

INVALIDITY No ICD 117 027

AFG Media Ltd, Ground Floor, The Tun, 6-8 Jackson's Entry, Edinburgh, City of Edinburgh, EH8 BPJ United Kingdom (applicant), represented by **Frkelly**, 27 Clyde Road Ballsbridge, Dublin 4, Ireland (professional representative)

a g a i n s t

Weiwei Wang, No.520, Group Tenth, Laowangji Village, Zhangqiao country, Zhecheng County, Henan, People's Republic of China (holder), represented by **Isabelle Bertaux**, 55 rue Ramey, 75018 Paris, France (professional representative).

On 29/04/2022, the Invalidation Division takes the following

DECISION

1. The application for a declaration of invalidity is upheld.
2. Registered Community design No 007076039-0001 is declared invalid.
3. The holder bears the costs, fixed at EUR 750.

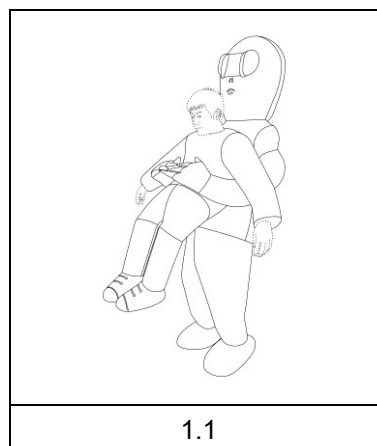
REASONS

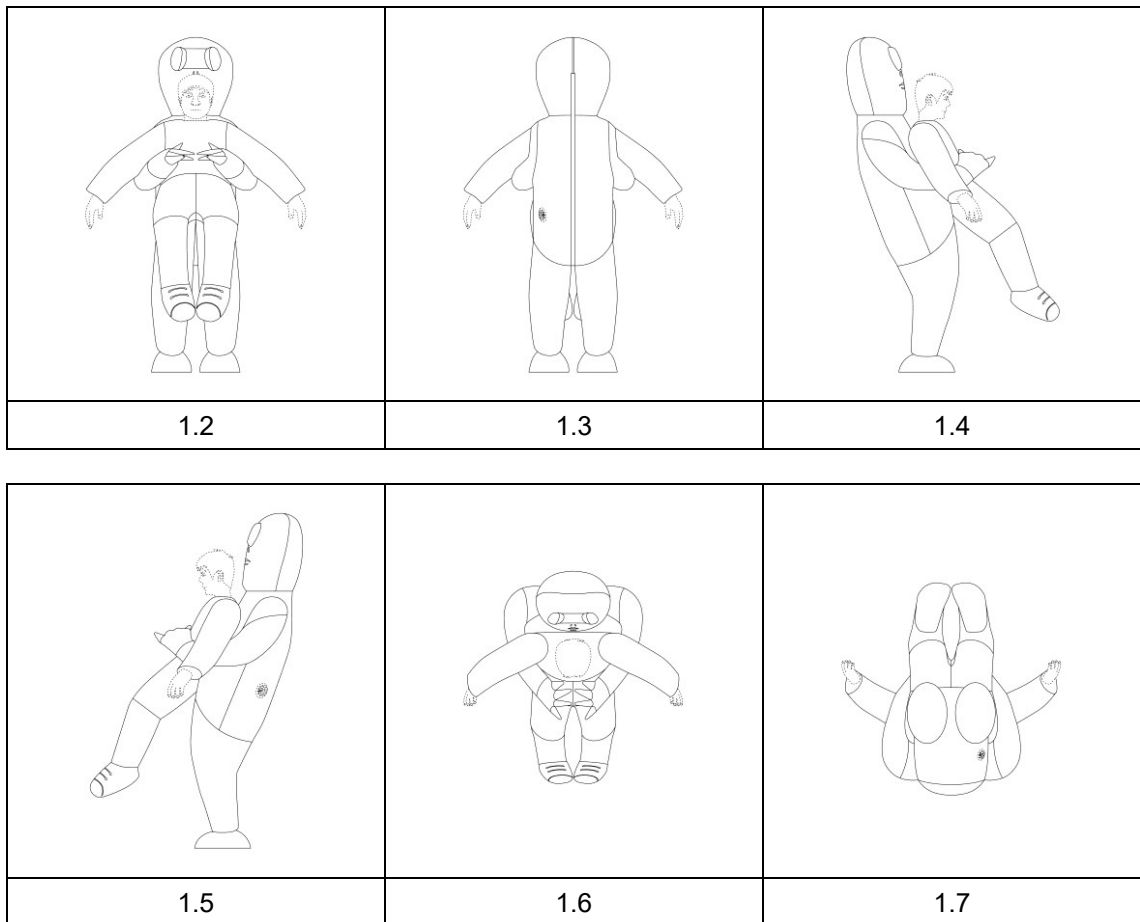
The applicant filed an application for a declaration of invalidity ('the application') against Community design No 007076039-0001 ('the contested design'). The contested design was filed and registered in the holder's name on 22/10/2019.

