ČELIŠOVA

Gailė SAKALAITĖ

Benjamin VAN BAVEL

According to Article 56 CDR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 57 CDR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 800 has been paid.

The amount determined in the fixing of costs may only be reviewed on request. According to Article 79(4) CDIR, such a request must be filed within one month from the date of notification of this fixing of costs and will be deemed to have been filed only when the review fee of EUR 100 has been paid (Annex to CDFR, paragraph 24).

INVALIDITY No ICD 106 283

Nikki.Amsterdam B.V., Mollerusweg 76, 2031BZ Haarlem, Netherlands (applicant),
represented by **Leeway B.V.**, Barbara Strozzi laan 101, 1083HN Amsterdam,
Netherlands (professional representative)

a g a i n s t

Nomenta Technologies (Guangzhou) LTD., 5th Floor, Block A, Lianfeng Creative Park,
No 2 Jisheng Road, Huangge Town, Nansha District Guangzhou, Guangdong 511455
People's Republic of China (holder).

On 14/11/2019, the Invalidity Division takes the following

DECISION

1. The application for a declaration of invalidity is upheld.
2. International design No 3 of registration No DM/100 201 is declared invalid for the European Union.
3. The IR holder bears the costs, fixed at EUR 750.

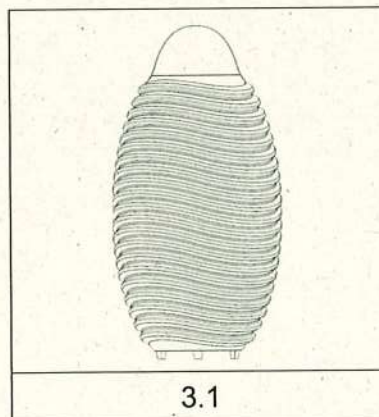
REASONS

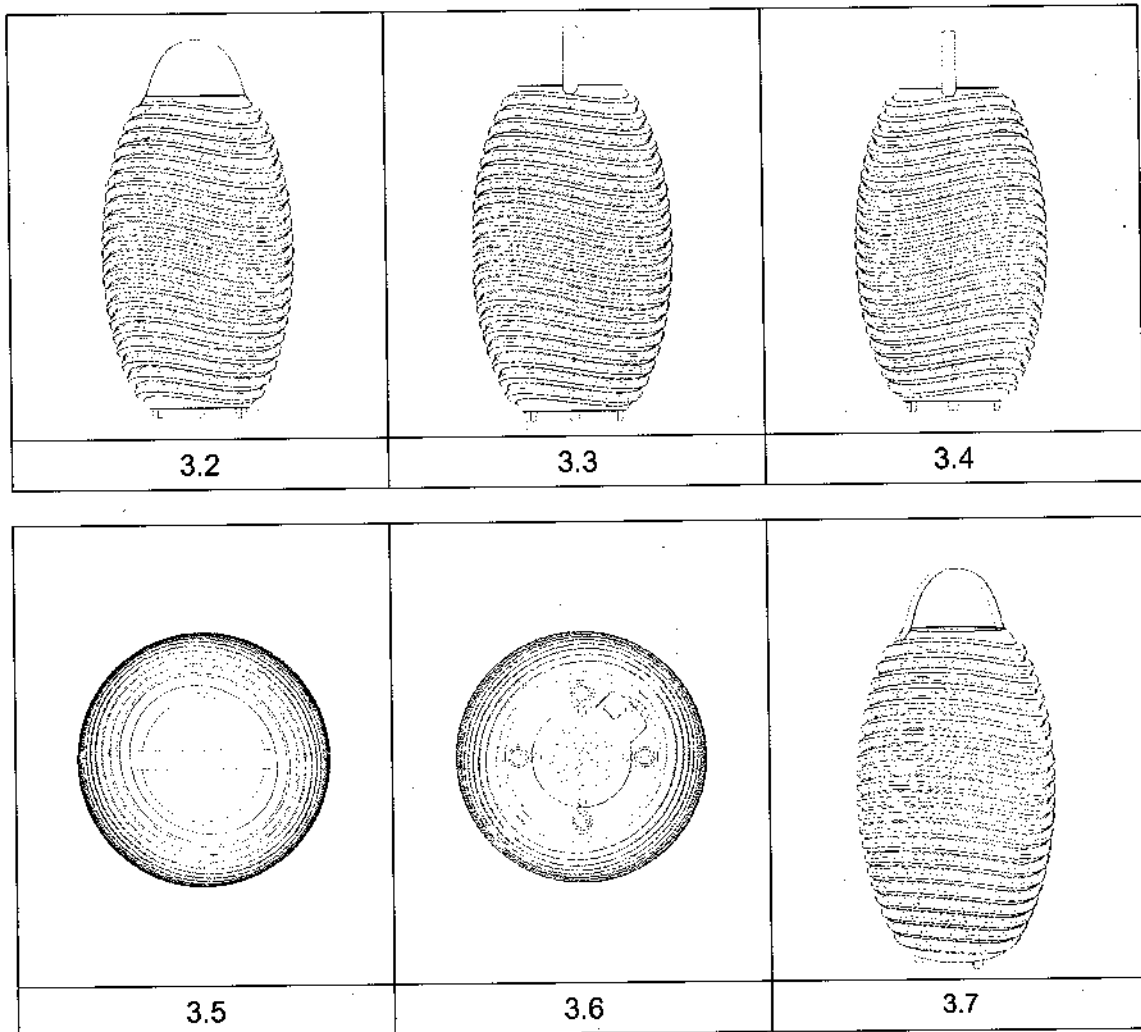
The applicant filed an application for a declaration of invalidity (the application) against international design No 3 of registration No DM/100 201, designating the European Union (the IR). The IR was applied for and registered in the holder's name on 06/11/2017. Chinese priority 201730162330.5 was filed on 05/05/2017. The IR was published in full in the *International Designs Bulletin* on 11/05/2018.

