



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

DECISION
of the Third Board of Appeal
of 9 November 2007

In Case R 1215/2006-3

Atria Yhtymä Oyj

PL 900

FI-60060 Atria

Finland

Community design proprietor /Appellant

represented by Borenius & Co Oy Ab, Tallberginkatu 2A, FI-00180 Helsinki, Finland

v

HK Ruokatalo Group Oyj

Kaivokatu 18

FI-20520 Turku

Finland

Cancellation applicant/Respondent

represented by Heinonen & Co, Fredrikinkatu 51-53 B, FI-00101 Helsinki, Finland

APPEAL relating to Invalidity Proceedings No ICD 1964 (Registered Community Design No 330 782-0002)

THE THIRD BOARD OF APPEAL

composed of Th. Margellos (Chairperson and Rapporteur), D.T. Keeling (Member) and I. Mayer (Member)

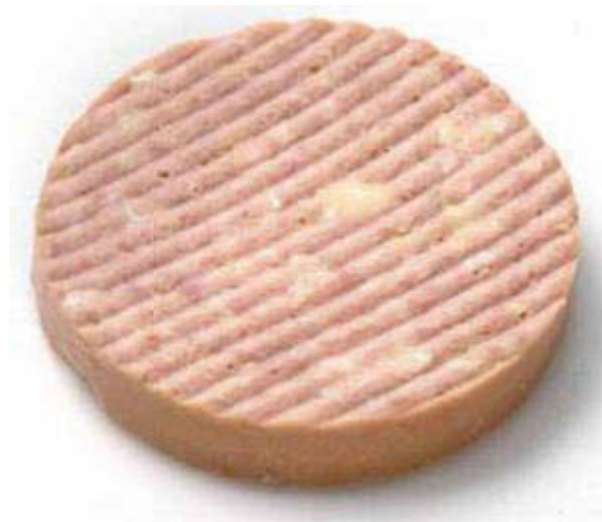
Registrar: J. Pinkowski

gives the following

Decision

Summary of the facts

- 1 Atria Yhtymä Oyj ('the appellant') is the holder of registered Community design No 330 782 -0002 ('the contested RCD'), the application for which was received on 27 April 2005. It is registered for the product 'meat foodstuffs' and represented as follows:



- 2 On 21 December 2005, HK Ruokatalo Group Oyj ('the cancellation applicant') filed an application for a declaration of invalidity against the contested RCD pursuant to Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs ('CDR') (OJ EC 2002 No L 3, p 1) claiming that it did not fulfil the CDR requirements in Articles 5 (novelty), 6 (individual character) and 8 (features of appearance of the product solely dictated by its technical function). The cancellation applicant provided the following documents:
 - A picture of a knife typically used to cut meat slices (Exhibit D1);
 - Internet extracts of a design used on product packaging by the French undertaking *Fleury Michon* (Exhibit D2);
 - Internet extracts of a design used on product packaging by the French undertaking *Charal* (Exhibit D3);
 - A database printout of French trade mark registration No 3 104 841 filed on 11 June 2001 of the figurative trade mark 'Madrangle Steak Haché de Jambon' and published on 20 July 2001 (Exhibit D4);
 - A database printout of French trade mark registration No 3 214 568 of the figurative trade mark 'Fleury Michon Steak Haché De Jambon' filed on 11 March 2003 and published on 18 April 2003 (Exhibit D5).