The following products are indicated in the registration:

21-01 *Inflatable toys.*

The registration contains the following views:



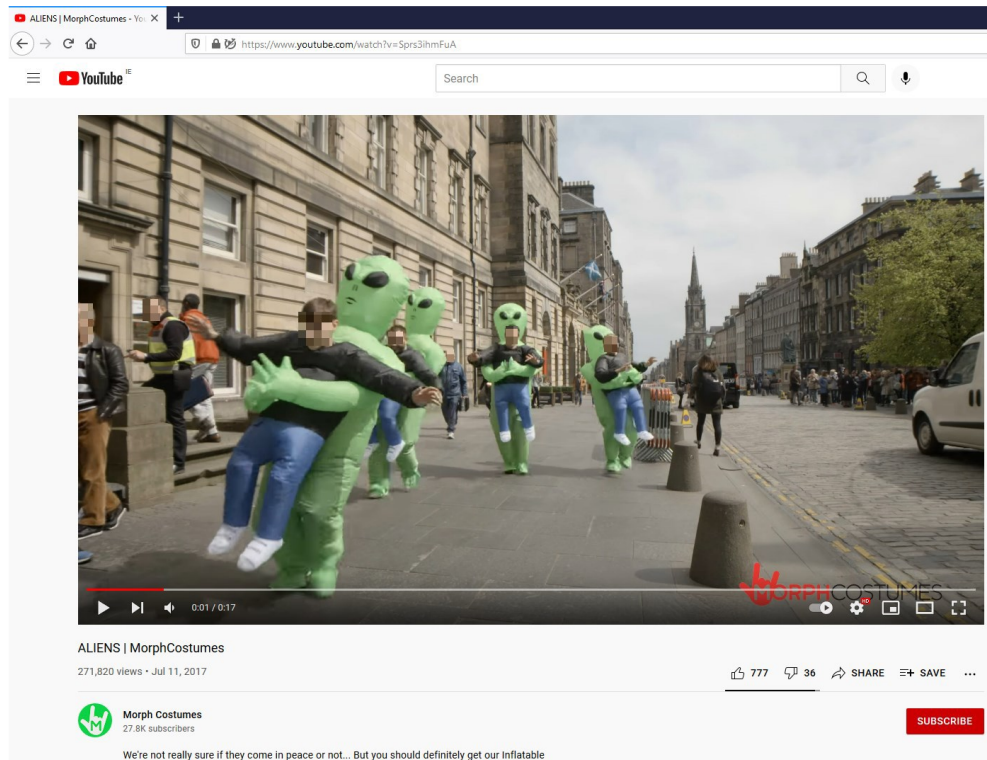


The applicant invoked Article 25(1)(b) CDR in conjunction with Articles 4 to 9 CDR.

SUMMARY OF THE PARTIES' ARGUMENTS

The applicant essentially argued that the contested design was not new and lacked individual character at the time of filing as it had launched a fancy dress costume under the title 'Alien Inflatable Costume' in 2017, and the contested design was a complete reproduction of the prior design. In support of its observations, the applicant submitted, inter alia, the following evidence:

- a screenshot taken from the video portal YouTube (<https://www.youtube.com>) depicting the design of the 'Alien Inflatable Costume' as shown below. The video concerns an event filmed in the streets of Edinburgh in the UK. The video was uploaded to YouTube on 11/07/2017. The link to the video is <https://www.youtube.com/watch?v=Sprs3ihmFuA>. The screenshot also contains information about the release of the video on the mentioned date (A1):



- an excerpt from the Internet Archive (<https://archive.org/web/>) of the website <https://www.morphsuits.com/adult-costumes/inflatable-costumes/> as archived on 02/08/2017 showing the same design of the inflatable costume in green colour as follows (B1):



- An excerpt from the online retail page <https://amazon.fr/Morph-Costumes-D%C3%A9guisement-Gonflable-%C2%AB-Alien/dp/B06XKMP9KX/> depicting



the following design:

(C1). The evidence includes the date as from which the design was made available to the public (08/06/2017) and the ASIN B06XKMP9KX.