The following products are indicated in the registration:

26-05 *LED Bluetooth speaker lamps.*

The registration contains the following images:





Please note that the images in this document are not necessarily to scale.

The applicant invoked Article 25(1)(b) CDR in conjunction with Articles 5 and 6 CDR.

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant claimed that its application for declaration of invalidity of the contested IR was based on Article 25(1)(b) CDR, as this design did not fulfil the requirements for design protection pursuant to Articles 4 to 9 CDR. The contested IR lacked novelty within the meaning of Article 5 CDR and individual character within the meaning of Article 6 CDR.

In support of its observations, the applicant submitted the following evidence:

- **Exhibit 1** – photos of 'The Lampion' from the company Nikki.Amsterdam as shown on Facebook and Instagram in the period between February 2017 and April 2017 and produced by the applicant's supplier Foshan Baicai Electron Co., Ltd.
- **Exhibit 2** – photos of the 'Top Pot Hard' from the company Serralunga as shown on its website via the Wayback Machine and on Facebook in the period between March 2014 and February 2017.

- **Exhibit 3** – photos of the ‘Honey outdoor lamp’ from the company Serralunga as shown on Facebook in the period between March 2015 and October 2015.
- **Exhibit 4** – a WhatsApp conversation including a link to an advertisement on the website www.alibaba.com for a ‘cheap modern round shape plastic’ lamp and a photo of this lamp dated 15/05/2016.
- **Exhibit 5** – photos of the product ‘Asserbo’ from the Christmas catalogue of GaveFabrikken, which was sent, pursuant to the applicant, by email to customers on 21/09/2016.
- **Exhibit 6** – photos of ‘The.Lampion’ and the ‘Honey outdoor lamp’, as shown in Exhibits 1 and 2, in the same views as the contested IR.

The holder did not appoint a representative entitled to represent it before the Office and did not submit any observations in reply.

ARTICLE 25(1)(b) CDR IN CONJUNCTION WITH ARTICLE 4 AND ARTICLES 5, 6, AND 7 CDR

a) Disclosure pursuant to Article 7 CDR

For the purpose of applying Articles 5 and 6 CDR, the tests of novelty and individual character, a design will be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the RCD filing date or the RCD priority date, if a priority is claimed, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the EU.

The onus is on the invalidity applicant to prove the disclosure of the earlier designs. There are no provisions in the CDR or the CDIR as to the kind or specific form of evidence the invalidity applicant is required to submit to prove that the prior design on which the application for a declaration of invalidity is based has been made available to the public before the relevant date.

Article 28(1)(b)(v) CDIR only states that where the ground for invalidity is that the RCD does not fulfil the requirements set out in Article 5 or 6 CDR, the indication and the reproduction of the prior designs that could form an obstacle to the novelty or individual character of the registered Community design, as well as documents proving the existence of those earlier designs, must be contained in the application.

It follows that, on the one hand, the invalidity applicant is free to choose the evidence it considers useful to submit in support of its application for invalidity and that, on the other hand, the Office is required to examine the evidence in its entirety in order to establish whether there is sufficient proof of a prior disclosure within the meaning of Article 7(1) CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 21-23).

In this regard, the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be based on solid and objective evidence that proves that the earlier design was made available to the public within the meaning of Article 7 CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 24).

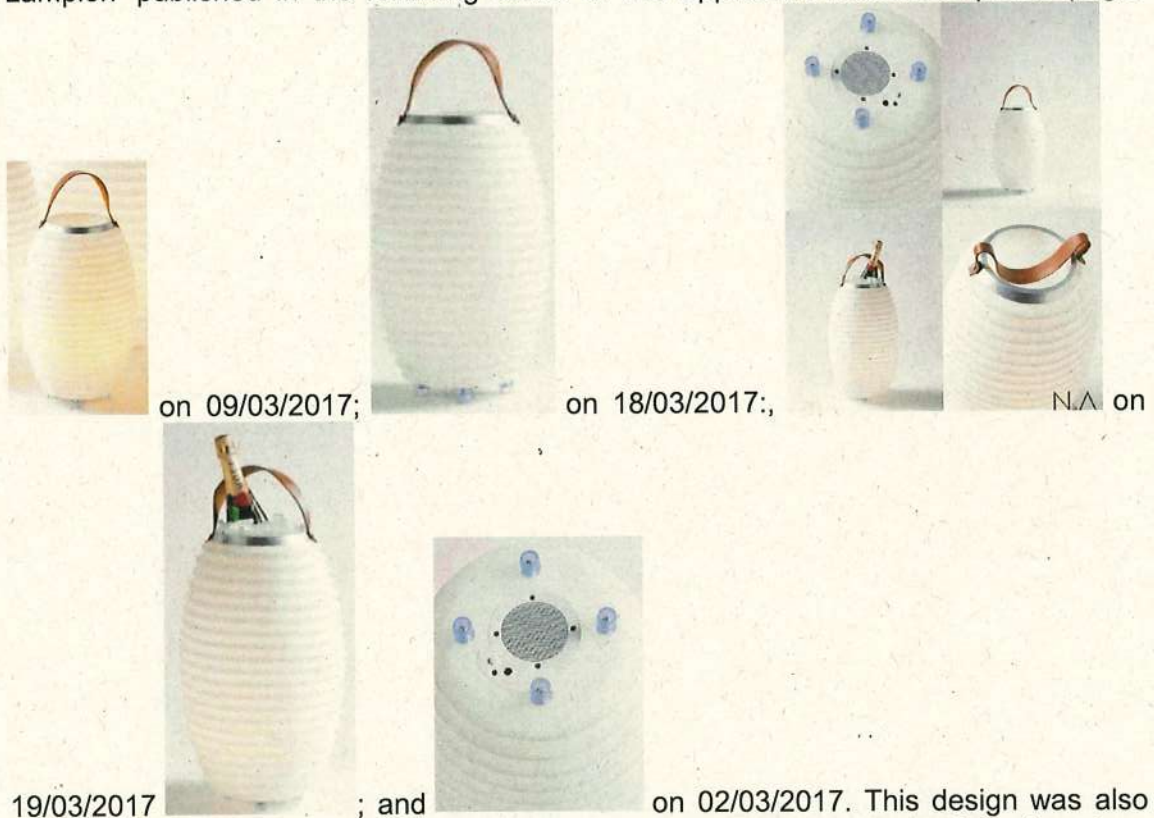
With reference to the evidential value of the individual documents, this means that regard should be had first and foremost to the credibility of the content. It is necessary to take account, in particular, of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and

