Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

23 October 2013 *

(Community design — Invalidity proceedings — Registered Community design representing a cup and saucer with grooves and a soup dish with grooves — Ground for invalidity — Unauthorised use of a work protected under the copyright law of a Member State — Article 25(1)(f) of Regulation (EC) No 6/2002)

In Cases T-566/11 and T-567/11,

Viejo Valle, SA, established in L'Olleria (Spain), represented by I. Temiño Ceniceros, lawyer,

applicant,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by V. Melgar, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of OHIM, intervener before the General Court, being

Établissements Coquet, established in Saint-Léonard-de-Noblat (France), represented by C. Bouchenard, lawyer,

APPLICATIONS against the decisions of the Third Board of Appeal of OHIM of 29 July 2011 (Cases R 1054/2010-3 and R 1055/2010-3), relating to opposition proceedings between Établissements Coquet and Viejo Valle, SA,

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur) and J. Schwarcz, Judges,

Registrar: E. Coulon,

having regard to the applications lodged at the Court Registry on 31 October 2011,

having regard to the responses of OHIM lodged at the Court Registry on 9 March 2012,

having regard to the responses of the intervener lodged at the Court Registry on 16 February 2012,

having regard to the application to join Cases T-566/11 and T-567/11 made by the applicant,

* Language of the case: Spanish.

having regard to the observations of OHIM and of the intervener on the joinder of Cases T-566/11 and T-567/11,

having regard to the reassignment of the case to the Second Chamber and to a new Judge-Rapporteur,

having regard to the decisions of 26 February 2013 dismissing the applications for a stay of proceedings made by the applicant,

having regard to the fact that no application for a hearing was submitted by the parties within the period of one month from notification of closure of the written procedures, and having therefore decided, acting upon a report of the Judge-Rapporteur and pursuant to Article 135a of the Rules of Procedure of the Court, to give a ruling without an oral procedure,

gives the following

Judgment

Background to the dispute

1 The applicant, Viejo Valle, SA, is the proprietor of Community designs registered under numbers 384912-0001 and 384912-0009, which were lodged on 9 August 2005 with the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and published in the *Community Designs Bulletin* on 18 October 2005 (the 'disputed designs').

2 The disputed designs relate, according to the terms of the applications for a Community design, to crockery and are depicted as follows:

— in relation to the Community design registered under number 384912-0001:



— in relation to the Community design registered under number 384912-0009:



3 On 30 September 2008, the intervener, Établissements Coquet, filed with OHIM applications for a declaration of invalidity of the disputed designs. Those applications for a declaration of invalidity were based on Article 25(1)(f) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

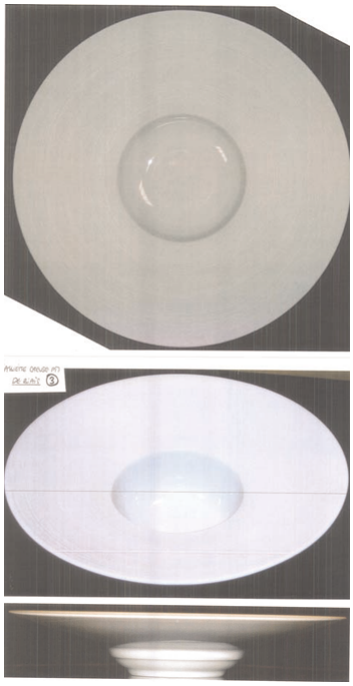
4 In support of its applications for a declaration of invalidity, the intervener relied on two items of crockery, namely a cup with saucer (as regards the design registered under number 384912-0001) and a soup dish (as regards the design registered under number 384912-0009), which belong to its 'Hémisphère' collection ('Satin' model), for which the intervener claimed copyright protection under French law.

5 The intervener attached the following photographs in its applications for a declaration of invalidity:

— in relation to the application for a declaration of invalidity of the Community design registered under number 384912-0001:



— in relation to the application for a declaration of invalidity of the Community design registered under number 384912-0009:



6 By decision of 7 April 2010, the Invalidity Division found the contested designs invalid on the basis of Article 25(1)(f) of Regulation No 6/2002.

