



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

The Boards of Appeal

DECISION
of the Third Board of Appeal
of 17 October 2013

In Case R 951/2012-3

Dellice Holding Ltd.

5 Costi Palama Street, Office Suite 201
CY-1096 Nicosia
Cyprus

RCD Proprietor / Appellant

represented by KNEPPELHOUT & KORTHALS N.V., Boompjes 40,
NL-3011 XB Rotterdam, Netherlands

v

Stokke AS

Håhjem
NO-6260 Skodje
Norway

Invalidity Applicant / Respondent

represented by PLESNER, Amerika Plads 37, DK-2100 Copenhagen Ø, Denmark

APPEAL relating to Invalidity Proceedings No 8420 (registered Community design
No 405915-0001)

THE THIRD BOARD OF APPEAL

composed of Th. M. Margellos (Chairperson and Rapporteur), E. Fink (Member) and
H. Salmi (Member)

Registrar: P. López Fernández de Corres

gives the following

Decision

Summary of the facts

- 1 On 26 September 2005, Dellice Holding Ltd ('the RCD proprietor') filed an application to register the design below ('the RCD') for the indication of products 'children's chairs':



- 2 The RCD was registered under No 405915-0001 and published in the Community Designs Bulletin No 2005/107 of 15 November 2005.

- 3 On 25 March 2011, Stokke AS ('the invalidity applicant') filed an application for a declaration of invalidity against the contested RCD claiming that the RCD had been registered in breach of Articles 4 to 6 and 25(1)(b), (e) and (f) CDR. The application was based on the following earlier rights and grounds:

1. *Lack of novelty and lack of individual character - Article 25(1)(b) CDR*

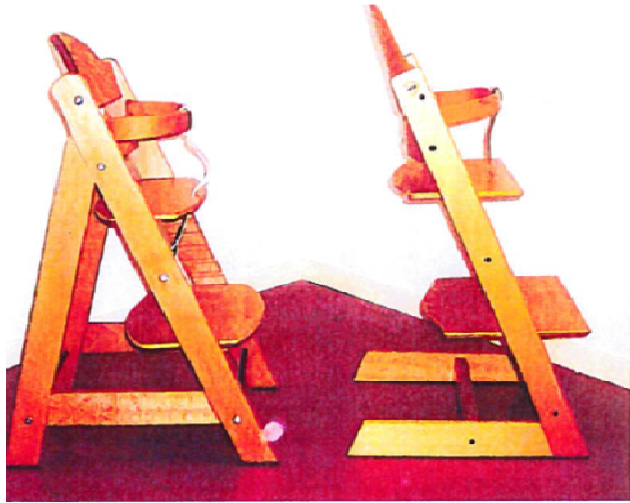
- The 'Tripp Trap chair' below ('TT chair') was first shown to the public at an International exhibition in Israel in 1974. The RCD differs in only immaterial details from the 'TT chair':



- The RCD differs in only immaterial details from the 'TT chair' with the higher upper backrest below commercialised in the United Kingdom and France in 1994 and which appeared thereafter in many French magazines (see copies of articles in French magazines: '*Que choisir*', May 1995; '*Famili*', January 1996; '*Elle*', November 1996; '*Prima*', January 1997:



- The overall impression of the RCD does not differ from the overall impression produced by the Bambino chair’:



- The overall impression of the RCD does not differ from the overall impression produced by the ‘Hauch Alpha chair’ below alongside the ‘TT chair’:



2. Article 25(1)(e) CDR and Section 4(1) of the Danish Trade Mark Act

- Danish trade mark registration No MP 767 786 for the three dimensional trade mark in colour of the ‘TT chair’ below filed and registered on 1 October 2001 (acquired distinctiveness) for ‘chairs, armchairs, stools’. The ‘Tripp Trapp chair’ enjoys strong reputation in Denmark and Europe:



3. *Article 25(1)(f) CDR*

- Peter Opsvik is the creator of the well-known adjustable ‘TT’ highchair.
- The ‘TT chair’ is protected by copyright. This has been confirmed by various courts in Europe. The ‘TT chair’ is protected by copyright as a work of applied art. The copyright legislations of the Member States have not been harmonised. However they all entitle the owner of the copyright to prohibit third parties not having the owner’s consent from reproducing the work or making it available to the public whether in original or amended form. Reference is made to the Dutch copyright Act 1912, sections 1 and 10, and the Danish Consolidated Act No 202 of 27 February 2010 on Copyright.
- All rights relating to the ‘TT chair’ now belong to the invalidity applicant. After a merger the rights were transferred to the invalidity applicant (see license and company history in Exhibit 1).
- The contested design has been the centre of a conflict in The Netherlands, where the proceedings were initiated against H3, Baby Safety Products B.V., a company connected to the RCD proprietor. In its judgment of 5 October 2010 the Dutch Court of Appeal held that H3 Baby Products BV did not have sufficient interest in its claim for a declaratory ruling that the contested chair did not infringe the ‘TT chair’. H3 Baby Products has appealed to the Dutch Supreme Court

- Copyright protection to the well-known adjustable children’s highchair, the ‘TT chair’. The invalidity applicant refers to the following judgments:
 - Judgment of the Danish Supreme Court of 5 January 2001 case II 352/1999 recognising the copyright attached to the ‘Tripp Trapp’ and finding the ‘2-Step chair’ a close imitation infringing the copyright to the ‘TT chair’ to (Exhibit 6);
 - Judgment of the Danish City Court of Aarhus in Case B.S. 8-1069/2007 upheld by the Danish Western High Court in Case VL B-2118-08 concerning the nearly identical ‘Hauch Alpha chair’. The chair was marketed in Denmark during Spring 2007. Those judgments found that the ‘Hauch Alpha chair’ infringed the copyright to the ‘TT chair’ – it was found on the whole similar, based on expert opinion, because all functions, possibilities of adjustment and technical solutions had been adopted without changes in the design of the ‘Hauch Alpha’.
 - Dutch Court of Appeal’s judgment of 30 June 2009 wherein it was found that the ‘Bambino chair’ infringed the copyright to the ‘TT chair’. The judgment has been appealed to the Dutch Supreme Court by H3 Baby Safety Products BV.
- The invalidity applicant attached by way of evidence a memorandum on its entitlement to the rights to the ‘Tripp Trapp chair’; product brochures; copies of the aforementioned judgements with translations.

4 The RCD proprietor responded as follows on 23 June 2011:

- Children’s highchairs are highly technically dictated that offer the designer only limited freedom to incorporate non-technical characteristics. The overall impression of the RCD is different from the ‘TT’.
- The functionally essential elements should not be taken into account when assessing the similarity of the overall impression for the adjustable children’s highchair and the degree of freedom of the designer when determining the individual character since the designer had no choice but to include these features when creating the RCD.