- 3 The cancellation applicant claimed that the contested design was not new since it is usual for meat products to be sliced by a knife that produces a striped surface on the slice and since earlier trade mark registrations had made available the design to the public. It also claimed that the contested design did not have an individual character since its overall impression did not differ from the usual meat slice. Lastly, it claimed that since a striped surface is an advantage when the hamburger steak is fried the surface of the contested design was dictated solely by the technical function of the product.
- 4 Invited by the Office to comment, the Community design proprietor filed observations on 30 March 2006, arguing essentially as follows:
 - The picture quality of the exhibits is low. Notwithstanding, the overall impression produced by the registered Community design differs from that produced by the designs cited by the cancellation applicant. The contested design has several characterising features: The circumferential wall is vertical. The grooves are wide in comparison with the ridges. The grooves and ridges form a slightly curved pattern. The ridges have a plain surface. None of these features are present in the designs in the exhibits.
 - The side wall of the hamburger in Exhibit D2 does not appear vertical as in the contested design and appears to suggest that the striped surface results from the use of a ribbed frying pan.
 - The stripes on the surface of the meat product in Exhibit D5 also appear to have resulted from the use of a ribbed frying pan.
 - There are fewer grooves in the design in Exhibit D3 than in the Community design. In the former the ridge is wider than the groove, whereas in the latter the width of the ridge is smaller than that of the groove.
 - It is impossible to say if there are any grooves in the product in Exhibit D4.
 - The design must be considered novel since the cancellation applicant has not shown that that an identical design has been made available to the public before the filing date of the contested design.
 - The only technical function that a meat foodstuff fulfils is that it can be eaten. It does not require a specific shape or features of appearance and can be boiled, oven cooked or fried. A striped surface on a meat burger is not a feature which is dictated by any technical function since even a hamburger with a smooth surface can be fried. Furthermore, the fact that a striped surface can be varied shows that the appearance of a meat burger is not solely dictated by a technical function. Thus, there are no features of appearance of the meat foodstuff in the design which are implied by the alleged technical function of being ‘suitable to be prepared’.
- 5 The Community design proprietor also submitted a statement and curriculum vitae of Mrs Helena Enqvist, a food nutritionist and consultant, whom it considers is an

informed user. The statement compared the pictures in the exhibits to the contested design and concluded that they were different.

- 6 On 2 June 2006, the cancellation applicant resubmitted by courier Exhibits D1 to D5 in colour. In addition, it made the following remarks:
- Meat foodstuffs are usually fried and a striped surface on a meat product, which is a common feature, accomplishes a better fried result. Consequently, the features of the contested design are dictated by the technical function of the product.
 - The claimed special shape of the grooves and ridges in the contested design is not apparent without extremely close examination. In the normal use of a meat burger, the user does not examine in detail the shape and size of the stripes, but perceives only the striped surface as a whole.
 - The contested design is directed to the public in general. The informed user is not a nutritionist with education and working experience in the field of foodstuffs but the housewife who does the family grocery shopping.
 - The statement of Mrs Enqvist does not compare the overall impression of the contested decision with other designs.
- 7 On 28 August 2006, the Community design proprietor replied stating that translations of exhibits D2 and D3 had not been provided and that the exhibits resubmitted as well as the website references had to be rejected as they had been filed out of time. As to the claim of lack of novelty, it argued that the cancellation applicant had failed to identify the details of the contested design that were immaterial. It emphasised that the outer surface of a meat foodstuff, which is a variable feature, is relevant in the assessment of the overall impression of the contested decision.
- 8 On 12 September 2006, the Invalidity Division of the Office issued a decision ('the contested decision') declaring the contested RCD invalid pursuant to Article 25(1)(b) CDR for lack of individual character within the meaning of Article 6 CDR. The CTM proprietor as the losing party was ordered to bear costs. The Invalidity Division based its decision on the graphic representation of the figurative trade mark, 'Fleury Michon Steak Haché de Jambon' reproduced below, which is the subject of French trade mark registration N° 3 214 568 published on 18 April 2003 (Exhibit D5)



as well as the following colour Internet extract of the ‘Fleury Michon Steak Haché de Jambon’ packaging (Exhibit D2):



The reasoning in the contested decision finding the lack of individual character of the contested design may be summarized as follows:

- The informed user is familiar with foodstuff products and understands that there is no functional or other limitation on the freedom of the designer in creating designs for meat foodstuffs.
 - It is irrelevant that the image in the registered design does not show whether the stripes are formed by grooves and ridges on raw meat or by burning the meat in a ribbed frying pan, since the informed user is not concerned with how the stripes have been formed. What matters is that the resulting surface is the same as in the contested design. As to the depth of the grooves in the contested design, the deviation from an essentially flat surface is not significant enough to alter the conclusion that the surface pattern in both the contested design and the prior design are the same and produce the same overall impression on the informed user.
- 9 On 15 September 2006, the Community design proprietor filed a notice of appeal against the contested decision. The statement setting out the grounds of the appeal was filed on 11 January 2007.
 - 10 On 26 March 2007, the respondent filed observations in response.
 - 11 On 27 April 2007, the appellant filed observations in reply.
 - 12 The respondent filed a rejoinder on 18 June 2007.

