



Datum van
inontvangstneming

:

06/03/2024



ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI GENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

6 March 2024 *

(Community design – Invalidity proceedings – Registered community design representing a shoe – Disclosure of the prior design – Article 7 of Regulation (EC) No 6/2002)

In Case T-647/22,

Puma SE, established in Herzogenaurach (Germany), represented by M. Schunke and P. Trieb, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by E. Markakis, acting as Agent,

defendant,

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

Handelsmaatschappij J. Van Hilst BV, established in Waalwijk (Netherlands), represented by L. Jonker and M. Roosendaal, lawyers,

THE GENERAL COURT (Sixth Chamber),

composed of M.J. Costeira, President, M. Kancheva and E. Tichy-Fisslberger (Rapporteur), Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

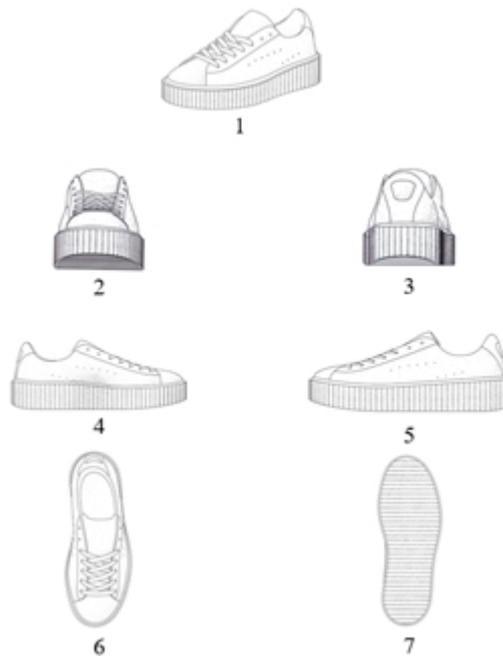
further to the hearing on 7 November 2023,
gives the following

Judgment

- 1 By its action under Article 263 TFEU, the applicant, Puma SE, seeks the annulment of the decision of the Third Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 11 August 2022 (Case R 726/2021-3) (‘the contested decision’).

Background to the dispute

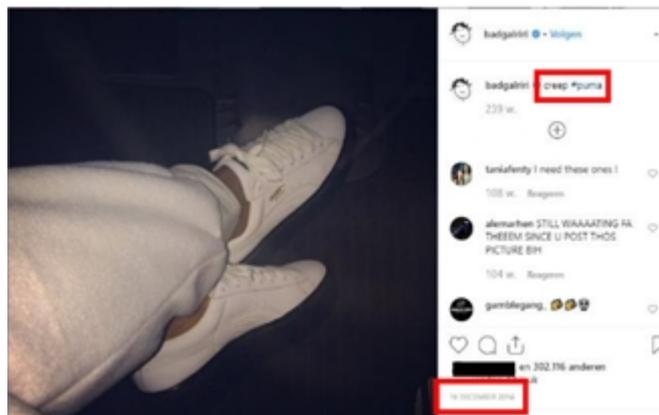
- 2 On 22 July 2019, the intervener, Handelsmaatschappij J. Van Hilst BV, filed with EUIPO an application for a declaration of invalidity of the Community design registered following an application filed on 26 July 2016 and represented in the following seven views:



- 3 The products in which the contested design is intended to be incorporated are in Class 02-04 of the Locarno Agreement Establishing an International Classification for Industrial Designs of 8 October 1968, as amended, and correspond to the following description: ‘Shoes’.
- 4 The ground relied on in support of the application for a declaration of invalidity was that set out in Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), read in conjunction with Article 4(1) of that regulation. The intervener had argued in

particular that the contested design lacked individual character within the meaning of Article 4(1) of Regulation No 6/2002, read in conjunction with Article 6 of that regulation, because it had been disclosed by the applicant itself prior to the 12-month period referred to in Article 7(2)(b) of that regulation (‘the grace period’). In support of its application, the intervener submitted, inter alia, the following:

- as Annexes IV to VI to the application for a declaration of invalidity: three posts, containing images, taken from the Instagram account ‘badgalriri’, dated 16 December 2014 and each receiving over 300 000 likes, reporting that Robyn Rihanna Fenty (‘Rihanna’) had been appointed as the applicant’s new creative director and that a contract had been signed to that effect, and showing Rihanna wearing a pair of white shoes with a thick black sole:





- as Annexes XVII and XVIII to the application for a declaration of invalidity, which were contained in a submission of the intervener of 24 April 2020: several articles reporting on Rihanna’s appointment as the applicant’s new creative director, as announced on 16 December 2014, including articles on ‘www.forbes.com’, ‘www.dazeddigital.com’, ‘www.trendalert.nl’, ‘www.nssmag.com’ and ‘mail.online’. Those articles, all published on 16 or 17 December 2014, reproduced, inter alia, images from Rihanna’s Instagram account of 16 December 2014, including the following:





- as Annexes XIX and XX to the application for a declaration of invalidity, which were contained in a submission of the intervener of 24 April 2020: an article that appeared on ‘hausofrihanna.com’, dated 17 December 2014, reporting on Rihanna’s appointment as the applicant’s new creative director and containing, inter alia, the following images of the prior design, as well as a screenshot from the *Wayback Machine* dated 28 December 2014 showing that article:





- 5 By decision of 19 March 2021, the Invalidity Division granted the application for a declaration of invalidity, finding, in particular and in essence, that the contested design did not have the individual character required by Article 6 of Regulation No 6/2002, in the light of a comparison between the overall impression produced by the contested design and the overall impression produced by the design appearing in the images reproduced in paragraph 4 above.
- 6 On 21 April 2021, the applicant filed a notice of appeal, pursuant to Articles 55 to 60 of Regulation No 6/2002, against the decision of the Invalidity Division.
- 7 By the contested decision, the Board of Appeal of EUIPO dismissed the applicant's appeal in its entirety. First, as regards the applicant's argument that the application for a declaration of invalidity was inadmissible on account of the breach of a contractual obligation by the intervener and its abusive character, the Board of Appeal found that that argument was to be rejected. According to the Board of Appeal, that argument was not capable of demonstrating an error affecting the Invalidity Division's findings and was therefore irrelevant in the proceedings before it. Secondly, as regards the substance of the case, for the purpose of applying Article 25(1)(b) of Regulation No 6/2002, read in conjunction with Article 6 thereof, the Board of Appeal found, in essence and in particular, that, in view of the overall impressions given by the designs at issue, the prior design 'destroy[ed]' the individual character of the contested design. The Board of Appeal observed that the prior design had been disclosed to the public before the start of the grace period, as could be inferred from the evidence submitted by the intervener (see paragraph 4 above). According to the Board of Appeal, the images submitted by the intervener were sharp and sufficiently clear, and thus permitted a clear and unambiguous identification of the prior design for the purposes of the comparison with the contested design in the context of assessing the latter's individual character. The Board of Appeal observed that, on the other hand, the applicant had not proven or presented any indicia showing that the publications submitted by the intervener had been manipulated in order to alter the facts. Lastly, the Board of Appeal observed that the applicant had failed to furnish any evidence which could establish that the online publication of the news articles and posts in question would be insufficient to enable the specialist circles within the European Union to become aware of the prior design.

Forms of order sought

- 8 The applicant claims that the Court should:
- annul the contested decision;
 - order EUIPO to pay the costs, including those incurred before the Board of Appeal.
- 9 EUIPO contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs in the event that a hearing is convened.
- 10 The intervener contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs, including those incurred before the Board of Appeal.

Law

- 11 In support of its action, the applicant puts forward two pleas in law alleging, first, that the Board of Appeal incorrectly concluded that the application for a declaration of invalidity was admissible and, secondly, infringement of Article 7(1) of Regulation No 6/2002, in so far as the Board of Appeal further incorrectly concluded that the prior design had been disclosed within the meaning of that provision.