Comparison with ‘TT’

- The frame of the RCD is an upside down ‘V’ is completely different from that of the ‘TT’, which is a leaning ‘L-shape’.
- The top edge of the frame is rounded in the RCD. In ‘TT’ it is square.

- Wooden waist belt is a standard part of the RCD. The waist belt is more curved. The waist belt is not a standard piece in the ‘TT’ and is curved differently.
- The horizontal wooden bar and the horizontal metal bars are positioned differently.
- The shape of the seat and footrests are different. They are oblong in the RCD and almost rectangular in the ‘TT’. The most prominent features of the ‘Tripp Trapp chair’ trade marks are the leaning ‘L-shape’ and the very rectangular seat and footrest. The leaning ‘L’ is a design feature unique to the ‘Tripp Trapp chair’. The RCD does not use the leaning ‘L’.

‘Hauch Alpha’

- The frame of the Hauch Alpha is an ‘A-shape’. Its front and back legs are connected by a two wooden bars. The front and back are connected by two wooden bars. In the RCD the front bars are connected by a metal bar. The shapes of the backrests, the waist bar and the seat and footrests.

Copyright

- Copyright provides no basis for preventing third parties from applying the elements from which the chair derives its utility and usefulness.
 - OHIM is not qualified to rule on the copyright law of a Member State.
 - There is, therefore, no likelihood of confusion.
 - Given that the RCD does not use the leaning L, there is no likelihood of confusion.
- 5 The RCD proprietor provided a historical and chronological overview of children’s highchairs before 1972 from the public register of the Vitra Design Museum; a copy of the European standard for convertible highchairs; the invalidity applicant’s patent application and a copy of the judgment of the Court of Appeal of Amsterdam of 15 March 2011 wherein it was found that the Carlo chair did not infringe the copyright to the ‘TT’.
- 6 On 14 September 2011, the invalidity applicant pointed out as follows:
- The ‘Tripp Trapp chair’ with the higher backrest was introduced in the United Kingdom and France in 1994. The higher upper backrest was replaced in the United Kingdom and France by the ‘add-on’ device in plastic known as the ‘Tripp Trapp Baby Set’ whereupon it ceased selling the ‘TT chair’ with the horizontal wooden waist bar with the strap.
 - The waist bar and the ‘TT baby set’, which are only supposed to be used for a short period, are immaterial to the assessment of the overall impression of the two chairs.

- The patent referred to by the RCD proprietor was merely a patent application. A copy of the actual patent that expired in 1992 is submitted. In any case, as expressly indicated, the embodiment in that application is only an example of how the invention can be brought into effect. The technical elements described in the patent do not dictate the design of the ‘TT’.
- The judgment of 15 March 2011 of the Dutch Court of Appeal is not final and an appeal to the Dutch Supreme Court is pending. The judgment of the Dutch Court of Appeal does not correspond with the views of the European Courts.
- The Office has the competence to decide on whether there would be an infringement to a copyright in a Member State.
- The RCD proprietor claims on the one hand that there is no copyright to the ‘Tripp Trapp chair’. According to the very judgment the RCD proprietor has submitted the ‘Tripp Trapp chair’ is a pioneering design and is entitled to copyright protection.
- The fact that the ‘Tripp Trapp chair’ is protected by copyright has been confirmed by the many European Courts (see above).
- For copyright infringement the decisive factor is the contested design entails a sufficient ‘liberation’ from the characteristic features of the design of the ‘TT chair’. See attached copy of the judgment of the Danish Supreme Court. According to the German Hanseatic Court of Appeal the decisive factor is whether the design constitutes an unlawful imitation of the ‘TT chair’.
- According to the Danish Supreme Court in its judgment of 5 January 2011 in Case 11 352/1999, the design of the ‘TT’ is not only motivated by function.
- Reference is made to the judgment of 1 November 2001 of the German Hanseatic Court of Appeal (Exhibit 18 and translation): In the Court’s opinion a multitude of possible solutions exist for constructing a children’s highchair standing on rockers and adjustable in height, so that the design chosen for the ‘TT chair’ does not practically as of necessity follow from the constructive task without any leeway for artistic expression. A multitude of shapes and design options are conceivable nominated to the shortlist for the European Design Award in 1996; mentioned in the book *‘Schöner Wohnen – Moderne kalssiket – Möbel, die Geschichte machen’*; and mentioned in the Norwegian press as one of the twelve selected furniture classics. ‘The ‘TT chair’ is a work of applied art in the sense of s. 2 para. 4 UrhG enjoying copyright protection by the German Copyright Act.
- Reference is also made to the decision of OHIM Invalidity Division of 12 February 2008 in Invalidity Proceedings No 4034 Stokke v Hong Zhang, in which the Hong Zhang chair registered as Community design No 000528377-000, with a filing date of 15 May 2006 was invalidated. In that decision it was held that despite the technical constraints there is still a large degree of freedom for designers of highchairs’

- The fact that the design of the ‘TT chair’ is not solely dictated by its technical function is also confirmed by the statement of Professor Marinissen, Emeritus Professor of Industrial Design Engineering, Delft University of Technology, who was asked to draw a chair incorporating the technical invention in the patent application. He came up with several drawings none resembling the ‘TT chair’. His conclusions correspond with those of the independent expert appointed by the Danish Supreme Court (see its judgment of 28 June 2011 in Exhibit 29). In his opinion, the ‘TT’ was a ‘completely original design for the time’, ‘The design of the ‘TT chair’ deviated from the usual baby-chair designs of the time’; ‘The design of the ‘TT chair’ does not necessarily follow from the technical features set out in the patent requested’.
- Professor Marinissen’s view is shared by the expert appointed by the Danish Supreme Court in Case 11 352/1999 mentioned above.
- The pictures of the highchairs submitted show how unusual and different the design of the ‘TT chair’ was in 1972.
- The only differences between the RCD and the ‘TT’ are the fact that the supporting horizontal in the side view of the ‘TT’ has been exchanged with a supporting vertical front bar in the side view of the RCD. All other elements are identical: the height, width, materials, the use of horizontal metals bars, the thickness of the side bars and foot plates, the identical grooves. These other elements are not purely functional. The small differences of the rounding of certain edges, in the backrest are immaterial.
- Even though the ‘L-shape’ is a characteristic element of the ‘TT chair’ when seen from the side, this shape alone does not characterise the ‘TT chair’. The aesthetic impact of the ‘TT chair’ is achieved through the clear straight lines, the very straight form and geometric shapes (see the German Hanseatic Court of Appeal judgment).