Submissions and arguments of the parties

- 13 The appellant requests the Board to annul the contested decision and maintain the contested design on the register. Its arguments may be summarized as follows:

- The Invalidity Division infringed Article 63(1) CDR by visiting the *Fleury Michon* Internet site.
- The conclusion in the contested decision that the resulting surface pattern is the same in the contested design and in the design of the meat product in the French trade mark registration No 3 214 568 is not consistent with the statement in that decision that the latter does not disclose whether the surface pattern in the prior design is flat or not. Whereas, on the one hand, the contested decision recognises that the contested design is not flat but is marked by grooves of a certain depth, it considers, on the other hand, that the image quality of the design in the earlier trade mark registration does not show whether the stripes on the surface are formed by grooves and ridges pressed on the raw meat or by the meat being burned in a frying pan with ribs. If it is uncertain whether the surface of the design in earlier registration is flat, it is not possible to conclude that the surface pattern is the same.
- The evidence of registration should be disregarded since the quality of the image of the earlier mark is poor.
- In any case, a flat surface with stripes that do not protrude looks different from a surface with grooves and ridges formed on the surface.
- The Invalidity Division overlooked the fact that the overall impression of a design is produced by all the features of a design and not only the surface pattern. The earlier design in question does not have the peripheral sidewall that the contested design has.

14 The respondent contends as follows:

- The appellant's claim that the contested decision is based on evidence other than that produced by the parties is incorrect. It filed as Exhibit D2 a printout from the *Fleury Michon* Internet site that shows in colour the same image as the earlier French trade mark registration.
- The Invalidity Division received the original document of the prior design. Those are the images that appear in the contested decision and these show clearly the image of the earlier design.
- The overall impression of the contested design is of a meat product with a striped surface. The prior design produces the same overall impression of a striped surface irrespective of whether the depth of the stripes is the same.
- In the normal use of a meat product, the informed user does not examine the shape or size of the stripes or the side walls.

15 The appellant replies that since it is unclear whether the stripes on the surface of the image of the earlier trade mark are formed by grooves and ridges pressed in the raw meat or burned on the surface by frying in a pan with ribs, the comparison of the overall impression in the contested decision is incorrect. It also argues that the

reproduction of the earlier design does not fulfil the requirements in the regulations or the Office's guidelines.

- 16 The cancellation applicant responds contending that the argument that the earlier design is not an actual design is a new argument which cannot be taken into consideration since it has not been invoked in the period for submitting the statement setting out the grounds of the appeal. Notwithstanding, it considers that the attachments to the invalidity application included a reproduction of the design as well as evidence of existence required by Article 28(1) (v) CDIR.

Reasons

- 17 The appeal complies with Articles 55 to 57 CDR and Article 34(1)(c) and (2) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs ('CDIR') (OJ EC 2002 No L 341, p. 28). It is therefore admissible.

Relevant provisions

- 18 Article 25(1)(b) CDR provides that a Community design may be declared invalid if it does not fulfil the requirements of Articles 4 to 9.

- 19 Individual character is defined by Article 6 CDR :

1. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:

...

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

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

- 20 Where the ground for invalidity is that a registered Community design does not fulfil the requirements of Article 5 or 6 CDIR, Article 28(1)(b)(v) CDIR provides that an application for a declaration of invalidity must contain the indication and reproduction of the prior design that could form an obstacle to the novelty or individual character of the registered Community design, as well as the documents proving the existence of those earlier rights.

- 21 As to the prior design which has been made available to the public, the cancellation applicant refers to a complex figurative trade mark for hamburger packaging, which includes the *Fleury Michon Steak Haché De Jambon* design of the hamburger alongside other elements. That packaging is the subject of French trade mark

registration filed on 11 March 2003 and published on 18 April 2003 by the French undertaking Fleury Michon (société anonyme) and covering *inter alia* meat products ('the Fleury Michon Steak Haché De Jambon figurative trade mark'). That trade mark is attested by the evidence of registration that was filed with the application for a declaration of invalidity (Exhibit D5).

