

O-240-11

REGISTERED DESIGNS ACT 1949 (AS AMENDED)

**IN THE MATTER OF REGISTERED DESIGN NO 3021251
IN THE NAME OF HUGHES ELECTRONICS LTD**

AND

**A REQUEST TO INVALIDATE (NO 28/09)
BY COMLYNX COMMUNICATIONS LTD**

Registered Designs Act 1949 (as amended)

In the matter of registered design no 3021251 in the name of Hughes Electronics Ltd

and

A request to invalidate (no 28/09) by Comlynx Communications Ltd

THE BACKGROUND, THE PLEADINGS AND THE INITIAL EVIDENCE

1) Hughes Electronics Ltd (“Hughes”) filed registered design no 3021251 on 14 May 2005. The design is said (on the form of application) to be a “telecoms adaptor”.

2) Comlynx Communications Ltd (“Comlynx”) requests the invalidation of the above registered design. The ground of invalidation is based on sections 11ZA/1B of the Registered Designs Act 1949 (as amended) (“the Act”). The claim is that Hughes publically disclosed the design at least 2 years before it applied for the design. The following material is provided in support of the claim:

- i) A 2003 product catalogue issued by Hughes. It is stated that the exact date on which the catalogue was disclosed is not known but it is believed to have been early 2003. It is stated that the adapter shown in the catalogue conforms to the registered design.
- ii) A 2004 product catalogue issued by Hughes. It is stated that the exact date on which the catalogue was disclosed is not known but it is believed to have been early 2004. It is stated that the adapter shown in the catalogue conforms to the registered design.
- iii) A letter dated 9 February 2004 from Hughes to Comlynx. Enclosed with the letter were samples of adapters which are said to conform to the registered design. The supplied adapters are not included in this material nor is a representation of them provided.

3) It should be noted that all of the above material and accompanying statements constitute evidence in these proceedings given the provisions of rule 21(1)(a) of the Registered Designs Rules 2006. The statement of case (which contains a statement of truth) is signed by Mr Richard Odley (later evidence identifies his as Comlynx’s managing director). Mr Odley is, therefore, the evidence giver.

4) Hughes filed a counterstatement denying the claims. Hughes claims that whilst the design was created in 2002 by one of its employees, tooling for the adaptor was not initiated until late 2003. Hughes states that it did not even have possession of an adaptor until 14 February 2004, with the first batch of adaptors for sale subsequently being shipped to the UK (from China) in April 2004, but not being sold until after 14 May 2004 (when the stocks of old style adaptors had run down); samples were not even offered until at least the beginning of June 2004. It is stated that the application for design registration was intentionally filed close to, but before, the expiry of the 12

month grace period for design registration under section 1B(6) of the Act. The three documents contained in Comlynx's evidence are commented on as follows:

- i) In relation to the 2003 catalogue: that the catalogue containing the design was only issued from June 2004 onwards. Catalogues issued in 2003 would not have contained it because the product did not exist then. It is explained that, as a cost-cutting measure, the 2003 front covers were also used in 2004.
- ii) In relation to the 2004 catalogue: similar explanations as above are given. It is stated that the 2004 covers were not introduced until the 2003 covers ran out. When the 2004 covers were launched (the exact date is not given), they were used until 2006. It is stated that the 2004 catalogue contained in Comlynx's statement of case was not issued until after June 2004.
- iii) In relation to the letter enclosing product samples: that in view of the above information, the samples provided in the letter must have been from Hughes' earlier generation of adaptors.

5) As with Comlynx's statement of case, all of the above constitutes evidence. The statement of case (which contains a statement of truth) is signed by Mr Glyn Hughes (later evidence identifies him as Hughes' managing director) who is, therefore, the evidence giver.

6) Both parties filed additional evidence to that referred to above. Neither side requested a hearing or filed written submissions in lieu of attendance. I will take into account, though, any submissions/arguments that have been made in the papers before me.

