

**DECISION
of the Third Board of Appeal
of 11 August 2022**

In case R 726/2021-3

PUMA SE

Intellectual Property Department
Attn.: Elena Willert
PUMA Way 1
91074 Herzogenaurach
Germany

Design Holder / Appellant

represented by Göhmann Rechtsanwälte Abogados Advokat Steuerberater
Partnerschaft mbB, Landschaftstraße 6, 30159, Hannover, Germany

v

Handelsmaatschappij J. Van Hilst B. V.

Elzenweg 19
5144 MB Waalwijk
The Netherlands

Invalidity Applicant / Defendant

represented by Holla Advocaten, Stationsplein 101, 5211 BM 's-Hertogenbosch, The
Netherlands

APPEAL relating to Invalidation Proceedings No ICD 107 679 (registered Community
design No 3 320 555-0002)

THE THIRD BOARD OF APPEAL

composed of G. Humphreys (Chairperson), C. Negro (Rapporteur) and
C. Bartos (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 PUMA SE ('the design holder') is the holder of registered Community design No 3 320 555-0002 with a filing date of 26 July 2016. Priority was claimed from United States design patent application No 29/572,153 filed on 25 July 2016. The design is represented in the following views:



1



2



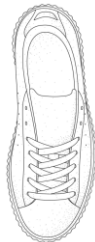
3



4



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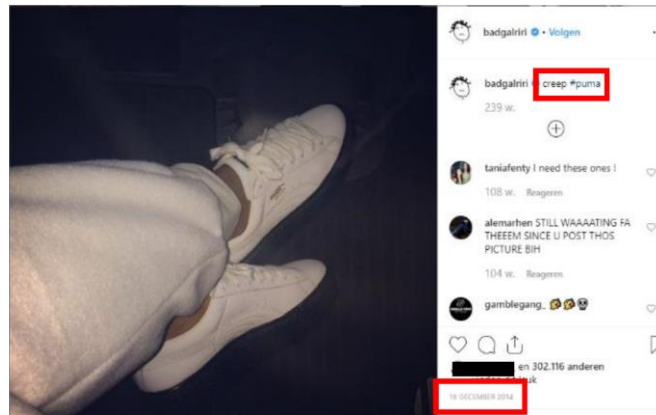
6



7

- 2 The indication of the products reads 'shoes'.
- 3 On 22 July 2019, Handelsmaatschappij J. Van Hilst B. V. ('the invalidity applicant') filed an application for a declaration of invalidity of the contested RCD based on Article 25(1)(b) CDR in conjunction with Articles 5 and 6 CDR claiming that the contested RCD lacked novelty and individual character.
- 4 In support of its application, the invalidity applicant submitted, inter alia, the following:
 - Annexes I to III: articles from www.footwearnews.com, www.complex.com and www.fashionmovesforward.com, dated July to November 2015, and entitled 'Has Rihanna just revealed her first Puma collaboration shoes?', 'Did Rihanna Accidentally Leak the Sneaker From Her Puma Collaboration?' and 'How Rihanna saved Puma', respectively;

- Annex IV to VI: three Instagram posts from the account ‘badgalriri’, dated 16 December 2014 and each garnering over 300 000 likes, showing Rihanna wearing a pair of white shoes with a thick black sole (‘the prior design’):



- 5 The invalidity applicant essentially argued that the contested RCD lacked novelty and individual character because it had been disclosed by the design holder itself prior to the 12 months ‘grace period’ preceding the priority date of the contested RCD. In particular, Rihanna had posted pictures of said design in her Instagram account on 16 December 2014. Additional Instagram posts which did not bear a date were reproduced by the media between July to September 2015. Further, several publications captured Rihanna wearing the prior design in New York city

in 2015. Finally, the invalidity applicant explained that the creeper sole incorporated into the contested RCD is not new since it had been made available to the public by other footwear manufacturers prior to the contested RCD's priority date.

- 6 The design holder replied that the application for invalidity was inadmissible because of a violation of contractual obligations between the parties, and bad faith. It further explained that the collaboration with Rihanna started around the end of 2014, and the crepe-soled shoe 'Creeper' is one of the first products launched as a consequence of this partnership. In fact, this product was launched on 25 September 2015 via Puma's website, that is within the 12 months 'grace period', and was chosen as 'shoe of the year' in 2016. The contested RCD was based on the 'Creeper' shoe model.

