

## JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

14 March 2018 (\*)

(Community design — Invalidity proceedings — Registered Community design representing footwear — Earlier Community design — Ground for invalidity — Lack of novelty — Disclosure prior to the priority date — Examination of the facts of the Office's own motion — Additional evidence adduced before the Board of Appeal — Articles 5, 7 and Article 63(2) of Regulation (EC) No 6/2002)

In Case T-651/16,

**Crocs, Inc.**, established in Niwot, Colorado (United States), represented by H. Seymour, L. Cassidy, J. Guise and D. Knight, Solicitors, N. Hadjadj Cazier, M. Berger and H. Haouideg, lawyers,

applicant,

v

**European Union Intellectual Property Office (EUIPO)**, represented by J. Ivanauskas, acting as Agent,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, and intervener before the General Court, being

**Gifi Diffusion**, established in Villeneuve-sur-Lot (France), represented by C. de Chassey, lawyer,

ACTION brought against the decision of the Third Board of Appeal of EUIPO of 6 June 2016 (Case R 853/2014-3), relating to invalidity proceedings between Gifi Diffusion and Crocs,

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović, President, A. Marcoulli and A. Kornezov (Rapporteur), Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 14 September 2016,

having regard to the response of EUIPO lodged at the Court Registry on 6 December 2016,

having regard to the response of the intervener lodged at the Court Registry on 12 December 2016,

further to the hearing on 25 October 2017,

gives the following

## Judgment

### Background to the dispute

- 1 On 22 November 2004, Western Brands LLC filed an application for registration of a Community design with the European Union Intellectual Property Office (EUIPO), pursuant to Council Regulation (EC)

No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), claiming the priority of a US design patent application filed on 28 May 2004.

2 The goods to which the contested design is intended to be applied are in Class 02–04 of the Locarno Agreement of 8 October 1968 establishing an International Classification for Industrial Designs, as amended, and correspond to the following description: ‘Footwear’.

3 The contested design was registered as Community design No 257001-0001 and published in *Community Designs Bulletin* No 9/2005 of 8 February 2005.

4 On 3 November 2005, the contested design was transferred to the applicant, Crocs.

5 On 20 March 2013, the intervener, Gifi Diffusion, filed an application for a declaration of invalidity of the contested design with EUIPO pursuant to Article 52 of Regulation No 6/2002, claiming that it lacked novelty, inter alia. In that regard, the intervener argued that the novelty of the contested design was destroyed because it had been disclosed by the applicant prior to 28 May 2003, that is to say prior to the 12-month period preceding the date of priority put forward for the purpose of Article 7(2)(b) of Regulation No 6/2002; the date of priority is defined as the date of filing of the application for a US design patent by the applicant, namely 28 May 2004. According to the intervener, disclosure took place by means of (i) exhibition at a boat show in Fort Lauderdale, Florida (United States); (ii) the sale of 10 000 pairs of clogs; and (iii) disclosure on the applicant’s website (<http://www.crocs.com>). In support of its assertions, the intervener produced the following evidence, inter alia:

- a printout from the applicant’s website as accessible on 25 November 2002 (‘Exhibit 2’);
- a printout from the applicant’s website as accessible on 13 December 2002 (‘Exhibit 3’);
- a printout from the applicant’s website showing, according to the intervener, that the clog corresponding to the contested design had been put on the market in July 2002 and exhibited in November 2002 at the Fort Lauderdale Boat Show and that, ‘by 2003, Crocs had become a bona fide phenomenon, universally accepted’ (‘Exhibit 4’);
- a printout from the applicant’s website showing a clog with a heel strap and marked ‘© 2003’ (‘Exhibit 5’).

6 On 13 February 2014, the Invalidity Division dismissed the application for a declaration of invalidity on the ground that the disclosure of the earlier designs had not been demonstrated. It found, inter alia, that the documents submitted by the intervener were not sufficient evidence of prior disclosure of the contested design because Exhibit 2 was not dated and Exhibits 3 to 5 were of poor quality.

7 On 27 March 2014, the intervener filed a notice of appeal with EUIPO, pursuant to Articles 55 to 60 of Regulation No 6/2002, against the decision of the Invalidity Division. In support of its appeal, the intervener produced the following evidence, inter alia:

- a printout from a website presenting the 2002 Fort Lauderdale Boat Show as an international fair (‘Exhibit 9’);
- a printout from the applicant’s website showing that the clog corresponding to the contested design had been displayed in November 2002 at the Fort Lauderdale Boat Show (‘Exhibit 10’);
- a printout from the applicant’s website showing that, on 13 December 2002, a clog corresponding to the contested design had been disclosed on that website (‘Exhibit 16’);
- a printout from the applicant’s website showing that, on 25 November 2002, a clog corresponding to the contested design had been disclosed on that website (‘Exhibit 17’);

- a printout from the applicant’s website showing that clogs corresponding to the contested design had been put on sale as early as December 2002 (‘Exhibit 19’);
- a printout from the applicant’s website listing the retailers for clogs corresponding to the contested design (‘Exhibit 20’);
- a further printout from the applicant’s website showing that clogs corresponding to the contested design had been put on sale as early as December 2002 (‘Exhibit 21’).