THE RELEVANT DATE(S)

7) The context of the dispute is a narrowly defined one. Comlynx claims that Hughes publically disclosed its design before the relevant date (by more than one year) with the result that the design lacks novelty whereas Hughes claims that any pre-application disclosures it made were made within the one year period prior to the relevant date. The reference to the one year period stems from section 1B of the Act, the relevant parts of which read:

- “(1) A design shall be protected by a right in a registered design to the extent that the design is new and has individual character.
- (2) For the purposes of subsection (1) above, a design is new if no identical design whose features differ only in immaterial details has been made available to the public before the relevant date.
- (3)
- (4)

- (5) For the purposes of this section, a design has been made available to the public before the relevant date if-
- (a) it has been published (whether following registration or otherwise), exhibited, used in trade or otherwise disclosed before that date; and
 - (b) the disclosure does not fall within subsection (6) below.
- (6) A disclosure falls within this subsection if-
- (a) it could not reasonably have become known before the relevant date in the normal course of business to persons carrying on business in the European Economic Area and specialising in the sector concerned;
 - (b) it was made to a person other than the designer, or any successor in title of his, under condition of confidentiality (whether express or implied);
 - (c) it was made by the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date;
 - (d) it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or
 - (e) it was made during the 12 months immediately preceding the relevant date as a consequence of an abuse in relation to the designer or any successor in title of his.
- (7) In subsections (2), (3), (5) and (6) above “the relevant date” means the date on which the application for the registration of the design was made or is treated by virtue of section 3B(2), (3) or (5) or 14(2) of this Act as having been made.
- (8)
- (9)

8) The relevant date is 14 May 2005. To be relied upon, any disclosure must have taken place before this date. However, the claimed disclosures are said to have been made by Hughes, so, sections 5(b) and 6(d) of the Act come into play. Disclosures made by Hughes in the twelve month period immediately preceding the relevant date cannot be counted against it. The twelve month period in question is 14 May 2004 to 13 May 2005. Therefore, any disclosures made by Hughes are only relevant if it is established that they took place before 14 May 2004.

THE ADDITIONAL EVIDENCE

Comlynx's evidence – witness statement of Richard Odley

9) Mr Odley explains that he is the managing director of Comlynx and that his evidence relies upon his “personal recollections, and my personal and company records and information”. In respect of the samples that accompanied the letter from Hughes in February 2004, these are said to still be in Comlynx's possession and that they appear to conform to Hughes' registered design and to the pictures in the 2003 and 2004 catalogues supplied with Comlynx's statement of case. A photograph of the letter and one of the retained samples is provided:



10) It is not possible for me to confirm that the sample conforms exactly to the registered design although I bear in mind Mr Odley's statement that it does. I note that the sample depicted has the word “secondary” on it. The relevance of this is that Comlynx's statement of case only referred to PSTN and PABX samples as disclosing the registered design. However, it seems clear from the evidence as a whole that the secondary adaptor is the same design as the PSTN and PABX

adaptors, the three adaptors look the same, but simply perform slightly different functions.

11) Mr Odley responds to the reference in Hughes' counterstatement that the sample products supplied on 9 February 2004 were earlier generations of the adaptors. He asks Hughes to provide evidence of such earlier generations being marketed at this time. He also refers to the 2003 & 2004 catalogues supplied with the statement of case. It is highlighted that in the 2003 catalogue the items were described as "adaptors" but in the 2004 catalogue the items were described as "line jack adaptors". The latter term is said not to be a usual industry term. It is stated that the term may have been created by Hughes to describe the new product. It is highlighted that the letter from February 2004 uses this new terminology and he therefore sees no basis for the sample provided being of an earlier generation.

12) Mr Odley also provides a letter dated 29 October 2008 from Hughes to Comlynx's legal representative. In this letter it is stated that the catalogue front covers are produced separately from the content. The outer binder is outsourced and the contents are produced in-house. It is stated that the 2003 catalogue binder was used until 2006 and that no 2004 or 2005 binders were produced. Mr Odley highlights that this is inconsistent with what is said in the counterstatement. Mr Odley asks that Hughes provides documentary evidence of the actual dates upon which the 2003 and 2004 catalogues were made available. I also note from this letter that Hughes claims to hold original computer dated drawings and confidentiality agreements with its original manufacturer and that it claims design rights dating back to these early documents.

Mr Hughes' evidence – witness statement of Glyn Hughes

13) Mr Hughes is the managing director of Hughes. He begins by explaining that various designs for the article in question exist in the market but that Hughes' design has a unique attractive compact design which has led to it being copied in China. He explains that there is little he can do to stop this, but if someone tries to sell a copy in the UK Hughes will send them a notice asking them to stop. He says that such a notice was sent to Comlynx on 8 October 2008.