- Several screenshots extracted from of the British TV video show 'This Morning' broadcasted on ITV in the United Kingdom and Virgin Media One in Ireland (evidence from Wikipedia D5) of 19/10/2017, which was also uploaded to the 'Thismorning' Twitter account (<https://twitter.com/thismorning/status/921095632089165827>) on the same date, depicting the design of the 'Alien Inflatable Costume' as follows (D1- D2 consists of a series of screenshots from the video taken at different timestamps):







The holder was invited to submit observations on the application but did not reply.

LACK OF NOVELTY PURSUANT TO ARTICLE 5 CDR

Article 5(1)(b) CDR provides that a registered Community design must be considered new if no identical design has been made available to the public before the filing date of the application for registration of the design for which protection is claimed or, if priority is claimed, the priority date. Pursuant to Article 5(2) CDR, designs must be deemed identical if their features differ only in immaterial details.

a) Disclosure pursuant to Article 7 CDR

For the purpose of applying Articles 5(1)(b) and 6(1)(b) CDR, a design will 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 contested design filing date or, if a priority is claimed, before its priority date, 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.

In principle, the onus is on the applicant to prove that a design has been disclosed. It is deemed to have been made available within the meaning of Article 7(1) CDR if the applicant has proved the events constituting disclosure. It is for the party challenging the disclosure to rebut that presumption by establishing to the requisite legal standards that the circumstances of the case could reasonably have prevented the disclosure events from becoming known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union (21/05/2015, T-22/13 & T-23/13, UMBRELLAS, EU:T:2015:310, § 26; 14/03/2018, T-651/16, Footwear, EU:T:2018:137, § 47).

As a matter of principle, disclosures on the internet form part of the prior art. Posting an image of a design on the internet constitutes disclosure for the purposes of Article 7(1) CDR (14/03/2018, T-651/16, Footwear, EU:T:2018:137, § 50), unless circumstances alleged or disputed by the parties cast such disclosure in doubt.

A1 consists of a screenshot taken from the video portal YouTube (<https://www.youtube.com>) showing an event filmed in the UK, video which was uploaded on Youtube on 11/07/2017. The link to the video can be found at <https://www.youtube.com/watch?v=Sprs3ihmFuA>. The screenshot also contains information about the release of the video on the mentioned date .

A design of a product captured in a video uploaded to an online video-sharing platform is considered to have been made available to the public within the meaning of Article 7(1) CDR, as long as the platform is a publicly accessible website for video sharing. Businesses actively use online media to promote their products (07/10/2014, R 1864/2013-3, Cases for portable computers, § 27-28). YouTube is a free website accessible to everyone. The date when the video was uploaded precedes the contested design filing date. In the absence of any facts, arguments or evidence to the contrary, the design invoked, which can be discerned from the screenshots submitted, is deemed to have been disclosed within the meaning of Article 7(1) CDR.

On the other side, B1 is an excerpt from the Internet Archive (<https://archive.org/web/>) of the website <https://www.morphsuits.com/adult-costumes/inflatable-costumes/> as archived on 02/08/2017 and displays the date when that web page was archived. The web page contains a representation of, inter alia, a green inflatable costume representing an alien picking a man up (in a blue and black costume).

According to the contents of the file, the web pages <https://www.morphsuits.com/> submitted as evidence of disclosure of the invoked design were detected several times by the Internet Archive. This internet service captures frequently visited web pages as they appear at the moment of the capture and archives them. To this extent the internet pages are not considered to have gone unnoticed by the public. In the absence of any comments or objections from the holder, the design is deemed to have been made available to the public.

Since the archiving date precede the contested design filing date, the design invoked is deemed to have been disclosed within the meaning of Article 7(1) CDR.

C1 indicates that the product with Amazon Standard Identification Number (ASIN) B06X KMP 9KX has been offered at <https://www.amazon.fr> since 08/06/2017. According to the General Court, evidence of disclosure of a product in online retail shops has sufficient probative value (27/02/2018, T-166/15, Sacs pour ordinateurs portables, EU:T:2018:100, § 78). The evidence supports the applicant's claim that the product was offered for sale at least on that date, which precedes the contested design's filing date. The design is deemed to have been made available to the public on the given internet website. This is sufficient proof of disclosure within the meaning of Article 7(1) CDR.