8 By decision of 6 June 2016 (‘the contested decision’), the Third Board of Appeal of EUIPO annulled the Invalidity Division’s decision and declared the contested design invalid. In its decision, the Board of Appeal held that (i) the relevant date for the purpose of assessing whether prior disclosure of the contested design had taken place (‘the relevant date as determined by the Board of Appeal’) was 28 May 2003, the contested design had been disclosed prior to that date and, therefore, it lacked novelty for the purpose of Article 5 of Regulation No 6/2002; (ii) Exhibits 16 and 17 were not new evidence but better versions of previously submitted Exhibits 3 and 2, which were completed and corroborated by Exhibits 10 and 19 to 21, so it was appropriate to take all those exhibits into account; (iii) those exhibits show that the contested design had been exhibited and used in trade — and hence made available to the public — before the relevant date as determined by the Board of Appeal in so far as Exhibits 10, 16 and 17 proved that clogs corresponding to the contested design had been displayed on the applicant’s website, given that Exhibit 10 shows that the exhibition of the clogs at the Fort Lauderdale Boat Show had been ‘a smashing success’ and Exhibits 10 and 19 to 21 proved that the clogs had been available for sale; (iv) the circumstances surrounding the disclosure of the contested design on the internet for the declared purpose of advertising and selling clogs corresponding to that design were such that the contested design could reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union; (v) the design disclosed on the applicant’s website was the same as the contested design; and (vi) accordingly, that disclosure of the contested design had destroyed its novelty for the purpose of Article 5 of Regulation No 6/2002, with the result that it must be declared invalid, without there being any need to examine other evidence or grounds for invalidity.

### **Forms of order sought**

9 The applicant claims that the Court should:

- annul the contested decision;
- uphold the registration of the contested design and dismiss the application for a declaration of invalidity;
- make an award of costs in its favour.

10 EUIPO contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs incurred by EUIPO.

11 The intervener contends that the Court should:

- uphold the contested decision;
- invalidate the contested design;
- grant the application for a declaration of invalidity;

- make an award of costs in its favour. The intervener clarified, at the hearing, that that form of order seeks an order for the unsuccessful party to the proceedings to pay the costs within the meaning of Article 134(1) of the Rules of Procedure of the General Court.

## Law

### *On the admissibility of the further evidence*

- 12 The intervener submitted at the hearing, as further evidence offered, a document from the United States Patent and Trademark Office from 8 September 2017 ('the USPTO document') rejecting the patent for the contested design. Pursuant to Article 85(4) of the Rules of Procedure, the other parties were given the opportunity to comment on that evidence, which they did within the time limit prescribed.
- 13 The applicant and EUIPO submit that the further evidence is inadmissible.
- 14 Under Article 85(3) of the Rules of Procedure, 'the main parties may ... produce or offer further evidence before the oral part of the procedure is closed ... provided that the delay in the submission of such evidence is justified'. It is apparent from Article 173(3) of the Rules of Procedure that, in proceedings relating to intellectual property rights, a party to the proceedings before the Board of Appeal, other than the applicant, who becomes a party to the proceedings before the General Court as intervener has the same procedural rights as the main parties.
- 15 In accordance with the case-law, since the purpose of the action before the Court is to review the legality of decisions of the Boards of Appeal of EUIPO within the meaning of Article 65 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) (now Article 72 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1)), the role of the Court is not to re-evaluate the facts in the light of documents produced for the first time before it. To admit such evidence is contrary to Article 188 of the Rules of Procedure, which states that the pleadings of the parties may not change the subject matter of the proceedings before the Board of Appeal (see judgment of 7 October 2014, *Tifosi Optics v OHIM – Tom Tailor (T)*, T-531/12, not published, EU:T:2014:855, paragraph 17 and the case-law cited).
- 16 In the present case, first of all, the USPTO document, produced for the first time before the Court, is dated 8 September 2017, that is to say after the written procedure was closed, with the result that the submission of that document at the hearing is justified for the purpose of Article 85(3) of the Rules of Procedure, read in conjunction with Article 173(3) thereof.
- 17 Secondly, the case-law has already established that a party is entitled to produce for the first time before the Court documents that are not strictly evidence but rather draw on EU, national or international case-law, even after the proceedings before EUIPO is complete. Indeed, neither the parties nor the Court itself can be precluded from drawing on EU, national or international case-law for the purpose of interpreting EU law (judgment of 2 July 2015, *BH Stores v OHIM – Alex Toys (ALEX)*, T-657/13, EU:T:2015:449, paragraph 26). In any event, it is clear that the USPTO document, which mentions facts already submitted to and taken into consideration by the Board of Appeal, is not designed to result in either a re-evaluation by the Court of the facts of the case in the light of that document, a change in the subject matter of the proceedings before the Board of Appeal, or the annulment or alteration of the contested decision on grounds that came into existence subsequent to its adoption (see judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 53 and the case-law cited).
- 18 Accordingly, the late submission of a document that followed the close of the written part of the procedure is justified. The further evidence offered is thus admissible.