14) In relation to the claimed disclosure in the February 2004 letter, Mr Hughes says that Mr Odley must be mistaken in terms of what samples were sent to him. He says that no samples were available to send to anyone at that time and that Hughes did not send Comlynx a sample of the new design until July 2004. Mr Hughes states that the bag in which the sample is contained (as shown in Mr Odley's evidence) does not originate from Hughes. He provides evidence of the bags (with Hughes' labelling) which is used when samples are sent out and when products are bagged up for sale. The bagging procedure Hughes adopts is shown in its company manual (an extract from this is provided). Mr Hughes states that the packaging in Mr Odley's photograph is thinner and may be of Chinese origin. The reason why labelling is used on Hughes' sample packaging is for traceability and to allow customers to order products. He later adds that the photographed sample could be one of Comlynx's own stock, one of Hughes later products re-bagged or a sample from an Asian vendor (a number of whom have produced copies). He believes it unlikely that a company would keep a sample unopened for 6 years without examining it.

15) Mr Hughes states that two different adaptors were sent to Comlynx on different dates. He refers to Hughes sales database which he says shows a sample being sent to Comlynx around 16 February 2004 (the entry actually relates to telephone calls about samples that had been provided - presumably the calls were follow-ups to the 9 February letter) and also a sample being sent on, or around, 20 July 2004. He states that a sample of the new design was also sent to all known potential customers on promotional cards in May 2005. The promotional card is shown in Appendix 4 (the sample provided with this flyer is the "secondary" adaptor"), the flyer carries no date. It is stated that Comlynx were sent a flyer. I can see from the sales database (the extract contains details about Hughes interactions with Comlynx) that the calls to Comlynx were on 16/17 February 2004 but nothing is recorded about the letter sent to Hughes on 9 February 2004. There is a note on 9 July 2004 reading: "this company imports LJ adaptors – sending him sample of our to see what they think so that they do not need to import them". There is also a note on the sales database dated May 2005 about the PABX mail-shot.

16) Mr Hughes states that it would be almost impossible for Mr Odley to recall the exact sample that was sent so long after the event. He then attaches a photograph (he no longer has physical samples) of its previous generation of adaptors which he believes were the ones sent with the letter in February 2004.

17) In terms of the catalogue covers, Mr Hughes repeats his evidence that the covers have no date point relationship with the content. He explains that, for economy and for carbon emission morality, old covers are used until the stock is exhausted. In terms of the claim to LINE JACK ADAPTOR being a new term coined by Hughes, he says that this is a widely used term often abbreviated to LJU. The adaptor adapts a "line jack unit" to an RJ45 interface. He provides an example of an unrelated business using the term "LJU telephone adaptors".

Hughes' evidence – witness statement of Mr Carl Risby

18) Mr Risby was the director of Rapid Response Ltd ("RR") between 2002 and 2007, a company which specialised in digital printing. He says that RR was a reasonably small company and that he was aware of every job that came in. He recalls three jobs that were undertaken for Hughes and that Ms Chantha Ung (an employee of Hughes) visited each time to make sure the job was correct. He states that the jobs also stand out in his mind because they were for very small batches of between 200-300 prints per time, which was a small amount even for his company. This made each print quite costly. Mr Risby states that he believes the three jobs were for catalogues for 2003, 2004 and 2006 and that there was no 2005 catalogue produced.

Hughes evidence – witness statement of Ms Chantha Ung

19) Ms Ung is an employee of Hughes. She states that although she cannot specifically recall (due to the time that has elapsed) exactly the samples which were sent to Comlynx in February 2004, she knows that it was not the 'new design adaptor'. She states that she sent Comlynx the old adaptor and followed this up with a call on 16 and 17 February 2004 to discuss it. After Comlynx declined what she refers to as the offer, she approached Comlynx again in July 2004 with the new

design adaptor which she states was a much more attractive compact unit. Ms Ung states that Hughes had just taken delivery of the new design adaptor (in July 2004) and she was targeting a small number of distributors (of which Comlynx was one) to test the market and build sales. She states that in February 2004 she did not have samples of the new design adaptor so she could not have sent them to Comlynx. Ms Ung further states that she would not have sent them exactly the same samples in July 2004 if she had only done so in February 2004, Comlynx having already “declined”. Ms Ung states that Comlynx were also sent the advertising mail-shot (referred to in Mr Hughes’ evidence) in May 2005, which also contained a sample of the new design. Much of the evidence she gives is taken from the records of the sales database of which she also provides a copy (as per Mr Hughes’ evidence).

