

DECISION
of the Third Board of Appeal
of 3 September 2020

In Case R 1042/2018-3

Multimox Holding B.V.

Mariastraat 62

5121JW Rijen

Netherlands

Proprietor/Appellant

represented by Kai Kohlmann, Donatusstr. 1, 52078 Aachen, Germany

against

Asian Gear B.V.

De Lasso 42

2371 GX Roelofarendsveen

Netherlands

Applicant/Respondent

represented by Fruytier Lawyers In Business, Kingsfordweg 99, 1043GP Amsterdam,
the Netherlands

Appeal relating to Invalidity Proceedings No 10 419 (Community design No 607155-0002)

issues

THE THIRD BOARD OF APPEAL

composed of Th.M. Margellos (Chairperson), E. Fink (Rapporteur) and G.
Humphreys (Member)

Registrar: H. Dijkema

gives the following

Decision

Facts

- 1 The appellant ('the proprietor') is the proprietor of registered Community design No 607155 ('the contested CD') with the product indication 'scooters', which was applied for on 19/10/2006, effectively extended, and reproduced in the following view:



- 2 The respondent ('the applicant') filed an application for a declaration of invalidity of the contested RCD. The appellant cited Article 25 (1) (b) CDR in conjunction with Article 4 CDR as grounds for invalidity; the contested CD did not have any novelty and individual character.
- 3 The following goods were enclosed with the application:
 - Annex 1: Photographs of a Republic of the State Intellectual Property Office of the People's Republic of China (hereinafter: 'SIPO') exhibits 'Certificate of design patent' for design No CN3568787 (D1):



- Annex 2: Undated screenshot of the SIPO database <http://epub.sip.gov.cn/patentoutline.action>, relating to design No CN3568787 with a German translation:

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- 4 The holder opposed the application for invalidity. It claimed that the application was inadmissible pursuant to Article 52 (3) CDR, since a final decision had already been made on the invalidity applicant's claim in invalidity proceedings No ICD 9089. This earlier procedure had been conducted against Mr El Boubsi as the proprietor's predecessor in legal terms. However, this had now been the managing director of the proprietor, which was also known to the applicant by means of expedited proceedings conducted in the Hague Regional Court. Therefore, identity of the parties was therefore present.
- 5 Proof of the disclosure of the earlier design pursuant to Article 7 (1) CDR had not been furnished. The Chinese certificate was barely legible and was not translated; the database extract verified at most on 11/10/2006, a few days before the filing of the application for the contested RCD on 19/10/2006. In 2006, the Chinese Patent Journal appeared on paper only once a week and it was not immediately possible to carry out a search for the specialist circles in the EU, as confirmed by the enclosed documents. The extract of the file, which the proprietor requested in the SIPO, of the filing documents of D1, as the applicant, Zhjiang Sanyang Jiche Gongye Gongs, while in the extract from the database the Zhejiang Sanyang Motorcycle Industry Co., Ltd as the proprietor was named.
- 6 The earlier design also had to be left out of consideration pursuant to Article 7 (2) and (3) CDR. As can be seen from the enclosed declaration, Mr El Boubsi, the proprietor's legal predecessor, the author of the design as per D1; the trademark applied for by a third party was vexatious.

7 It filed the following documents:

- Annex 1: Decision No ICD 9089 of the Invalidity Division of 05/02/2014;
- Annex 2: Decision of the Board of Appeal R 995/2014-3 of 10/12/2014;
- Annex 3: Communication from the Office of 04/07/2016 concerning the registration of a transfer of rights in the contested Community design;
- Annex 4: Dutch minutes of a hearing before the General Court in the Hague, 17/11/2016, with a German translation;
- Annex 5: Internet print ‘latest Developments of SIPO’s Automation’ of 22/02/2006 with a German translation;
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- Annex 10: Statement by the Yu BO of 21/10/2016 in the language of the case with a German translation.

8 The applicant contends that the application is admissible. The objection of lack of translation and inconsistency was incorrect. Sanyang motorcycle Industry Co., Ltd, applicant of D1, later named Zhejiang Motorcycle Industry Co., Ltd. The only decisive factor was that Mr El Boubsi, as the legal predecessor in the proprietor, was aware, in filing the application for the contested RCD, that he was not entitled to it. The date of publication of the D1 could not matter. The earlier design was protected by copyright; the cumulative of copyright and design law is admissible both in China and pursuant to Article 96 (2) CDR; the alleged lack of a SIPO’s bulletin does not alter this in any way. On 09/06/2006, the proprietor of D1 had already acquired the internet domain www.cnsycn.com; on this page, a motor scooter as per D1 had also been disclosed. As of D1, it was already sold in China in 2004 and, since February 2005, also in the Netherlands and the United Kingdom.