- 7 The contested RCD was new and enjoyed individual character. The evidence furnished by the invalidity applicant was insufficient to prove prior disclosure of a design that could destroy the novelty and individual character of the contested RCD. In most of the alleged publications, the shoe cannot be seen in detail. The posts in the social media, being private websites, could not come to the attention of EU business circles in the sector concerned. In addition, the internet printouts display false dates. There is no witness evidence, no sales or actual offers. The design holder further comments on each of the invalidity applicant's annexes. In particular, in relation to the Instagram posts (Annexes IV to VI), it claims that the images are too dark to discern the details of the shoes, the publication has no reference to any product, but concerns a private social media site which could not have been reasonably become known in the normal course of business to the specialists in shoes. It finally argued that the validity of the contested RCD is supported by a number of decisions, both by national courts and the EUIPO. In support of its arguments, the design holder submitted, inter alia, articles showing that the products designed by Rihanna were accompanied by extensive marketing campaigns (Exhibit 6), examples of the prior art (Exhibits 12 and 13), an affidavit of the design holder's General Counsel IP declaring that the contested RCD had not been disclosed before the 12 months 'grace period' (Exhibit 15), as well as a number of national decisions (i.a. Exhibits 16 and 18).

- 8 The invalidity applicant essentially replied that it had not violated any contractual relationship nor was it acting in bad faith. The contested RCD had been disclosed on several occasions prior to the 12 months 'grace period' preceding the priority date of the contested RCD. Each of these disclosure events (i.a. Instagram posts and event in Germany on 16 December 2014, images of Rihanna wearing the RCD in public in New York city on 6 July 2015, and Instagram post of Rihanna showing the Puma creeper on 7 July 2015) received significant media attention. The disclosures could have thus been reasonably become known to the specialised circles in the footwear sector. The images are clear enough to enable comparison with the contested RCD. In support of its claims, it submitted, amongst other documents, the following:
 - Annexes XVII and XVIII: several articles reporting on Rihanna's appointment as Puma's new creative director, including articles on www.forbes.com, www.dazeddigital.com, www.trendalert.nl, www.nssmag.com and mail.online, all published on 16 or

17 December 2014. These articles reproduced, inter alia, images from Rihanna's Instagram of 16 December 2014, including the following:



- Annex XIX and XX: an article in hausofrihanna.com, dated 17 December 2014, reporting Rihanna's appointment as Puma's new creative director and featuring, amongst others, the following images of the prior design, as well a screenshot from the Wayback Machine dated 28 December 2014 capturing said article:



- 9 In its rejoinder, the design holder essentially reiterated its previous argumentation. The images are blurred and include uncertain dates. At any rate, it has not been proven that these alleged events of disclosure had become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union. The additional evidence is inadmissible, as

it is not presented with the necessary clarity and structure, and some of the annexes are not in the language of the proceedings.

- 10 By decision of 19 March 2021 ('the contested decision'), the Invalidity Division declared the contested RCD invalid for lack of individual character in relation to the prior design, and ordered the design holder to bear the costs.
- 11 It preliminarily held that the additional evidence filed by the invalidity applicant is admissible as supplementary (Article 63(2) CDR) because it is associated with the documents already submitted, it shows the same designs and the design holder had the opportunity to view and comment on it.
- 12 The evidence, namely posts on Rihanna's Instagram account and reproductions thereof in several fashion online newsletters and magazines, showed that the prior design had been posted to Rihanna's Instagram and reproduced in several online fashion newsletters and magazines before the start of the 12-month grace period in accordance with Article 7 CDR. A collaboration between Rihanna and Puma started in December 2014 (Annex III). Given the broad media attention the announcement drew, it was very likely that the relevant circles had learned about these publications. Further, the images of the prior design were of sufficient quality to discern the features corresponding to the contested RCD. Even if the prior design was not sold before the date of the start of the grace period, the fact that it has been disclosed through internet publications was enough to negate novelty and/or individual character of the contested RCD. The design holder failed to prove that the circumstances of the present case had prevented this disclosure from becoming known in the normal course of business to the circles specialised in the sector concerned, operating in the European Union.
- 13 In assessing the individual character of the contested RCD, the Invalidity Division noted that the informed user was a person familiar with shoes and the casual fashion sector to which the designs pertained. The designer's freedom was only restricted insofar as it was necessary to adapt to the feet and protect them. It was therefore not substantially limited. When comparing the contested RCD and the prior design, these generated the same overall impression on the informed user. Both designs depicted a flat and thick, vertically-striped shoe sole, a closure of seven holes with thick laces and a pattern of two lines of tiny holes on each side of the shoe. Neither of the design differed in the contours of the sole or in the crepe relief. The additional features of the heel and outsole pattern of the contested design are not sufficient to produce an overall different impression from the prior design. The view on insole does not reveal any particular design features and the omission of decorative features disclosed in the prior design, namely the Puma brand on the side of shoe and the label on the flap, do not confer the contested RCD the individual character either.
- 14 On 21 April 2021, the design holder filed an appeal against the contested decision, requesting that the decision be set aside. The statement of grounds of the appeal was received on 7 July 2021.
- 15 On 7 September 2021, due to the holiday period and the size of the statement of grounds of appeal, the invalidity applicant requested a one-month extension to file its observations.