20) Ms Ung states that the first time she sent Comlynx a catalogue was in July 2004 (this is taken from her notes in the sales database). She states that this would have been the catalogue with the 2003 front cover and that she knows this because Hughes did not get their 2004 catalogue covers printed and delivered until early July 2004 as they were still running down the 2003 covers. She states that the covers are bought in small quantities and are expensive which is why they are used before new ones are ordered. She states that there is a note in the sales database “chkd and intro” on 24 May 2005 whereby Comlynx had been contacted and the standard “intro” package sent to Comlynx which consists of an introductory letter and catalogue. She assumes that a new person at Comlynx had requested this and she states that this would have been the catalogue with the 2004 cover. She states that the 2004 covers took even longer to use up than the 2003 covers; the 2004 covers were used until 2006. She states that after the 2004 cover Hughes realised they could never use all the covers in a single year so they changed the format of the next cover to “2006-2007” so that it would cover two years and would look more current. She states that Hughes did not print any 2005 covers. Ms Ung states that the date of the cover does not date the inside of the catalogue as the inside is produced in-house and is changed constantly to reflect the product profile Hughes wishes to show.

Comlynx’s reply evidence – witness statement of Nigel Townley

21) Mr Townley is an employee of Vaxlynx, a company which operates out of the same offices as Comlynx. There is no explanation as to whether Vaxlynx and Comlynx are related. In any event, Mr Townley previously worked for Comlynx. He appears to be the “Nigel” referred to in Hughes’ sales database and it is reasonable to assume that he is the “Nigel” to whom the letter dated 9 February 2004 containing the disputed samples was sent.

22) Mr Townley does not recall a telephone call from Hughes on 20 July 2004 nor on 16 or 17 February 2004. He does though recall receiving two samples of products from Hughes which are identical to each other. He says the first was by letter dated 9 February (he identifies this as Attachment D to Mr Odley’s evidence) and the second via an undated flyer, he gives no date for the receipt of this. He recalls discussing the first sample with Mr Odley as it was an attractive product. He confirms that the photograph in Mr Odley’s attachment D is the same sample supplied with the flyer. Mr Townley has no recollection, and Comlynx has no records, of receiving any other samples from Hughes.

Comlynx's reply evidence – witness statement of David Stoker

23) Mr Stoker is an employee of Comlynx. His evidence also attests to the samples that were received initially in February 2004 and then later with an undated flyer (no date is given as to when the latter were received). He says the two samples were identical.

Comlynx's reply evidence – witness statement of Mr Odley

24) Mr Odley's 2nd witness statement is a mixture of fact, submission, and observations on what Hughes could have done to prove its case. The following points emerge:

- That the computer dated drawings and confidentiality agreements with the original manufacturer (both of which are referred to in the letter from Hughes to Comlynx's legal representative) relating to the new design have not been supplied to the tribunal.
- That HR Revenue and Customs require records to be retained for 6 years so Hughes (at the time the proceedings were launched) should have had in its possession (and probably should still have) documents relating to the purchase of the products from its supplier and documents relating to the samples which were supplied to Comlynx. None have been provided.
- That Comlynx have only received two sets of samples not three as claimed by Hughes. He says that Comlynx never received any samples in or around July 2004.
- That the unusualness of the initial approach in February 2004 (it was unusual because the companies are competitors) led to the retention of the samples and Mr Odley having a clear recollection of events. The fact that the catalogues were also retained is said to be further proof that Comlynx retained all relevant documentation.
- A photograph of the May 2005 mail-shot is provided from which he notes that the sample was not contained in the packaging that Mr Hughes gave evidence about.
- In relation to the abbreviation "LJU" it is stated that this stands for "Line Jack Unit" and not line jack adaptor. The product shown in Mr Hughes evidence from an unrelated party is said to be different and that the term "line jack adaptor" is unique to Hughes.
- That if Hughes' claim that the application for design registration was filed intentionally close but in good time before the 12 month grace period were true, Mr Hughes must have known precisely the date of first public disclosure. However, Mr Hughes does not know the exact date as all he can state is that the design was first sent to customers after the beginning of June 2004. He says that he would not have relied purely on memory so he must have had documentation, none of which has been supplied. If Mr Hughes was relying

on his memory then he may simply have forgotten about the disclosure to Comlynx in February 2004.