### *Substance*

19 In support of its action, the applicant puts forward two pleas in law alleging, first, infringement of Article 63(2) of Regulation No 6/2002 and secondly, infringement of Article 7 thereof.

The first plea, alleging infringement of Article 63(2) of Regulation No 6/2002

20 By its first plea, the applicant claims that the Board of Appeal was wrong in finding that the evidence filed by the intervener for the first time before the Board of Appeal was admissible, because the admission of new disclosure evidence later in the proceedings altered the scope of the application for a declaration of invalidity. In that regard, the applicant refers to certain parts of the written observations that it submitted during the proceedings before the Board of Appeal.

21 EUIPO and the intervener dispute the applicant's arguments.

22 As a preliminary point, as regards the reference, in paragraph 13 of the application, to specific points in the observations submitted by the applicant during the administrative procedure before EUIPO, which it produced as annexes to the application, it is appropriate to reject the arguments thus referred to as inadmissible. Indeed, under the first subparagraph of Article 21 of the Statute of the Court of Justice of the European Union, which applies to proceedings before the General Court pursuant to the first subparagraph of Article 53 of the statute and Article 76(1)(d) of the Rules of Procedure of the General Court, all applications initiating proceedings must contain, inter alia, a brief statement of the pleas on which the application is based. That information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action. The same considerations also apply to all claims, which must be accompanied by pleas and arguments enabling both the defendant and the Court to assess their validity. Therefore, the essential points of fact and of law on which an action is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and comprehensible (judgments of 18 July 2006, *Rossi v OHIM*, C-214/05 P, EU:C:2006:494, paragraphs 34 to 37; of 6 May 2008, *Redcats v OHIM — Revert & Cía (REVERIE)*, T-246/06, not published, EU:T:2008:141, paragraph 23; and of 7 November 2013, *Budziewska v OHIM — Puma (Bounding feline)*, T-666/11, not published, EU:T:2013:584, point 34).

23 Although specific points in the body of the application can be supported and completed by references to specific passages in the documents annexed to it, a general reference to other documents cannot compensate for the failure to set out the essential elements of the legal argument which must appear in the application itself (see order of 14 December 2010, *General Bearing v OHIM (GENERAL BEARING CORPORATION)*, T-394/09, not published, EU:T:2010:515, paragraph 21 and the case-law cited).

24 Similar requirements apply where a claim or an argument is relied on in support of a plea in law (judgments of 9 July 2010, *Grain Millers v OHIM — Grain Millers (GRAIN MILLERS)*, T-430/08, not published, EU:T:2010:304, paragraph 38; of 13 March 2013, *Biodes v OHIM — Manasul Internacional (FARMASUL)*, T-553/10, not published, EU:T:2013:126, paragraph 22; and of 7 November 2013, *Bounding feline*, T-666/11, not published, EU:T:2013:584, paragraph 34).

25 In the present case, in paragraph 13 of the application, the applicant simply refers to arguments set out in specific points of the pleadings that it lodged during the administrative procedure before EUIPO. In accordance with the abovementioned principles, those arguments are not admissible in the present case.

26 With regard to the other arguments put forward by the applicant in support of the first plea, it is appropriate to find that the Board of Appeal did not infringe Article 63(2) of Regulation No 6/2002 by accepting the exhibits submitted by the intervener as an annex to the statement of grounds.

27 In the present case, the Board of Appeal took the view, in paragraphs 41 to 51 of the contested decision, that the taking into consideration of Exhibits 10, 16, 17 and 19 to 21 submitted by the applicant as an annex to the statement of grounds was justified since, on the one hand, Exhibits 16 and 17 were not new evidence but better versions of previously produced Exhibits 3 and 2 and, on the other hand, the purpose of Exhibits 10 and 19 to 21 was not to prove new facts but to corroborate and complete Exhibits 16 and 17,

which already proved that the applicant had advertised clogs to which the contested design had been applied and had put them on sale prior to the relevant date as determined by the Board of Appeal.