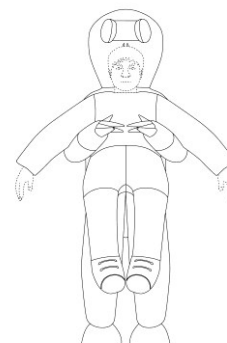
Finally D1- D2 consist of several screenshots from the TV show broadcasted, inter alia, in Ireland and hosted at the social network Twitter account <https://twitter.com/thismorning/status/921095632089165827> which depict the applicant's 'Alien Inflatable Costume' in several moments. The date of the show and its post on the Twitter account also precede the contested design's filing date.

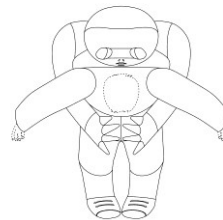
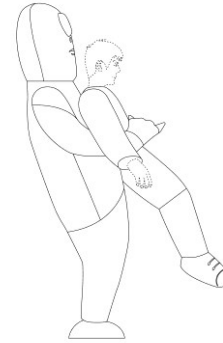
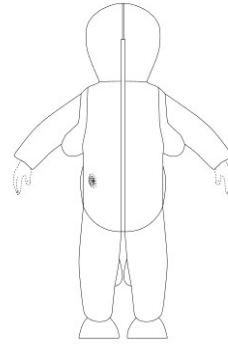
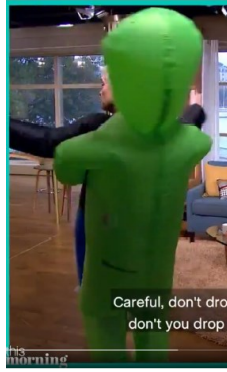
All the events disclose the very same appearance of the 'Alien Inflatable Costume'. The evidence therefore corroborate each other and support the applicant's claim regarding the availability of the costume before the contested design was filed. For the purpose of the following comparison, the images of the costume as presented at the TV show will be used, as they provide a full representation of the design.

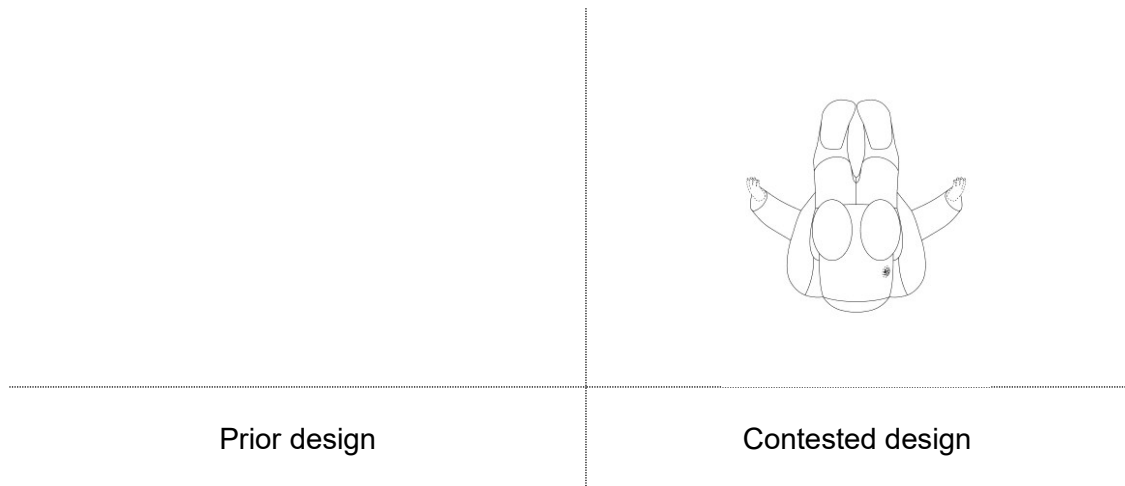
b) Comparison of the prior and contested designs

The designs under comparison are shown below with their corresponding views:

The overall impression







Registration confers protection upon the holder of a Community design for the design features of a product, in whole or in part, that are shown visibly in an application and made available to the public by way of publication or consultation of the relevant file (Recital 11, Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs).

Features of a contested Community design that are disclaimed are disregarded when comparing designs. This applies to the features of a contested Community design represented with dotted lines, blurring, colour shading or boundaries or in any other manner that makes it clear that protection is not sought for those features (14/06/2011, T-68/10, Watches, EU:T:2011:269, § 59-64).