whether, on its face, the document appears sound and reliable (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 23-24, 26).

The case-law further specifies that the items of evidence submitted by the applicant for a declaration of invalidity must be weighed against each other. The reason for this is that, although some of the items of evidence may be insufficient in themselves to demonstrate the disclosure of a prior design, the fact remains that, if they are combined or read in conjunction with other documents or information, they may contribute towards establishing proof of the disclosure (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 25).

One of the earlier designs invoked by the applicant was named 'The Lampion' (or 'The.Lampion'). The applicant showed that this design had been published a number of times on its Facebook and Instagram social media accounts. The dates shown therein pre-date the priority date of the contested IR and they all refer to the same design, bearing the same name. There are 'likes' and comments visible next to the images of the design.

Of the many posts and views shown therein, the applicant presented the design of 'The Lampion' published in the following views on the applicant's Facebook profile page:



Taking all these documents together, it becomes clear that they corroborate each other to demonstrate that the applicant disclosed the earlier design, 'The Lampion', on two social media accounts prior to the filing date of the contested IR.

Having said that, and in the absence of any objections from the IR holder, the Invalidity Division considers that the earlier design indicated above was disclosed for the purposes of the application of Article 7 CDR.

The Invalidity Division will assess this design to establish if the contested IR lacks novelty and/or individual character and will proceed to the analysis of the remaining evidence if necessary.

b) Individual character pursuant to Article 6 CDR

Under Article 6(1)(b) CDR, a registered Community design must 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 that has been made available to the public before the date of filing of the application for registration of the design for which protection is claimed or, if priority is claimed, the date of priority. Article 6(2) CDR states that, in assessing that individual character, the degree of freedom of the designer in developing the design must be taken into consideration.

Recital 14 CDR provides that, when assessing whether a design has individual character with respect to the existing design corpus, it is necessary to take into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs.

It follows from the above that the assessment of the individual character of a Community design with respect to any earlier design disclosed to the public must, in essence, proceed from a four-step review:

- the sector of products in which the compared designs are incorporated or to which they are applied,
- the informed user of the products according to their purpose and, in reference to the informed user:
 - the degree of knowledge of the state of the art, and
 - the degree of attention in the comparison, direct if possible, of the designs,
- the degree of freedom of the designer in the development of the designs, and
- the result of the comparison of the designs, taking into account the overall impressions produced on the user by the contested design and any of the earlier designs. The assessment should not be simply an analytical comparison of a list of similarities and differences (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 54-84; 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 53-59; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 21).

The comparison should focus on the contested design as registered and must be based on the elements that are actually protected, without regard to the features excluded from the protection (14/06/2011, T-68/10, Watches, EU:T:2011:269, § 74; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The designer's degree of freedom in developing a design is established, *inter alia*, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned (09/09/2011, T-10/08 & T-11/08, Internal combustion engine, EU:T:2011:447, § 32, 47; 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67).

The General Court has refused to allow a general design trend to be regarded as a factor that restricts the designer's freedom, since it is precisely that freedom on the part of the designer that allows him to discover new shapes and new trends or even to innovate in the context of an existing trend (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 95).