- In relation to Hughes' sales database, it is observed that no information is given as to whether it can be amended after the event and, so, its reliability is limited. It is highlighted that the records make no mention of what samples have been sent. Mr Odley accepts that the reference to the May 2005 mail-shot is correct (although the document is not dated and Comlynx cannot say exactly when it was received) but he highlights that there is no mention of 9 February 2004 letter. The 9 February 2004 letter also begins by referring to a telephone conversation which, similarly, is not recorded on the database. Mr Odley cannot recall the initiating conversation, however, this is not surprising given that the letter was addressed to Nigel (presumably Mr Townley) and not Mr Odley.
- That the prices of the old generation of products are unlikely to have been the same as the new generation so Hughes could have provided evidence of sales showing differing prices.
- That Hughes' own work procedures are that all stock should bear a batch and part number but these were not specified on the samples received. Also, the procedures indicate that a written record must be kept of all samples despatched yet neither the sample requisition form nor the warehouse form (both of which are referred to in Hughes company manual) have been supplied.
- There is no evidence as to when the packaging used by Hughes commenced and that Mr Hughes could have provided invoices for the supply of packaging. Mr Odley states that this means that what Mr Hughes says regarding the packaging cannot be relied upon.
- That the old design referred to and exhibited by Mr Hughes is the one he "believes" was sent in February 2004. He says that Mr Hughes' belief is inaccurate because he [Mr Odley] has the actual sample.
- That much of Ms Ung's evidence relating to her interactions with Comlynx rely too heavily on the sales database and that she is speculating about what happened. In terms of Hughes receiving the new adapter, it is highlighted that Ms Ung states that it was received in July 2004 whereas Mr Hughes states that samples were sent to customers in June 2004. It is said that she is simply relying on memory because there are no supporting documents.
- That there is no evidence other than Ms Ung's recollection that the 2004 covers were delivered in early July 2004. Mr Risby does not state when any of the deliveries took place and Mr Odley considers it incredible that Mr Risby can recall printing the catalogues bearing the dates 2003, 2004 & 2006 and also remembers not printing 2005.

25) Mr Odley then gives his views on the most probable scenario. He says that if Hughes cannot establish the date of first disclosure then it is likely that it simply

overlooked the February 2004 disclosure to Comlynx. If, on the other hand, Hughes is correct then Comlynx must have been retaining all of its evidence and swapped the packaging, all with a subsequent attack on the design in mind. He says that Mr Hughes is simply relying on his recollections and putting a present day slant on things – for example, the claim to being eco-friendly (this relates to the reusing of catalogue covers), whilst laudable, was not in most people’s mind back then.

DECISION

26) To find in favour of Comlynx, the tribunal must be satisfied that Hughes disclosed its registered design prior to 14 May 2004.

27) It is considered that the catalogues in Comlynx’s possession and referred to in its statement of case have the least degree of reliability when it comes to establishing a relevant disclosure. There are a number of reasons for this. Firstly, Comlynx’s evidence does little to explain the circumstances of their receipt and the statements made in terms of the date on which they were received are vague. In terms of the date of receipt, all that is said is that the 2003 and 2004 catalogues were believed to have been received in early 2003 and early 2004 respectively. There is no clear explanation or evidence as to why the catalogues were believed to have been received in early 2003/2004. It may be that the belief is based purely on the fact that the catalogues are for the year referred to. Without better supporting evidence the claim to disclosure on the basis of these catalogues is no more than speculation. A relevant disclosure cannot be established on such a basis. This is particularly so when one bears in mind the evidence of Hughes in respect of the re-using of front covers. Whilst it may be a little unusual to send potential customers a current catalogue dated with the previous year, there is nothing implausible in the explanations given by Hughes. Whilst it is true that there is no documentary evidence from Hughes as to when, exactly, the last 2003 catalogues were used (and by extension when the first 2004 catalogues were used) it is not incumbent on them to provide such evidence when the claim itself appears to be based on speculation.