Novelty

- The ‘TT chair’ was made available to the public in 1974 and differs in only immaterial aspects from the RCD.

Lack of individual character

- The overall impression of the RCD does not differ from the ‘TT’

A distinctive sign is used in a subsequent design

- The RCD proprietor’s use of the RCD for children’s chairs implies a likelihood of confusion with the ‘TT chair’ registered as a trade mark in Denmark

7 According to the RCD proprietor’s observations of 5 December 2011:

- The basic structure and details of the chairs differ.
- It is not proven that Stokke AS is the sole owner of the ‘TT chair’ design.
- It has not been shown the invalidity applicant enjoys copyright to the ‘TT chair’. Protection, if any, extends only to the ‘L-shape’ characterising the side view and that therefore, the scope of protection is limited. In addition, taking into account the mandatory safety regulations, the only way to deviate from prior art is to use a different frame.
- Stokke still tries to take advantage of its expired patent right.
- Proceedings are pending between the parties before the Supreme Court in the Netherlands and in Denmark.
- Copyright protection and its scope of protection are different. The scope of protection of the ‘TT chair’ is limited by the technique issue. The Amsterdam High Court rulings on the Carlo and Leander chairs demonstrate this.
- When the ‘TT’ was made public, there were many highchairs similar to the ‘TT’ as is demonstrated by the exhibit presented in Norwegian proceedings.
- Taking into account the mandatory safety regulations and the freedom of design style, the only way to significantly deviate from prior art is to use a different frame.
- The ‘TT’ with its slanted diagonal frame is a technical effect based upon shifting the centre of gravity as a result of growth of a child and an analogy with an existing technical principle the stairs.
- The technical and functional elements should not be taken into account when assessing the similarity of the overall impression made by the two chairs.
- There are many judgments of national courts wherein it is stated that the ‘TT’ is dictated by its function and technique: judgment of Danish Court of Horsens of 28 November concerning the ‘Migros chair’; judgment of Court of Amsterdam of 21 October 2009;
- Translation of report of expert J Jacobs in response to the report of Prof. Marinissen who states as follows: It is irrelevant that there are many ways of creating highchairs based on the principle of adjustment. Stokke chose a solution based in part on the technical principle. The question is whether that solution is protected by copyright. The ‘TT chair’ does not have a remarkable appearance. It is a product whose form, material and details are taken completely from the 1960’s classical design. Thus it is absolutely logical that the design is plain and unadorned. During the 1950’s and 60’s many furniture pieces in Scandinavia were constructed with visible head screws and concealed nuts. The ‘L-shape’ does not make the ‘TT chair’ unique. The curved backrest is an ergonomic solution. The measurements of the posts are based on common wood measurements. In terms of form, details and use of materials, the ‘TT’ fits in perfectly with the character of the era in which it

was developed. I believe that the solution chosen was a well-known technical principle which was applied for use in an adjustable chair without any added value. The slanting line used logically follows from the interplay of forces occurring on the chair and follows from the analogy with the step ladder. That the metal tie rods between the supports are in black indicates a purely technical choice, as black connection elements come right out of a factory, without a designer having added anything original to it. That the back of the ‘supporting heel’ is slanted may have resulted from a desire to decrease the chance that somebody would stumble over the chair. The affixing grooves for the safety straps and the cover pegs are determined by technical considerations. The light character of the wood and the finishing with white lacquer are in keeping with Scandinavian furniture style.

- Judgment of the District Court in The Hague, The Netherlands: ‘Bambino, Amber, Thomas, Jasmine and Tamara v TT’. The differences are so important that they independently lead to the conclusion that the Bambino does not infringe the ‘TT’ copyright. The ‘TT’ has a distinctive ‘L-shape’ and makes a floating impression – these characteristics are the most prominent in the ‘Tamara’.
- 8 On 15 March 2012, the Invalidity Division issued a decision (‘the contested decision’) declaring the RCD invalid pursuant to Article 25(1)(b) CDR in conjunction with Article 6 CDR, due to lack of individual character, and ordering the RCD proprietor to bear the costs. The contested decision is summarised as follows:
- As evidence the invalidity applicant has provided an extract from the shopping guide *Que choisir*, dated May 1995 depicting the prior design as follows:



- The prior design was published on a shopping guide in May 1995. Therefore, the prior design depicted in the shopping guide is considered to have been made available to the public prior to the date of filing of the contested RCD within the meaning of Article 7(1) CDR.
 - The RCD differs from the prior design by its two rear straight posts, the wood-like bar connecting its two rear posts, unlike the prior design in which the wood like bar connects the two horizontal floor in the middle, by the rounded edges of its two flat rectangular panels, whereas those of the prior design are squared and by the thin metallic bar connecting the two front side posts. These differences are not immaterial. Thus the RCD and the prior design are not identical within the framework of Article 5 CDR. The prior design does not form an obstacle to the novelty of the RCD.
 - The informed user is familiar with children's highchairs. He is aware that children's highchairs must have a seat, a footrest, a back and a means to secure children. Due to these requirements, the degree of freedom of the designer is limited. However, as far as the form of the backrest or the sitting characteristics of the chair are concerned, the designer can exercise freely his/her creativity.
 - Both the RCD and the prior design are characterized by the bookshelf-like construction of the frame, consisting of two parallel posts, and the two flat rectangular panels of the seat and the foot rest which are slid into the grooves of the posts. Like a bookshelf, this construction allows the easy adjustment of the heights of the panels. There was no need for the designer of the RCD to adopt the same shape and dimensions of the different configurations of the bookshelf like construction in order to fulfil the technical function of adjusting the height of the seat and the footrest.
 - The RCD has taken over the same design features that characterise the bookshelf-like construction of the prior design. The only difference between the designs is only visible in the side view. However, this difference is insignificant since the overall impression is dominated by the common design features of the bookshelf-like construction visible from the front view.
 - The overall impressions produced are the same. The RCD lacks individual character within the meaning of Article 6 CDR.
- 9 On 15 May 2012 the RCD proprietor filed an appeal against the contested decision. The statement setting out the grounds of appeal was filed on 13 July 2012.
- 10 The invalidity applicant replied with observations on 27 August 2012.
- 11 The RCD proprietor was invited by the registry of the Boards of Appeal to file a response.
- 12 On 1 November 2012, the RCD proprietor indicated that it did not wish to file a reply to the invalidity applicant's observations in the appeal.