9 In support of its argument, it filed the following documents:

- Annex 3: Declaration by Zhejiang Sanyang Motorcyle Industy Co., Ltd., Ltd., of 09/09/2016, in English, a German translation;
- Annex 4: Extract from the Chinese company register relating to ‘Sanyang Motorcyle Industy Co., Ltd.’, in Chinese with Dutch and German translation;
- Annex 5: Extract from paragraph 20 of a Dutch letter of law, undated, with a German translation;
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as well as a German translation of domain name information for ‘cnsyncn.com’;

- Annex 8: Extract from the report from a bankrupt company in Dutch with a German translation;
 - Annex 9: Article 16 of the Chinese Copyright Act, with a German translation;
 - Annex 10: Further explanation of the ‘Zhejiang Sanyang Motorcyle Industry Co., Ltd.’ of 09/09/2016 in English is a German translation;
 - Annex 11: Declaration by Taizhou Zhongneng Motorcyle Co., Ltd., Ltd., from 27/03/2013, in English, with a German translation;
 - Annex 12: Letter from the Vehicle Certification Agency in Bristol, United Kingdom, dated 03/02/2005, with a German translation;
 - Annex 13: ‘EC Type-Approval Certificate’ issued by ‘RDW’ in the Netherlands, in English, with a German translation.
- 10 By decision of 30/04/2018, the Invalidity Division allowed the application, declared the contested RCD to be invalid and ordered the proprietor to bear the costs of the proceedings.
- 11 The Invalidity Division essentially stated the following as grounds:
- The application for a declaration of invalidity was admissible. The request underlying the invalidity proceedings No ICD 9089 was based on another earlier design and therefore concerned a different claim.
 - There was no discrepancy between the certificate and the database extract claimed in respect of the earlier Chinese design. Was did not preclude the fact that the extract filed by the proprietor from the application files did not contain any views. The certificate clearly showed which design had been registered, with which appearance was registered and was published on 11/10/2006.
 - A earlier design, which is published in the Official Journal of an Office for Industrial Property, in principle, is regarded as having been disclosed pursuant to Article 7 (1) CDR. Even at a time when the respective registers were not yet accessible online, the exchange of official journals was a common practice and could be seen on the Official Journal in Europe published by SIPO. In the present case, the relatively short period of time between the date of publication of the D1 and the filing date of the contested RCD can do nothing to change this.
 - Despite the lack of a translation, the certificate was able to recognise the 11/10/2006 date of publication under the INID code 45 as the date of publication.
 - No significant differences were apparent between the opposing designs. Taking into account an average degree of design freedom, the overall impression produced on the informed user by motor scooters was therefore the same and opposed D1 of the individual character of the contested CD. The question of whether it was also prejudicial to novelty could therefore remain open.

Grounds

- 12 The proprietor against this decision was directed at the proprietor's notice of appeal filed on 06/06/2018 and submitted grounds of appeal on 24/08/2018.
- 13 It essentially argued the following, taking account of its submission at first instance:
- Article 52 (3) CDR precluded the admissibility of the application for a declaration of invalidity. He related the same parties and referred to the lack of novelty and individual character pursuant to Article 25 (1) (b) CDR in conjunction with Article 4 CDR. No comments were made on the facts and circumstances that were specifically invoked.
 - Due to the lack of a translation, the 'Certificate of Design Patent' had to be disregarded. The INID code 45 was barely legible. The contested decision was based on a piece of evidence that had neither been translated nor translated.
 - The registered proprietor of D1 did not note, in the absence of a translation, that this is the case. As evidenced by the certified register extract presented at first instance, the name of the applicant was not the same with that of the proprietor mentioned in the database extract.
 - The contested decision did not concern the evidence submitted by the proprietor of the contested RCD, according to which, in 2006, a theoretical possibility of a publication in China could itself have been possible 15 working days after the date of publication. The SIPO-Official Official Journal had been published on paper only once a week, that the data had not been translated and that a search had resulted in the designation of a Chinese patent attorney.
 - The applicant since 2013, has been seeking to declare the contested RCD invalid and it was obvious that it has been unable to locate D1.
 - D1 did not preclude the contested RCD from having individual character. The degree of freedom of design was greatly restricted, which meant that even minor differences were not attentive to the attention of the informed user.
- 14 The applicant accepts the contested decision and makes the following additional comments:
- There was no discrepancy in relation to the proprietor of the earlier design. They merely involved a change of name, namely from the original applicant 'Zhejiang Sanyang Gongye Gongye Gongsi' in 'Zhejiang Sanyang motorcycle Industry Co., Ltd.'
 - The objection of lack of disclosure was irrelevant; the only decisive factor was that the proprietor of the proprietor of the contested RCD, Mr El Boubsi, had acted in bad faith in making the application; it had known that it did not own the Sanyang model protected with D1. The attached Annex letter confirmed that Mr El Boubsi had stayed in China in 2006 and was therefore familiar with the earlier Sanyang model.