- 28 That finding of the Board of Appeal is exempt of any error of law. Indeed, Exhibits 16 and 17 are not new evidence but the same screenshots as in Exhibits 3 and 2, bearing in mind that the Invalidity Division had rejected them precisely because of their poor quality, the only difference being the improved clarity and legibility of the former. Exhibits 10 and 19 to 21 are supplementary evidence that completes the evidence already submitted and simply corroborate the facts already mentioned in the exhibits lodged before the Invalidity Division. Indeed, Exhibit 10 merely reiterates that the clog corresponding to the contested design had been exhibited at the Fort Lauderdale Boat Show, which had already been established by Exhibit 4 filed with the application for a declaration of invalidity (see paragraph 5 above), while Exhibits 19 to 21 simply confirm what had already been established by Exhibits 2 and 3, namely, first, that the clog corresponding to the contested design had been published on the applicant's website and, secondly, that it had been put on sale.
- 29 Moreover, it must be noted, as did the Board of Appeal, that all those exhibits directly originated from the applicant's official website, with the result that the applicant was well aware of them.
- 30 In that regard, it should be noted, as did EUIPO, that the wording of Article 63(2) of Regulation No 6/2002 is identical to that of Article 76(2) of Regulation No 207/2009. The case-law on Article 76(2) of Regulation No 207/2009 is therefore applicable to the present case *mutatis mutandis*, as rightly argued by EUIPO.
- 31 The Court has already held that it was apparent from the wording of that provision that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time limits to which such submission is subject under the provisions of Regulation No 6/2002 and that EUIPO is in no way prohibited from taking account of facts and evidence which are submitted or produced late (see, by analogy, judgments of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 42, and of 26 September 2013, *Centrotherm Systemtechnik v OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraph 77).
- 32 In stating that the EUIPO 'may' decide to disregard such evidence, the provision grants EUIPO a wide discretion to decide, while giving reasons for its decision in that regard, whether or not to take such information into account (see, by analogy, judgments of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 43, and of 26 September 2013, *Centrotherm Systemtechnik v OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraph 78).
- 33 It also follows from the case-law of the Court that it remains possible to submit evidence in addition to the evidence adduced within the time limit set by EUIPO for that purpose after expiry of that time limit and that EUIPO is in no way prohibited from taking account of the supplementary evidence which is produced after that time (see, by analogy, judgments of 26 September 2013, *Centrotherm Systemtechnik v OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraph 88, and of 21 June 2017, *GP Joule PV v EUIPO — Green Power Technologies (GPTech)*, T-235/16, EU:T:2017:413, paragraphs 43 and 44).
- 34 Taking into account facts or evidence submitted out of time is particularly likely to be justified where EUIPO considers, first, that the material submitted out of time is, on the face of it, likely to be relevant to the outcome of the application for a declaration of invalidity brought before it and, secondly, that the stage of the proceedings at which that late submission takes place and the circumstances surrounding it do not argue against such matters being taken into account (see, by analogy, judgments of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 44, and of 26 September 2013, *Centrotherm Systemtechnik v OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraph 113). Such considerations are particularly likely to justify EUIPO's taking into account of evidence which, although not submitted within the prescribed time limit, is submitted at a later stage of the proceedings by way of complement to the evidence submitted within that time limit (see, by analogy, judgments of 26 September

2013, *Centrotherm Systemtechnik v OHIM and centrotherm Clean Solutions*, C-610/11 P, EU:C:2013:593, paragraph 114, and of 21 June 2017, *GPTech*, T-235/16, EU:T:2017:413, paragraph 44).

35 It is appropriate to find that the contested decision satisfies those requirements.

36 First, as set out in paragraph 28 above, the contested exhibits cannot be regarded as ‘new’ evidence but rather as additional to the evidence already submitted. Secondly, those exhibits are perfectly relevant to the outcome of the proceedings before the Board of Appeal since they were likely to prove that the applicant had advertised the clogs to which the contested design had been applied and that they had been put on sale. Thirdly, the stage of the proceedings at which that late submission took place and the circumstances surrounding it did not argue against such matters being taken into account. Indeed, the exhibits were submitted during the appeal before the Board of Appeal, with the result that the applicant was able to submit observations on those exhibits prior to the decision of the Board of Appeal and, as stated in paragraph 29 above, those exhibits directly originated from the party against which they were invoked and were therefore known to it, which constitutes a circumstance, for the purpose of the case-law referred to in paragraph 34 above, justifying their being taken into account.