7 On 10 June 2010, the applicant filed notices of appeal with OHIM against the Invalidity Division's decision.

8 By two decisions of 29 July 2011 (Cases R 1054/2010-3 and R 1055/2010-3) (the 'contested decisions'), the third Board of Appeal of OHIM dismissed the applicant's appeals.

9 First, the Board of Appeal found that the applicant's position, which was that the intervener had not sufficiently identified the protected work and therefore did not meet the requirements of Article 28(1)(b)(iii) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 (OJ 2002 L 341, p. 28), was clearly unfounded.

10 Secondly, the Board of Appeal found that the applicant's statement that the intervener had not submitted the evidence proving that it owned the copyright was unfounded.

11 Thirdly, the Board of Appeal considered the applicant's submission that the items of crockery relied on by the intervener in support of its applications for a declaration of invalidity were not capable of copyright protection and were industrial creations which could be protected only by the legislation relating to designs.

12 In the first place, the Board of Appeal noted that the works relied on by the intervener were not the items of crockery themselves (cup and saucer and soup dish), but the ornamental grooves which appeared on the surface of those items. The intervener had always clearly stated that it was not complaining of the applicant's use of the shapes of the items of crockery, but of the use of the decoration on those items, which was capable of protection as an original creative work.

13 In the second place, the Board of Appeal noted that the intervener had shown that the industrial character of a work, relied on by the applicant, did not constitute a ground for refusing copyright protection.

14 It stated that the work consists in the decoration of crockery with a pattern of fine, parallel and concentric grooves that were of the same width and unbroken on all of the exterior of the cup, and nearly all of the inside of the saucer and of the soup dish, except for the central circle. That decoration sets those items of crockery apart and makes them sufficiently original in nature to warrant their protection under French law.

15 The Board of Appeal noted that the applicant had not explained why that decoration was not able to be protected by copyright. The applicant refers to a lack of 'artistic' character, but that does not constitute a relevant criteria. It refers to the absence of originality, without producing evidence in that regard.

16 The Board of Appeal held that, in actual fact, the finish to the surface of the items of crockery relied on by the intervener fell within the category of intellectual works capable of reflecting the personality of their author and that it was accordingly protected under French copyright law.

17 Fourthly, the Board of Appeal assessed the applicant's arguments relating to the use, in the context of the Community design system, of the protected work. According to those arguments, on the one hand, the comparison of the items of crockery at issue, as a whole, revealed considerable differences between them and, on the other, it was also appropriate to take account of the designer's freedom.

18 The Board of Appeal noted that those arguments related to another ground for invalidity, provided for in Article 6 of Regulation No 6/2002. In order to assess the ground for invalidity put forward in the present case, it is not necessary to compare the items of crockery in their entirety, but only to determine whether a work protected by copyright has been used in the disputed designs. The differences in shape between those items of crockery are irrelevant. On the other hand, it is relevant that, first, the presence of the protected work, namely the same pattern of grooves, and, secondly, the fact that those grooves cover the same parts of the items of crockery may clearly be seen in the

disputed designs. It is specifically in the sum of those two characteristics that the creative content of the earlier work, which was copied – or 'used' – without permission in the disputed designs, is apparent.

19 The Board of Appeal, accordingly, dismissed the applicant's appeals.

Forms of order sought by the parties

20 The applicant submits, in essence, that the Court should:

— declare admissible the annexes attached to the applications;

— annul the contested decisions;

— order OHIM to pay the costs.

21 OHIM submits, in essence, that the Court should:

— declare inadmissible Annexes B 7 to B 14 attached to the application in Case T-566/11 and Annexes B 7 to B 15 attached to the application in Case T-567/11;

— dismiss the applications;

— order the applicant to pay the costs.

22 The intervener submits, in essence, that the Court should:

— declare inadmissible Annexes B 7 to B 14 attached to the application in Case T-566/11 and Annexes B 7 to B 17 attached to the application in Case T-567/11;

— dismiss the applications;

— order the applicant to pay the costs.

Law

23 In the light of the application for joinder made by the applicant and the observations made by the other parties, it is appropriate to join the present cases for the purposes of the judgment, pursuant to Article 50 of the Court's Rules of Procedure.