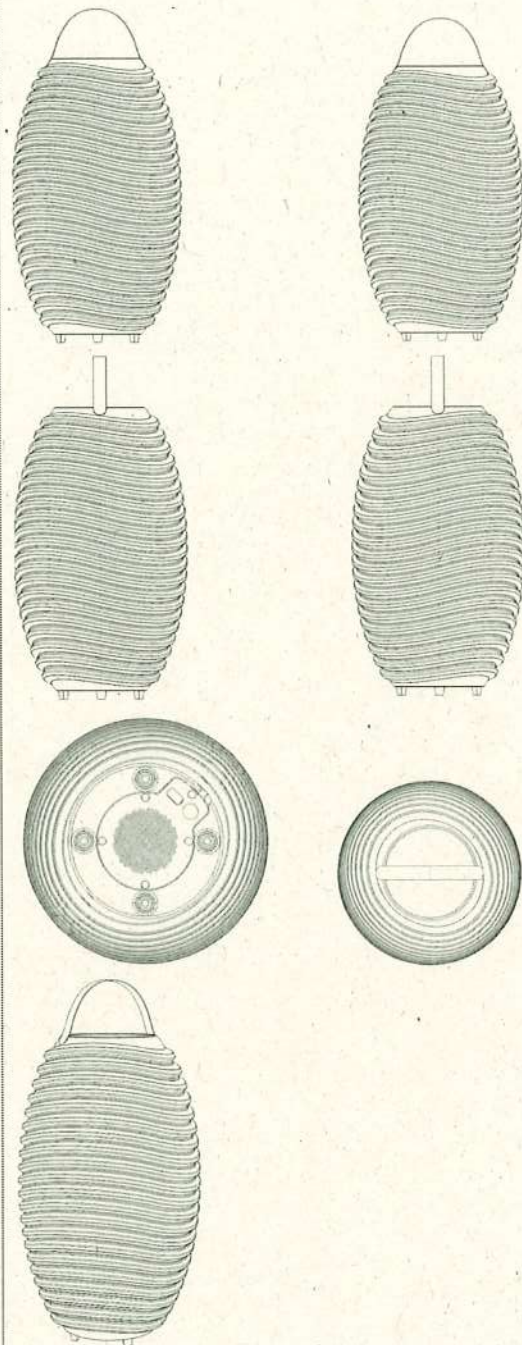
When assessing the individual character of a design taking into account the existing design corpus, the degree of freedom of the designer in developing the design may be such as to make informed users more sensitive to differences between the designs under comparison (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 81), as may the manner in which the product at issue is used, in particular the way it is usually handled (22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 66; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The informed user is a legal fiction that must be understood, depending on each case, as an intermediate concept between the average consumer, applicable in trade mark matters, of whom no specific knowledge is required and who, in general, does not perform a direct comparison between the marks, and the man of the art, applicable in the field of patents, an expert endowed with extensive technical skills and exhibiting a very high degree of attention when directly comparing conflicting inventions (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 53; 25/04/2013, T-80/10, Montres, EU:T:2013:214, § 100).

Pursuant to Article 63(1) CDR, in invalidity proceedings, the Invalidity Division is restricted to examining the facts, evidence and arguments submitted by the parties and the relief sought. The Invalidity Division therefore does not carry out its own research. This, however, does not preclude it from also taking into consideration facts that are well known, that is, that are likely to be known by anyone or can be learned from generally accessible sources.

The facts and arguments in a particular case, in principle, must have been known before the IR was filed; however, facts relating to the design corpus, the density of the market or the designer's freedom should precede the date of disclosure of the prior design.

The designs under comparison are shown below:



Prior design

Contested design

Before comparing the designs at issue, the Invalidity Division notes that it is the contested Community design that is the point of reference when assessing novelty and individual character in the comparison with the earlier design. Therefore, individual character has to be assessed solely on the basis of the features disclosed in the contested design (13/06/2017, T-9/15, Dosen [für Getränke], EU:T:2017:386, § 87).

The Invalidity Division notes that a number of similarities between the designs under comparison exist:

- the cylindrical shape of the lamp, being slightly broader in the middle, in both designs;
- the handle of a similar shape, placed in the same position on top of the lamp;
- the decorative surface of the lamp, showing horizontal protruding lines of approximately the same thickness;
- four legs of the same shape, placed in the same position on the bottom of the lamp.

However, the following material differences between the designs under comparison can be identified:

- The decorative surface of protruding lines is slightly 'wavy' in the contested design, whereas the lines are straight in the earlier design.
- The handle of the contested IR is plain, whereas in the earlier design it features a bolt. In addition, a slight difference in the thickness of the handle can be noted, being slightly broader in its middle part in the earlier design and of uniform width in the contested IR. The handle also has square endings in the earlier design and rounded endings in the contested design.
- There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

The sector concerned and the informed user

From the representations of the designs and the parties' submissions, it is apparent that the prior design serves as an ice bucket that can be illuminated and that the contested IR has Bluetooth speakers built in. However, both the earlier and the contested designs still serve as lamps; the informed user is therefore a person who is familiar with the basic features attributable to these products.

Such products usually have a light bulb or light-emitting diode and an energy source, be it an electric plug or a battery.

The designer's freedom

Although the presence of an electricity source and a light source, functional features that limit the designer's freedom, is necessary in this type of product, this does not mean that there is a limited degree of freedom for the designer in other respects, given that there are infinite possibilities for altering the form of the elements mentioned above and their positioning and also the shape, material, decorations and general appearance of the actual product, in particular the shape of the lamp shade.

Consequently, the designer's freedom within the meaning of Article 6(2) CDR is broad. In accordance with the case-law cited, only minor differences between the prior and the contested designs will be insufficient to produce different overall impressions on the informed user.

The overall impression

The contested design presents a feature that has no counterpart in the earlier design, namely that the protruding lines of the decorative surface are slightly 'wavy' in the contested design, whereas they are straight in the earlier design. In addition, the handle

of the contested IR is plain, whereas in the earlier design it features a bolt and is slightly wider in the middle. There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

However, this small number of differences is considerably less striking than the overall impression created by the numerous features in common, described above.