- 22 In addition, the cancellation applicant filed with its application for a declaration of invalidity, various Fleury Michon Internet extracts (Exhibit D2) illustrating packaging identical to the Fleury Michon Steak Haché De Jambon figurative trade mark. On 2 June 2006, the cancellation applicant resubmitted by courier all the exhibits filed with the invalidity application, including in colour the Internet extracts, in response to the concern expressed by the Community design proprietor that the images in the exhibits were poor in quality. The contested decision merely reproduced the images in the Exhibits D2 and D5. The Community design proprietor's allegation that the Invalidity Division infringed Article 63(1) CDR by reproducing an image from the Internet of its own motion is, therefore, not correct.
- 23 With regard to the reproduction of the image in Exhibit D5, the Community design proprietor argues that since the quality of that image is poor it does not facilitate a proper comparison of the actual prior design with the contested registered Community design. Since the actual food products are commonly reproduced on packaging labels, there can be no doubt that the hamburger featured on the packaging in question is a reproduction of the features of the *Fleury Michon* hamburger. The earlier hamburger design is depicted clearly and unambiguously in the *Fleury Michon* figurative trade mark, the existence of which is proven by the evidence of registration as well as the extract in colour of the same design featured in the *Fleury Michon* website (Exhibit D2). Accordingly, the Board considers that the picture of the hamburger in the *Fleury Michon* trade mark constitutes an acceptable representation of the prior design within the meaning of Article 28(1)(b)(v) CDIR.
- 24 The parties also disagree on who is the informed user for the purposes of the assessment of individual character. As the use of the term 'user' indicates, the person in question must be a user of meat foodstuffs since the class of products indicated in the registration is for meat foodstuffs. S/he is, thus, someone using meat foodstuffs and not a designer, a manufacturer or a specialist in the food industry. Mrs Enqvist is a food nutritionist and consultant and as such is a specialist in the food industry. Her statement cannot, therefore, provide an indication of the overall impression, which the conflicting designs would make on the informed user. As the use of a foodstuff necessarily entails its consumption, the informed user is someone who regularly consumes meat products and especially hamburgers and is informed about their ingredients, how they are cooked and served, as well as their overall appearance (see, to that effect, Decision of 28 November 2006 – R 1310/2005-3 'Galletas', at paragraph 13).
- 25 In the assessment of the individual character, regard must be had to the degree of freedom of the designer in developing the design. As far as a hamburger is concerned, the degree of freedom of the designer is only limited by the fact that it is often served in a roll or bun, baked specially for this purpose. For that reason it is often round and relatively thin. Thus, even if small differences in the shape and

depth may confer individual character on the design of a hamburger, there is, however, in principle no functional or other limitation affecting the surface of a hamburger. As the Community design proprietor itself has pointed out, even a hamburger with a flat surface can be eaten. Therefore, it cannot be assumed that small differences in the depth of the grooves, the type of ridge, the number of stripes and the curvature of those stripes on the surface will confer individual character on a hamburger design.

- 26 In the assessment of the individual character, regard must be had to the degree of freedom of the designer in developing the design. In this case, there is no functional or other limitation affecting the design of the surface of a hamburger. As the Community design proprietor itself has pointed out, the surface of hamburger does not influence how it tastes, is served or is eaten.
- 27 Moreover, the depth of the grooves, the type of ridge, the number of stripes, the slight curvature of those stripes or whether the circumference is plain on a hamburger are not elements that are of concern to the informed user as consumer. Since the informed user's fundamental concerns are to factors such as taste, cooking time and percentage of meat content, s/he will not consider the precise extent to which the grooves, the ridges, and the stripes on the surface of the registered Community design differ from the *Fleury Michon* hamburger design. Furthermore, with regard to the shape and depth, s/he will perceive no differences between the conflicting hamburger designs. Consequently, s/he will perceive the designs in question as being quasi identical. Accordingly, the overall impression that the registered Community design produces on the informed user does not differ from the overall impression produced on that user by the *Fleury Michon* hamburger depicted in French trade mark registration No 3 214 568 published on 18 April 2003.
- 28 For the above reasons, the appeal is dismissed and the contested decision declaring the registered Community design invalid for lack of individual character is upheld.

Costs

- 29 Since the appeal has been unsuccessful, the appellant must be ordered to bear the fees and costs incurred by the respondent, in accordance with Article 70(1) CDR.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the appellant to bear the fees and costs incurred by the respondent.**

Th. Margellos

D.T. Keeling

I. Mayer

Registrar:

J. Pinkowski