24 The applicant relies on various pleas and arguments, which may be summarised as follows.

25 In the first plea, alleging breach of Article 28(1)(b)(iii) of Regulation No 2245/2002, the applicant claims, in essence, that the intervener did not submit the requisite information concerning the protected works.

26 The applicant extends the arguments of that first plea by claiming that there is no copyright as a result of a prior disclosure of the works and of their lack of originality.

27 In the second plea, alleging breach of Article 25(1)(f) of Regulation No 6/2002, the applicant asserts, in essence, that the Board of Appeal incorrectly found that the disputed designs constituted unauthorised use of the works of the intervener.

28 It is appropriate, from the outset, to rule on the admissibility and, where applicable, the relevance, of certain documents annexed by the applicant to its applications and its requests for a stay of proceedings.

Admissibility and relevance of certain documents annexed to the applications and to the requests for a stay of proceedings

29 The applicant produced, for the first time before the Court, documents taken from internet websites of other undertakings in the crockery sector, from museums and from newspapers (Annexes B 7 to B 14 of the application in Case T-566/11; Annexes B 7 to B 17 of the application in Case T-567/11), from which it is apparent, according to the applicant, that other undertakings before the intervener had decorated items of crockery by applying fine concentric grooves on the outer surface of those items and that that decoration is in no way original, but is a practice which has always taken place.

30 The applicant concluded from this that the intervener had, in actual fact, no copyright in the works relied on in support of its applications for a declaration of invalidity.

31 In addition, in its requests for a stay of proceedings of 3 December 2012 and 8 January 2013, the applicant submitted two judgments of French courts, from November and December 2012. In those judgments, two French courts, before each of which the intervener brought infringement proceedings against a third party in relation to the same works claimed by the intervener in the present case, found that the intervener did not have any copyright protection over those works.

32 The applicant deduces therefrom that the ground for invalidity relied on against it by the intervener before OHIM was no longer valid and that it is appropriate, once those national judgments have become final, to grant the present applications and annul the contested decisions.

33 OHIM and the intervener contest the admissibility of the documents produced by the applicant before the Court and the applicant's position.

34 In relation, first, to the documents produced by the applicant in Annexes B 7 to B 14 of the application in Case T-566/11 and in Annexes B 7 to B 17 of the application in Case T-567/11, it is appropriate to note that they constitute new items of evidence, which were not available to the Board of Appeal.

35 Those documents, which are produced for the first time before the Court, cannot be taken into consideration. The purpose of actions brought before the Court is to review the legality of decisions of the Boards of Appeal of OHIM as referred to in Article 61 of Regulation No 6/2002, with the result that it is not the Court's function to review the facts in the light of documents which have been produced for the first time before it. Accordingly, the abovementioned documents must be excluded, without it being necessary to assess their probative value (Case T-9/07 *Grupo Promer Mon Graphic* v *OHIM - PepsiCo (Representation of a circular promotional item)* [2010] ECR II-981, paragraph 24; Joined Cases T-83/11 and T-84/11 *Antrax It* v *OHIM - THC (Radiators for heating)* [2012] ECR, paragraph 28; see also, by analogy, Case T-165/06 *Fiorucci* v *OHIM - Edwin (ELIO FIORUCCI)* [2009] ECR II-1375, paragraphs 21 and 22 and the case-law cited).

36 In relation, next, to the judgments of the French courts which are annexed to the requests for a stay of proceedings, it is appropriate to note that they too constitute new items of evidence which were not available to OHIM. The fact that those judgments were delivered after the contested decisions does not change that finding.

37 That said, the case-law referred to in paragraph 35 above does not preclude the possibility of referring to national judgments for the first time before the Court, if it is not alleged that the Board of Appeal failed to take the factual aspects of a specific national judgment into account but rather that it

infringed a provision of Regulation No 6/2002 and national case-law is cited in support of that plea (see, by analogy, judgment of 12 March 2008 in Case T-332/04 *Sebirán* v *OHIM - El Coto De Rioja (Coto D'Arcis)*, not published in the ECR, paragraph 56; Case T-420/03 *El Corte Inglés* v *OHIM - Abril Sanchez and Ricote Saugar (BOOMERANG TV)* [2008] ECR II-837, paragraph 37; and Case T-270/06 *Lego Juris* v *OHIM - Mega Brands (red Lego brick)* [2008] ECR II-3117, paragraphs 23 to 25).