37 In the light of the above, the first plea must be dismissed as unfounded.

The second plea, alleging infringement of Article 7 of Regulation No 6/2002

38 In support of the second plea, the applicant claims that the website disclosures of the contested design concerned events which 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, within the meaning of Article 7(1) of Regulation No 6/2002. In that regard, the applicant refers to specific parts of the observations that it filed during the proceedings before EUIPO. It recalls, in addition, that it had just been created in 2002, that, at the time, its website was searched only by customers from Florida and Colorado (United States) and that, therefore, it could not reasonably have become known to circles specialised in the sector concerned, operating within the European Union, given that, first of all, neither the applicant nor the address nor even the existence of its website was known to those circles; secondly, it had not been demonstrated that there were any links to the applicant’s website on other websites at the time; and, thirdly, the applicant’s website could not be found using search engines either.

39 According to the applicant, which relies in that regard on the Opinion of Advocate General Wathelet in *H. Gautzsch Großhandel* (C-479/12, EU:C:2013:537, points 52 to 54), for the purpose of assessing whether the disclosure events could not reasonably have become known in the normal course of business to circles specialised in the sector concerned, operating within the European Union, it must be determined whether a member of the specialised circles in the European Union, having no previous awareness of the applicant’s business or knowledge of its website, would be more likely than not to have become aware of those disclosures while carrying out the normal activities associated with his business. In the present case, the applicant claims that it produced supporting evidence that such awareness or knowledge was highly unlikely. It submits that it is impossible to prove a negative fact, namely that the disclosure had not become known to the circles specialised in the sector concerned, operating within the European Union, and that the holder of a Community design cannot be expected to prove a negative fact. Had the disclosure of the contested design actually become known to the circles specialised in the sector concerned, operating within the European Union, it would have been easy for the intervener to prove as much by way of documents, witness evidence or other means; however, the intervener did not invoke any actual disclosure to the circles specialised in the sector concerned, operating within the European Union.

40 According to the applicant, the Board of Appeal’s reasoning in the present case is also inconsistent with its decision of 26 August 2013 in Case R 1195/2011-3 stating that the commercial content and intent of a publication were less relevant circumstances than information as to how it would actually have come to the attention of the circles concerned within the European Union.

41 In any event, even if it were true that the disclosure of the contested design had become known to an undertaking in the sector concerned, operating within the European Union, or even several such undertakings, the applicant claims there is no evidence to support a conclusion that the disclosure was sufficiently widespread given that a quantitative hurdle must be overcome in order to vitiate the exception set out in Article 7(1) of Regulation No 6/2002.

42 EUIPO and the intervener dispute the applicant's arguments.

– Preliminary observations

43 With regard, first, to the arguments listed by the applicant in paragraph 19 of the application, referring to arguments in specific parts of its pleadings before EUIPO, they must be disregarded as inadmissible for the reasons set out in paragraphs 22 to 25 above.

44 Next, it must be recalled that Article 7(1) of Regulation No 6/2002, that article being headed 'Disclosure', provides as follows:

'For the purpose of applying Articles 5 and 6, a design shall 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 date referred to in Articles 5(1)(a) and 6(1)(a) or in Articles 5(1)(b) and 6(1)(b), as the case may be, 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 Community. ...'

45 It should also be noted that, under Article 7(2)(b) of Regulation No 6/2002, a disclosure is not to be taken into consideration if a design for which protection is claimed has been made available to the public during the 12-month period preceding the date of filing of the application for registration or, if a priority is claimed, the date of priority ('the relevant period').

46 The application for registration of the contested design pleads a priority of 28 May 2004. Even if the USPTO document, which is not a final decision as confirmed by the intervener at the hearing, invalidates the priority claimed, which both the applicant and EUIPO dispute, the fact remains, on any view, that Article 7(2)(b) of Regulation No 6/2002 envisages two separate starting points for the relevant period, namely either the date of filing of the application for registration or the date of priority. In the present case, given that the disclosure events occurred in any event prior to the 12-month period preceding the filing of the application for registration of the contested design with EUIPO within the meaning of Article 7(2)(b) of the regulation, namely on 22 November 2004, the USPTO document is irrelevant to the outcome of the present dispute.

47 It follows from the case-law that a design is deemed to have been made available within the meaning of Article 7 of Regulation No 6/2002 once the party relying thereon has proven the events constituting disclosure. In order to refute that presumption, the party challenging the disclosure must establish to the requisite legal standard that the circumstances of the case could reasonably prevent those facts from becoming known in the normal course of business to the circles specialised in the sector concerned (judgments of 21 May 2015, *Senz Technologies v OHIM — Impliva (Umbrellas)*, T-22/13 and T-23/13, EU:T:2015:310, paragraph 26, and of 15 October 2015, *Promarc Technics v OHIM — PIS (Part of a door)*, T-251/14, not published, EU:T:2015:780, paragraph 26).