- It was only a clear assumption that the SIPO database had only been available after the filing date of the contested RCD.
 - D1 also precluded the individual character of the contested RCD.
- 15 The applicant enclosed p. 1 of a three-sided attorney's letter in Dutch, a German translation (Annex 14).
- 16 The proprietor expressly renounced the reply and asked for a decision on this matter to be requested in a timely manner.

Reasons

- 17 The appeal is well founded. The applicant has not shown that D1 was published before the filing date of the contested CD within the meaning of Article 7 (1) CDR.

Admissibility of the application for a declaration of invalidity

- 18 The application for a declaration of invalidity is not contrary to Article 52 (3) CDR and is admissible.
- 19 Article 52 (3) CDR requires that an Community design court has already made a final and binding decision on an application for a declaration of invalidity on the same cause of action and between the same parties. Although also based on the ground for invalidity of lack of novelty and individual character pursuant to Article 25 (1) (b) CDR, the request underlying the decision of the Invalidity Division No ICD 9089 of 05/02/2014 was likewise based on the earlier design cited in the present case Chinese design No CN3568787. In the absence of sufficient proof of disclosure of the prior designs, the Invalidity Division rejected the application as unfounded. There is therefore no requirement for the 'same claim' within the meaning of the abovementioned provision, which means that the question of identity of the parties discussed by the proprietor can likewise be made questionable just as if the question of corresponding application of the provision was the subject of a final decision by the Office.

Disclosure of the earlier design

- 20 Article 7 (1) CDR stipulates that a design shall 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 date referred to in Article 5 (1) (b) CDR, 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 Community.

- 21 Neither the CDR nor the CDIR contains provisions on the requirements regarding proving disclosure. Article 52 CDR in conjunction with Article 28 (1) (b) (v) CDIR merely stipulates that the application for a declaration of invalidity must be accompanied by documents proving the existence of the claimed earlier designs. The applicant is thus in principle free to choose suitable evidence in principle.
- 22 In addition, 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 provides proof of disclosure. In this respect, the evidence submitted by the applicant in the invalidity proceedings must be assessed in its entirety. This is because, even if individual documents per se may not be sufficient to prove the disclosure, they can nevertheless contribute towards proving disclosure in the overall view. 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 (17/05/2018, T-760/16, Fahrradkörbe, EU:T:2018:277, § 40 et seq.; 09/03/2012, T — 450/08, Flacons, EU:T:2012:117, § 21 ff).
- 23 A design is considered to have been disclosed if the applicant has proved the facts on which the disclosure was disclosed. However, it is sufficient to prove sufficient that the proprietor of the contested RCD, who would like to rebut this presumption, could reasonably establish that, in view of the specific circumstances of the case, these facts could be known to the relevant specialist circles in the sector concerned, in the normal course of business (13/06/2019, T-74/18, Information leather alter, EU:T:2019:417, § 23; 21/05/2015, T-22/13 & T-23/13, Umbrellas, EU:T:2015:310, § 26).
- 24 The disclosure of disclosure pursuant to Article 7 (1) CDR is therefore to be carried out a two-stage analysis, namely, firstly, whether the evidence submitted in support of the application for a declaration of invalidity prove the disclosure of a prior design before the relevant point in time; and, secondly, if the proprietor disputes whether these facts might reasonably have become known in the normal course of business to the relevant specialists active in the European Union, otherwise the disclosure cannot be taken into account (27/02/2020, T-159/19, furniture, EU:T:2020:77, § 20; 13/06/2019, T-74/18, Information leaf, EU:T:2019:417, § 24)
- 25 According to these principles, the documents submitted by the applicant are not sufficient to prove that D1 was disclosed before the filing date of the contested RCD.
- 26 The registration certificate submitted by fax (para. 3, Annex 1) is of poor image quality. It is only the date on which the filing date (INID code 22), specifically ‘2005.12.22’, can be clearly identified. On the date of publication (INID code 45), the Board is only able to recognise the 2006 year by recognising best will and, in contrast with the filing date, no complete date. The applicant itself has contributed nothing to clarifying this situation; however, it merely contributed to

the (incorrect) findings of the Invalidity Division; the certificate referred to the date of publication.