The first plea, alleging that the application for a declaration of invalidity was inadmissible

- 12 By its first plea, the applicant submits, in essence, that the application for a declaration of invalidity lodged by the intervener with EUIPO was inadmissible.
- 13 In the first place, the applicant argues that, by submitting that application, the intervener infringed certain contractual obligations existing between it and the applicant. More specifically, the applicant maintains that, in the context of infringement proceedings brought by it against the intervener before the Netherlands courts, they reached an agreement to terminate the infringement proceedings, that agreement having been followed by a withdrawal of the legal proceedings initiated by it. However, by subsequently initiating the invalidity proceedings, the intervener disregarded that agreement after the applicant had been deprived under that agreement of the opportunity to obtain a court decision. The applicant maintains that there is an implicit obligation on the infringer in the

context of a settlement not to challenge immediately after that settlement the rights the infringement of which it has recognised under that settlement. In the second place, the applicant argues that, by filing the application in question, the intervener also acted in bad faith. The applicant maintains that the invalidity proceedings were initiated by the intervener for purposes extraneous to that type of proceedings. The applicant claims that, after filing the application in question, the intervener demanded, by way of settlement, exorbitant sums, namely EUR 156 360, to be reimbursed by the applicant. In the third and last place, the applicant argues that the use of an application for a declaration of invalidity, such as that at issue, amounts to an abuse of rights.

- 14 EUIPO and the intervener dispute those arguments.
- 15 The applicant's argument that the application for a declaration of invalidity was inadmissible is unfounded. In the context of the examination of the ground for invalidity relied on by the intervener before the adjudicating bodies of EUIPO, the question of the alleged existence of bad faith, of a possible infringement of a contractual obligation by the intervener or of the alleged abusive character of the intervener's application is irrelevant because, as the Board of Appeal stated, in essence, in paragraph 60 of the contested decision, while factors such as bad faith, infringement of a contractual obligation or abusive character may be relied on in the context of ad hoc civil law proceedings between the parties concerned, those factors cannot usefully be relied on as a defence in invalidity proceedings, such as those at issue, given that, in such proceedings, it is a matter of ruling on the individual character of the contested design, the assessment of which is objective. In invalidity proceedings, there is no need to rule on conduct, whether it be that of the proprietor of the contested design or that of the proprietor of the earlier design (see, to that effect, judgment of 9 March 2012, *Coverpla v OHIM – Heinz-Glas (Phial)*, T-450/08, not published, EU:T:2012:117, paragraph 48).
- 16 In any event, according to the applicant itself, the agreement concluded between it and the intervener was a court settlement which was intended to terminate the infringement proceedings brought by the applicant before the Netherlands courts, but which was not intended to create a prohibition on the intervener seeking a declaration of invalidity of the contested design. The applicant's expectation that the intervener would not initiate invalidity proceedings against the contested design or the feeling of surprise that it might have experienced when it established that the intervener had, through its application for a declaration of invalidity before EUIPO, called into question the existence of the contested design after having concluded that court settlement, cannot serve as a factual basis for concluding that there was bad faith or an abuse of rights on the part of the intervener.
- 17 It follows that the first plea must be rejected as unfounded.

