

Hasselblatt

Community Design Regulation

Article-by-Article Commentary

Second Edition



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Article-by-Article Commentary

edited by

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Foreword

Design rights are, quite rightly, increasingly coming under the spotlight given their acknowledged importance to the ‘knowledge economy’.

Ever since the Lisbon revision of the Paris Convention in 1958, there has been a specific obligation to protect industrial designs, but to date the nature of the protection has been largely left open to the parties involved and the various resulting regimes have not been harmonised.

To address this issue within the EU single market, the EU legislators adopted the Regulation on the Community Design and the Design Directive, harmonising the laws of the Member States.

In spite of the legal novelties introduced by this and the rapid adoption of the Registered Community Design (RCD) by businesses throughout the EU and across the globe, there remains a relatively small body of detailed literature aimed at the needs of IP professionals.

This is, perhaps, surprising given the value placed on design rights by industry, which is clearly demonstrated by the more than 1 million applications for RCDs that have come from companies based all over the world since 2003.

Under the editorship of Professor Hasselblatt, the current book and a companion volume on the EU trade mark set out to address the gap in the market for comprehensive pan-European commentaries in English, covering the entire text of the relevant legislation for EU trade marks and designs ‘provision by provision’.

As anyone working in IP is fully aware, we are living in a fast-changing, complex and interconnected world in which IP rights have become an increasingly important topic for policymakers.

New technologies are bringing developments in genetics, artificial intelligence, robotics, nanotechnology, 3D printing, blockchain and biotechnology. These changes are building on the transformation already made under the Digital Revolution and are ushering in a Fourth Industrial Revolution.

Since the first edition of this book was published, the Trade Mark Regulation has been amended resulting in a number of changes including a new name for the Office and for the EU trade mark. More generally, the legislative reform has brought about greater modernisation, harmonisation and clarification with regard to certain legal issues.

While users have also been asking about the prospect of a similar legislative change for designs, the Office understands from the European Commission that a new Design Regulation remains quite remote. This seems a pity, since EU industry works in a global economy in which some others appear to have a keener eye for the need to modernise design protection. In South Korea, for example, it is already possible to register 3D designs.

No doubt, in light of the high value placed on design and its important economic role, users will continue to press for updated legislation as soon as the Commission’s legislative workload permits.

Given the evolution in the business environment and the continuous process of revising the Office’s examination guidelines to take account of new conditions and, of course, decisions rendered by the Court of Justice, it is refreshing to see the publication of a second edition of these useful legal volumes and the continued commitment to keeping pace with changes.

Foreword

This is certainly important considering the increasing attention now being given to all kinds of IP rights and the recognition that intangible assets are now more important to business value than things like property or land.

We know from studies carried out by the EUIPO and the European Patent Office that industries using IP rights intensively support, directly or indirectly, 38 % of EU jobs – that is 82 million people – almost 42 % of the GDP and 90 % of external trade.

The same research demonstrated that several IP rights – trade marks, designs and patents – are often used in a bundled fashion. The smart phones in our pockets enjoy some kind of design protection, contain patented technology and are identified by a world-famous trade mark name.

The study, which for design data examined RCDs, showed that industries that specifically use designs intensively support, directly or indirectly, more than 38 million employees; this amounts to 18 % of all jobs in the EU and accounts for 13.4 % of the GDP.

The Registered Community Design and the EUTM are part of a two-tier system of trade marks and design rights. Consequently, the EUIPO works closely with national and regional IP offices to provide a choice of national or EU-wide rights to entrepreneurs, depending on their business needs. This relationship has been reinforced by the success of the European Union Intellectual Property Network, which has built a wide range of shared IT tools to modernise the trade mark and design system and which is also working to converge practices.

We currently have seven areas of convergence, including two covering the graphic representations of designs and the harmonisation of product indications, and a new project on the disclosure of designs on the internet has been launched. In the absence of legislative reform on designs, this kind of voluntary convergence is extremely important.

More globally, this partnership approach needs to be continued and extended to other IP rights such as patents if EU businesses are to get the support they need to capitalise on their creativity and innovation. Indeed, the requirements for cooperation and convergence go well beyond the borders of the EU. For this reason, the EUIPO continues to work on behalf of the European Commission as the implementation agency for EU-funded IP projects in many global regions in order to encourage greater convergence, transparency and accessibility, particularly for the benefit of SMEs.

Against this background, there is an ongoing need for expert, updated and detailed analyses regarding the legislation underpinning EU designs and trade marks.

Professor Hasselblatt is a well-known and highly respected figure in the IP world. He is a partner at the Cologne office of CMS Hasche Sigle, adjunct professor at the McGeorge School of Law, Sacramento, and the Chicago-Kent College of Law, and a member of GRUR's expert committee for trade mark and unfair competition law.

In addition to personally authoring a number of commentaries, Professor Hasselblatt has assembled an impressive list of co-authors for both volumes, including leading figures in European intellectual property law drawn from a wide spectrum of law firms, faculties and authorities.

The books are written 'by practitioners for practitioners' and as such are a very welcome and useful addition to the canon of literature on IP, deserving a place on the bookshelf of any professional or student interested in the EU design and trade mark system.

António Campinos
Executive Director EUIPO
Alicante, June 2018

Preface

The international market for books in the field of intellectual property is largely saturated. There is, however, a noticeable void in the area of pan-European commentaries in the English language on both the Community Design Regulation (CDR) and the European Union Trade Mark Regulation (EUTMR). In fact, the low density of the available English language literature is in striking contrast to the commercial importance of the Community design and the European Union trade mark. The present Commentary and the parallel work on the EUTMR aim to make a contribution to filling this gap.