48 In the present case, a two-step analysis is thus appropriate, as rightly carried out by the Board of Appeal in paragraph 52 of the contested decision and, accordingly, the Court should examine, in the first place, whether the evidence produced by the intervener showed that the contested design had been disclosed before the relevant period started and, in the second place, whether the applicant was able to demonstrate that the disclosure events thus claimed by the intervener 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.

– Proof of disclosure

49 The Board of Appeal took the view, in paragraphs 54 to 58 of the contested decision, that, taken as a whole, Exhibits 10, 16, 17 and 19 to 21 proved that the contested design had been exhibited and used in trade before the relevant period started. First, Exhibits 10, 16 and 17 proved that clogs to which the contested design had been applied had been displayed on the applicant's website at least on 25 November and 13 December 2002. Secondly, Exhibit 10 established that the exhibition at the Fort Lauderdale Boat Show, before the relevant period started, of the clogs to which the contested design had been applied had been a smashing success. Thirdly, Exhibits 10 and 19 to 21 proved that the clogs to which the contested design had been applied were available for sale before the relevant period started, at least through a distributor identified as Western Brands (Exhibit 19) and several retailers in the United States identified by name (Exhibit 20).

50 The parties do not dispute those findings. The Court notes in particular that the applicant disputes neither the correctness of the three disclosure events established by the Board of Appeal, namely the display of clogs corresponding to the contested design on the applicant's website, the exhibition of those clogs at the Fort Lauderdale Boat Show and the fact that the clogs were available for sale through a distribution and retail network, nor that those facts occurred before the relevant period started.

51 In that regard, it is clear from the case-law that the presumption provided for in Article 7(1) of Regulation No 6/2002 applies irrespective of where the events constituting disclosure took place, since it can be seen from the wording of the first sentence of that article that there is no requirement, for the purpose of applying Articles 5 and 6 of that regulation, for the events constituting disclosure to have taken place within the European Union in order for a design to be deemed to have been made available to the public (judgments of 13 February 2014, *H. Gautzsch Großhandel*, C-479/12, EU:C:2014:75, paragraph 33; of 21 May 2015, *Umbrellas*, T-22/13 and T-23/13, EU:T:2015:310, paragraph 27; and of 15 October 2015, *Part of a door*, T-251/14, not published, EU:T:2015:780, paragraph 29). Indeed, the first sentence of Article 7(1) of Regulation No 6/2002 envisages a broad concept of disclosure of the design, as evidenced by the terms 'otherwise disclosed' (judgment of 15 October 2015, *Part of a door*, T-251/14, not published, EU:T:2015:780, paragraph 30).

52 Accordingly, the Board of Appeal was right to find that, with those three disclosure events, even if they took place outside the European Union, at least taken as a whole, the contested design has been 'exhibited, used in trade or otherwise disclosed' before the relevant period started, within the meaning of Article 7(1) of Regulation No 6/2002.

– Proof of the fact that the disclosure 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

53 As a preliminary point, it should be recalled that the Board of Appeal has found, in paragraph 64 of the contested decision, that the circles specialised in the relevant sector to be taken into account in the present case were professionals in the trade and manufacture of footwear. The parties do not dispute that finding.

54 According to the case-law referred to in paragraph 47 above, once proven, as in the present case (see paragraph 52 above), that the contested design had been exhibited, used in trade or otherwise disclosed before the relevant period started, there is a presumption that the design has been made available within the meaning of Article 7(1) of Regulation No 6/2002 and it is for the party challenging the disclosure, the applicant in the present case, to rebut that presumption by establishing to the requisite legal standard that the circumstances of the case could reasonably prevent those events from becoming known in the normal course of business to the circles specialised in the sector concerned.

55 The case-law shows that the question whether events taking place outside the European Union could reasonably have become known to the persons forming part of the circles specialised in the sector concerned is a question of fact; the answer to that question is dependent on the assessment of the particular circumstances of each individual case (judgments of 13 February 2014, *H. Gautzsch Großhandel*,

C-479/12, EU:C:2014:75, paragraph 34, and of 21 May 2015, *Umbrellas*, T-22/13 et T-23/13, EU:T:2015:310, paragraph 28).