38 It therefore follows from the foregoing that, whilst the judgments of the French courts annexed to the requests for a stay of proceedings are clearly inadmissible in relation to the facts to which they refer and which were not available to the Board of Appeal, they are not inadmissible inasmuch as the applicant is alleging that the Board of Appeal infringed a provision of EU law.

39 In the present case, the applicant produced those judgments in support of a single argument, that 'in so far as a national court dismissed the existence of any intellectual property rights in relation to the goods referred to by [the intervener] as a basis for its applications for a declaration of invalidity, … the application for invalidity must fail in full, … as otherwise the applicant would incur irreversible losses as it would lose its legitimate right of exclusivity as a result of a non-existent prior right'.

40 In relation to that argument, it is appropriate, however, to note that, as submitted in essence by the intervener, the French judgments are only applicable between the parties in the national proceedings and in the context of the infringement proceedings between them. Those judgments, even when they become final, are therefore not valid erga omnes in relation to the existence or the inexistence of the intervener's copyright.

41 Unlike final administrative decisions adopted in the context of protection systems based on the administrative lodging and registration of an intellectual property right, those judgments therefore cannot lead the Courts of the European Union to hold that the action has become devoid of purpose and declare that there is no need to adjudicate (see, for cases which do not proceed to judgment as a result of the revocation of the mark relied on in support of an application for a declaration of invalidity decided by final decision of the competent trade mark office and valid *erga omnes*, orders of 26 June 2008 in Joined Cases T-354/07 to T-356/07 *Pfizer* v *OHIM – Isdin (FOTOPROTECTOR ISDIN)*, not published in the ECR, and of 27 February 2012 in Case T-183/11 *MIP Metro* v *OHIM – Jacinto (My Little Bear)*, not published in the ECR).

42 Thus, the only argument which the applicant derives from those judgments, and, therefore, the only reason for which it has submitted them – which is that they automatically render groundless the intervener's applications for a declaration of invalidity – is misconceived.

43 In the absence of any other argument by the applicant derived from those judgments (see, to that effect, *Coto D'Arcis*, paragraph 37 above, paragraph 57) and since it is not for the Court to take the place of the applicant in managing its case (see, to that effect, order of 29 November 1993 in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 23, and Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraphs 94 and 97), those judgments of the French courts, already inadmissible as to the facts which they contain, cannot be taken into consideration in order to assess the lawfulness of the contested decisions and must therefore be considered irrelevant.

The first plea, alleging breach of Article 28(1)(b)(iii) of Regulation No 2245/2002 in that the intervener did not present the requisite information concerning the protected works

44 The applicant submits that the intervener did not present the requisite information concerning the protected works. In particular, the intervener did not prove the dates on which the works were created and did not state which natural person was the actual designer.

45 Under French law, copyright protection arises from the mere creation of a work, from the very moment of its creation. It is essential to know the authorship of the work and the date of its creation, in order to determine whether it is original and whether it can, accordingly, be protected or whether, on the contrary, it has already been created previously by another author. In the same way, it was also necessary to adduce evidence of the transfer to the intervener of the copyright of the natural person who created the work.

46 OHIM and the intervener challenge the applicant's position. They submit that the intervener has supplied the necessary and sufficient information.

47 It is apparent from a combined reading of the provisions of Article 25(1)(f) and (3) of Regulation No 6/2002 and of Article 28(1)(b)(iii) of Regulation No 2245/2002, first, that a Community design may be declared invalid where it constitutes an unauthorised use of a work protected under the copyright law of a Member State, secondly, that an application for a declaration of invalidity may be made solely by the holder of the copyright and, thirdly, that that application must contain the representation and particulars of the protected work on which it is based and particulars showing that the applicant for a declaration of invalidity is the holder of the copyright.