In particular, the designs have in common the cylindrical shape of the lamp, a handle of a similar shape, placed in the same position on the top of the lamp, the decorative surface of the lamp showing horizontal protruding lines of approximately the same thickness and four legs of the same shape, placed in the same position at the bottom of the lamp.

Owing to those similar features, it can be concluded that the contested IR does not possess individual character.

This conclusion is reinforced by the quite considerable freedom of the designer and the fact that the shape and decorations of the design are arbitrary. The contested IR could have had many different shapes and forms.

In light of the foregoing, it is concluded that the challenged design does not produce a different overall impression from that of the prior design. It reproduces features of the prior design that are arbitrary and not subject to any technical necessity obliging a designer to adopt a particular shape and size.

As a result, the Office considers that the challenged design lacks individual character in the sense of Article 6(1)(b) CDR and must be invalidated.

CONCLUSION

The facts and evidence submitted by the applicant support the grounds for invalidity under Article 25(1)(b) CDR in conjunction with Article 6 CDR; therefore, the application is upheld and the IR is declared invalid.

As the invalidity action has been fully upheld on the basis of the earlier design assessed in the present decision, there is no need to examine the other designs invoked in the rest of the evidence. Equally, there is no need to examine the remaining ground for invalidity, foreseen in Article 5 CDR.

COSTS

According to Article 70(1) CDR, the losing party in invalidity proceedings must bear the fees and costs incurred by the other party.

Since the holder is the losing party, it must bear the invalidity fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 70(1) CDR and Article 79(7)(f) CDIR, the costs to be paid to the applicant are the costs of representation, which are to be fixed on the basis of the maximum rate set therein, and the costs of the invalidity fee.

**The Invalidity Division**

Ludmila ČELIŠOVA

Gailė SAKALAITĖ

Benjamin VAN BAVEL

According to Article 56 CDR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 57 CDR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 800 has been paid.

The amount determined in the fixing of costs may only be reviewed on request. According to Article 79(4) CDR, such a request must be filed within one month from the date of notification of this fixing of costs and will be deemed to have been filed only when the review fee of EUR 100 has been paid (Annex to CDFR, paragraph 24).

INVALIDITY No ICD 106 284

Nikki.Amsterdam B.V., Mollerusweg 76, 2031BZ Haarlem, Netherlands (applicant),
represented by **Leeway B.V.**, Barbara Strozilaan 101, 1083HN Amsterdam,
Netherlands (professional representative)

against

Nomenta Technologies (Guangzhou) LTD., 5th Floor, Block A, Lianfeng Creative Park,
No 2 Jisheng Road, Huangge Town, Nansha District Guangzhou, Guangdong 511455
People's Republic of China (holder).

On 14/11/2019, the Invalidity Division takes the following

DECISION

1. The application for a declaration of invalidity is upheld.
2. International design No 4 of registration No DM/100 201 is declared invalid for the European Union.
3. The IR holder bears the costs, fixed at EUR 750.