- 56 The Court has also held that in order to assess whether disclosure 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, it must be examined whether, on the basis of the facts which must be adduced by the party challenging the disclosure, it is appropriate to consider that it was not actually possible for those circles to be aware of the events constituting disclosure, whilst bearing in mind what can reasonably be required of those circles in terms of being aware of prior art. Those facts may concern, for example, the composition of the specialised circles, their qualifications, customs and behaviour, the scope of their activities, their presence at events where designs are presented, the characteristics of the design at issue, such as its interdependency with other products or sectors, and the characteristics of the products into which the design at issue has been integrated, including the degree of technicality of the products concerned. In any event, a design cannot be deemed to be known in the normal course of business if the circles specialised in the sector concerned can become aware of it only by chance (judgment of 21 May 2015, *Umbrellas*, T-22/13 et T-23/13, EU:T:2015:310, paragraph 29).
- 57 In the present case, it must be recalled that the Board of Appeal found three separate disclosure events (see paragraph 49 above) and that it is sufficient that a single one of those disclosure events became known to the circles specialised in the sector concerned, operating within the European Union, for the exception in Article 7(1) of Regulation No 6/2002 not to apply.
- 58 In the first place, it is appropriate to note that, in the application, the applicant focuses on a single one of the three disclosure events found by the Board of Appeal, namely the display on its website of the clogs to which the contested design had been applied, by claiming that its website was not accessible in the normal course of business to the circles specialised in the sector concerned, operating within the European Union.
- 59 In that regard, the applicant appears to propose a different standard of proof to that established by the case-law referred to in paragraphs 55 and 56 above, by submitting that, for the purpose of determining whether the disclosure 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, the relevant question is what is more likely. In that regard, suffice it to state that in its judgment of 13 February 2014, *H. Gautzsch Großhandel* (C-479/12, EU:C:2014:75), the Court, in essence, confirmed the finding in paragraph 55 above, namely that the question whether events taking place outside the European Union could reasonably have become known to the persons forming part of the circles specialised in the sector concerned is a question of fact and the answer to that question is dependent on the assessment of the particular circumstances of each individual case.
- 60 It follows that the Court must examine whether, on the basis of facts which must be adduced by the party challenging the disclosure, it was appropriate to consider that it was not actually possible for those circles to be aware of the events constituting disclosure, whilst bearing in mind what can reasonably be required of those circles in terms of being aware of prior art.
- 61 In that respect, with regard to the applicant's assertion that the only internet users that were likely to find its website were those residing in Florida and Colorado and not shoe manufacturers operating on another continent, suffice it to state that the applicant does not dispute that its website was technically accessible worldwide (see also paragraph 72 of the contested decision).
- 62 Next, as regards the applicant's assertion, supported by two expert reports, that its website could not be found using search engines by searching the words 'shoe', 'clog' or 'footwear', that assertion does not establish to the requisite legal standard that the applicant's website could not reasonably have become known to the circles specialised in the sector concerned, operating within the European Union. First, it is not apparent from the expert reports that the applicant's website was not included in the results of a search using the applicant's name 'cros'. Secondly, as rightly pointed out by EUIPO, the applicant's website could have become known to the circles specialised in the sector concerned, operating within the European

Union, by other means than through a search engine, such as, inter alia, the exhibition at the Fort Lauderdale Boat Show of the clogs to which the contested design had been applied — which, in the applicant's own words on its website, had been a 'smashing success' (paragraph 78 of the contested decision) — or through the clogs' distribution and retail network.

63 Consequently, the arguments put forward by the applicant are not such as to invalidate the Board of Appeal's finding that the applicant failed to show that the display on its website of the clogs to which the contested design had been applied 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.

64 In the second place, with regard to the other two disclosure events found by the Board of Appeal, it is true that all the evidence on which the Board of Appeal relied for the purpose of establishing that the contested design had been disclosed before the relevant period started originates from the applicant's website. However, EUIPO rightly pointed out that, with regard to the exhibition at the Fort Lauderdale Boat Show of the clogs to which the contested design had been applied and the fact that the clogs were available for sale through a distribution and retail network, the Board of Appeal relied on items of evidence originating from the applicant's website for the sole purpose of showing that those facts, which occurred outside that website, had actually taken place.

65 Therefore, even if the applicant's website were virtually inaccessible and impossible to find before the relevant period started, that would not automatically prove that the circles specialised in the sector concerned, operating within the European Union, could not reasonably have been informed of the two disclosure events mentioned in the previous paragraph, which occurred outside the applicant's website.

66 In that respect, with regard to the Fort Lauderdale Boat Show, EUIPO asserts that it is an important international event in the nautical sector and that it is therefore unlikely that EU professionals from the footwear industry could not have become aware of the new clog designed for boating.