The second plea, alleging infringement of Article 7(1) of Regulation No 6/2002

- 18 By its second plea, the applicant argues that, in failing to take account of the fact that the evidence adduced by the intervener in support of its application for a declaration of invalidity was insufficient to demonstrate disclosure of the prior design before the start of the grace period, the Board of Appeal infringed Article 7(1) of Regulation No 6/2002.
- 19 In the first place, regarding the four photos posted on Instagram and showing Rihanna wearing white tennis shoes with a black sole, submitted as Annexes IV to VI to the application for a declaration of invalidity and as Annexes XVII to XIX to the intervener's submission of 24 April 2020 (see paragraph 4, first and second indents, above), the applicant submits that those photos do not enable the features that form the overall impression produced by the prior design to be recognised in such a way as to enable that overall impression to be compared with the overall impression produced by the contested design.
- 20 The applicant argues that those photos are all of insufficient quality, since they are, in particular, too dark and blurred. It maintains that those images do not focus on the shoes, but on Rihanna. The applicant submits that, as a matter of fact, those images do not contain enough detail to make the features of the prior design visible unless those features are viewed from a retroactive perspective, that is to say, from the perspective of today and thus with the benefit of the knowledge that an informed user may have, at the present time, of the features of the contested design. The applicant argues that, in any event, not all views of the design are visible. Lastly, it submits that the Board of Appeal also failed to take into account the circumstances in which Instagram posts are usually perceived, and that this leads a fortiori to the fact that no detail whatsoever can be perceived in relation to the shoes shown. It is, the applicant argues, generally known that Instagram is almost exclusively used on mobile phones. In addition, at the time in question, namely in December 2014, and unlike today, one could not, the applicant maintains, zoom in on images on Instagram. It submits that that function was only introduced in September 2016 and argues that, even if it were to be considered that it is possible nowadays to zoom in on the images, that function does not help much to perceive small details in a photo, as the image quality is automatically degraded on Instagram.
- 21 In the second place, as regards the photo showing white shoes with a black sole, included in the publication contained in Annexes XIX and XX to the application for a declaration of invalidity (see paragraph 4, third indent, above), that is, the applicant submits, an image which should certainly not be equated with the images posted on Instagram.
- 22 First, the applicant argues that that photo does allow rudimentary identification of some features of the prior design, but only thanks to enlargement, which does not correspond to what the public saw in the present case. It maintains that that photo has a doubtful and obscure origin, as does the 'hausofrihanna.com' webpage itself.

The applicant submits that that website is an unofficial fan page dedicated to Rihanna and hosted by a woman residing in Barbados. It maintains that that website is the only website that has published a picture of the shoes side by side without them being worn by Rihanna. The applicant argues that the photo published on that website thus has nothing to do with the procedure for signing the contract under which Rihanna became the applicant's creative director, which was the event in connection with which the photos posted on Instagram were taken. The applicant claims that that photo obviously did not exist at the time the contract was signed. It argues that it could simply have been added to the 'hausofrihanna.com' website at any time without the date of publication necessarily having been changed.

- 23 Secondly and in any event, the applicant submits that, even if the photo in question was not a fake and had actually been published on the 'hausofrihanna.com' website before the start of the grace period, an act of disclosure could be ruled out in the present case, since such a publication 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 applicant maintains that, assuming that the photo in question is authentic, the relevant professional circles would also only have become aware of that photo by chance.
- 24 EUIPO and the intervener dispute those arguments.
- 25 As a preliminary point, it should be borne in mind that the assessment as to whether a design has individual character must be conducted in relation to one or more earlier designs, taken individually from among all the designs which have been made available to the public previously, and not in relation to a combination of features taken in isolation and drawn from a number of earlier designs (judgment of 19 June 2014, *Karen Millen Fashions*, C-345/13, EU:C:2014:2013, paragraphs 25 and 35). Thus, an earlier design must be an earlier design which is 'whole' or comprises 'all the component parts', and cannot be the result of a combination of features (see judgment of 27 April 2022, *Group Nivelles v EUIPO – Easy Sanitary Solutions (Shower drainage channel)*, T-327/20, EU:T:2022:263, paragraph 109 and the case-law cited).
- 26 In the present case, it is common ground that the prior design relied on by the intervener is such an earlier whole design and not a combination of features drawn from various earlier designs. The applicant does not dispute the uniqueness of the prior design, but only its disclosure.
- 27 Next, it should be borne in mind that, according to Article 7(1) of Regulation No 6/2002, for the purpose of applying Articles 5 and 6 of that regulation, a design is to be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, before the date of filing of the application for registration, except where these events could not reasonably have become known in the normal

course of business to the circles specialised in the sector concerned, operating within the European Union.