- 27 Although the screenshots of the database extract and the accompanying translation (para. 3, Annex 2) mention the date of publication as 11/10/2006, they do not contain any information on the form of this publication, since it is obviously not the SIPS Register itself but merely a database that is involved. Both documents thus prove, in the overall view, the existence of the valid design No CN3568787 with the filing date of 22/12/2005 and the publication date of 11/10/2006, but not the specific shape of this publication, that is to say in particular from the views which took place with regard to the views which were made in relation to D1. In this case, clarity could create an extract from the relevant edition of the SIPO patent leaf, which, however, the applicant did not submit an extract despite the proprietor's repeated complaints. The event of disclosure is therefore already not proven.
- 28 Even if it is assumed, in the applicant's favour, to publish all the views of D1, with all the views submitted on 11/10/2006, the documents submitted by it are also not sufficient to refute the proprietor's substantiated argument that such disclosure at the time the contested RCD was filed could not have been known to the relevant specialists in the EU in the normal course of business.
- 29 The SIPO notification of 22/02/2006 (paragraph 5, Annex 5) states that the only official form of publication was the weekly Patent Office sheet. The data from the English-language website created for searches would be updated on a quarterly basis. The most important tool for finding a design is the design CD. The description of its electronic line service published by SIPO explains that this service contains only graphic documents of patent applications filed according to 10/02/2010 (para. 5, Annex 8), i.e. a period of several years after the application of D1 on 22/12/2005.
- 30 The applicant merely counters this by stating that this information was irrelevant, because it expressly only related to patent applications. However, it did not explain how much the publication practice of SIPO might have for design applications, let alone documents in this regard. Her argument is therefore not convincing either, because the database extract submitted by it itself originates from a patent database, as can be seen from the address element 'patentoffline' (see paragraph 3).
- 31 In the absence of any evidence to the contrary, it is therefore to be assumed that the date of publication, which corresponds to 11/10/2006, the date of publication of the weekly IPO-patent, and that this publication consequently takes place only in paper form and in the Chinese language. It is true that the disclosure of a design is in principle independent of the language used in the publication, because knowledge of the external appearance of a product within the meaning of Article 3 (a) CDR does not require any linguistic knowledge. However, a publication in paper form is naturally not accessible to a limited group of users and without any relevant linguistic knowledge. For the specialists active in the EU, D1 was therefore not available in the normal course of business on the date

of publication 11/10/2006, but instead at the beginning, following the assignment of a corresponding search, in respect of which, according to the information submitted by the proprietor, it was generally 10 working days, i.e. two weeks (see paragraph 5, Annex 9). The applicant has also not opposed this submission.

- 32 Since the publication of D1 was published on 11/10/2006 only eight days before the filing of the contested RCD on 19/10/2006, it is therefore not possible to assume that it is effectively disclosed within the meaning of Article 7 (1) CDR.
- 33 In support of the assumption made by the Cancellation Division, by means of the publication in the Patent Journal, on account of the customary exchange of patent specifications, there was in any case a theoretical possibility of taking note of the application date of the contested RCD on 19/10/2006; the Board does not see any evidence. Article 76 CDR only governs the exchange of patent documents between the authorities of the Member States concerning industrial property rights, and not the exchange with China. Even if it were assumed, in favour of the applicant, that such an exchange took place in 2006, it should not be assumed, with consideration given by administrative authorities and common postal delivery times, that the SIPO-Patent Journal of 11/10/2006 was already available to the relevant specialist circles for research purposes in the libraries of the national offices of the Member States.
- 34 Proof of the D1 prepublication on the website www.cnsyn.com is not provided either. The Internet archive Wayback Machine is well known to archive only the text that is available at a given reference date, but not the pictures inserted. Moreover, the screenshots submitted (paragraph 7, Annex 7) only show the Chinese version of the page, although they were obviously also available in English (see the button in the top right 'English'). Consequently, it is more than doubtful whether the images were to be found at all for EU specialists. Not least, however, the applicant itself was able to locate D1 after more than a decade or with an unsuccessful application for a declaration of invalidity.
- 35 The mere fact that Mr El Boubsi, the proprietor's legal predecessor, possibly took place in China at the time of publication of D1 is also unable to prove proof of disclosure pursuant to Article 7 (1) CDR. In so far as the applicant insisted that Mr El Boubsi had acted in bad faith when he filed the application for the contested RCD, it was sufficient to point out that the applicant's bad faith is not a ground for invalidity pursuant to Article 25 CDR; the list of grounds for invalidity is conclusive.
- 36 The question of who is entitled to copyright on D1 is also irrelevant for the assessment of the disclosure of the earlier design within the meaning of Article 7 (1) CDR. The ground for invalidity under Article 25 (1) (f) CDR was not claimed. The applicant's submission on possible copyright infringements by Mr El Boubsi is therefore impossible from the outset.
- 37 Finally, the argument that the motor scooters according to D1 had been brought onto the market in China since 2004 from the company 'Taizhou Zhongneng Motorcycle Co. Ltd' has also been rejected. Firstly, the registration certificates