- 16 On 8 September 2021, the Registry invited the design holder to comment on the extension request, and informed the parties that, since the invalidity applicant's deadline to file observations to the statement of grounds expired before the design holder's deadline to submit its comments to the request for extension, the deadline to file the invalidity applicant's observations was extended until 8 October 2021.
- 17 The design holder objected to the granting of the extension request arguing in essence that the invalidity applicant's extension request was a tactical obstruction, and that no exceptional circumstances were provided. It further claimed that the Office should not allow additional submissions as this would give the invalidity applicant an improper and unfair procedural advantage.
- 18 On 16 September 2021, the invalidity applicant's request for extension was rejected by the Chairperson of the Third Board. The deadline of 8 October 2021 remained in place.
- 19 By communication of 20 September 2021, the design holder claimed that the invalidity applicant's deadline to file observations should remain the original (7 September 2021) and any submissions should be rejected as belated.
- 20 The invalidity applicant replied with observations on 8 October 2021, requesting that the appeal be dismissed. On 29 November 2021, the design holder responded that these observations should be rejected as belated.
- 21 On 15 December 2021, the Office invited the invalidity applicant to submit evidence on exceptional circumstances invoked as referred to in Article 24(1) EUTMDR.
- 22 The invalidity applicant replied on 14 January 2022.
- 23 The design holder sent a further response on 11 February 2022.

Submissions and arguments of the parties

- 24 The design holder's arguments raised in the statement of grounds may be summarised as follows:
 - The images of the prior design depicted in the Instagram posts are of insufficient quality to allow a comparison with the contested RCD. It can only be discerned that they concern a white shoe with a black sole. The images in the contested decision are magnified and only show limited views of the prior design. In fact, they do not show the back, top, side and bottom of the shoe, and do not discern with any clarity the features and structure of the sole which is the most characteristic feature. Not even with an (inadmissible) retroactive approach is it possible to discern all features of the contested RCD. When taking a realistic approach on how the post is actually used, no Instagram user that scrolls down one post after another everyday would take the time to enlarge or print it out. Therefore, the details of a shoe which is hardly visible at the lower right edge of the photos would not be discerned. What is more, in the photos, the centre of attention is Rihanna and

her glamorous outfit, but not the shoes. As for the photo from the www.hausofrihanna.com, this is a fake post with no comments, and derives from an unreliable source or has been inserted in the article at a later stage. At any rate, the photo does not show the shoe's rear and bottom view, or the details of the sole's structure. The sole looks like a uniform brick, completely different from the sophisticatedly structured sole of the contested RCD. The upper shoe, on the other hand, looks much more elegant and slim than the rough, heavy and compact drawings of the contested RCD. There are all together only seven publications worldwide that have been presented by the invalidity applicant and that the contested decision refers to, all the others do not show any shoes and are obviously misleading. It is thus not possible to assume that the public has become aware of the prior design. The evidence is not sufficient to establish legal certainty for declaring one of the most successful registered Community designs invalid.

- There has been no disclosure to the relevant public in accordance with Article 7 CDR. None of the submitted evidence sufficiently proves that the prior design had become known in the normal course of business to the circle specialised in the sector concerned in the EU. It was not proven that the cited websites are aimed at professionals, let alone those inside the EU. To the contrary, the evidence concerns gossip news regarding the personality of Rihanna or private posts of Rihanna's Instagram account, but such sources have nothing to do with the shoe industry. Further, the invalidity applicant has not provided a clear description of who shall constitute the relevant specialised circles. There is no evidence regarding their qualifications, their customs or their behaviour, the scope of their activities or that those circles have actually noticed any one of the pictures that allegedly disclose the prior design.
 - There exist significant uncertainties regarding the dates of the alleged disclosures. Internet printouts often show false dates. Websites are easily updated, yet most do not provide any archive of previously displayed material, nor do they display records that enable the public to establish precisely what was published and when. Finally, errors or manipulation of evidence taken from dubious sites of the internet cannot be ruled out.
 - The application for invalidity is inadmissible due to bad faith, breach of a contractual obligation, and abusive character of the application. The invalidity applicant's behaviour is unethical since it is in breach of its contractual obligations, a way to blackmail money or just used to abuse the procedures in an unreasonable way in order to get a competitive edge. EU law cannot be relied on for abusive or fraudulent ends.
- 25 The invalidity applicant's arguments raised in reply to the appeal, the admissibility of which is contested by the design holder, may be summarised as follows:
- The evidence, considered in its entirety, is sufficient to establish disclosure of the prior design. The photos are of sufficient quality to discern the features corresponding to the contested RCD, and cannot be fake as they can be viewed from a mobile phone or a PC. They all bear the date that were posted

on Instagram. With these posts, Rihanna wanted to draw attention to her collaboration with Puma and, as a consequence, attention was paid to the shoes.