In the present case, the contested design clearly shows an inflatable alien costume in solid lines holding tightly the inflatable costume of a man, which is slightly inclined, and again in solid lines, although it's head and hands are in broken lines. Therefore, protection is clearly sought for the costumes, the inflatable alien and the slightly inclined man, and the design will be further assessed on that basis. The man's hands and head will be taken into account only for illustrative purposes, since protection is not sought for those parts.

Also, the contested design does not show any colour, material nor any other features and thus shows a degree of abstraction vis-à-vis the design of the product as marketed. Since the contested design is the point of reference, novelty in comparison with a prior design must be assessed solely on the basis of the features disclosed in the contested design (13/06/2017, T-9/15, Dosen [für Getränke], EU:T:2017:386, § 87). Therefore, the colours and materials of the prior design will not be taken into account for the assessment in the present case.

The applicant argues that the Contested Design reproduces each and every feature of the prior design and when comparing both designs, in the absence of colour, the following common features are noted:

- the overall shape of the 'alien' part of the design is identical;
- the overall shape of the 'human' part of the design is identical;
- the proportions of the designs are identical;
- the positioning of the inflation fan is identical or at least close to identical;
- the shape and positioning of the mouth and nose on the 'alien' part of the designs are identical;
- the shape and positioning of the eyes on the 'alien' part of the designs are near identical, with the only minor difference being in the direction of the slant of the eyes;

- the number and shape of the fingers on the 'alien' part of the designs are identical;
- the shape of the shoes on the 'human' part of the design are identical; and
- the lines on the shoes of the 'human' part of the design are identical.

As said above, the holder did not submit any observations.

The Invalidity Division essentially agrees with the applicant's detailed explanation, pointing out that although it is true that the eyes are indeed directed differently, their shape is slightly different too, as the prior design's eyes have an eye-drop silhouette, whereas those of the contested design form an oval shape.

Having said that, the overall shape of the bodies is close to identical to the point that the mentioned difference of the eyes becomes hardly noticeable. The two designs consist of the same exact (and even same positioned) inflatable costumes, consisting of an alien holding a man, as explained above; in the prior design, the inflatable man-costume held by the alien does not have a head nor hands, which again coincides with the contested design. According to case-law, two designs differ only in immaterial details if those details are not immediately perceptible and would not therefore produce even slight differences between the designs. By implication, it is necessary to assess the novelty of a design to determine whether there are any non-immaterial differences between the designs at issue (06/06/2013, T-68/11, Watch-dials, EU:T:2013:298, § 37). The Invalidity Division shares the applicant's view that in this case, the designs do not show any non-immaterial differences.

The contested design and the prior design are identical in sense of Article 5(2) CDR. Therefore, the contested design is not new within the meaning of Article 5(1)(b) CDR.

CONCLUSION

The facts and evidence submitted by the applicant support the grounds for invalidity under Article 25(1)(b) CDR in conjunction with Articles 4(1) and 5(1)(b) CDR. Therefore, the application is upheld and the contested design is declared invalid.

Since the application is fully successful on this ground and based on this design, there is no need to examine the other ground of Article 25(1)(b) CDR invoked in the application, namely that in conjunction with Article 6 CDR nor the other earlier designs invoked in the application.

COSTS

According to Article 70(1) CDR, the losing party in invalidity proceedings must bear the fees and costs incurred by the other party.

Since the holder is the losing party, they must bear the invalidity fee as well as the costs incurred by the applicant in the course of these proceedings.

According to Article 70(1) CDR and Article 79(7)(f) CDIR, the costs to be paid to the applicant are the costs of representation, which are to be fixed on the basis of the maximum rate set therein, and the costs of the invalidity fee.



The Invalidity Division

Ludmila CELISOVA

Rebecca SANTANA
DAVIES

Michele M. BENEDETTI -
ALOISI

According to Article 56 CDR, any party adversely affected by this decision has a right to appeal against this decision. According to Article 57 CDR, notice of appeal must be filed in writing at the Office within two months of the date of notification of this decision. Furthermore, a written statement of the grounds of appeal must be filed within four months of the same date. The notice of appeal will be deemed to have been filed only when the appeal fee of EUR 800 has been paid.

The amount determined in the fixing of costs may only be reviewed on request. According to Article 79(4) CDIR, such a request must be filed within one month from the date of notification of this fixing of costs and will be deemed to have been filed only when the review fee of EUR 100 has been paid (Annex to CDFR, paragraph 24).