- 28 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.
- 29 According to the case-law, a design is deemed to have been made available once the party asserting it has proved the events constituting the disclosure. In order to rebut 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 (see judgment of 2 March 2022, *Fabryki Mebli 'Forte' v EUIPO – Bog-Fran (Furniture)*, T-1/21, not published, EU:T:2022:108, paragraph 41 and the case-law cited).
- 30 Therefore, in order to establish that an earlier design has been disclosed, it is necessary to carry out an analysis in two stages, consisting in examining, in the first place, whether the evidence submitted in the application for a declaration of invalidity shows, on the one hand, facts constituting disclosure of a design and, on the other hand, that that disclosure occurred earlier than the date of filing or priority of the design at issue and, in the second place, where the holder of the design at issue has claimed the contrary, whether those facts could reasonably become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union, failing which a disclosure will be considered to have no effects and will not be taken into account (see judgment of 2 March 2022, *Furniture*, T-1/21, not published, EU:T:2022:108, paragraph 42 and the case-law cited).
- 31 Furthermore, it must be borne in mind that Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Regulation No 6/2002 (OJ 2002 L 341, p. 28) does not contain any indications as to the evidence of disclosure of the earlier design to be given by the applicant for a declaration of invalidity. In particular, Article 28(1)(b)(v) of that regulation merely requires that where the application for invalidity is based, in particular, on the lack of novelty of the Community design for which protection is claimed, it must contain the indication and the reproduction of the invalidity applicant's design that could form an obstacle to the novelty or individual character of the Community design for which protection is claimed, as well as documents proving the previous disclosure of the earlier design (see judgment of 15 March 2023, *Homy Casa v EUIPO – Albatros International (Chairs)*, T-89/22, not published, EU:T:2023:132, paragraph 28 and the case-law cited).
- 32 Lastly, neither Regulation No 6/2002 nor Regulation No 2245/2002 specifies a compulsory form of evidence to be lodged by the invalidity applicant to prove the disclosure of his or her design before the date of filing of the application for

registration of the design for which protection is claimed. Thus, Article 28(1)(b)(v) and (vi) of Regulation No 2245/2002 merely requires that the application for a declaration of invalidity contain ‘documents proving the existence of [the earlier design]’ as well as ‘an indication of the facts, evidence and arguments submitted in support of [the grounds of the application]’. Equally, Article 65(1) of Regulation No 6/2002 provides only a non-exhaustive list of possible measures of inquiry before EUIPO (see judgment of 15 March 2023, *Chairs*, T-89/22, not published, EU:T:2023:132, paragraph 29 and the case-law cited).

- 33 It follows that, first, the applicant for a declaration of invalidity is free to choose the evidence which it considers useful to submit to EUIPO in support of its application for a declaration of invalidity and, secondly, EUIPO is required to examine all evidence submitted in order to establish whether that evidence actually proves disclosure of the earlier design (see judgment of 15 March 2023, *Chairs*, T-89/22, not published, EU:T:2023:132, paragraph 30 and the case-law cited).
- 34 Nevertheless, the disclosure of an earlier design cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence that proves effective disclosure of the earlier design on the market. In addition, the elements of evidence provided by the invalidity applicant must be assessed in relation to each other. Whilst some of that evidence might be insufficient on its own to prove the disclosure of an earlier design, the fact remains that, when combined or read in conjunction with other documents or information, it may nevertheless contribute to establishing disclosure. Lastly, in order to assess the evidential value of a document, it is necessary to verify the plausibility and the accuracy of the information which that document contains. Account must be taken of, inter alia, the origin of the document, the circumstances of its preparation and its recipient, and whether it seems from the content to be sensible and reliable (see judgment of 15 March 2023, *Chairs*, T-89/22, not published, EU:T:2023:132, paragraph 31 and the case-law cited).
- 35 In the present case, the Board of Appeal, in paragraphs 37 to 45 of the contested decision, found, in essence, first, that the evidence adduced by the intervener was sufficient to demonstrate the events constituting disclosure of the prior design, and, secondly, that the applicant had, for its part, failed to prove to the requisite legal standard that the circumstances of the case prevented the circles specialised in the sector concerned from becoming aware of the publication of the prior design. On the basis of those assessments, the Board of Appeal found, by way of conclusion, in paragraph 45 of the contested decision, that the prior design had been made available to the public within the meaning of Article 7(1) of Regulation No 6/2002.
- 36 In accordance with the provisions and case-law principles set out in paragraphs 27 to 34 above and in the light of the material in the file before the Court, that finding

of the Board of Appeal, which is not vitiated by an error of assessment, must be upheld.