Submissions and arguments of the parties

13 The RCD proprietor argues as follows:

Other IP rights

- Where a design is considered to be new it is impossible for that design to include a copyright work or a distinctive sign. The criteria for the evaluation for a design in Articles 5 and 6 are very different from copyrights, patents and trade marks.
- In order to establish whether the RCD at stake is new and has individual character, the manner in which the scope of protection and thus the infringement is considered in relation to copyrights and trade marks is very different from that established on the basis of the CDR.
- The Invalidity Division rightfully concluded that the RCD is new since the differences are not immaterial. If in fact the RCD is considered new, the RCD cannot include either a copyrighted work or a distinctive sign. The Invalidity Division should have clearly pointed out that due to its finding that the RCD is new, the grounds of invalidity in relation to its copyright and trade mark claims are also dismissed.
- A product or elements of a product that have been patent protected cannot after the expiry of the product be considered a design or design element. Once a patent has lapsed, the technical aspects claimed under the patent are free for all to use.
- The bookshelf-like construction, namely, the groove construction, is not a design element, but a technical element for which the prior design obtained patent protection. Most highchairs are characterised by this nowadays.
- The invalidity applicant has provided no proof of copyright and refers only to judgments. The issue concerning the designs is pending before the Court of The Hague.

Novelty and individual character

- Children's chairs have been designed for centuries. All include a backrest, a seat, a footrest and in some cases ('Clairmonte 1947 patent') two posts and a frame. The fact that a children's chair has a backrest, seat, footrest and two posts is not new. Two posts and a frame were present in the 1947 patented 'Clairmonte'. Highchairs also need to fulfil European safety norms. Highchairs must also be suitable for mass production.
- Peter Opsvik, the designer of the 'TT' claims that he was the first to design a chair that combined the growth pattern following principle with the possibility to slide the adjustable highchair under the table. He has indicated that the 'form follows function' aspect is what the design of the 'TT chair' is all about (see Exhibit 17).

- Due to the fact that the design of the ‘TT’ is dictated by function, the freedom of choice of the examiner is limited. A backrest, a seat, a footrest, two posts and a frame are elements that can have been found in children’s highchairs. Peter Opsvik also wanted the seat and footrest to be adjustable. The way he implemented that was technically dictated and obtained patent protection for it. The grooves have to be cut out horizontally in order to ensure that the seat and footrest plate can be horizontally fixed for the children to sit straight. Also the width of the grooves is dictated by function, the seat and footrest need to have a certain thickness to carry weight of the baby up to adult. The grooves need to be long enough to carry the entire plates which are not supported at the front or back. All the functional and technical elements must be excluded. The metal bars have a technical function and ensure the stability and strength of the ‘TT’.
- The contested decision does not take into account all the relevant differences.
- The only freedom the designer has with regard to the groove construction is the number of grooves. In the RCD there are 11 grooves. In the ‘TT’ there are 14 grooves.
- The RCD is very rounded and not angular or square like the ‘TT’. The top corners, edges and ends are rounded.
- Viewed from the side, the RCD has an inverted ‘V-shape’ with a rounded top. Viewed from the side the prior design appears as an inverted ‘T’ or ‘L-shape’ with an angle of 70°. Due to that shape the side view gives the impression that the seat plate and footrest float between the side posts.
- The base of the RCD is shaped by one metallic bar and one wooden bar connecting the front and back posts respectively. The four legs are not connected at the base. The back legs are connected by a wooden post placed a few centimetres above the base. The front legs are connected by a thin metal bar placed a few centimetres above the base. The side posts are not connected to one another. The ‘TT chair’ has only one interconnecting post in the middle of the side posts, forming an ‘H’ or ‘I’ shape. The ‘TT’ does not have a metal bar at the base. They are placed on the side bars and are not seen viewed from the side. The metal bar in the middle of the RCD ensures the construction has sufficient strength. The metal bars have a technical function which is to ensure stability and strength.
- The shape of the backrest is not the same.
- The front and back of the plates is the same. The plates are rounded and are identically shaped at the front and the back. The edges of the plates of the prior design are square at the front and curved at the rear.
- The overall measurements also differ. The ‘TT’ is 78 cm in height, 46 cm in width and 49 cm in depth. The RCD is 84 cm in height, 45.4 cm in width and 55 cm in depth compared to the prior design without the upper backrest of 78 cm in height, width 46 cm and depth 43 cm.

- The similarities between the designs are not described correctly. The RCD is not inclined towards the back. Its two posts are connected at the top with the two back side posts. The groove mechanism is not a design element but a patented element, protection for which has expired, and should not be considered as a point of similarity. The panels of the designs at issue are not the same.
- The informed user that should have been taken into account is far more informed than assumed by the Invalidity Division and will be very much aware of the differences between the designs available, the functional and technical constraints and requirements. The informed user is someone, such as a parent, who is focused on the details, is very much aware of highchairs on the market and appreciates the design.
- The overall impression is not determined by the groove or bookshelf-like construction or the functional elements. The overall impression produced by the RCD will take into account the side view, the differences in the base, the shape of the backrest, the seat, the footrest, the edges, the corners and overall measurements. Therefore, the overall impression produced by the RCD differs significantly from that produced by the earlier design.
- The Invalidity Division incorrectly concluded that there is no need for the designer of the RCD to adopt the same shape and dimensions of the different components of the bookshelf-like construction such as the panels and side posts in order to fulfil the technical function of adjusting the height of the seat and the foot rest. Many of the features of children's highchairs, adjustability and safety are dictated by its technical function. The degree of freedom of the designer is limited.
- There is no settled case-law that states that the side view of a design is less important in the overall impression produced on the informed user. The L-shape is one of the most prominent elements of the design. When the chair is used at the table, the design will be viewed from the side.

14 The invalidity applicant contends as follows:

- It is not disputed that the 'TT chair' has been made available to the public prior to the date of filing of the RCD.
- It is also not disputed that the 'TT chair' with the higher backrest was made available to the public prior to the date of filing of the RCD.
- The higher backrest was replaced in the United Kingdom and France by the add-on device in plastic known as the 'TT baby set' (Exhibit 15). When the 'TT baby set' was introduced, it ceased selling the 'TT' chair with the horizontal wooden waist bar with the strap.
- It is not disputed that the RCD must be compared to the original design of the 'TT chair' as well as the 'TT chair' with the higher upper backrest.