- These disclosures on the internet had become known in the normal course of business to the circles specialised in the sector concerned. The mere fact that Rihanna wore the prior design - identical to the contested RCD - in public in events in Germany and New York is sufficient for the contested RCD to be disclosed to the specialised circles in the fashion sector. This is because there is fashion press at every public performance of Rihanna, especially when she is presented during a press event as the new creative director of Puma, one of the best known shoe brands. Further, any online content is available worldwide and can be known to the specialised circles operating in the EU, even if some of the websites are based in the US.
- The argument regarding bad faith is irrelevant. Bad faith is not recognised as a separate ground for invalidity under the design regulation. At any rate, there were no contractual obligations from which it follows that it would not be permissible to apply for the invalidity of the contested RCD nor is there any abusive character in filing the present application for invalidity.
- In support of its claims, the invalidity applicant submitted, inter alia, a number of articles from websites including www.StarStyle.com, www.marieclaire.co.uk and www.fashionrogue.com dated 16 or 17 December 2014, referring to her appointment as the new creative director of Puma.

- 26 In reply to the Chairperson's invitation to submit evidence on the exceptional circumstances, the invalidity applicant essentially argued that its submissions were filed within the deadline set by the Office. The latter had given precise, unconditional and consistent assurances about the prolongation of the deadline. Given that it had adhered to set deadline, the discussion whether exceptional circumstances existed is irrelevant. At any rate, the delay was due to the extensive size of the appeal and the absence of key members of staff during the summer period. The invalidity applicant finally claimed that denying the submission would seriously disadvantage its position and fundamental right to an adversarial process and to a fair trial, as well as infringe the principle of legitimate expectations and its right to be heard.
- 27 By communication of 11 February 2022, the design holder responded that the events did not give rise to legitimate expectations, and that rejecting the submissions would not infringe on the invalidity applicant's right to be heard or its right to a fair trial. No exceptional circumstances justifying the extension of the time limit had been presented.

Reasons

- 28 The appeal complies with Articles 56 and 57 CDR and Article 34 CDIR. It is, therefore, admissible. The appeal however is unfounded, for the reasons detailed below.

On the admissibility of the response to the appeal

- 29 In accordance with Article 24(1) EUTMDR, in *inter partes* proceedings, the defendant may file a response within two months of the date of notification of the appellant's statement of grounds. In exceptional circumstances, that time limit may be extended upon reasoned request by the defendant. Article 3(3) of the Rules of Procedure of the Boards of Appeal provides that a reasoned request for extension of the time limit for filing a response to an appeal shall be submitted within the original time limit. Where sufficient evidence of the invoked exceptional circumstances referred to in Articles 24(1) EUTMDR is not submitted, the Boards of Appeal may request such evidence if deemed necessary (also Article 59(2) CDR). Pursuant to Article 41(2)(b) EUTMDR, the Rapporteur shall, where necessary and subject to the direction of the Chairperson of the Board of Appeal decide on requests for the extension of time limits.
- 30 In the light of these principles, the Board considers that the response to the appeal should be rejected as inadmissible on the basis of its belated filing. No evidence of the exceptional circumstances invoked for granting the extension request was provided. The arguments put forward by the invalidity applicant were not convincing. The invalidity applicant's contention that the delay was due to the size of the appeal and the absence of staff during the summer period cannot be justified as exceptional circumstances. Most of the design holder's arguments had already been presented at first instance whereas no new evidence was provided at the appeal stage. In fact, on appeal, the design holder's submissions were merely built on the argumentation previously made and therefore none of the latter should be unfamiliar to the invalidity applicant. Neither can the absence of staff during a holiday period be regarded as exceptional circumstance, since this is a foreseeable issue. In the view of the Board, there is no reason why the invalidity applicant could not have submitted its response within the set time period, in particular since this had already been prepared, as admitted by the invalidity applicant itself.
- 31 It follows that the invalidity applicant's response to the statement of grounds of appeal must be rejected as inadmissible and cannot be taken into account. For the sake of completeness, the Board notes that, even if this were to be taken into account, the outcome of the present proceedings would be the same.