Proof of the events constituting disclosure of the prior design

- 37 As regards the events constituting disclosure of the prior design, it must first of all be noted that the overall impression produced by a design on the informed user can be established by first looking at its features.
- 38 In the present case, as regards the features of the prior design, the Board of Appeal observed, in essence, in paragraphs 40 and 55 to 57 of the contested decision, that those features consisted of a shoe with a number of lines along the upper and a decorative top stitching, delineating the throat of the shoe and the heel tab; an upper with a low collar which is approximately the same thickness as the sole; a large flat sole of uniform thickness with pronounced ribbing, which creates a ledge with the upper; an Achilles notch that is the same height as the throat of the shoe; seven pairs of circular eyelets and a thick shoe lace; a pattern of two parallel lines of small holes (dots) on the side of the upper; a verbal and figurative element, located on one side of the upper.
- 39 As can be inferred from the arguments set out in paragraphs 19 and 20 above, the applicant claims, in essence, that it was not possible for the Board of Appeal to discern those features from the four photos submitted as Annexes IV to VI to the application for a declaration of invalidity and as Annexes XVII and XVIII to the intervener's submission of 24 April 2020 (see paragraph 4, first and second indents, above), which were posted on Instagram and which – as is common ground – show Rihanna wearing white tennis shoes with a black sole.
- 40 It must be held that that claim is unfounded.
- 41 The posts showing Rihanna wearing white trainers, submitted as Annexes IV to VI and XVII and XVIII to the application for a declaration of invalidity (see paragraph 4, first and second indents, above), which are all images taken from an Instagram account named 'badgalriri', make it possible to identify, with the naked eye or by enlarging those photos, all the features of the prior design from various angles.
- 42 More specifically, the front perspective and the side views of the design illustrated in those images make it possible to identify a sports shoe with a number of lines and holes along the upper, a closure of seven holes with thick laces and a flat and thick, vertically striped sole. All the other features of the prior design are also perceptible. In particular, the word element is shown in the first image set out in the first indent of paragraph 4 above and in the second photo set out in the second indent of paragraph 4 above.
- 43 In so far as the applicant's arguments revolve around whether it is possible to discern vertical ribbing on the edge of the thick sole in the images in question, it

must be stated that that ribbing can be distinguished in the first photo set out in the second indent of paragraph 4 above.

- 44 Moreover, it should be noted that the posts showing Rihanna wearing white trainers, submitted as Annexes IV to VI and XVII and XVIII to the application for a declaration of invalidity, come from websites the existence of which is not disputed by the applicant and which, from their content, must be regarded as reliable. It should be recalled that the Instagram account from which the photos in question originate is Rihanna's own Instagram account. It is true that, in some parts of the application, the applicant appears to call into question the fact that it is indeed Rihanna's Instagram account, as it existed in December 2014. However, that general contention must be rejected, as it has no substantiated factual basis that makes it possible to cast doubt on the fact that it is Rihanna's Instagram account existing at the time in question. In addition to being unsubstantiated, that contention is not supported by any evidence.
- 45 Those findings are not called into question by the applicant's arguments.
- 46 First, the applicant's argument that the photos posted on Instagram are too dark and blurred and therefore of poor quality must be rejected as unfounded. The images posted on Instagram are of sufficient quality to allow all the features of the prior design to be recognised, bearing in mind that what counts in that regard is the appearance and quality of those photos as contained in EUIPO's file, which has been placed by that agency on the Court's file, and not the quality, which is admittedly worse, of the reduced versions of those photos as contained in the contested decision or in the written pleadings of the parties to the dispute.
- 47 Secondly, the applicant's argument that the images in question do not focus on the shoes, but on Rihanna, must be rejected for two reasons. In so far as it relates to the first of the photos set out in the first indent of paragraph 4 above and to the second image set out in the second indent of paragraph 4 above, that argument has no factual basis. Those photos focus on Rihanna's legs and shoes. Moreover, that argument is ineffective. It is true that the other images do not focus on the shoes, but those other images nevertheless make it possible to perceive the overwhelming majority of the elements making up those shoes and, more importantly, all the features of the prior design referred to in paragraph 38 above.
- 48 Thirdly, the argument that the images in question do not contain enough detail to make the features of the prior design perceptible unless those features are viewed from a retroactive perspective, that is to say, with the benefit of the knowledge that an informed user may have, at the present time, of the features of the contested design, must be rejected as unfounded. As has already been noted, the front and side views of the shoes appearing in the images in question make it possible to identify a sports shoe with a number of lines and holes along the upper, a closure of seven holes with thick laces and a flat and thick, vertically striped sole, as well as all the other features of the prior design. The perception of those