48 In relation, first, to whether the intervener's applications for a declaration of invalidity before OHIM contained the representation and particulars of the protected works on which they were based, the Board of Appeal correctly found that the intervener had broadly satisfied the requirements of Article 28(1)(b)(iii) of Regulation No 2245/2002 in that regard.

49 The intervener specifically identified, in its applications for a declaration of invalidity of 30 September 2008, the works relied on in support of those applications, both by photographs of those works annexed to the applications and by textual descriptions. Those descriptions referred, on the one hand, to a white coloured cup, which had fine grooves on the outer surface and was smooth on the inside, and its white coloured saucer, which had a large grooved rim slightly raised at its edge and a smooth flat part, and on the other, to a soup dish which had a very wide, horizontal and finely grooved edge, with a narrow recess in the centre, which was plain and in the shape of a bowl and also formed the base of the plate.

50 In relation, next, to the applicant's criticism that the intervener should have provided the dates of the creation of the works, the identity of the natural person who created them and evidence of the transfer of his copyright to the intervener, that criticism may be dismissed for the following reasons.

51 Article 25(3) of Regulation No 6/2002 and Article 28(1)(b)(iii) of Regulation No 2245/2002 require that the applicant for a declaration of invalidity of a Community design on the basis of a copyright protected under the law of a Member State be the holder of that copyright and that it provide OHIM with particulars establishing that fact.

52 The question of whether the applicant for a declaration of invalidity is the holder of the copyright, within the meaning of that provision, and the question of proving that right before OHIM, cannot be answered without having regard to the law of the Member State, in the present case French law, which is relied on in support of the application for a declaration of invalidity. The law of the relevant Member State serves in particular, in that context, to define the procedures for acquiring and proving copyright of the work relied on in support of the application for a declaration of invalidity (see, to that effect and by analogy, Case T-304/09 *Tilda Riceland Private* v *OHIM – Siam Grains (BASmALI)*, [2012] ECR, paragraph 22).

53 It is apparent from the file that the holder of a copyright under French law is, unless proved otherwise, the person under whose name the work is disclosed.

54 As noted by OHIM and the intervener, whilst French law provides that 'the author of an intellectual work shall enjoy in that work, by the mere fact of its creation, an exclusive intangible property right which shall be enforceable against all persons' (Article L. 111-1 of the French Intellectual Property Code (the 'IPC')) and that 'a work shall be deemed to have been created, irrespective of any public disclosure, by the mere fact of realisation of the author's concept, even if incomplete' (Article L. 111-2 of the IPC), it also states that 'authorship shall belong, unless proved otherwise, to the person or persons under whose name the work has been disclosed' (Article L. 113-1 of the IPC) and that '[a] collective work shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed[, t]he author's rights … vest[ing] in that person' (Article L. 113-5 of the IPC).

55 The intervener states that, according to French case-law, in the absence of claims by the natural person who is its author, copyright in a work is attributed to the legal person who makes commercial use of it under its name.

56 Whilst it is therefore true that the Board of Appeal incorrectly stated in the contested decisions that the copyright came into existence upon the creation 'and/or disclosure' of the work, since it appears from the provisions of the IPC that it arises from the mere act of creation, that fact is irrelevant. In the present case, the only relevant question is the identification of the holder of the copyright, which, in the absence of a claim by the natural person who created the work, is the natural or legal person under whose name that work is disclosed.

57 It is thus to no avail that the applicant alleges that OHIM did not require information on the creation of the works such as the date of creation and the identity of the person who created it, and on the transfer of copyright to the intervener and complains that the Board of Appeal failed to grant its application when such particulars had not been provided.

58 Moreover and incidentally, the applicant does not dispute that the date of disclosure by the intervener of the works relied on in support of the applications for a declaration of invalidity may be determined from the documents produced by that party before OHIM.

59 It is therefore appropriate to dismiss the present plea in that it is based on an alleged inadequacy of information supplied by the intervener before OHIM in relation to the protected works and, in particular, on the absence of evidence of the dates of creation of the works, of the identity of the natural person who designed them and of the transfer of that person's rights to the intervener.

