

tional court's declaratory judgement and for suspension of proceedings in OHIM until the national judgement becomes final.

The application for the invalidation of a design can be submitted as long as the design exists. However, since acquiescence (Art. 54 CTMR/ Art. 9 TMD) precludes the trade mark proprietor from opposing the use of that trade mark, it is arguable that under Art. 25(1)(e) CDR, such a defence could be accepted by way of analogy. However, similarly as with express consent to registration, CDR lacks legal ground for such an application.

## 2. Limits of protection of other distinctive signs and statute of limitations

With the exception of protection for company symbols and work titles, which under §23 MarkenG are subject to the fair use limitation in the same way as trade marks are, and names, which cannot be enforced in cases of use of own name and where freedom of speech has priority, there are no special limitations of protection for enforcement of the other types of distinctive signs. The application of the statute of limitations should however be considered with regard to all distinctive signs.

The right to prohibit use, as required by Art 25(1)(e) CDR is not limited in time and exists as long as the infringing activity takes place, i.e. in case of a Community design – as long as it is registered or protected as unregistered Community design. This lack of limitation can be questioned, as on the one hand the justification for the invalidation of a Community design is certainly the public interest in clearing the register of rights that do not deserve protection,<sup>285</sup> which should not be limited in time, but on the other hand – Art. 25(1)(e) CDR expressly refers to the fact that the invalidation can go only as far as the owner of the prior sign has the right to prohibit the use of the allegedly infringing design under the Community or national law, which may include the national provisions regulating the statute of limitations. As it has been argued by Hacker, the registration of a sign leads to a constant infringement and therefore the right to apply for its invalidation cannot be limited in time.<sup>286</sup> On the other hand arguably due to the public character of the Design Register, it must be assumed that the registration has become known to the holders of prior rights and the begin of the term of limitation is easy to establish. It is submitted that since Art. 25(1)(e) CDR refers to right to prohibit use, the assessment should not differ from that of

285 Ruhl 2007, *supra* note 89, Vor Art. 24-26, para. 3.

286 Hacker, *supra* note 19, 261.

infringement, including the statute of limitations. The commencement starting from the publication in the register seems an appropriate solution.

Under unfair competition protection, there is no explicit limitation of protection in time. As long as the competitive individuality exists and is able to indicate the origin or the specific features of the product and the anticompetitive behaviour is still effective (e.g. the design remains registered), the owner of the prior sign may institute an action under unfair competition rules.

The right to claim protection under national law for trade marks, company symbols and work titles is precluded under the statute of limitations after three years from the obtaining knowledge of the infringement,<sup>287</sup> according to §20 MarkenG. Similar rule applies to trade names and names under the general rule of §195 BGB.<sup>288</sup>

287 It is submitted that in the case of registered design it should be from the date of the registration and not actual gaining knowledge, due to the public nature of the registers.

288 Ingerl/Rohnke, *supra* note 24, Nach §15 paras. 27, 172.