features is immediate, that is to say, it does not depend on the knowledge that an informed user might have of the features of the contested design.

- 49 Fourthly, the argument that not all views of the prior design are visible must be rejected. It is true that the applicant does not specify which part of the shoes appearing in the images in question is not visible. In the light of the images in question, it must be concluded that the applicant is referring to the rear part of the shoes. However, if the applicant's argument is to be understood in such a way, that argument is not convincing. In the first photo set out in the first indent of paragraph 4 above and in the second image set out in the second indent of paragraph 4 above, a significant portion of the rear part of the left shoe worn by Rihanna can be distinguished. In view of the other photos and given that the shoes are manufactured in such a way as to constitute a pair of uniform shoes, it must be concluded that the left rear part of the left shoe – which is, admittedly, not perceptible – shares the features of the visible portion of the left shoe, in particular as regards the thickness of the sole and the vertical ribbing. Lastly, in view of the images in question, there is no reason to infer that the right shoe would be different from the left shoe, in particular as regards the thickness of the sole and the vertical ribbing.
- 50 Fifthly, it is necessary to reject as unfounded all of the applicant's arguments alleging, in essence, that the Board of Appeal failed to take into account the fact that the Instagram application is almost exclusively used on mobile phones, that the quality of the photos shown thereon is always degraded, which makes the small details on such a photo imperceptible, and that those details can only be discerned, if at all, by zooming in on the photo, which was not even possible in 2014.
- 51 The photos in question are not so blurred or small that the details in those photos cannot be discerned. In addition, it is common knowledge that, as early as 2014, a photo shown on Instagram could be the subject of a screenshot – inter alia on a mobile phone – which could, in turn, be zoomed in on.
- 52 Furthermore, in so far as, by that argument, the applicant appears to wish to assert that nobody took an interest in Rihanna's shoes in December 2014 and that nobody therefore perceived the prior design, the following must be noted.
- 53 Simply on account of the fact that, in December 2014, Rihanna was a world-famous pop star, it should be observed that both her fans and the circles specialised in the fashion sector had, at that time, developed a particular interest in the shoes that she wore on the day on which the contract under which the star became the applicant's creative director was signed. That being the case, it is perfectly reasonable to take the view that a not insignificant proportion of the people who were interested in music or in Rihanna herself, including her clothing, in December 2014 viewed the photos in question closely in order to discern from those photos the appearance of the shoes that the star wore, thus recognising the features of the prior design.

- 54 It follows that, contrary to what the applicant claims, the photos set out in the first and second indents of paragraph 4 above are sufficient in themselves, in terms of the number of details that they show, as well as in terms of their visual quality, for it to be concluded that, on the date on which the contested decision was adopted, the features of the prior design were discernible.
- 55 In those circumstances, there is no need to address the question whether the Board of Appeal’s findings regarding the identification of the features of the prior design may also be based on the second photo contained in the publications submitted as Annexes XIX and XX to the application for a declaration of invalidity, namely the photo published on the website ‘hausofrihanna.com’, set out in the third indent of paragraph 4 above.
- 56 Furthermore, it must be held that the events constituting disclosure referred to above, dated 16 and 17 December 2014, predate by more than 12 months the filing of the application for registration of the contested design on 26 July 2016, with the result that the grace period provided for in Article 7(2)(b) of Regulation No 6/2002 does not apply in the present case.