60 As to the claims, put forward in the extension to that first plea, that the intervener has no copyright, since the practice of decorating items of crockery by applying fine concentric grooves on the outer surfaces has been used by other undertakings in that sector before the intervener, and that the decoration is in no way original, but is a practice which has always taken place, it should be noted that those claims are, if not new, at the very least entirely based on items of evidence produced at the stage of the application before the Court and thus already dismissed as inadmissible.

61 Accordingly, before OHIM, the applicant did not claim that crockery undertakings other than the intervener had disclosed prior to the intervener the works relied on in support of the applications for a declaration of invalidity. Moreover, the applicant itself accepts, in its applications, that it is only before the Court that it invoked particulars in that regard.

62 As to the lack of originality in decorating an item of crockery with grooves, the applicant in no way disputes the Board of Appeal's assessment that, although that lack of originality was claimed at the stage of the procedure before the Invalidity Division, no evidence in support of that claim was produced at that time.

63 It is apparent from the case-law that, having regard to the wording of Article 61 of Regulation No 6/2002, the Court's review of the legality of a decision of the Board of Appeal must relate to the issues of law raised before the Board of Appeal. Therefore, it is not the Court's function to examine new pleas introduced before it or to review the facts in the light of evidence adduced for the first time before it. To allow the examination of those new pleas and to admit such evidence would be contrary to Article 135(4) of the Rules of Procedure, according to which the parties' pleadings may not change the subject-matter of the proceedings before the Board of Appeal (see, by analogy, *ELIO FIORUCCI*, paragraph 35 above, paragraphs 21 and 22 and the case-law cited).

64 It follows from paragraphs 60 to 63 above that the applicant's claims – which relate to prior disclosure of the work by other crockery undertakings, and to lack of originality of the decoration on the ground that such decoration has always been carried out – must be dismissed, if not as inadmissible as new pleas, then as unfounded, as relying entirely on inadmissible evidence.

65 The present plea and the claims made by extension must therefore be dismissed.

The second plea, alleging breach of Article 25(1)(f) of Regulation No 6/2002, on the ground that the Board of Appeal incorrectly held that the disputed designs constituted unauthorised use of the work of the intervener

66 The applicant complains that the Board of Appeal found that the work relied on by the intervener was not the cup, saucer and soup dish, but the ornamental grooves which appeared on the surfaces of those items of crockery. The applicant asserts that characteristics other than those concentric grooves should have been taken into consideration in order to assess the presence of the intervener's work in the disputed designs and, accordingly, the copyright infringement claimed by the intervener.

67 An assessment of the applicant's and the intervener's various items of crockery reveals numerous differences which confer distinctive characteristics upon those items, such as to create a completely different overall impression. Those differences do not support the assertion that the protected work was used in the disputed designs.

68 It is clearly apparent from the photographs submitted that the parties' cups, saucers and soup dishes have nothing in common aside from their grooves.

69 The intervener's cup has a rounded shape, with a particular handle, which in no way resembles the conical shapes of the applicant's cup. The applicant's saucer has a smooth central outline which is comparatively larger than the intervener's saucer and a flatter edge, since only the outer edge is at an angle. Seen from the outside, the recess of the applicant's soup dish is completely smooth with the exception of an incision a few millimetres from the base. It is rounder than the intervener's soup dish and has no rim or ridges. The opening and the angle of the edges of the plates are different, that of the applicant being rounder than that of the intervener, the angle of which is straighter. In addition, the grooves are wider and more pronounced in the disputed designs.

70 Taking account of the fact that the designer's freedom is limited in the field of items of crockery, it is impossible to find that the disputed designs make use of the works claimed by the intervener.

71 The applicant adds that, even if it could be considered that the work for which the intervener claims protection consists of ornamental grooves on the surfaces of its items of crockery, it is nonetheless appropriate to ask what the original part of the work in question is.

72 OHIM and the intervener contest the applicant's position.

73 It is appropriate to note that the ground for invalidity relied on in the present case by the intervener is not based on the lack of individual character of the disputed designs within the meaning of Article 6 of Regulation No 6/2002, but on an unauthorised use, in those designs, of a work protected by the copyright legislation of a Member State.

74 It follows that the only question which OHIM was asked was whether the intervener was the holder of a copyright under French law and whether that copyright was the subject of unauthorised use in the disputed designs.