submitted do not show any images of D1, but technical drawings of a motor scooter (para. 7, Annexes 12 and 13); there is no apparent connection between these drawings and D1 and was also not demonstrated by the applicant. Secondly, it is only certification that the vehicle type corresponding to the drawings satisfies the technical requirements for placement on the market in the United Kingdom and the Netherlands, respectively. A statement regarding the date of actual release on the market of the respective models does not include the certificates. Thirdly, the relationship between the ‘Taizhou Zhongneng Motorcyle Co. Ltd’ is the vehicle manufacturer mentioned in the certificates and the ‘Zhejiang Motorcycle Industry Co., Ltd.’ (D1) is not explained in any way. In its declaration of 27/03/2013, cited above in English (para. 7, Annex 11), ‘Taizhou Zhongneng Motorcyle Co. Ltd.’ must have received the abovementioned certificates of eligibility in 2005 and 2006. In the (uncertified) German translation, the company name ‘Taizhou Zhongneng Motorcyle Co. Ltd’ was simply replaced by ‘Zhejiang Sanyang motorcycle Industry Co., Ltd.’. However, an obviously incorrect translation cannot in any way be sufficient to prove that the vehicles manufactured by ‘Taizhou Zhongneng Motorcyle Co. Ltd’ are these according to D1.

- 38 The applicant’s entire argument is thus incapable of disputing the doubts raised by the proprietor on disclosure. In particular, despite these objections the applicant has failed to submit meaningful documents throughout the proceedings, for example in the form of an extract from the Chinese Patent Journal of 11/10/2006 or a confirmation by SIPO about the publication practice in 2006.
- 39 Proof of the disclosure of an earlier design that might preclude the novelty and individual character of the contested design is therefore not provided. An examination of whether the disclosure claimed had to be disregarded pursuant to Article 7 (2) and (3) CDR is therefore unnecessary.
- 40 The contested decision had to be annulled and the application for a declaration of invalidity rejected.

Costs

- 41 Pursuant to Article 70 (1) CDR, the losing party in the proceedings shall bear the costs incurred by the other party. As the losing party, the applicant shall bear the costs incurred by the proprietor in the invalidity and appeal proceedings.

The operative part of the decision

On these grounds,

THE BOARD

as follows:

- 1. The contested decision is annulled.**
- 2. The application for a declaration of invalidity is rejected.**
- 3. Orders the applicant to bear the costs of the invalidity and appeal proceedings.**

Signed

Th. M. Margellos

Signed

E. Fink

Signed

G. Humphreys

Registrar:

Signed

P.O. M. Chaleva



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- The application for a declaration of invalidity was admissible. The request underlying the invalidity proceedings No ICD 9091 was based on another earlier design and therefore concerned a different claim.
 - There was no discrepancy between the certificate and the database extract claimed in respect of the earlier Chinese design. Was did not preclude the fact that the extract filed by the proprietor from the application files did not contain any views. The certificate clearly showed which design had been registered, with which appearance was registered and was published on 11/10/2006.
 - A earlier design, which is published in the Official Journal of an Office for Industrial Property, in principle, is regarded as having been disclosed pursuant to Article 7 (1) CDR. Even at a time when the respective registers were not yet accessible online, the exchange of official journals was a common practice and could be seen on the Official Journal in Europe published by SIPO. In the present case, the relatively short period of time between the date of publication of the D1 and the filing date of the contested RCD can do nothing to change this.
 - Despite the lack of a translation, the certificate was able to recognise the 11/10/2006 date of publication under the INID code 45 as the date of publication.
 - No significant differences were apparent between the opposing designs. Taking into account an average degree of design freedom, the overall impression produced on the informed user by motor scooters was therefore the same and opposed D1 of the individual character of the contested CD. The question of whether it was also prejudicial to novelty could therefore remain open.