28) When reaching the above finding I have noted the change in worded description of the articles in question from “adaptors” (in the 2003 catalogue) to “line jack adaptors” (in the 2004 catalogue). Comlynx say that the latter is a new term coined by Hughes. In the context of the catalogues this point has little relevance given that if this was a newly coined term to describe its new generation of products, why was this included only in the 2004 catalogue and not the 2003 catalogue when both catalogues are claimed to disclose the registered design? Furthermore, even though Hughes’ evidence of another trader using the term is not compelling (the other trader uses the term LJU adapter – LJU being an abbreviation for LINE JACK UNIT), it at least shows that LINE JACK is a known and used term (through the use of LJU) and, therefore, LINE JACK ADAPTOR simply appears to be a normal descriptive phrase. I also note from the 2004 catalogue that the product above the adaptor is a LINE JACK UNIT. The adaptor is a LINE JACK ADAPTOR. I see nothing unusual or telling in the use of this term. This also relates to the use of the term in the letter to Comlynx dated 9 February 2004.

29) The evidence with greater potential to establish a relevant disclosure is the letter, and accompanying product samples, sent by Hughes to Comlynx on 9

February 2004. There is no dispute that the letter was sent and there is no dispute that the letter contained samples of adaptors. The dispute is whether the product samples supplied were those conforming to the design registration or whether the samples were of an earlier generation of adaptors. Other samples have also been sent to Comlynx by Hughes. The position can be summarised as:

February 2004 – Both sides agree that samples were sent, Comlynx claim that the samples correspond to the registered design whereas Hughes claim that the samples were of earlier generation products.

July 2004 – Hughes claim that further samples were sent but these were the first ones to correspond to the registered design. Comlynx claim that no samples were received at this time.

May 2005 – Both sides agree that Hughes sent a flyer (including to Comlynx) about the products that correspond to the registered design, a product sample was attached to the flyer.

30) Much of Hughes' evidence is based around the claim that the February 2004 letter could not have contained samples of the registered design because Hughes did not have it in its possession to send it to anyone. All of the assumptions it makes about the samples appear to be based on this. This is why Mr Hughes believes that the samples provided in February 2004 must have been of an earlier design. There is, though, no documentary evidence to support Mr Hughes' and Ms Ung's statements, statements which have a degree of contradiction. The following summarises Mr Hughes' and Ms Ung's statements in this regard:

Mr Hughes: 2002 (month unknown) – The design was created by one of Hughes' employees.

Mr Hughes: Late 2003 – tooling for the adaptor was initiated

Mr Hughes: 14 February 2004 – first possession by Hughes of an adaptor conforming to the registered design.

Mr Hughes: April 2004 – first batch of adaptors for sale shipped to the UK from China.

Mr Hughes: Post 14 May 2004 – no sales made until this date when the stocks of old style adaptors had run down;

Mr Hughes: Beginning of June - samples were not even offered until at least this date

Ms Ung: Hughes took delivery of the new adaptor in July 2004.

31) It is noted that Mr Hughes is very specific about certain dates such as first possession of a new adaptor not occurring until 14 February 2004. Mr Hughes must have an excellent memory if he is simply recalling this fact. If his memory was triggered by the existence of a particular document, he has chosen not to provide it

or to even to explain what that document was. He is also adamant that no sales took place of the new adaptor until after 14 May 2004. This date is the date relevant to my determination; this is no doubt why Mr Hughes refers to it. However, Mr Hughes' evidence would have been more convincing if he had informed the tribunal as to when sales were actually made (and more convincing again if documentary evidence was filed in support) rather than simply saying that they were made after the date that is of importance to my decision. The implication that can be taken is that Mr Hughes is fitting his evidence to the dates that are of importance to the proceedings rather than giving evidence of actualities. The same can be said of the 14 February 2004 date; without supporting material, this seems far too precise a date to be the subject of a normal recollection unless, of course, the date has been selected to ensure that it is after the claimed disclosure on 9 February 2004.