75 It has already been held at paragraphs 48 to 59 above that the intervener complied with the requirements of Article 28(1)(b)(iii) of Regulation No 2245/2002, in relation to the supply, in the application for a declaration of invalidity, of the representation and particulars concerning the work protected by the copyright on which the application was based.

76 As to the claims that the intervener had no copyright since the practice of decorating items of crockery with fine concentric grooves on their outer surfaces was carried out by other undertakings in the sector before the intervener, and that the decoration is in no way original, but is a practice which has always taken place, it has already been held at paragraphs 60 to 64 above that those claims are, if not inadmissible because new, at least unfounded, as relying entirely on inadmissible evidence.

77 As to the argument, expounded in the present plea, that the Board of Appeal should not have restricted its assessment to the decoration of the items of crockery, but should also have taken into consideration their shapes, it should be dismissed, for the following reasons.

78 It is true that the work relied on by the intervener before OHIM in order to apply for a declaration of invalidity of the disputed designs was not restricted to the mere decoration of the items of crockery, but extended also to other aspects of those items, inter alia their shapes. However, the decoration was, as such, clearly claimed by the intervener, before OHIM, as the embodiment of a creative endeavour protected by copyright law. The intervener thus claimed that the originality of the crockery in its 'Hémisphère' collection lay in particular in the alternation of surface grooves and smooth parts, that finish being, according to the intervener, original and reflecting the designer's creativity.

79 As is apparent from the French case-law in the file and cited by the Board of Appeal, in French law, an item of crockery may, both by its shape and by its decoration, constitute a work protected by copyright, provided that one or other of those aspects is the result of a creative activity and that it is of an originality that attests to the designer's personality.

80 Therefore, there was nothing in principle to prevent the Board of Appeal accepting the decoration of the intervener's items of crockery as a work whose unauthorised use was at issue. In so doing, the Board of Appeal admittedly restricted its assessment to one aspect of the parties' items of crockery. However, of the two parties to the dispute, only the intervener could possibly have had cause to complain, which it did not do, of that approach by the Board of Appeal, which did not deal with some of its claims under copyright law.

81 It follows from the above that the Board of Appeal's restriction of its analysis to the decoration of the intervener's items of crockery does not, in the present case, render the contested decisions unlawful.

82 It follows that all the arguments by which the applicant draws attention to the differences in shape of the disputed designs and of the intervener's items of crockery are irrelevant.

83 The only relevant consideration for the assessment of the legality of the contested decisions is, as the Board of Appeal found, first, whether the grooved decoration of the intervener's items of crockery constituted an original creative work and, secondly, whether that work was copied in the disputed designs, thus resulting in unauthorised use of the intervener's copyright.

84 In relation to the first aspect, the Board of Appeal made the following findings.

85 It found that the work consisted in the decorating of items of crockery with a pattern of fine parallel and concentric grooves, of the same width and unbroken, on all of the exterior of the cup and nearly all the inside surfaces of the saucer and of the soup dish, except for the central circle.

86 In the Board of Appeal's opinion, that particular decoration of the items of crockery makes it possible to distinguish them and confers upon them a sufficiently original character, such that it warrants their protection under French law. As a result, the presence of the fine grooves at issue was within the criteria laid down by French law.

87 The Board of Appeal noted that at no time had the applicant expressly stated before it the grounds on which the decoration of the intervener's items of crockery did not warrant copyright protection. The Board of Appeal stated that the lack of artistic character, relied on by the applicant, was not a relevant factor. It noted that the applicant had also referred to the lack of originality of an item of crockery covered in grooves, but without providing any evidence in support of that argument, and that the applicant had once more incorrectly disputed that the intervener's work warranted protection under French law, on the ground that crockery is an industrial product.

88 The Board of Appeal held that, ultimately, the surface finish of the items of crockery relied on by the intervener, as it appeared, fell, 'despite (or because of) its simplicity', within the category of intellectual works capable of reflecting the personality of their author and was accordingly protected under French copyright law.