Grounds

- 12 The proprietor against this decision was directed at the proprietor's notice of appeal filed on 06/06/2018 and submitted grounds of appeal on 24/08/2018.
- 13 It essentially argued the following, taking account of its submission at first instance:
- Article 52 (3) CDR precluded the admissibility of the application for a declaration of invalidity. He related the same parties and referred to the lack of novelty and individual character pursuant to Article 25 (1) (b) CDR in conjunction with Article 4 CDR. No comments were made on the facts and circumstances that were specifically invoked.
 - Due to the lack of a translation, the 'Certificate of Design Patent' had to be disregarded. The INID code 45 was barely legible. The contested decision was based on a piece of evidence that had neither been translated nor translated.
 - The registered proprietor of D1 did not note, in the absence of a translation, that this is the case. As evidenced by the certified register extract presented at first instance, the name of the applicant was not the same with that of the proprietor mentioned in the database extract.
 - The contested decision did not concern the evidence submitted by the proprietor of the contested RCD, according to which, in 2006, a theoretical possibility of a publication in China could itself have been possible 15 working days after the date of publication. The SIPO-Official Official Journal had been published on paper only once a week, that the data had not been translated and that a search had resulted in the designation of a Chinese patent attorney.
 - The applicant since 2013, has been seeking to declare the contested RCD invalid and it was obvious that it has been unable to locate D1.
 - D1 did not preclude the contested RCD from having individual character. The degree of freedom of design was greatly restricted, which meant that even minor differences were not attentive to the attention of the informed user.
- 14 The applicant accepts the contested decision and makes the following additional comments:
- There was no discrepancy in relation to the proprietor of the earlier design. They merely involved a change of name, namely from the original applicant 'Zhejiang Sanyang Gongye Gongye Gongsi' in 'Zhejiang Sanyang motorcycle Industry Co., Ltd.'
 - The objection of lack of disclosure was irrelevant; the only decisive factor was that the proprietor of the proprietor of the contested RCD, Mr El Boubsi, had acted in bad faith in making the application; it had known that it did not own the Sanyang model protected with D1. The attached Annex letter confirmed that Mr El Boubsi had stayed in China in 2006 and was therefore familiar with the earlier Sanyang model.

- It was only a clear assumption that the SIPO database had only been available after the filing date of the contested RCD.
- D1 also precluded the individual character of the contested RCD.

- 15 The applicant enclosed p. 1 of a three-sided attorney's letter in Dutch, a German translation (Annex 14).
- 16 The proprietor expressly renounced the reply and asked for a decision on this matter to be requested in a timely manner.

Reasons

- 17 The appeal is well founded. The applicant has not shown that D1 was published before the filing date of the contested CD within the meaning of Article 7 (1) CDR.

Admissibility of the application for a declaration of invalidity

- 18 The application for a declaration of invalidity is not contrary to Article 52 (3) CDR and is admissible.
- 19 Article 52 (3) CDR requires that an Community design court has already made a final and binding decision on an application for a declaration of invalidity on the same cause of action and between the same parties. Although the request underlying the decisions of the Cancellation Division in relation to proceedings ICD 9091 was likewise based on the ground for invalidity of lack of novelty and individual character pursuant to Article 25 (1) (b) CDR, it was, however, based on earlier designs other than the Chinese design No CN3568787 claimed in the present case. With the first decision of 13/02/2014, the application was refused on account of a lack of sufficient evidence of a disclosure of the prior designs. This decision was annulled by the Board of Appeal and remits the case to the Cancellation Division. By its second decision of 29/04/2016, the Cancellation Division found that the contested RCD was novelty and individual character, and again refused the application as unfounded. Since the examination of the novelty and individual character were based on other earlier designs, there is therefore already a 'same claim' within the meaning of the abovementioned provision, which means that the question of identity of the parties discussed by the proprietor can be made likewise without the question of a corresponding application of the provision to final and final decisions of the Office.

Disclosure of the earlier design

- 20 Article 7 (1) CDR stipulates that a design shall 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 date referred to in Article 5 (1) (b) CDR, 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 Community.