- That the ‘TT chair’ is protected by copyright as a work of applied art has been confirmed by Danish, German and Dutch judgments (Exhibits 4, 6, 10, 18, 26 and 28).
- The Invalidity Division has never concluded that the design of the ‘TT chair’ with the higher backrest has individual character with the design of the ‘TT’ from the early 70’s.
- The degree of freedom of the designer of an adjustable highchair is merely limited by the fact that the chair must have a seat, a footrest, a back and a means to secure the children.
- It is not disputed that anyone is free to make use of horizontally extending guides that make it possible for the seat and footrest to be placed at different heights. However, the ‘groove mechanism’ could have been achieved by using wholly different grooves positioned at varying intervals (see judgment of 1 November 2001 of the German Hanseatic Court of Appeal submitted as Exhibit 22 and the drawings of Prof. Marinissen in Exhibit 24).
- The technical elements of the ‘groove mechanism’ in the patent do not dictate the design of the ‘TT chair’ as a whole.
- There are numerous adjustable highchairs on the market which do not look similar to the ‘TT chair’ and which comply with the norms.
- The designer’s toning down of his own creativity that the ‘form of the chair gave itself from the functions it was serving’ is irrelevant.
- The term ‘bookshelf-like construction’ in the contested decision, which it was found was taken over in the RCD, does not refer to the groove mechanism alone as alleged by the RCD proprietor. The Invalidity Division derives that term from an assessment of the overall appearance of the design of the ‘TT chair’.
- The RCD proprietor has not substantiated the claim that nowadays most highchairs are characterised by the bookshelf-like construction. Such a trend would in any case be irrelevant since the examination of the individual character of the RCD consists in verifying whether the impression produced by it differs from the design of the ‘TT’, irrespective of the aesthetic or commercial considerations which may favour the marketing of a certain ‘style’ or ‘type’ of design (see judgment of 22 June 2010 in Case T- 153/08, at para. 58).

Lack of novelty

- The RCD is not novel. The differences between the designs found in the contested decision are immaterial.

Lack of individual character

- Even though the ‘L-shape’ seen from the side is a characteristic element of the design of the ‘TT chair’, it achieves its design characteristics through a multitude of style elements: the concept of parallel lines, the overall symmetry of shapes.
- Even though the L-shape is a characteristic element of the design of the ‘TT’ when seen from the side, this shape does not characterise the ‘TT’.
- The only difference between the RCD and the ‘TT’ is the fact that supporting horizontal front bar in the side view of the ‘TT’ has been exchanged with a supporting vertical front bar in the side view of the RCD. All other elements are practically identical.
- The height, the width, the use of black horizontal metal bars, the thickness of the side bars and foot plates, the grooves, which are all elements that are not functional are the same. The angle of inclination of the front bar in the RCD is identical to that of the ‘TT’.
- The RCD is depicted in light/natural wood with metal bars. The use of the materials and the colour are a factor that must be taken into account in making the comparison between the designs. It is irrelevant that the ‘TT’ is sold in other colours.
- The small differences of the rounding of the edges, the measurements, the number of grooves, the over view of the base are immaterial. The informed user will perceive the design as a whole and will not proceed to analyse the various details: the rounding of the edges, the measurements, the number of grooves and the over view of the base. The overall impression is not dominated by the side view.
- Highchairs can take on a number of different forms and there are very technical or functional constraints. There are several mass produced highchairs on the market that are not similar to the ‘TT chair’. It is irrelevant whether the ‘TT chair’ is suitable for mass production.

Article 25(1)(f) CDR

- Proceedings are pending between the parties in The Netherlands before the Dutch Supreme Court from the judgment of the Dutch Court of Appeal of The Hague of 5 October 2010 and the judgment in the first instance of the District Court of The Hague of 7 February 2007. However, the Office has the competence to assess whether the RCD infringes the copyright to the ‘TT chair’.
- An RCD has to be declared invalid if it constitutes an unauthorised use of a work under the copyright law of one single Member State, which in this case is either Denmark or The Netherlands. Even if it is held that the RCD is new under Article 5 RCD, it does not mean that it cannot infringe a copyright. If the RCD constitutes an unauthorised use of a work under the copyright law of one single Member State, the contested RCD must be declared invalid.

- The decisive factor under Danish law is whether the RCD entails a sufficient liberation from characteristic features of the ‘TT’ (Exhibits 30 and 31).
- The only difference between the RCD and the ‘TT’ is the fact that the supporting horizontal front bar in the side view of the ‘TT’ has been exchanged with the supporting vertical bar in the side view of the RCD. The RCD does not entail a sufficient liberation from the characteristic features of the design of the ‘TT chair’.

Article 25(1)(e) CDR

- The RCD is confusingly similar to the design of the ‘TT chair’. Because it is new in the meaning of Article 5 RCD does not mean that it cannot infringe a trade mark.
- In support of its contentions, the invalidity applicant provided a copy of the judgment of the Norwegian Supreme Court of 27 June 2012 in Case HR-2012- 01325, with a translation thereof, as well as Internet extract on IKEA highchairs. Judgment of the Norwegian Supreme Court of 27 June 2012: ‘Oliver highchair’. The ‘Oliver chair’ is also designed like a staircase, with adjustable seat and footplates that are inserted into transverse grooves. It also has a slanting ‘L-shape’. The most prominent difference is that the slanting L-shape of the ‘TT chair’ has straight lines, whereas that of the ‘Oliver’ is arched. There would seem to be general agreement, at least in Denmark, Sweden and Norway that the degree of innovation has consequences in terms of how broad protection against imitations is in scope. The scope of protection will be determined by how original and distinctive an artistic work is. The scope of protection reflects the scope of the individual creative effort. Although it will generally be problematic to grant extensive protection to items intended for practical use that meet every day needs such as perspective, it carries little weight in relation to a distinctive artistic work like the ‘TT chair’. The German ruling emphasises the wide freedom of choice facing the designer in the detailed design of his ‘TT chair’. Two Danish Supreme Court judgments, U.2001.747H (Tvilum) and the Supreme Court judgment of 28 June 2001 (‘Lulu’) would appear to be premised on the ‘TT chair’ as a functional object, only enjoying protection against very close imitations. However, the fact that both judgments strongly emphasise the distinctiveness of the ‘TT chair’ clearly indicates that the scope of protection is influenced by the creative step as well. Copyright relates to the artistic work and the comparison must, therefore, be made on the overall impression conveyed by the artistic work.

Reasons

- 15 The appeal complies with Articles 55 to 57 CDR and Article 34(1) (c) and (2) CDIR. It is therefore admissible.
- 16 Article 25(1)(f) CDR has been validly invoked in the invalidity application and has been addressed by the parties in the proceedings before the Invalidity

Division. The invalidity applicant in particular cited Dutch and Danish copyright law and referred to judgments of the Dutch and Danish courts on copyright concerning the ‘TT chair’.

- 17 The Board will proceed with the examination of the invalidity application based on this ground even though it was not addressed by the Invalidity Division for reasons of procedural economy.