32) A copy of Hughes sales database in respect of its interactions with Comlynx was provided by both Mr Hughes and Ms Ung. The database does not, however, identify which particular product samples the database entries are referring to. There are also discrepancies because, as Mr Odley points out, there is no record of the February 2004 letter being sent and, furthermore, the introduction to the letter refers to a telephone conversation which is similarly not recorded. I agree that this reduces the reliability of the sales database. Given that the product samples are not identified on the database, the only possible relevance to this evidence is Ms Ung's claim that she would not have sent Comlynx an identical product sample in both February and July of 2004 and, therefore, the February sample was an old generation and the July sample the new. Whilst this is noted, this is not, in itself, strong evidence, as it is not implausible that the same sample was sent five months after the February one. Ms Ung is simply speculating.

33) There is also the circumstances relating to the packaging of the product samples. Mr Hughes states that the packaging of the February 2004 product depicted in Mr Odley's evidence does not conform to the packaging used by Hughes. Mr Hughes states that the packaging looks Chinese in origin and the film gauge seems thinner than that used by Hughes. He provides examples of Hughes' see-through bags with a sticker on to indicate that they are issued by Hughes. Whilst all this is noted, and whilst the accompanying extracts from Hughes company manual indicates a structured regime for issuing samples to customers, I see no reason why the sample packaging depicted by Mr Odley could not have come from Hughes. Someone may have made a mistake and forgot to label the bag. I do not accept that the bag itself is thinner than Hughes' bags, this is simply not possible to ascertain. Furthermore, it is not clear whether these practices outlined in the company manual were in place at the relevant time. Although the implication from Mr Hughes is that they were, there is no evidence of this. I also note from paragraph 5.12 of the company manual, "sample requisition form (s008)", that samples are to be placed in a jiffy bag with the label then attached to it. It could be that the samples were provided in a jiffy bag which was disposed of by Comlynx who then simply kept its contents together with the letter. I can place no real weight on this evidence.

34) Hughes suggests that Comlynx have mixed up the samples in its possession whereas Comlynx suggest that Hughes forgot about the disclosure to them. Comlynx's evidence is clear and straightforward and there is little else it could have done to support its claim. It has provided from their records the letter and the

accompanying sample from February 2004 and the flyer and accompanying sample from May 2005. Three individuals attest to the receipt of the documents and that the samples were the same, so meaning that the February 2004 sample must have been of a product conforming to the registered design. Comlynx say that it did not mix up the February 2004 sample with the July 2004 sample because it did not receive anything in July 2004. Despite my earlier comments regarding the degree of reliability about the sales database, it should not be ignored completely. The sales database refers to samples being sent around July 2004. However, even if a sample was sent in July 2004 any claim that it must have been mixed up with the earlier one has little weight because even if it was sent and received (together with an accompanying letter) it is not in Comlynx's records. It may simply not have been retained, so there is nothing to mix up.

35) On the other hand, Comlynx's suggestion that Hughes may simply have forgotten about a disclosure to Comlynx has more plausibility. There is no documentary evidence about the timing of the new generation of design. I agree with Mr Odley that a considerable paper-trail will have been created. Even if not all of it was kept in Hughes' records, I would have expected there to be something. Hughes could have provided evidence from its manufacturer. It could have provided evidence regarding its agreement with the manufacturer, the existence of which is referred to in Hughes letter to Comlynx's legal representatives. Despite Hughes' evidence from the sales database and the evidence about the plastic bags, matters turn on dates. Mr Hughes is working, on the face of it, purely from memory. I have already made some observations about the dates he has given. There is no evidence that any of the witnesses are being untruthful. The difficulty resides in the length of time that has elapsed. That being said, for the reasons I have given, I consider the more probable of explanations to be that Hughes did disclose the registered design to Comlynx in February 2004. This means that the registered design was not new. The request for cancellation succeeds. The registered design is hereby deemed to be invalid.

COSTS

36) Comlynx having been successful, it is entitled to a contribution towards its costs. With regard to costs, although the registrar has a wide discretion in relation to such matters, he nevertheless works from a published scale (as per Tribunal Practice Notice 4/2007). I have borne the scale in mind when determining what award of costs to make. I hereby order Hughes Electronics Ltd to pay Comlynx Communications Ltd the sum of £1100. This sum is calculated as follows:

Official fee for filing application	£50
Preparing a statement and considering the other side's statement	£250
Filing evidence and considering the Hughes' evidence	£800

37) The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 5th day of July 2011

**Oliver Morris
For the Registrar
The Comptroller-General**