



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

The Boards of Appeal

**DECISION
of the Third Board of Appeal
of 30 November 2007**

In Case R 1126/2007-3

LG Electronics Inc.

20, Yeouido-dong, Yeongdeungpo-gu

Seoul 150-721

Republic of Korea (LA)

Appellant/Applicant

represented by CABINET REGIMBEAU, 20, rue de Chazelles, F-75847 Paris
Cédex 17, France

APPEAL relating to a decision of the Designs Department on Community Design
No°595 764

THE THIRD BOARD OF APPEAL

composed of Th. Margellos (Chairperson and Rapporteur), H. Salmi (Member), and
I. Mayer (Member)

Registrar: J. Pinkowski

gives the following

Language of the case: English

Decision

Summary of the facts

- 1 By letter received on 26 September 2006, LG Electronics Inc. ('the applicant') filed a multiple application for a Community registered design described as a 'dishwasher' pursuant to Article 35 (1) of Council Regulation (EC) No°6/2002 of 12 December 2001 on the Community Designs ('CDR') (OJ EC 2002 N L 3, p. 1) ('the application'). The appearance of that design is not in issue in the present proceedings. The application also included a claim for the priority of Korean applications filed on 16 March 2006.
- 2 On 2 October 2006, the Office informed the applicant of the receipt of the multiple applications on 26 September 2006.
- 3 On 5 October 2006, the applicant replied stating that its records showed that the Office received the multiple applications in question on 15 September 2006. As evidence it provided a copy of the courier's note specifying the delivery to the Office on 15 September 2006 of a package weighing 0.5 kg from the applicant's representative bearing the dispatch/tracking reference number 799002505941.
- 4 On 13 October 2006, the Designs Department of the Office informed the applicant that the filing date of 25 September 2006 would be accorded as that was the date it had received the application. It also informed the applicant that the priority claim would not be allowed. It invited the applicant to apply for a decision on the matter within two months pursuant to Article 40 of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs ('CDIR')(OJ EC L 341, p. 28–53) if it considered the filing date accorded to be inaccurate.
- 5 On 21 November 2006, the Office's customer care unit informed the applicant that the Office did not receive the design application on 15 September 2006 but only, by error, a letter addressed by the applicant to *Cabinet Sator* by courier. It could not, however, confirm whether that error had been brought to its attention.
- 6 On 22 December 2006, the applicant filed a request for *restitutio in integrum* giving the following reasons:
 - On the same day (14 September 2006) that it sent to the Office the multiple design applications using the FEDEX International Priority Service, it sent by the same courier and using the same service another letter to *Cabinet Sator* in Algeria.
 - It appears that FEDEX erroneously switched the dispatch notes of the letters addressed respectively to the Office and *Cabinet Sator* in Algeria, so that the letter addressed to Cabinet Sator was accorded the dispatch note No 799002505941, that had been foreseen by the courier for the letter to the Office containing the multiple application. Consequently, the letter that was intended for the client in Algeria was delivered erroneously to the Office on

15 September and the letter that should have been delivered to the Office was delivered to *Cabinet Sator* on 16 September 2006.

- By sending the Community design application via FEDEX, it took all care and diligence required by the circumstances given that FEDEX is a recognized delivery services.

It provides by way of evidence the following:

- Information provided by FEDEX, tracking the pickup and delivery of the letters which the applicant's representative gave to the courier on 15 September 2006;
 - A copy of the letter issued by FEDEX confirming the error in the delivery of the above letters;
 - a copy of the communication of 21 November 2006 of the Office's customer care unit.
- 7 By decision of 18 May 2007, the examiner rejected the request for *restitutio in integrum* since she considered that it did not fulfil the requirements of Article 67(5) CDR which provides that *restitutio in integrum* does not apply to the time-limit of six months for filing the application for a registered Community design in order to claim priority of a previous design or utility model under Article 41(1) CDR.
- 8 On 18 July 2007, the applicant filed an appeal against the contested decision together with the statement setting out the grounds of appeal.
- 9 The appeal was sent to the Designs Department for revision and was remitted to the Board on 26 October 2007.

Grounds of appeal

- 10 The applicant in essence requests that *restitutio in integrum* should be granted and that the application be accorded a filing date of 15 September 2006: It reproduces the reasons previously given to the Designs Department (see paragraph 6).

Reasons

- 11 The appeal complies with Articles 56 and 57 CDR and Article 34 CDIR. It is therefore admissible.
- 12 Article 38(1) CDR provides that the date of filing of an application for a registered Community design shall be the date on which the documents containing the information specified in Article 36(1) CDR are filed with the

Office by the applicant, or, if the application has been filed with the central industrial property office of a Member State or with the Benelux Design Office, with that office.