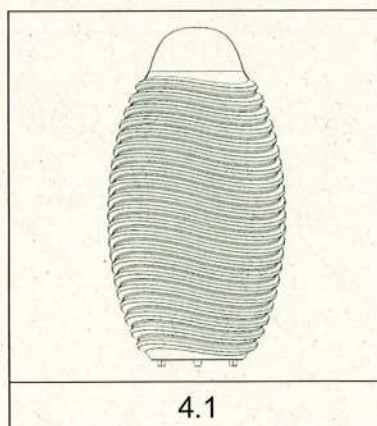
REASONS

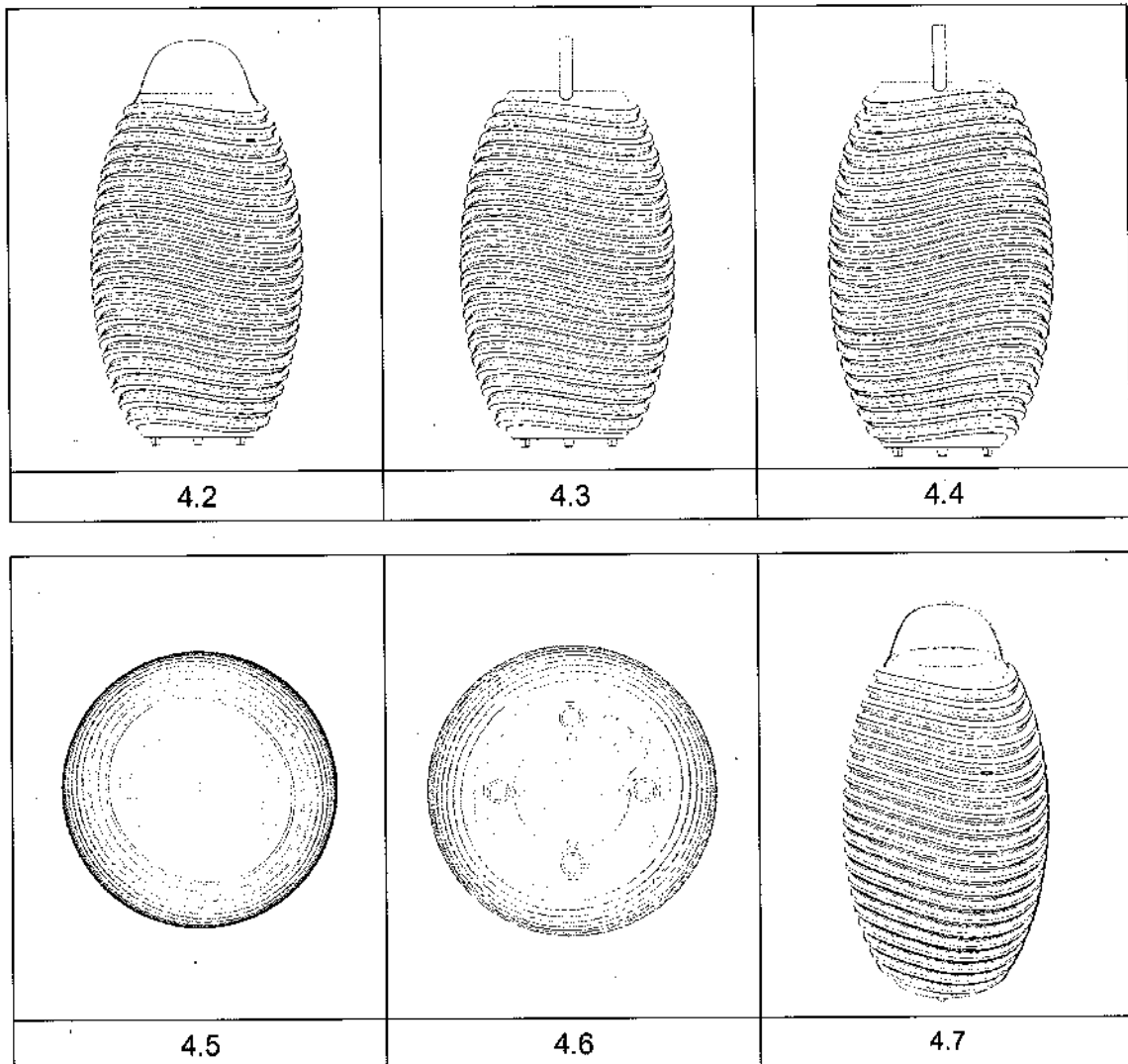
The applicant filed an application for a declaration of invalidity (the application) against international design No 4 of registration No DM/100 201, designating the European Union (the IR). The IR was applied for and registered in the holder's name on 06/11/2017. Chinese priority 201730162330.5 was filed on 05/05/2017. The IR was published in full in the *International Designs Bulletin* on 11/05/2018.

The following products are indicated in the registration:

26-05 *LED Bluetooth speaker lamps.*

The registration contains the following images:





Please note that the images in this document are not necessarily to scale.

The applicant invoked Article 25(1)(b) CDR in conjunction with Articles 5 and 6 CDR.

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant claimed that its application for declaration of invalidity of the contested IR was based on Article 25(1)(b) CDR, as this design did not fulfil the requirements for design protection pursuant to Articles 4 to 9 CDR. The contested IR lacked novelty within the meaning of Article 5 CDR and individual character within the meaning of Article 6 CDR.

In support of its observations, the applicant submitted the following evidence:

- **Exhibit 1** – photos of 'The Lampion' from the company Nikki.Amsterdam as shown on Facebook and Instagram in the period between February 2017 and April 2017 and produced by the applicant's supplier Foshan Baicai Electron Co., Ltd.
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- **Exhibit 6** – photos of 'The.Lampion' and the 'Honey outdoor lamp', as shown in Exhibits 1 and 2, in the same views as the contested IR.

The holder did not appoint a representative entitled to represent it before the Office and did not submit any observations in reply.

ARTICLE 25(1)(b) CDR IN CONJUNCTION WITH ARTICLE 4 AND ARTICLES 5, 6, AND 7 CDR

a) Disclosure pursuant to Article 7 CDR

For the purpose of applying Articles 5 and 6 CDR, the tests of novelty and individual character, a design will be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the RCD filing date or the RCD priority date, if a priority is claimed, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the EU.

The onus is on the invalidity applicant to prove the disclosure of the earlier designs. There are no provisions in the CDR or the CDIR as to the kind or specific form of evidence the invalidity applicant is required to submit to prove that the prior design on which the application for a declaration of invalidity is based has been made available to the public before the relevant date.

Article 28(1)(b)(v) CDIR only states that where the ground for invalidity is that the RCD does not fulfil the requirements set out in Article 5 or 6 CDR, the indication and the reproduction of the prior designs that could form an obstacle to the novelty or individual character of the registered Community design, as well as documents proving the existence of those earlier designs, must be contained in the application.

It follows that, on the one hand, the invalidity applicant is free to choose the evidence it considers useful to submit in support of its application for invalidity and that, on the other hand, the Office is required to examine the evidence in its entirety in order to establish whether there is sufficient proof of a prior disclosure within the meaning of Article 7(1) CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 21-23).

In this regard, the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be based on solid and objective evidence that proves that the earlier design was made available to the public within the meaning of Article 7 CDR (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 24).

With reference to the evidential value of the individual documents, this means that regard should be had first and foremost to the credibility of the content. It is necessary to take account, in particular, of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and

whether, on its face, the document appears sound and reliable (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 23-24, 26).

The case-law further specifies that the items of evidence submitted by the applicant for a declaration of invalidity must be weighed against each other. The reason for this is that, although some of the items of evidence may be insufficient in themselves to demonstrate the disclosure of a prior design, the fact remains that, if they are combined or read in conjunction with other documents or information, they may contribute towards establishing proof of the disclosure (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 25).

One of the earlier designs invoked by the applicant was named 'The Lampion' (or 'The.Lampion'). The applicant showed that this design had been published a number of times on its Facebook and Instagram social media accounts. The dates shown therein pre-date the priority date of the contested IR and they all refer to the same design, bearing the same name. There are 'likes' and comments visible next to the images of the design.