89 It must be noted that the applicant has not succeeded in calling those findings into question.

90 The applicant does not dispute, before the Court, the Board of Appeal's statements, which are moreover correct, on the irrelevance of an artistic appreciation of the work and on the applicability of copyright law to industrial goods. As to the purported lack of originality, it has already been noted that all the evidence submitted by the applicant before the Court in that respect is inadmissible.

91 Consequently, it must be held that the applicant has not shown that the Board of Appeal incorrectly found that the decoration of the intervener's items of crockery constituted a work protected by copyright.

92 On the second aspect, which relates to the use of the intervener's work in the disputed designs, the Board of Appeal made the following findings.

93 The Board of Appeal found, first, that the protected work, namely the same pattern of grooves, was present in the disputed designs and, secondly, that those grooves covered exactly the same parts of the items of crockery. The Board of Appeal noted that it was specifically in the sum of those two characteristics that the creative content of the prior work 'which was copied – or "used" – without permission' in the disputed designs was apparent.

94 The applicant, having admitted that the items of crockery at issue had their grooves in common, merely submitted, before the Court, that the grooves were 'wider and more pronounced' in the disputed designs. The applicant, in that context, referred to the Opinion of Advocate General Mengozzi in Case C-281/10 P *PepsiCo* v *Grupo Promer Mon Graphic* [2011] ECR I-10153 and to a purported constraint on the designer's freedom.

95 However, the applicant's arguments are not sufficient to establish an error by the Board of Appeal.

96 First, it is appropriate to note that the applicant incorrectly relied on the Opinion of Advocate General Mengozzi in *PepsiCo* v *Grupo Promer Mon Graphic*, paragraph 94 above, and on a purported constraint on the designer's freedom.

97 The ground for invalidity put forward in the present case is based on Article 25(1)(f) of Regulation No 6/2002 and not, as in *PepsiCo* v *Grupo Promer Mon Graphic*, paragraph 94 above, that based on Article 25(1)(d) of the same regulation.

98 The outcome of the present dispute does not therefore have to be determined on the basis of a global comparison between two designs in which a constraint on the designer's freedom as a result of technical or legal constraints, which moreover have not been established in the present case, may make the informed user more attentive to details and better able to recognise the individual character of the disputed design (see, in that regard, *Radiators for heating*, paragraph 35 above, paragraphs 43 to 45 and the case-law cited).

99 The outcome of the present dispute depends solely on whether the disputed design constitutes 'unauthorised use' of the work protected by the law on copyright of the Member State concerned.

100 The Board of Appeal therefore correctly held that, in order to assess the ground for invalidity, it was not appropriate to compare the designs at issue as a whole, but only to determine whether the work protected by copyright was used in the later designs, that is to determine whether the presence of that work could be noted in those designs, with the result that, in that context, the differences relied on by the applicant, such as the shape of the cup or the design of its handle or the shape of the bowl of the soup dish, were irrelevant.

101 Secondly, and as correctly noted by the Board of Appeal, it is undeniable that the decoration of the disputed designs greatly resembles the decoration of the intervener's items of crockery, both as concerns the identical nature of the covered surfaces and as concerns the concentric nature, regularity and narrowness of the grooves. The greater thickness and the more pronounced character of the grooves, claimed by the applicant, are not sufficient to obscure that similarity.

102 It follows from all of the foregoing considerations that the applicant has not established, before the Court, that the Board of Appeal erred in finding, on the basis of the elements available to it, that the decoration of the items of crockery relied on by the intervener in support of its applications for a declaration of invalidity was protected under French copyright law and that that decoration was the subject of an unauthorised use in the disputed designs.

103 The present plea must therefore be rejected.

104 Since the applicant has failed in all its pleas, these actions must be dismissed.

Costs

105 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

106 Since the applicant has been unsuccessful, it must be ordered to pay OHIM and the intervener's costs, as applied for in those parties' pleadings.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Joins Cases T-566/11 and T-567/11 for the purposes of the judgment;

2. Dismisses the actions;

3. Orders Viejo Valle, SA to bear its own costs and those of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) and of Établissements Coquets.

Forwood Dehousse Schwarcz

Delivered in open court in Luxembourg on 23 October 2013.

[Signatures]

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