Article 25(1)(b) CDR in conjunction with Article 6(1) CDR

- 32 According to Article 6(1)(b) CDR a registered Community design is to 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 before the filing date of the application for registration or, if a priority is claimed, the date of priority.

Disclosure of the prior design

- 33 Pursuant to Article 7(1) CDR, for the purposes of applying Article 5 or Article 6 CDR, a design is to 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 filing date or, as the case may be, the priority date of the contested design, 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 European Union.
- 34 In order to establish the disclosure of a prior design, an overall assessment must be made taking into account all the relevant circumstances of the particular case. Furthermore, the disclosure cannot be proved by means of probabilities or suppositions but must be demonstrated by solid and objective evidence. Such evidence must be considered in its entirety. While some elements of the evidence considered on their own may be insufficient to demonstrate the disclosure of a prior design, the fact remains that, when combined or in conjunction with other documents or information they can contribute to the proof of disclosure (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 24-25).
- 35 In addition, in order to assess the evidential value of a document, it is necessary to verify the plausibility and the accuracy of the information which that document contains. It is necessary to take account of, inter alia, the origin of the document, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 26 and the case-law cited).
- 36 The provisions of the CDR and the CDIR do not specify the kind or quantity of evidence the invalidity applicant is required to furnish in order to prove the disclosure of the prior design on which the application for a declaration of invalidity is based. Article 28(1)(b)(v) CDIR only provides that ‘documents proving the existence of those earlier designs’ must be submitted. It follows that, on the one hand, the invalidity applicant is free to choose the evidence it considers useful to submit in support of its application of invalidity and that, on the other, the Board is required to examine the evidence submitted in order to establish if there is sufficient proof of a prior disclosure (09/03/2012, T-450/08, Phials, EU:T:2012:117, § 23).
- 37 The evidence submitted together with the invalidity application in order to prove disclosure of the prior design includes, inter alia, three Instagram posts uploaded by the user ‘@badgalriri’ on 16 December 2014 (Annexes IV to VI). These posts contain images of the prior design and predate the 12-month grace period preceding the priority date of the contested RCD. Given that the display of a picture on the internet constitutes an event which can be classified as ‘publication’ within the meaning of Article 7(1) CDR, the presentation of the prior design on Rihanna’s Instagram account constitutes an event of disclosure (20/10/2021, T-823/19, Bobby pins, EU:T:2021:718, § 32). That said posts have been made available to the public is further confirmed by the fact that they have received numerous comments and more than 300 000 likes.

- 38 The disclosure of the prior design as shown in the Instagram posts is further supported by a plethora of news articles from independent sources (Annexes XVII to XIX). The articles prominently feature these posts displaying the prior design and bear a date preceding the priority date of the contested RCD. By way of illustration, in the article published at www.dazeddigital.com on 16 December 2014, the prior design is featured prominently under the headline ‘Rihanna signs up as Puma’s new creative director’ and is captioned with the phrase ‘Rihanna in white Pumas @badgalriri via Instagram’, as well as additional posts from Rihanna that are featured throughout the article, including the post submitted in Annex IV. Likewise, in the articles published at www.forbes.com, www.trendalert.nl and mail.online on 16 December 2014, said Instagram photos are featured under the headlines ‘Rihanna Named Creative Director of PUMA’, ‘Rihanna is de nieuwe creative directo van Puma’ and ‘She’s found love in a footwear place! Rihanna announces as new creative director for Puma’, respectively. Further, the article from www.hausofrihanna.com, as also captured by the Wayback Machine internet archive on 28 December 2014, contains said images of the prior design (Annexes XIX and XX).
- 39 The above publications constitute in themselves events of disclosure since they show the image of the prior design on the internet (see also paragraph 37). The extracts contain the internet source, the prior design and its date of disclosure (December 2014) which is before the grace period of 12 months preceding the priority date of the contested RCD. Considering the items of evidence in their entirety and in relation to each other (27/02/2020, T-159/19, Furniture, EU:T:2020:77, § 22 and the case-law cited), it must be held that the invalidity applicant has provided solid and objective evidence of effective and sufficient disclosure of the prior design within the meaning of Article 7(1) CDR. Given that the evidence examined above is sufficient to prove the disclosure of the prior design, there is no need to assess the remaining documents furnished by the invalidity applicant.
- 40 The design holder does not dispute the fact that a publication on the internet may represent disclosure, rather questions the quality of the filed images of the prior design. After examining those, the Board finds that they are of sufficient quality to identify the relevant features of the prior design. Contrary to the design holder’s claims, the images are clear without any darkness or obscurity, and do not prevent a clear and unambiguous identification of the prior design for the purposes of the comparison with the contested RCD in the context of assessing the latter’s individual character (30/06/2021, T-373/20, Construction transportable, EU:T:2021:400, § 24-26). The appearance of the prior design is discernible and can be seen from various angles. In fact, the front perspective and side views of the prior design, as illustrated in the images furnished by the invalidity applicant, makes it possible to identify the main relevant features of that design, namely a shoe with a number of lines and holes along the upper, a closure of seven holes with thick laces, and a flat and thick, vertically-striped sole.
- 41 The design holder further disputes the credibility of the articles arguing in essence that their content and dates could have been manipulated. This argument is also rejected. When the invalidity applicant submits as evidence of disclosure a printout from a website, the abstract possibility that its content or dates has been