67 While, at the hearing, the applicant disputed EUIPO's assertions by contending that EUIPO had failed to adduce any evidence supporting those allegations, it is apparent from Exhibit 9 that the 2002 Fort Lauderdale Boat Show was an international fair, which could be attended by professionals of the footwear industry, as shown by the applicant's attendance at the 2002 Boat Show, and the applicant's own website reports that the exhibition on that occasion of the clogs in question had been a smashing success (Exhibit 10). In addition, in accordance with the case-law referred to in paragraph 47 above, it is for the applicant to prove that the circumstances of the case could reasonably prevent that disclosure event from becoming known in the normal course of business to the circles specialised in the sector concerned, which it failed to do.

68 As to the fact that the clogs were available for sale, to the extent that the applicant seems to suggest that the sales took place in two American states only, namely Florida and Colorado, it must be pointed out, as did EUIPO, that that assertion is clearly inconsistent with Exhibit 20, which lists the retailers of the clogs in question. According to that list, the clogs were not put on sale in Florida and Colorado alone but also elsewhere in the United States, namely in Vermont, South Carolina, the US Virgin Islands, Texas, Tennessee, North Carolina, Georgia, Virginia and New York State and the State of Washington. The clogs were therefore put on sale in a large number of American states and it is thus unlikely, given the importance for the EU market of commercial trends on the US market, that it went unnoticed by the circles specialised in the sector concerned, operating within the European Union.

69 Moreover, with regard to the third disclosure event, the applicant adduced no item of evidence capable of rebutting the presumption of disclosure for the purpose of Article 7 of Regulation No 6/2002.

70 It follows that the applicant failed to establish to the requisite legal standard that the three disclosure events established by the Board of Appeal could not have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, bearing in mind

that a single disclosure event for the purpose of Article 7 of Regulation No 6/2002 is sufficient to find that the contested design lacks novelty.

71 Admittedly, the applicant is right in arguing that it cannot be expected to prove a negative fact. However, far from being required to prove negative facts, the applicant could have adduced positive proof relating, in the present case, for instance, to data showing that, notwithstanding the fact that its website was accessible worldwide, there was no, or very little, actual traffic from users originating in the European Union, or that the Fort Lauderdale Boat Show had not been attended by exhibitors or participants from the European Union, or also that the distribution and retail network for the clogs to which the contested design had been applied was not actually operational and that no order had been placed using that network.

72 Next, in so far as the applicant alleges that the approach followed in the contested decision is inconsistent with that adopted by the Board of Appeal in its decision of 26 August 2013 in Case R 1195/2011-3, suffice it to observe that the issue addressed by the Board of Appeal in that case was whether a given design had actually been made available to the public within the meaning of Article 7 of Regulation No 6/2002 (see paragraph 19 of that decision) and not the issue invoked by the applicant in its second plea, alleging, without challenging the disclosure events, that the disclosure of the contested design could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned. It follows that there is no inconsistency between the reasoning in the contested decision and the approach adopted by the Board of Appeal in its decision of 26 August 2013 in Case R 1195/2011-3.

73 Lastly, as to the applicant's argument that only a disclosure that was 'so widespread so as overcome [the] quantitative hurdle' would preclude the exception in Article 7(1) of Regulation No 6/2002 from applying, suffice it to observe that that provision provides no quantitative threshold with regard to actual knowledge of the disclosure events.

74 In the light of all the foregoing, the second plea must be dismissed.

75 Consequently, the action must be dismissed without there being any need to rule on the admissibility of the applicant's head of claim seeking confirmation of the registration of the contested design and rejection of the application for a declaration of invalidity (see, to that effect, judgment of 8 December 2011, *Aktieselskabet af 21. november 2001 v OHIM — Parfums Givenchy (only givenchy)*, T-586/10, not published, EU:T:2011:722, paragraph 67).

76 As to the intervener's head of claim seeking an order from the Court invalidating the contested design and granting the application for a declaration of invalidity, to the extent that, as concluded in the previous paragraph, the action must be dismissed, the contested decision, which declared the contested design invalid, is confirmed. Accordingly, there is no need to rule on that head of claim.

### **Costs**

77 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

78 In the present case, EUIPO and the intervener, the latter having clarified its form of order at the hearing, applied for the applicant to be ordered to pay the costs in these proceedings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by EUIPO and the intervener, in accordance with the form of order sought by those parties.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Dismisses the action;**
2. **Orders Crocs, Inc. to bear its own costs and pay those incurred by the European Union Intellectual Property Office (EUIPO) and by Gifi Diffusion in the proceedings before the General Court.**

Tomljenović

Marcoulli

Kornezov

Delivered in open court in Luxembourg on 14 March 2018.

E. Coulon

V. Tomljenović

Registrar    President

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\* Language of the case: English.