Article 25(1)(f) CDR

- 18 According to Article 25(1)(f) CDR a Community design may be declared invalid if the design constitutes an unauthorised use of a work protected under the copyright law of a Member State.
- 19 Furthermore, the third paragraph of that article provides that the ground provided for in paragraph 1(f) may be invoked solely by the invalidity applicant for or holder of the earlier right.

Relevant national provisions

- 20 Chapter 1 of the Danish Consolidated Act on Copyright 2010 headed ‘Protected Works’ in para. 1(1) provides that ‘The person creating a literary or artistic work shall have copyright therein, be it expressed in writing or in speech as a fictional or a descriptive representation, or whether it be a musical or dramatic work, cinematographic or photo-graphic work, or a work of fine art, architecture, applied art, or expressed in some other manner.’
- 21 On the scope of protection Article 2(1) of the above chapter provides that ‘Within the limitations specified in this Act copyright implies the exclusive right to control the work by reproducing it and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique.’
- 22 Chapter 4 of that Act provides in Article 63(1) that ‘The copyright in a work shall last for 70 years after the year of the author’s death.’
- 23 Chapter 3 headed assignment of copyright, in Article 53 of the Danish Consolidated Act on Copyright 2010 of 27 February 2010 provides that the copyright holder may wholly or partially assign his rights under this Act.

Entitlement of the invalidity applicant to invoke copyright

- 24 In the early 1970’s, the Norwegian furniture designer Peter Opsvik designed the ‘TT’ highchair. The copyright was subsequently assigned to Peter Opsvik AS. The chair is manufactured and sold by Stokke AS on the basis of an exclusive licence agreement, which also has the obligation to pursue any copyright infringement.

- 25 The memorandum of the Norwegian advocate Helge Olav Bugge, ‘License and Company History related to Stokke and Peter Opsvik re Tripp Trapp’ contains a chronological account of how the rights to the ‘TT chair’ have come to be vested to the invalidity applicant. The creator of the ‘TT chair’ was the designer Peter Opsvik. On 6 October 1972 a licence agreement was concluded between Peter Opsvik and Stokke Fabrikker AS under which the latter was granted a sole license right to manufacture and sell the ‘TT chair’, and the right and obligation to take action against any imitation of the product though Peter Opsvik retained his copyright. In 1984, Peter Opsvik transferred the licence agreement and the copyright to the ‘TT chair’ to Peter Opsvik AS, the majority shareholding being owned by Peter Opsvik and his sons (66%), the remaining 34% by an environmental charity foundation. Following in a group demerger in 1984, the rights enjoyed by Stokke Fabrikker AS under the licence agreement and the right to commercialise the ‘TT chair’ were transferred to Stokke Industri AS. In 1995 and a new licence agreement was concluded between Peter Opsvik AS and Stokke Industri AS conferring upon the latter the right to manufacture and sell the ‘TT chair’ and to take action against infringement of the copyright. In 1998 there was an internal group agreement within the Stokke group. In 2000 there was another merger within the Stokke group under which all rights and obligations were transferred to Stokke Gruppen AS. In 2004, Stokke Gruppen AS changed its name to Stokke AS.
- 26 The foregoing memorandum was presented in proceedings before the German courts. Indeed, the Danish and other courts in the judgments referred to by the invalidity applicant confirm the *locus standi* of the invalidity applicant and its predecessors, named as the party whose rights have been infringed, the right to manufacture, sell and pursue infringements of the copyright to the ‘TT chair’. For example, the German Hanseatic Court of Appeal in its judgment of 1 November 2001 (Annex 18 of observations of 14 September 2011) corroborates the content of the above memorandum namely that the plaintiff Stokke Gruppen A/S derives its pertaining right from a licensing agreement made on 6 October 1972 with the Norwegian designer Peter Opsvik, and that under that licensing agreement its legal predecessor Stokke Fabriker A/S was granted the exclusive right of use in such item of furniture.
- 27 Accordingly, the Board considers that the invalidity applicant has proved its entitlement to the right to invoke copyright against the RCD, which it claims infringes its exclusive right to the ‘TT chair’, within the meaning of Article 25(3) CDR pursuant to Article 53 of the Danish Consolidated Act on Copyright 2010.

Judgments of the Danish courts

- 28 Article 25(1)(e) CDR expressly refers to the national law governing the distinctive sign.
- 29 As evidence of its copyright under Danish law, the invalidity applicant cites the following judgments:

- Danish Supreme Court judgment of 28 June 2011 in Case 306/2009 finding the ‘Lulu chair’, below, an infringement to the copyright to the ‘TT chair’ (Exhibits 30 and 31 in observations of 14 September 2011):



- Danish Supreme Court judgment of 5 January 2001 case II 352/1999 finding the ‘2-Stepchair’ below a close imitation infringing the copyright to the ‘TT chair’ (Exhibits 6 and 7):



- Judgment of Danish Western High Court in Case B. S. 3-1771/90 (Exhibits 4 and 5) of 10 April 1992 upholding the judgment of the Danish City Court of Herning finding the ‘VARI A model X children’s chair’ below an infringement of the copyright to the ‘TT chair’ irrespective of the differences in e.g. the design of the legs:



- Judgment of Danish Western High Court in Case VL B-2118-08 of 28 May 2009 upholding the judgment of the Danish City Court of Aarhus in Case B.S. 8-1069/2007 and finding the 'Hauch Alpha chair' below pictured alongside the 'TT chair' an infringement of the copyright to the 'TT chair' (Exhibits 10 and 11):



Copyright protection in Denmark for works of applied art

- 30 Applied art, a work intended for practical use, such as the design of a children's highchair may be protected as a work of applied art pursuant to Chapter 1 paragraph 1(1) of the Danish Copyright Act, provided it can be characterised as artistic work.

- 31 The Danish Copyright Act does not define what constitutes an artistic work. It is apparent from the above mentioned judgments that, in order for an embodiment to be characterised as artistic work it must result from creative effort of an individual nature that brings about something that is original.
- 32 The exclusive right conferred by the Danish copyright law applies for the lifetime of its creator and for 70 years after the end of the year of his death. The period of protection is the same for works of applied art. The assessment of whether Stokke may invoke the copyright to the 'TT chair' needs to be based on the factual situation of children's chairs in 1973 when the 'TT chair' was created. It is, thus, irrelevant how highchairs may be designed nowadays.