manipulated or modified is not a sufficient ground for undermining the credibility of the evidence. That credibility may be undermined by facts that concretely suggest a manipulation of the evidence such as clear signs of falsification, manifest contradictions in the information shown or obvious inconsistencies that may reasonably justify doubts as to the genuineness of the printouts (20/10/2021, T-823/19, Bobby pins, EU:T:2021:718, § 49; 27/02/2018, T-166/15, Cases for mobile phones, EU:T:2018:100, § 90). The design holder has not proven or presented any indicia - which are not mere allegations or presumptions - showing that the dates or images included in these articles have been manipulated in order to alter the facts. There is also no explanation provided as to why the editor would have an interest in retroactively changing the content of the website or as to how it could be technically possible for the invalidity applicant to manipulate websites hosted by a third party. Neither there is an explanation or discussion as to how it would be feasible to change the dates or content of the Instagram comments or likes. The fact that certain publications do not have a comment cannot lead to the conclusion that said articles have never been published. Such claims are mere assertions that cannot call into question the probative value of these extracts, which clearly contain the source of origin, images of the prior design and, as a consequence, its disclosure to the public within the meaning of Article 7(1) CDR.

- 42 The design holder finally argues that, even assuming that disclosure has been proved, the alleged prior design could not be considered as a prior design within the meaning of Article 7(1) CDR since its publication and accessibility could not reasonably have become known to the circles specialised in the sector concerned, namely the footwear sector.
- 43 It is consistent case-law that, in order to refute the presumption of disclosure the design holder must establish to the requisite legal standards that the circumstances of the case could reasonably prevent those facts from becoming known in the normal course of business in the circles specialised in the sector concerned operating in the European Union (18/05/2022, T-256/21, Armchairs, EU:T:2022:297, § 33 and case-law cited). It is thus for the party challenging the disclosure (and not the invalidity applicant, as contended by the design holder) to provide facts which may concern, for example, the composition of the specialised circles, their qualifications, the scope of their activities, their presence at events where designs are presented, the characteristics of the design at issue, such as their interdependency with other products or sectors, and the characteristics of the products into which the design at issue has been integrated (21/05/2015, T-22/13 and T-23/13, Umbrellas, EU:T:2015:310, § 29). The exception provided for in Article 7(1) CDR is to be interpreted restrictively in accordance with its purpose to ensure that only events that are difficult to verify and could have become known to the relevant trade circles only by chance are not capable of constituting an event of disclosure (21/09/2017, C-361/15 P, Shower drains, EU:C:2017:720, § 100-102; 21/05/2015, T-22/13, Umbrellas, EU:T:2015:310, § 29). This is not the case here where there is abundant evidence of several events of disclosure of the prior design as analysed in paragraphs 37-39. There is, moreover, no quantitative threshold with regard to the actual knowledge of the disclosure event (14/03/2018, T-651/16, Crocs, EU:T:2018:137, § 73).

- 44 The design holder has failed to furnish any evidence which could establish that the publication of the Instagram posts and the news articles would be insufficient to enable the specialised circles within the European Union to become aware of the prior design. It sounds reasonable that the specialised circles in the footwear sector will undertake image searches on the internet or make use of other criteria (e.g. keywords, contents or titles) when exploring the designs available on the market. This is further supported by the fact that Rihanna's appointment as creative director of Puma attracted significant media attention worldwide. Therefore, photos on Rihanna's Instagram wearing the prior design would only become known to the specialised circles since these caught a great deal of media attention, as confirmed by the evidence submitted by both parties (e.g. Annexes XVII to XIX and Exhibit 6). The design holder itself explained that Rihanna served as Puma's creative director since 2014 and that the launch of products designed by Rihanna were accompanied by extensive marketing campaigns. Nothing indicates that the said websites would be difficult to reach or inaccessible using any search engine in the internet. Mere allegations that all these publications derive from US gossip sites that would not normally become known to any member of the shoe industry cannot lead to the conclusion that the specialised circles within the European Union could not have become aware of said publications. Neither the affidavit originating from a related to the design holder person (Exhibit 15) declaring that the prior design had not been disclosed before the 12-month grace period suffice to prove this.
- 45 In light of all the foregoing, the Board concludes that the design holder has failed to establish that the circumstances of the present case prevented the circles specialised in the sector concerned from learning of the publication of the prior design. Accordingly, the latter has been made available to the public within the meaning of Article 7(1) CDR.