The fact that certain disclosure events could not reasonably have become known in the normal course of business to the relevant specialist circles

- 57 In the present case, in addition to establishing the three distinct factual contexts of disclosure, that is to say, the three groups of publications accompanied by photos referred to in paragraph 4 above, the Board of Appeal, in paragraph 44 of the contested decision, found, in essence, that the applicant had failed to furnish any evidence which could establish that the online publication of the news articles submitted by the intervener would have been insufficient to enable the specialist circles within the European Union to become aware of the prior design.
- 58 The applicant does not, for its part, dispute the fact that the photos posted on Instagram set out in the first and second indents of paragraph 4 above, which are all events constituting disclosure, could reasonably have become known to the circles specialised in the sector concerned, operating within the European Union, in the normal course of business. By the arguments referred to in paragraph 23 above, it solely calls into question that the photo published on the website ‘hausofrihanna.com’ could have become known to the specialist circles.
- 59 It follows that the applicant has not put forward any arguments capable of supporting the exception provided for in the first sentence of Article 7(1) of Regulation No 6/2002, as regards the photos posted on Instagram set out in the first and second indents of paragraph 4 above having been perceived by the specialist circles, it being recalled that it was for the applicant to rely on that exception, as has already been stated in paragraphs 29 and 30 above.
- 60 In that context, for the purposes of completeness, it must also be borne in mind that, according to the case-law, it is sufficient that a single one of the 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 (see, by analogy, judgment of 14 March 2018, *Crocs v EUIPO – Gift Diffusion (Footwear)*, T-651/16, not published, EU:T:2018:137, paragraph 57). It follows, as regards the present case, that if, for example, the very first of the images set out in the second indent of paragraph 4 above could have become known to the circles specialised in the sector concerned, operating within the European Union, since that photograph is, in itself, a disclosure event, that would make it possible to preclude that exception referred to in Article 7(1) of that regulation from applying. That is the case here.

- 61 It follows from the foregoing that it is necessary to uphold the Board of Appeal’s assessment as regards the photos set out in the first and second indents of paragraph 4 above not only in the light of the question whether events capable of supporting a disclosure of the prior design have been proved (see paragraphs 37 to 54 above), but also as regards the question whether those events of disclosure could have become known to the circles specialised in the sector concerned, operating within the European Union (see paragraphs 58 to 60 above).
- 62 In those circumstances, there is no need to address the question whether the second photo published on ‘hausofrihanna.com’, set out in the third indent of paragraph 4 above, could have become known to the specialist circles.
- 63 In the light of all the foregoing considerations, it must be held that the Board of Appeal was entitled to find, for the purposes of the comparison of the overall impression produced by each of the designs at issue, that the evidence furnished by the intervener during the proceedings before it, that is to say, more specifically, the images posted on the Instagram account, set out in the first and second indents of paragraph 4 above, satisfied the conditions required to demonstrate actual disclosure of the earlier design on the market on 16 or 17 December 2014 and, therefore, before the start of the grace period, within the meaning of Article 7(1) and (2)(b) of Regulation No 6/2002.
- 64 In view of those considerations, the second plea must also be rejected and the action must be dismissed in its entirety.

Costs

- 65 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.
- 66 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by EUIPO and the intervener.
- 67 In addition, the intervener has claimed that the applicant should be ordered to pay the costs which it incurred before the Board of Appeal. In that regard, it suffices to

note that, since this judgment dismisses the action brought against the contested decision, point 2 of the operative part of that decision continues to govern the costs incurred before the Board of Appeal (see, to that effect, judgment of 19 October 2017, *Aldi v EUIPO – Sky (SKYLITE)*, T-736/15, not published, EU:T:2017:729, paragraph 131).

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Puma SE to pay the costs.**

Costeira

Kancheva

Tichy-Fisslberger

Delivered in open court in Luxembourg on 6 March 2024.

V. Di Bucci

M. van der Woude

Registrar

President



**Certified copy of an original signed by qualified
electronic signature**

Registry of the General Court

6 March 2024