'TT chair' protected as a work of applied art in Denmark

- 33 The Danish judgments referred to above acknowledge that the 'TT' chair is a work of applied art protected by artistic copyright (see the above judgment of the Danish Supreme Court stating that the design of the 'TT chair' is protected as a work of applied art according to Section 1 of the Copyright Act and judgment of 10 April 1992 of the Danish City Court of Herning upheld by the Danish Western High Court in Case B. S. 3-1771/90 according to which the 'Tripp Trapp' chair is an internationally recognised piece of applied art protected by artistic copyright ... undisputedly an artistic work, under Section 1 of the Danish Copyright Act; the judgments of the Danish courts concerning the 'Hauch Alpha' chair referring to the design of the 'TT chair' as 'extraordinary and original').
- 34 The Danish Supreme Court has also recognised that the 'TT chair' is a 'pioneer design, in form', 'a ground breaking design, which departed significantly from the designs of the time and was a completely original design, which deviated from the usual baby-chair designs of the time' (see the judgments of the Danish Supreme Court in the 'Lulu' case and in the '2-step chair' case).
- 35 According to the Danish courts, the originality of the 'TT chair' is to be found in the straight and parallel lines, the very stringent form, the use of the L-shape for the posts and the horizontal legs, the way the adjustability of the chair has been designed, and the contrast of the light wood with black metal bars and screws.
- 36 With regard to artistic works of applied art, which are intended for practical use, an important issue is whether a stricter creativity requirement applies to obtain copyright protection insofar as far as the exclusive right to a specific design with practical implications could effectively amount to a de facto patent. This is effectively the rationale behind the RCD proprietor's argument that a product or elements of a product that have been patent protected cannot after the expiry of the patent be considered a design or design element and that once a patent has lapsed, the technical aspects claimed under the patent are free for all to use.
- 37 The invalidity applicant's position in response is that the technical elements of the 'groove mechanism' that had been patent protected could have been achieved differently, and do not dictate the design of the 'TT chair' as a whole and further refers to the expert opinion of Prof. Marinissen, Emeritus Professor of Industrial Design Engineering, Delft University of Technology, who was asked to draw a

chair incorporating the technical invention in the patent application and who produced several drawings of chairs that complied with the patent, but none resembling the ‘TT chair’. His conclusions correspond with those of the independent expert appointed by the Danish Supreme Court referred to in the judgment of 28 June 2011, whose opinion was that the ‘TT’ was a ‘completely original design for the time’; ‘The design of the ‘TT chair’ deviated from the usual baby-chair designs of the time’; ‘The design of the ‘TT chair’ does not necessarily follow from the technical features set out in the patent requested.’

Scope of copyright protection: Overall evaluation and relevant public

- 38 The key element of copyright is an exclusive right to the exploitation of the work. The exclusive right also encompasses the work in a different embodiment. The scope of copyright is not so wide as to include any adaptation that is sufficiently comprehensive as to create a new and independent work.
- 39 It is clear from the judgments of the Danish Supreme Court that the issue must be judged from the perspective of the non-expert public, that an overall evaluation must be made and whether the non-expert, who has no specialist background or interest in furniture in this case, would perceive the alleged adaptation as confusingly similar to the prior art – see the Danish Supreme Court judgment concerning the ‘2-step chair’ in which it was found that ‘according to an overall evaluation, the design of the form of the ‘2-step chair’ has a considerable likeness to the ‘TT chair’, which is not motivated by function, and the two chairs are confusingly similar to persons without any specialist background or interest in furniture.’
- 40 The Danish Supreme Court in its judgment rendered in connection with the ‘2-step chair’ accepted that following the expiry of the patent, copyright protection could only concern the forms that are not a necessary consequence of the constructive idea. However, in relation to the ‘TT chair’, it considered that ‘a chair utilising the constructive idea may be designed in another idiom, for example in connection with the design of the bearing sides’, in other words, that the possibility of adjustment could have been achieved by other means. Accordingly, it found that although the chairs differed when seen from the side, the ‘2-step chair’ differed from the ‘TT chair’ by the curved supporting piece, the curved stringers, the curved milled grooves on the legs and the placing of the transverse bars between the legs, but when it is not possible to see the chairs at the same time they are confusingly similar to persons without any specialist background or interest in furniture since the characteristic appearance of the ‘TT chair’ is also present in the ‘2-step chair’ constructed according to the same technical principles. According to an overall evaluation, The Danish Supreme Court concluded that the design of the form of the ‘2-step’ chair had a considerable likeness to the ‘TT chair’ and infringed the copyright to the ‘TT chair’.
- 41 Likewise, the Danish Western High Court in Case VL B-2118-08 concerning the nearly identical ‘Hauch Alpha chair’ found that the ‘Hauch Alpha chair’ infringed the copyright to the ‘TT chair’, because all functions, possibilities of adjustment

and technical solutions had been adopted without changes in the design of the ‘Hauch Alpha’ chair. It accepted that compared to the ‘TT chair’ almost all details of the design of the ‘Hauch Alpha’ differ, but that, on the whole it was very similar to the ‘TT chair’ in particular because all its functions, possibilities of adjustment and technical solutions had been adopted without changes in the design of the ‘Hauch Alpha’ chair. It noted that the design of the ‘TT chair’ was extraordinary and original due to its lines, form and potential use and that even if almost all details of the ‘Hauch Alpha’ chair differed, it was on the whole very similar, in particular because all functions, possibilities of adjustment and technical solutions have been adopted without changes in the design of the ‘Hauch Alpha’ chair.

- 42 Similarly, the Danish Supreme Court of 10 April 1992 in case No 3-1711/90. found that despite the difference in the design of the legs, based on an overall assessment the ‘Vari Model X’ chair had such likeness to the ‘Tripp Trapp chair’ that it is infringed the plaintiff’s copyright to the ‘TT chair’, which is an undisputed original work, which is publicly known after more than 15 yearlong uninterrupted period of production and marketing’.
- 43 Despite the findings of the Danish courts, the RCD proprietor argues that there were many highchairs similar to the ‘TT’, about which there is little original, and refers to depictions of chairs on the website of the Vitra Design Museum existing at the time the ‘TT chairs’ were created which in its view exhibit characteristics of the ‘TT chair’. The Board notes that all of these chairs identified by the RCD proprietor differ in overall impression from the ‘TT chair’. Only three products are children’s highchairs, namely, the ‘JP Tarbox’ patent 1924, ‘the Zig Zag’ and the ‘Clairmonte’ from 1947. The ‘JP Tarbox’ does not display the lightness, the straight lines or the floating characteristic of the ‘TT chair’. Neither the ‘Clairmonte’ nor the ‘Zig Zag’ displays the type of adjustability characteristic of the ‘TT chair’.