Informed user

- 46 The informed user is a fictitious person to be determined with regard to the contested design (06/06/2019, T-209/18, Kraftfahrzeuge / Kraftfahrzeuge, EU:T:2019:377, § 37; 10/11/2021, T-193/20, Panels, EU:T:2021:782, § 24). The informed user is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied. Without being a designer or a technical expert, the informed user knows the various designs which exist in the sector concerned and possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his or her interest in the products concerned, shows a relatively high degree of attention when he or she uses them (20/10/2011, C-281/10 P, Metal rappers, EU:C:2011:679, § 59; 22/06/2010, T-153/08, Communications equipment, EU:T:2010:248, § 47).
- 47 The contested RCD will be applied to shoes. Accordingly, the informed user is any member of the general public who habitually purchases such items, puts them to their intended use, possesses a certain degree of knowledge with regard to the features which those designs normally include, and has become informed on the subject by browsing through catalogues of, or including, shoes, visiting the relevant stores, downloading information from the internet, or searching for them

via any other means. As a result of his or her interest in shoes, the informed user shows a relatively high degree of attention when using them.

Designer's freedom

- 48 The degree of freedom of the designer in developing the design is established, inter alia, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned (09/09/2011, T-10/08, Internal combustion engine, EU:T:2011:446, § 32; 18/03/2010, T-9/07, Metal rappers, EU:T:2010:96, § 67).
- 49 The greater the designer's freedom in developing the challenged design, the less likely it is that minor differences between the designs at issue will be sufficient to produce a different overall impression on an informed user. Conversely, the more the designer's freedom in developing the challenged design is restricted, the more likely minor differences between the designs at issue will be sufficient to produce a different overall impression on an informed user. Therefore, if the designer enjoys a high degree of freedom in developing a design, that reinforces the conclusion that the designs which do not have significant differences produce the same overall impression on an informed user (09/09/2011, T-10/08, Internal combustion engine, EU:T:2011:446, § 33).
- 50 The designer's freedom in developing shoes is wide. It is only restricted insofar as the shoes need to follow the ergonomics of the feet and provide firmness, postural steadiness and to be comfortable and safe for the user. Nevertheless, the designer is free to choose, inter alia, the shape, form, material, colour, patterns and decorative elements. This is verified by the plethora of examples of shoes furnished by the parties (see, e.g. Exhibits 12 and 13) which show a great variety of designs in terms of, inter alia, shape, outer surface decoration, material and colour combination. Further constraints or statutory requirements applicable to the products are not apparent and have not been demonstrated by the parties.

Overall impression

- 51 The individual character of a design results from a different overall impression from the viewpoint of the informed user with reference to the existing design corpus taking into account the differences which are sufficiently pronounced to produce a different overall impression and discarding the differences which do not affect the overall impression (07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 29). The comparison of the overall impressions produced by the designs must be synthetic and may not be limited to an analytic comparison of a list of similarities and differences (07/11/2013, T-666/11, Gatto domestico, EU:T:2013:584, § 30).
- 52 The point of reference for the assessment of the individual character is the contested RCD under examination given it is its validity which is at issue (10/11/2021, T-193/20, Building panels, EU:T:2021:782, § 82). Accordingly, the colour or additional elements of the prior design will not be taken into

consideration as the contested RCD is represented in a technical drawing that does not disclose any colour.