- 21 neither the CDR nor the CDIR contains provisions on the requirements regarding proving disclosure. Article 52 CDR in conjunction with Article 28 (1) (b) (v) CDIR merely stipulates that the application for a declaration of invalidity must be accompanied by documents proving the existence of the claimed earlier designs. The applicant is thus in principle free to choose suitable evidence in principle.
- 22 In addition, 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 provides proof of disclosure. In this respect, the evidence submitted by the applicant in the invalidity proceedings must be assessed in its entirety. This is because, even if individual documents per se may not be sufficient to prove the disclosure, they can nevertheless contribute towards proving disclosure in the overall view. 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 (17/05/2018, T-760/16, Fahrradkörbe, EU:T:2018:277, § 40 et seq.; 09/03/2012, T — 450/08, Flacons, EU:T:2012:117, § 21 ff).
- 23 A design is considered to have been disclosed if the applicant has proved the facts on which the disclosure was disclosed. However, it is sufficient to prove sufficient that the proprietor of the contested RCD, who would like to rebut this presumption, could reasonably establish that, in view of the specific circumstances of the case, these facts could be known to the relevant specialist circles in the sector concerned, in the normal course of business (13/06/2019, T-74/18, Information leather alter, EU:T:2019:417, § 23; 21/05/2015, T-22/13 & T-23/13, Umbrellas, EU:T:2015:310, § 26).
- 24 The disclosure of disclosure pursuant to Article 7 (1) CDR is therefore to be carried out a two-stage analysis, namely, firstly, whether the evidence submitted in support of the application for a declaration of invalidity prove the disclosure of a prior design before the relevant point in time; and, secondly, if the proprietor disputes whether these facts might reasonably have become known in the normal course of business to the relevant specialists active in the European Union, otherwise the disclosure cannot be taken into account (27/02/2020, T-159/19, furniture, EU:T:2020:77, § 20; 13/06/2019, T-74/18, Information leaf, EU:T:2019:417, § 24)
- 25 According to these principles, the documents submitted by the applicant are not sufficient to prove that D1 was disclosed before the filing date of the contested RCD.
- 26 The registration certificate submitted by fax (para. 3, Annex 1) is of poor image quality. It is only the date on which the filing date (INID code 22), specifically ‘2005.12.22’, can be clearly identified. On the date of publication (INID code 45), the Board is only able to recognise the 2006 year by recognising best will and, in

contrast with the filing date, no complete date. The applicant itself has contributed nothing to clarifying this situation; however, it merely contributed to the (incorrect) findings of the Invalidity Division; the certificate referred to the date of publication.

- 27 Although the screenshots of the database extract and the accompanying translation (para. 3, Annex 2) mention the date of publication as 11/10/2006, they do not contain any information on the form of this publication, since it is obviously not the SIPS Register itself but merely a database that is involved. Both documents thus prove, in the overall view, the existence of the valid design No CN3568787 with the filing date of 22/12/2005 and the publication date of 11/10/2006, but not the specific shape of this publication, that is to say in particular from the views which took place with regard to the views which were made in relation to D1. In this case, clarity could create an extract from the relevant edition of the SIPO patent leaf, which, however, the applicant did not submit an extract despite the proprietor's repeated complaints. The event of disclosure is therefore already not proven.
- 28 Even if it is assumed, in the applicant's favour, to publish all the views of D1, with all the views submitted on 11/10/2006, the documents submitted by it are also not sufficient to refute the proprietor's substantiated argument that such disclosure at the time the contested RCD was filed could not have been known to the relevant specialists in the EU in the normal course of business.
- 29 The SIPO notification of 22/02/2006 (paragraph 5, Annex 5) states that the only official form of publication was the weekly Patent Office sheet. The data from the English-language website created for searches would be updated on a quarterly basis. The most important tool for finding a design is the design CD. The description of its electronic line service published by SIPO explains that this service contains only graphic documents of patent applications filed according to 10/02/2010 (para. 5, Annex 8), i.e. a period of several years after the application of D1 on 22/12/2005.
- 30 The applicant merely counters this by stating that this information was irrelevant, because it expressly only related to patent applications. However, it did not explain how much the publication practice of SIPO might have for design applications, let alone documents in this regard. Her argument is therefore not convincing either, because the database extract submitted by it itself originates from a patent database, as can be seen from the address element 'patentoffline' (see paragraph 3).
- 31 In the absence of any evidence to the contrary, it is therefore to be assumed that the date of publication, which corresponds to 11/10/2006, the date of publication of the weekly IPO-patent, and that this publication consequently takes place only in paper form and in the Chinese language. It is true that the disclosure of a design is in principle independent of the language used in the publication, because knowledge of the external appearance of a product within the meaning of Article 3 (a) CDR does not require any linguistic knowledge. However, a publication in paper form is naturally not accessible to a limited group of users and without any

relevant linguistic knowledge. For the specialists active in the EU, D1 was therefore not able to be accessed in the normal course of business on the date of publication 11/10/2006, but rather at the very first after assignment of a corresponding search for which, according to the information submitted by the proprietor, it was generally 10 working days, i.e. two weeks (see paragraph 5, Annex 9). The applicant has also not opposed this submission.