Application of Danish copyright to the present case

- 44 The key element of copyright is an exclusive right to the exploitation of the work. The exclusive right also encompasses the work in a different embodiment. The scope of copyright is not so wide as to include any adaptation that is sufficiently comprehensive as to create a new and independent work. In the present case, therefore, the issue before the Board is whether under Danish copyright law as interpreted by the Danish courts, the RCD is a new and independent work. The fact that the Invalidity Division rightly found that the prior design did not form an obstacle to the novelty of the RCD pursuant to Article 5 CDR cannot imply that the RCD cannot include either a copyrighted work (or a distinctive sign) as the RCD proprietor argues.
- 45 It is true that the differences between the designs are as follows:
 - The number of grooves differ (11 in the RCD compared to 14 in the prior design);

- the plates and other elements of the RCD are rounded when compared to those in the ‘TT chair’;
 - the side view of the chairs differs (an inverted ‘V’ in the RCD and an inverted ‘7’ or ‘L’ in the ‘TT’);
 - The side posts and the four legs are not connected to one another in the RCD;
 - How the base is conceived is different. The base of the RCD is shaped by one metallic bar and one wooden bar connecting the front and back posts respectively; the back legs are connected by a wooden post placed a few centimetres above the base. The front legs are connected by a thin metal bar placed a few centimetres above the base. The ‘TT chair’ has only one interconnecting post in the middle of the side posts, forming an ‘H’ or ‘I’ shape. The ‘TT’ does not have a metal bar at the base.
 - The shape of the backrest is not the same.
 - The plates are rounded and are identically shaped at the front and the back. The edges of the plates of the prior design are square at the front and curved at the rear.
 - The overall measurements also differ. The ‘TT’ is 78 cm in height, 46 cm in width and 49 cm in depth. The RCD is 84 cm in height, 45.4 cm in width and 55 cm in depth compared to the prior design without the upper backrest of 78 cm in height, width 46 cm and depth 43 cm.
- 46 As noted by the Danish courts, the horizontally cut groove mechanism that is present in both designs cannot be excluded (see also the German Hanseatic Court ruling), a chair fulfilling the patent requirements could have been conceived differently than the ‘TT chair’. Both the RCD and the prior design of the ‘TT chair’ employ the same mechanism of horizontally cut grooves positioned on the front post.
- 47 Even though the ‘L-shape’ seen from the side is a characteristic element of the design of the ‘TT chair’, it achieves its design characteristics through a multitude of style elements: the concept of parallel lines, the overall symmetry of shapes, the way the adjustability of the chair has been designed, that is by allowing an adjustment of the seat and foot plates alongside posts that are inclined backwards, as well as the contrast of the light wood with the black metal bars and screws. The fact that viewed from the side the chairs may differ is not essential as illustrated by the above mentioned judgments of the Danish courts.
- 48 Thus, in the RCD as in the comparable ‘Hauch Alpha chair’, which like the RCD differs in the side view as well as in almost all the details, all functions, possibilities of adjustment and technical solutions had been adopted without changes in the design of the RCD. In an overall evaluation, the design of the form of the RCD bears considerable likeness to the ‘TT chair’, which is not motivated by function and the two chairs would appear confusingly similar to the relevant public defined by the Danish courts who is the person without any specialist

background or interest in furniture. That person will not pay attention to the details of height, width, the positioning of the black horizontal metal bars, the thickness of the side bars and foot plates, or the precise number of grooves.

- 49 In the overall impression from the perspective of the relevant public the difference between the RCD and the 'TT' in the fact that supporting horizontal front bar in the side view of the 'TT' has been exchanged with a supporting vertical front bar in the side view of the RCD, is overshadowed by the fact that both the RCD and the 'TT' are designed in light/natural wood with metal bars. The use of the materials and the colour are a factor that must be taken into account in making the comparison between the designs. It is irrelevant that the 'TT' is sold in other colours. Moreover, the original characteristics of the 'TT' are taken over by the RCD, when the two chairs are compared from the front, whether in front or at an angle. The seat and foot plates, as well as the metal rods are narrow in both. Parallel lines are repeated in the side supports, the two plates and the two metal rods. As a contrast to the straight lines, the backrests are curved. Another characteristic of the 'TT' is the contrast between the supporting parts in light wood and the rods and screws in black metal. This is replicated in the RCD. The slanting L-shape a characteristic feature of the 'TT' is replicated in the inclination of the two front posts of the RCD. The RCD is also based on the same cantilever principle. The use of the cantilever principle, the relatively similar width of the side supports, the narrowness of the plates all result in the RCD presenting similarities with the characteristics of the 'TT'.
- 50 In light of the above considerations the Board considers that the RCD infringes the copyright to the 'TT' chair under Danish law.

Individual character

- 51 The Board also concurs with the findings of the Invalidity Division on the lack of individual character of the RCD since the overall impression produced on an informed user by the challenged design does not differ from that produced by the earlier design of the 'TT chair'.
- 52 The RCD and the 'TT chair's' both have the same structure of a side post that lean backwards with two adjustable plates between them that serve as a seat and footrest. There is not a significant difference in the degree to which the side bars incline. In both there are grooves that have been placed horizontally in the inner side of the two parts of the side posts. The planks that make up the backrest are curved in both and there is gap between them. The curvature of the waist bar does not differ substantially. There is a wooden waist bar in the RCD, which is rounded, as in the 'TT chair'. The curved shape of the front rail, the purpose of which is to ensure a child's safety, which can be assured by another form, is identically adopted in the RCD. How the waist strap is secured is not material since in both its central position and function is the same. Moreover, the arrangement of the seat and the footrest plates in a stair-like manner between the side posts, especially apparent viewed from the side, is the same in the designs in question.

- 53 The differences overall are not so conspicuous that they affect the overall impression of similarity of these designs. The details relied on by the RCD proprietor cannot have any impact on the overall impression produced on the informed user by the two highchairs, who is a person wishing to seat a child in a highchair and informed on the subject of children's chairs. The informed user will be guided by the basic structures alone and not by differences in the details, namely, the differences in the shape of the plates, any difference that there might be in the number of grooves, the difference viewed from the side, the slight difference in the angle of inclination of the front post viewed from the side, the extent of the gap between the parallel side posts, and the difference at the base.
- 54 For the above reasons, the Board considers that that the overall impression produced on an informed user by the challenged design does not differ from that produced by the earlier design of the 'TT chair'.
- 55 In light of the foregoing, the Invalidity Division rightfully invalidated the RCD.

Costs

- 56 Since the RCD proprietor is the losing party, it must bear the costs of the invalidity applicant pursuant to Article 70(1) CDR

Order

On those grounds,

THE BOARD

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the RCD proprietor to bear the costs of the invalidity applicant.**

Th. M. Margellos

E. Fink

H. Salmi

Registrar:

P. López Fernández de Corres