- 13 Article 41(1) CDR provides that a person who has duly filed an application for a design right or for a utility model in or for any State party to the Paris Convention for the Protection of Industrial Property, or to the Agreement establishing the World Trade Organisation, or his successors in title, shall enjoy, for the purpose of filing an application for a registered Community design in respect of the same design or utility model, a right of priority of six months from the date of filing of the first application.
- 14 Article 67 CDR headed '*Restitutio in integrum*' provides in material part as follows:
 1. The applicant for or a holder of a registered Community design or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to observe a time-limit vis-à-vis the Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any right or means of redress.
 2. The application must be filed in writing within two months of the removal of the cause of non-compliance with the time-limit. The omitted act must be completed within this period. The application shall only be admissible within the year immediately following the expiry of the unobserved time-limit.
 3. The application must state the grounds on which it is based and must set out the facts on which it relies. It shall not be deemed to be filed until the fee for the re-establishment of rights has been paid.
 4. The department competent to decide on the omitted act shall decide upon the application.
 5. The provisions of this Article shall not be applicable to the time-limits referred to in paragraph 2 and Article 41(1)'.
- 15 The above mentioned provisions do not exclude *restitutio in integrum* in respect of a filing date.
- 16 The provisions on *restitutio in integrum* and on the filing date in the CDR mirror those applied to the Community trade mark prior to the entry in force of the latest amendments. Indeed, various trade mark cases have already considered claims for *restitutio in integrum* in respect of a filing date (see judgment of the Court of First Instance of 20 June 2001 in Case T-146/00 *Stefan Ruf and Martin Stier v OHIM* ('Dakota') [2001] ECR II-1797; Decisions of the Boards of Appeal

of 7 October 2002 in Case R 354/2002-1 – LET'S TOAST; of 28 February 2001 in Case R 370/1999-3 and R 160/2000-3 – Immunocell).

- 17 The Board, therefore, considers that in the present case it would be inconsistent to refuse to consider *restitutio in integrum* for a filing date merely because to do so would mean the acceptance of a priority right that was rejected with the decision according the later filing date.
- 18 In particular, in that regard, it is noted that under the Community trade mark provisions currently in force *restitutio in integrum* can be applied even to the priority period. Furthermore, the European Patent Convention 2000, revising the text of the original European Patent Convention dated 1973, which is expected to enter into force by 13 December 2007 also makes it possible to apply *restitutio in integrum* to the priority period.
- 19 In the circumstances, since the loss of the priority right has been the consequence of the decision according a later filing date, and the issue is first and foremost one of whether a filing date of 15 September 2006 should be re-established, the Designs Division erred in rejecting the request pursuant to Article 67(5) CDR. The contested decision is, accordingly, annulled.
- 20 As to the examination of the remainder of the requirements for *restitutio in integrum*, the Board refers to Article 60 (1) CDR which confers upon it the discretion to exercise any power within the competence of the first instance (see, to that effect, judgment of the Court of First Instance of 8 July 1999 in Case T-163/98 *The Procter & Gamble Company v OHIM* ('Baby-Dry') [1999] ECR II-2383, at paragraphs 38, 42 and 43; OJ OHIM 11/1999, p. 1487).
- 21 The request for *restitutio in integrum* was made on 28 December 2006, together with the grounds for that request as well as the instruction that the relevant fee be deducted from the representative's current account. It was on 11 December 2006 that the applicant was informed by the courier of the circumstances of that error. The request, accordingly, complies with Article 67(2), (3) and (5) CTMR. It is therefore admissible.
- 22 The information provided by FedEx to the applicant tracking the pickup and delivery of the letters shows that the applicant's representative gave the design application to the courier for delivery to the Office on 14 September 2006 together with another letter addressed to *Cabinet Sator*, a client in Algeria. That information also shows that FedEx delivered to the Office on 15 September 2006 a letter sent by the applicant's representative bearing the courier's dispatch/tracking reference number 799002505941. On the basis of that information, and until receipt of the Office's communication on 2 October 2006 indicating that the application had been received on 26 September 2006, the applicant in all reasonableness assumed that the design application in question had been delivered. The letter which FedEx issued to the applicant in response to the Office's finding that the application was not received on 15 September 2006, a copy of which has been submitted by way of evidence in support of the *restitutio in integrum* claim, further shows that the late arrival of the multiple

application resulted from an error on the part of the courier, who switched the dispatch notes, with the consequence that the letter that was intended for the Office was delivered to *Cabinet Sator* in Algeria and *vice versa*. The fact of that having occurred is corroborated by the information of 21 November 2006 of the Office's customer care unit confirming to the applicant that the Office did in fact receive by courier of 15 September 2006 a letter addressed by the applicant's representative to *Cabinet Sator* in Algeria. It is clear from all the above that the late receipt of the application on 26 September 2006 was not a consequence of a breakdown of applicant's representative's internal procedures for sending communications to the Office, but rather a result of circumstances over which it had no control.

- 23 Furthermore, there can be no doubt that the applicant's representative exercised all due care required by the circumstances. It cannot be faulted for having chosen to communicate by courier or for its choice of courier. Communications to the Office can be by any means possible and since courier companies, such as FedEx, commit themselves to deliver within twenty-four hours, it can be reasonably expected that the courier would have delivered the design application on 15 September 2006 (see, to that effect, decisions of the Boards of Appeal of 12 September 2001 in Case R 491/2000-3 – MAG-FORM/MAGE, at paragraph 29 and of 12 September 2003 in Case R 853/2002-4 – *avenoses (FIG. MARK) / AVEENO*, at paragraph 14).
- 24 In the circumstances, therefore, the request for *restitutio in integrum* is allowed and the design application is granted the filing date of 15 September 2006.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Allows *restitutio in integrum* and grants the Community design application the filing date of 15 September 2006.**

Th. Margellos

H. Salmi

I. Mayer

Registrar:

J. Pinkowski