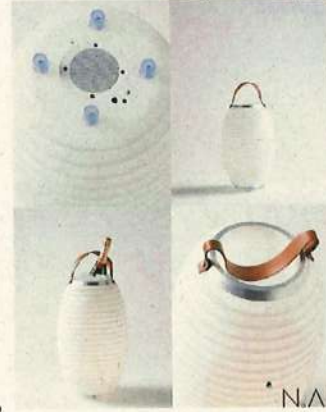
Of the many posts and views shown therein, the applicant presented the design of 'The Lampion' published in the following views on the applicant's Facebook profile page:



on 09/03/2017;



on 18/03/2017;



N/A on



19/03/2017

; and



on 02/03/2017. This design was also

shown on the applicant's Instagram account on 06/04/2017 with the following view:



Taking all these documents together, it becomes clear that they corroborate each other to demonstrate that the applicant disclosed the earlier design, 'The Lampion', on two social media accounts prior to the filing date of the contested IR.

Having said that, and in the absence of any objections from the IR holder, the Invalidity Division considers that the earlier design indicated above was disclosed for the purposes of the application of Article 7 CDR.

The Invalidity Division will assess this design to establish if the contested IR lacks novelty and/or individual character and will proceed to the analysis of the remaining evidence if necessary.

b) Individual character pursuant to Article 6 CDR

Under Article 6(1)(b) CDR, a registered Community design must 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 that has been made available to the public before the date of filing of the application for registration of the design for which protection is claimed or, if priority is claimed, the date of priority. Article 6(2) CDR states that, in assessing that individual character, the degree of freedom of the designer in developing the design must be taken into consideration.

Recital 14 CDR provides that, when assessing whether a design has individual character with respect to the existing design corpus, it is necessary to take into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs.

It follows from the above that the assessment of the individual character of a Community design with respect to any earlier design disclosed to the public must, in essence, proceed from a four-step review:

- the sector of products in which the compared designs are incorporated or to which they are applied,
- the informed user of the products according to their purpose and, in reference to the informed user:
 - the degree of knowledge of the state of the art, and
 - the degree of attention in the comparison, direct if possible, of the designs,
- the degree of freedom of the designer in the development of the designs, and
- the result of the comparison of the designs, taking into account the overall impressions produced on the user by the contested design and any of the earlier designs. The assessment should not be simply an analytical comparison of a list of similarities and differences (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 54-84; 20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 53-59; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 21).

The comparison should focus on the contested design as registered and must be based on the elements that are actually protected, without regard to the features excluded from the protection (14/06/2011, T-68/10, Watches, EU:T:2011:269, § 74; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The designer's degree of freedom in developing a design is established, *inter alia*, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned (09/09/2011, T-10/08 & T-11/08, Internal combustion engine, EU:T:2011:447, § 32, 47; 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67).

The General Court has refused to allow a general design trend to be regarded as a factor that restricts the designer's freedom, since it is precisely that freedom on the part of the designer that allows him to discover new shapes and new trends or even to innovate in the context of an existing trend (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 95).

When assessing the individual character of a design taking into account the existing design corpus, the degree of freedom of the designer in developing the design may be such as to make informed users more sensitive to differences between the designs under comparison (13/11/2012, T-83/11 & T-84/11, Radiatori per riscaldamento, EU:T:2014:115, § 81), as may the manner in which the product at issue is used, in particular the way it is usually handled (22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 66; 07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).

The informed user is a legal fiction that must be understood, depending on each case, as an intermediate concept between the average consumer, applicable in trade mark matters, of whom no specific knowledge is required and who, in general, does not perform a direct comparison between the marks, and the man of the art, applicable in the field of patents, an expert endowed with extensive technical skills and exhibiting a very high degree of attention when directly comparing conflicting inventions (18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 53; 25/04/2013, T-80/10, Montres, EU:T:2013:214, § 100).

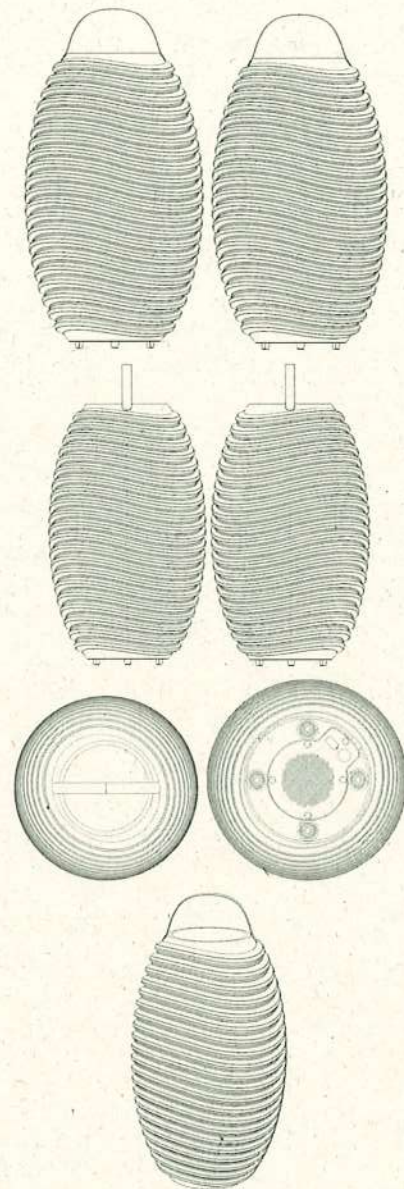
Pursuant to Article 63(1) CDR, in invalidity proceedings, the Invalidity Division is restricted to examining the facts, evidence and arguments submitted by the parties and the relief sought. The Invalidity Division therefore does not carry out its own research. This, however, does not preclude it from also taking into consideration facts that are well known, that is, that are likely to be known by anyone or can be learned from generally accessible sources.