53 The designs under comparison are included in the following table where, for ease of comparison, the prior design has been isolated and presented, as rightly carried out in the contested decision:

<i>Contested RCD</i>	<i>Prior Design</i>
	
	
	

- 54 The contested RCD reveals the following features:
- A shoe with a number of lines along the upper, delineating the throat of the shoe and the heel tab;
 - An upper with a low collar which is approximately the same thickness as the sole;
 - A large flat sole of uniform thickness with pronounced ribbing which creates a ledge with the upper;
 - An Achilles notch that is the same height as the throat of the shoe;
 - Seven pairs of circular eyelets and a thick shoe lace;
 - A pattern of two parallel lines of small holes (dots) on both sides of the upper.
- 55 The prior design shows the following features:
- A shoe with a number of lines along the upper and a decorative top stitching, delineating the throat of the shoe and the heel tab;
 - An upper with a low collar which is approximately the same thickness as the sole;
 - A large flat sole of uniform thickness with pronounced ribbing, which creates a ledge with the upper;
 - An Achilles notch that is the same height as the throat of the shoe;
 - Seven pairs of circular eyelets and a thick shoe lace;
 - A pattern of two parallel lines of small holes (dots) on the side of the upper;
 - A verbal and figurative element, located on one side of the upper.
- 56 Both the contested RCD and the prior design show a shoe of the same shape consisting of an upper part with a number of lines and holes, a closure of seven pairs of circular eyelets, and a flat, thick, vertically-striped sole.
- 57 Notably, the upper of the shoes has the same form comprising a low-cut collar with an Achilles notch that is the same height as the throat of the shoe and approximately the same thickness as the sole. The designs further feature the same number (seven) and shape (circular) of eyelets, and a thick and wide shoe lace. A pattern of two parallel lines of small holes is discernible on the side of the upper of the conflicting designs, in identical positions and configurations. Moreover, the sole of the contested RCD and the prior design share numerous features, including the same thickness, the pronounced ribbing, and the noticeable ledge with the upper. Coinciding in these features, the designs produce the same overall impression on the informed user.

- 58 The designs present only one difference, in the additional topstitching (composed of three wavy lines that curve around the back of the shoe) and the verbal element ‘PUMA BASKET’ next to a figurative depiction of a leaping cat present in the prior design, which are absent in the contested RCD. As noted above, the point of reference for the assessment of the individual character is the contested RCD under examination given that it is its validity which is at issue (13/06/2017, T-9/15, Canettes, EU:T:2017:386, § 87), and therefore these elements in the prior design will not be taken into account. At any rate, the Board considers that the informed user will not give particular importance to these elements. The topstitching concerns a small part of the surface of the shoe, therefore making it less impactful (21/04/2021, T-326/20, Beverage bottles, EU:T:2021:208, § 66), whereas the remaining verbal and figurative element serves to identify the manufacturer of the product at issue and thus the informed user will not perceive it as a feature of appearance that contributes to the overall impression (14/06/2011, T-68/10, Watches, EU:T:2011:269, § 82).
- 59 Finally, as noted by the design holder, the contested RCD discloses views from the rear and bottom of the shoe which are not shown in the images of the prior design. This, however, cannot justify a different outcome. As stated above (paragraph 51), the comparison of the overall impressions does not involve a detailed analysis of each and every feature of the compared designs but an overall comparison of the designs. In the present case, what contributes to the same overall impressions is the same shape and form of the shoe consisting of an upper with a number of lines and holes placed and arranged the same, as well the same shape and form of the thick, vertically-striped sole. It is these features that convey to the informed user the same overall impressions. Any differences at the rear or bottom side of the shoes, given that these concern smaller or less impactful parts of the shoes, would be insufficient to outweigh the abovementioned similarities and generate distinct overall impressions. The wide degree of freedom that the designer enjoys (see paragraph 51), reinforces the conclusion that the conflicting designs, which do not have significant differences, generate the same overall impressions (09/09/2011, T-10/08, Internal combustion engine, EU:T:2011:446, § 33).
- 60 As for the design holder’s argument that the application for invalidity is inadmissible due to bad faith, breach of a contractual obligation, and abusive character on the part of the invalidity applicant, this argument is irrelevant in the current proceedings. While any possible bad faith or breach of contractual obligation on the part of the invalidity applicant might be raised in an *ad hoc* civil law proceedings between the parties, it cannot be raised as a defence in these invalidity proceedings as it is not capable of demonstrating an error affecting the Invalidity Division’s conclusion that the declaration of invalidity was justified due to the lack of individual character of the contested RCD.
- 61 Given that the prior design destroys the individual character of the contested RCD under Article 6 CDR and the request for a declaration of invalidity is fully successful on that ground, there is no need to examine the remaining grounds or prior designs invoked by the invalidity applicant.
- 62 The appeal is to be dismissed.

Costs

- 63 Since the appeal has been unsuccessful, the design holder must be ordered to bear the costs incurred by the invalidity applicant, in accordance with Article 70(1) CDR.

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the design holder to bear the costs incurred by the invalidity applicant.**

Signed

G. Humphreys

Signed

C. Negro

Signed

C. Bartos

Registrar:

Signed

p.o. E. Apaolaza