- 32 Since the publication of D1 was published on 11/10/2006 only eight days before the filing of the contested RCD on 19/10/2006, it is therefore not possible to assume that it is effectively disclosed within the meaning of Article 7 (1) CDR.
- 33 In support of the assumption made by the Cancellation Division, by means of the publication in the Patent Journal, on account of the customary exchange of patent specifications, there was in any case a theoretical possibility of taking note of the application date of the contested RCD on 19/10/2006; the Board does not see any evidence. Article 76 CDR only governs the exchange of patent documents between the authorities of the Member States concerning industrial property rights, and not the exchange with China. Even if it were assumed, in favour of the applicant, that such an exchange took place in 2006, it should not be assumed, with consideration given by administrative authorities and common postal delivery times, that the SIPO-Patent Journal of 11/10/2006 was already available to the relevant specialist circles for research purposes in the libraries of the national offices of the Member States.
- 34 Proof of the D1 prepublication on the website www.cnsyn.com is not provided either. The Internet archive Wayback Machine is well known to archive only the text that is available at a given reference date, but not the pictures inserted. Moreover, the screenshots submitted (paragraph 7, Annex 7) only show the Chinese version of the page, although they were obviously also available in English (see the button in the top right 'English'). Consequently, it is more than doubtful whether the images were to be found at all for EU specialists. Not least, however, the applicant itself was able to locate D1 after more than a decade or with an unsuccessful application for a declaration of invalidity.
- 35 The mere fact that Mr El Boubsi, the proprietor's legal predecessor, possibly took place in China at the time of publication of D1 is also unable to prove proof of disclosure pursuant to Article 7 (1) CDR. In so far as the applicant insisted that Mr El Boubsi had acted in bad faith when he filed the application for the contested RCD, it was sufficient to point out that the applicant's bad faith is not a ground for invalidity pursuant to Article 25 CDR; the list of grounds for invalidity is conclusive.
- 36 The question of who is entitled to copyright on D1 is also irrelevant for the assessment of the disclosure of the earlier design within the meaning of Article 7 (1) CDR. The ground for invalidity under Article 25 (1) (f) CDR was not claimed. The applicant's submission on possible copyright infringements by Mr El Boubsi is therefore impossible from the outset.

- 37 Finally, the argument that the motor scooters according to D1 had been brought onto the market in China since 2004 from the company ‘Taizhou Zhongneng Motorcyle Co. Ltd’ has also been rejected. Firstly, the registration certificates submitted do not show any images of D1, but technical drawings of a motor scooter (para. 7, Annexes 12 and 13); there is no apparent connection between these drawings and D1 and was also not demonstrated by the applicant. Secondly, it is only certification that the vehicle type corresponding to the drawings satisfies the technical requirements for placement on the market in the United Kingdom and the Netherlands, respectively. A statement regarding the date of actual release on the market of the respective models does not include the certificates. Thirdly, the relationship between the ‘Taizhou Zhongneng Motorcyle Co. Ltd’ is the vehicle manufacturer mentioned in the certificates and the ‘Zhejiang Motorcycle Industry Co., Ltd.’ (D1) is not explained in any way. In its declaration of 27/03/2013, cited above in English (para. 7, Annex 11), ‘Taizhou Zhongneng Motorcyle Co. Ltd.’ must have received the abovementioned certificates of eligibility in 2005 and 2006. In the (uncertified) German translation, the company name ‘Taizhou Zhongneng Motorcyle Co. Ltd’ was simply replaced by ‘Zhejiang Sanyang motorcycle Industry Co., Ltd.’. However, an obviously incorrect translation cannot in any way be sufficient to prove that the vehicles manufactured by ‘Taizhou Zhongneng Motorcyle Co. Ltd’ are these according to D1.
- 38 The applicant’s entire argument is thus incapable of disputing the doubts raised by the proprietor on disclosure. In particular, despite these objections the applicant has failed to submit meaningful documents throughout the proceedings, for example in the form of an extract from the Chinese Patent Journal of 11/10/2006 or a confirmation by SIPO about the publication practice in 2006.
- 39 Proof of the disclosure of an earlier design that might preclude the novelty and individual character of the contested design is therefore not provided. An examination of whether the disclosure claimed had to be disregarded pursuant to Article 7 (2) and (3) CDR is therefore unnecessary.
- 40 The contested decision had to be annulled and the application for a declaration of invalidity rejected.

Costs

- 41 Pursuant to Article 70 (1) CDR, the losing party in the proceedings shall bear the costs incurred by the other party. As the losing party, the applicant shall bear the costs incurred by the proprietor in the invalidity and appeal proceedings.

The operative part of the decision

On these grounds,

THE BOARD

as follows:

- 1. The contested decision is annulled.**
- 2. The application for a declaration of invalidity is rejected.**
- 3. Orders the applicant to bear the costs of the invalidity and appeal proceedings.**

Signed

Th. M. Margellos

Signed

E. Fink

Signed

G. Humphreys

Registrar:

Signed

P.O. M. Chaleva

