

C. The area of conflict between distinctive signs and the Community design

Community designs protect the appearance of a product and cover i.a. three-dimensional objects, packaging, patterns, logos and typefaces. As has been shown above - all those objects of a design may be protected as distinctive signs. Since the existence and possible conflict with a prior sign are not part of the considerations made upon grant of protection for a Community design, the eligibility for such protection is in fact judged in invalidation proceedings instigated only by the interested market participants.⁸⁷

The conflict with a prior distinctive sign may lead to the invalidation of a Community design either on the basis of Art. 25(1)(b) CDR – when it can be shown that the sign forms part of the prior art and the Community design is either identical (in the case of asserted lack of novelty) or, though not being identical, does not produce a different overall impression on the informed user. The third ground for invalidation relevant for holders of distinctive signs is Art. 25(1)(e) i.e. situation where the owner of a prior right is able to show that the Community design in fact infringes his prior right, whereas this infringement claim may be based on any, Community or national, legal ground as long as it confers on the owner of the sign a right to prohibit the use of his sign.

If a design is not novel it will also not possess individual character.⁸⁸ However, even if the design is novel and possesses individual character, it might nevertheless infringe a prior distinctive sign (especially in cases where there is no likelihood of confusion between the signs but there exists a likelihood of association or where the prior sign has a reputation). As will be shown in the subsequent chapters, the ground for invalidation of a Community design on the basis of its conflict with a prior distinctive sign, grants its owner a broad selection of weapons against the design.

87 Anyone – in case of Art. 25(1)(b) CDR or the holder of a prior sign in case of Art. 25(1)(e) CDR, as prescribed in Art. 25(3) CDR.

88 Musker in: Gielen/ von Bomhard, *supra* note 73, 367.