The facts and arguments in a particular case, in principle, must have been known before the IR was filed; however, facts relating to the design corpus, the density of the market or the designer's freedom should precede the date of disclosure of the prior design.

The designs under comparison are shown below:



Prior design



Contested design

Before comparing the designs at issue, the Invalidity Division notes that it is the contested Community design that is the point of reference when assessing novelty and individual character in the comparison with the earlier design. Therefore, individual character has to be assessed solely on the basis of the features disclosed in the contested design (13/06/2017, T-9/15, Dosen [für Getränke], EU:T:2017:386, § 87).

The Invalidity Division notes that a number of similarities between the designs under comparison exist:

- the cylindrical shape of the lamp, being slightly broader in the middle, in both designs;
- the handle of a similar shape, placed in the same position on top of the lamp;
- the decorative surface of the lamp, showing horizontal protruding lines of approximately the same thickness;
- four legs of the same shape, placed in the same position on the bottom of the lamp.

However, the following material differences between the designs under comparison can be identified:

- The decorative surface of protruding lines is slightly 'wavy' in the contested design, whereas the lines are straight in the earlier design.
- The handle of the contested IR is plain, whereas in the earlier design it features a bolt. In addition, a slight difference in the thickness of the handle can be noted, being slightly broader in its middle part in the earlier design and of uniform width in the contested IR. The handle also has square endings in the earlier design and rounded endings in the contested design.
- There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

The sector concerned and the informed user

From the representations of the designs and the parties' submissions, it is apparent that the prior design serves as an ice bucket that can be illuminated and that the contested IR has Bluetooth speakers built in. However, both the earlier and the contested designs still serve as lamps; the informed user is therefore a person who is familiar with the basic features attributable to these products.

Such products usually have a light bulb or light-emitting diode and an energy source, be it an electric plug or a battery.

The designer's freedom

Although the presence of an electricity source and a light source, functional features that limit the designer's freedom, is necessary in this type of product, this does not mean that there is a limited degree of freedom for the designer in other respects, given that there are infinite possibilities for altering the form of the elements mentioned above and their positioning and also the shape, material, decorations and general appearance of the actual product, in particular the shape of the lamp shade.

Consequently, the designer's freedom within the meaning of Article 6(2) CDR is broad. In accordance with the case-law cited, only minor differences between the prior and the contested designs will be insufficient to produce different overall impressions on the informed user.

The overall impression

The contested design presents a feature that has no counterpart in the earlier design, namely that the protruding lines of the decorative surface are slightly 'wavy' in the contested design, whereas they are straight in the earlier design. In addition, the handle of the contested IR is plain, whereas in the earlier design it features a bolt and is slightly wider in the middle. There is a rim around the opening at the top of the earlier design; such a rim is not shown in the contested design.

However, this small number of differences is considerably less striking than the overall impression created by the numerous features in common, described above.

In particular, the designs have in common the cylindrical shape of the lamp, a handle of a similar shape, placed in the same position on the top of the lamp, the decorative surface of the lamp showing horizontal protruding lines of approximately the same thickness and four legs of the same shape, placed in the same position at the bottom of the lamp.

Owing to those similar features, it can be concluded that the contested IR does not possess individual character.

This conclusion is reinforced by the quite considerable freedom of the designer and the fact that the shape and decorations of the design are arbitrary. The contested IR could have had many different shapes and forms.

In light of the foregoing, it is concluded that the challenged design does not produce a different overall impression from that of the prior design. It reproduces features of the prior design that are arbitrary and not subject to any technical necessity obliging a designer to adopt a particular shape and size.

As a result, the Office considers that the challenged design lacks individual character in the sense of Article 6(1)(b) CDR and must be invalidated.

CONCLUSION

The facts and evidence submitted by the applicant support the grounds for invalidity under Article 25(1)(b) CDR in conjunction with Article 6 CDR; therefore, the application is upheld and the IR is declared invalid.

As the invalidity action has been fully upheld on the basis of the earlier design assessed in the present decision, there is no need to examine the other designs invoked in the rest of the evidence. Equally, there is no need to examine the remaining ground for invalidity, foreseen in Article 5 CDR.

COSTS

According to Article 70(1) CDR, the losing party in invalidity proceedings must bear the fees and costs incurred by the other party.

Since the holder is the losing party, it must bear the invalidity fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 70(1) CDR and Article 79(7)(f) CDiR, the costs to be paid to the applicant are the costs of representation, which are to be fixed on the basis of the maximum rate set therein, and the costs of the invalidity fee.

**The Invalidity Division**

Ludmila ČELIŠOVA

Gailė SAKALAITĖ

Benjamin VAN BAVEL

According to Article 56 CDR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 57 CDR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 800 has been paid.

The amount determined in the fixing of costs may only be reviewed on request. According to Article 79(4) CDR, such a request must be filed within one month from the date of notification of this fixing of costs and will be deemed to have been filed only when the review fee of EUR 100 has been paid (Annex to CDFR, paragraph 24).