



Mr Wubbo De Boer
President
Office for Harmonisation in the Internal Market (Trade Marks and Designs)
Avenida Europa, 4
E-03008 Alicante
Spain

cc.: Mr. Peter Rodinger / Mr. Vincent O'Reilly

27 October 2008

Dear Mr De Boer

Registered Community Designs Database

As you know, MARQUES represents trade mark and design owner's interests before the relevant European Union and other international bodies. We wish to take every opportunity to improve the system to the benefit of the users. MARQUES values its close working relationship with OHIM.

We write in relation to the publicly accessible electronic database of Registered Community Designs, which is accessible via the OHIM website.

In its current format, we find the RCD database to be an excellent resource for accessing the register of protected RCDs. However, the RCD database does not currently display applications which have been deemed non-registrable by the Office. We consider that as a matter of legislation and good practice, it should.

The legal basis for the maintenance of a database is, as we understand it, Council Regulation (EC) No. 6/2002, as implemented by Regulation 2245/2002/EC (as amended), which states at Article 71 of the Implementing Regulation:

1. The Office shall maintain an electronic database with ***the particulars of applications for registration*** of Community designs and entries in the Register. The Office may, subject to the restrictions prescribed by Article 50(2) and (3) of Regulation (EC) No/2002, make available the contents of that database for direct access or on CD-ROM or in any other machine readable form.
2. The President of the office shall determine the conditions of access to the database and the manner in which the contents of this database may be available in machine-readable form, including the charges for those acts.

(emphasis added)

Article 71 is, on its terms, subject to Article 50(2) and (3) of Council Regulation (EC) No 6/2002, which states:

2. Upon such request, where the conditions set out in Article 48 are satisfied, the registered Community design shall be registered, but neither the representation of the design nor any file relating to the application shall, subject to Article 74(2), be open to public inspection.

3. The Office shall publish in the Community Designs Bulletin a mention of the deferment of the publication of the registered Community design. The mention shall be accompanied by information identifying the right holder in the registered Community design, the date of filing the application and any other particulars prescribed by the implementing regulation.

In MARQUES' view, the correct interpretation of Article 71 read with Article 50(2) and (3) requires the RCD database to display all applications for registration, including those ultimately held non-registrable. This is further confirmed by the mention of the database including "the particulars of applications for registration of Community designs **and** entries in the Register" – it is clearly not supposed to be confined only to designs which have registered having been published in the Register.

Having made the database available there is also nothing to justify its being incomplete: Article 50(2) and (3) clearly envisages that the designs themselves should be shown to the public, subject only to deferment.

It should be noted that OHIM's current position of not displaying rejected RCD applications is inconsistent with its position with respect to the CTM database (which displays all applications and registrations, as well as rejected and cancelled marks), when there is no relevant difference in either the enabling legislation or best practice which would suggest that RCDs should be treated differently to CTMs.

It also appears that OHIM practice includes the removal of images of designs that have been withdrawn or surrendered after publication. Again, there appears to be nothing in law or good practice to justify this approach. An earlier fault of removing the images of designs that were declared invalid appears now to have been fixed.

Our members are regularly called on to assess whether a design is capable of registration as an RCD. However, without an indication of what designs are being rejected by OHIM, it is impossible for appropriate advice to be given. Whilst the applicant is informed of the basis or bases for an application being held non-registrable, the wider Community does not currently have access to such information.

As we are sure you are aware, the fundamental and overriding objective of the Regulation, as expressed in its preamble, is the encouragement of "innovation and development of new products and investment in their production". By creating a framework for greater predictability, unsuccessful applications can be reduced. In our view, displaying unsuccessful applications on the RCD database will reduce the costs associated with protecting innovation, thereby furthering the objectives of the legislation, whilst complying with the overriding principle of proportionality.

We understand that some in the Designs Department consider that the issue is dealt with by other Articles:

- Article 72 deals with parts of the file, not the database of particulars of applications;
- Article 73 deals only with deferred designs; however, a deferred design which is rejected should not be disclosed on the RCD database until after the date of deferred publication; and

- Article 74 deals with inspection of files – again the issue we raise does not concern files, but rather the electronic database with the particulars of applications.

We look forward to hearing from you, and can make ourselves available for a discussion of this issue with you or your staff.

Yours faithfully



Jane Collins
Chair of MARQUES



David Stone
Chair of the MARQUES Designs Team