Unlike in the field of European Union trade mark law, there have been no reforms or fundamental changes in the realm of EU design law. Nonetheless it is safe to say that it was high time for a comprehensive update of this book. First of all, there has been a deluge of decisions handed down by the EUIPO, the GC, the JC and the Community design courts since the release of the first edition in spring 2015. In addition, the study on the *'Legal review on industrial design protection in Europe'*, tasked by the EU Commission and published in June 2016, recommends various amendments to the design regime, including the definition of the design, the concept of functionality, the notion of disclosure and, last but certainly not least, the protection of component parts of complex products as well as exceptions under the so-called 'repair clause'. Furthermore, the Office's Guidelines have been significantly revised. All of these aspects will be dealt with in this second edition which states the law as of March 2018.

This Commentary has been written by 'practitioners for practitioners', with a focal point on the application, registration and enforcement practice regarding Community Designs. The authors of this work come from all walks of life and are all true design experts; the band of authors encompasses practising lawyers, legal scholars, judges and EUIPO officials. Suffice to say that the Commentary reflects the personal views of the authors and should not be attributed to their respective law firms and clients or to particular cases. In the case of EUIPO agents and officials, the views and opinions expressed do not necessarily reflect those of the Office.

Instead of reflecting the legal conception of one or of a few Member States, the Commentary endeavours to interpret the CDR from a European perspective, focusing on the plethora of decisions rendered by the Office, the GC and the CJ, supplemented by important decisions handed down by the Community Design Courts, namely where such decisions were rendered in 'landmark cases'.

The format corresponds to that of a 'traditional' German commentary, dealing with the entire text of the CDR on an article by article basis. As far as possible, the commentaries on the individual articles are for the most part structured identically so as to enhance the user-friendliness of the work. In addition, by way of cross references, the reader's attention is called to systematics not only in the CDR, but also to similarities or differences in terms of the EUTMR. Where appropriate, the authors explain the practical implications of the provisions contained in the CDR and the CDJR.

The CDR commentary under A. obviously constitutes the main part of the present work. However, the CDR does not regulate all of the proprietor's rights but deals only with the claims for information and compensation in certain respects. The Regulation remains silent about all other claims. Under Art. 88 CDR, the courts are to apply their national law on all matters not covered by the CDR. This holds true, amongst others, to

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many remedies in infringement actions. Therefore, in order to achieve the quite ambitious goal of ‘unitary character’ throughout the EU, it is of paramount importance to establish and maintain uniform standards for the enforcement of the CDR in all EU Member States. At the same time, it has to be ensured that, as far as it is possible, these standards will be uniformly applied by the courts. In this respect, the Enforcement Directive (2004/48/EC) has proven to be quite valuable, as it provides for a harmonized body of law. As it is crucial for the proprietors of CD rights to be familiar with said legal framework, under B. this Commentary deals with those measures and remedies that are not dealt with in the CDR.

Furthermore, under C. the Commentary includes a section explaining the enforcement of intellectual property rights under the national laws in each of the 28 Member States. This entails the assertion of the proprietors’ IP rights out of court as well as in litigation in summary and main proceedings. All of these ‘country reports’ are written by experts from the respective EU jurisdiction and follow a uniform structure.

The commentary is rounded off by supplementary rules, such as implementing regulations and examination guidelines under D., followed by a Table of Cases under E., reflecting the decisions cited throughout this Commentary.

The authors, the publisher and the editor would be very appreciative of readers’ comments and suggestions. Please send any feedback and criticism to gordian.hasselblatt@cms-hs.com.

Gordian N. Hasselblatt
Cologne, June 2018

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List of Abbreviations

acc.	according to
ACRR	(Polish) Act on Copyright and Related Rights
AIPPI	International Association for the Protection of Intellectual Property
All E.R.	All England Reporter
AnwBl	<i>Anwaltsblatt</i> (German law journal)
approx.	approximately
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
BGH	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
BoA	Board of Appeal
BT	<i>Bundestag</i> (German Parliament)
C&D	cease and desist
CD	Community design
CDFR	Community Design Fees Regulation
CDIR	Community Design Implementing Regulation
CDPA (UK)	Copyright Designs and Patent Act
CDR	Community Design Regulation
cf.	confer (see)
ch.	chapter
Ch D	Chancery Division (UK)
Chap/s.	Chapter/s
CJ	Court of Justice
CJEU	Court of Justice of the European Union
cl.	clause
Com.	Commission
Common Regulations	Common Regulations under the 1999 Act, the 1960 Act and the 1934 Act of the Hague Agreement
CTM	Community Trade Mark
CTMFR	Community Trade Mark Fees Regulation
CTMIR	Community Trade Mark Implementing Regulation
CTMR	Community Trade Mark Regulation
DDir	Design Directive
Dec.	Decision
Dir.	Directive
diss. op.	dissenting opinion
Drs	<i>Drucksache</i> (printed matter of the German Parliament)
Duke LJ	Duke Law Journal
e. g.	exempli gratia (for instance)
E.I.P.R.	European Intellectual Property Review
ECHR	European Convention on Human Rights
ECR	Report of cases before the European Court of Justice and the General Court
EEA	European Economic Area
ELJ	European Law Journal
EPC	European Political Cooperation
EU	European Union
EUIPO	European Union Intellectual Property Office
EUTM	European trade mark
EUTMRDR	European Union trade mark delegated regulation
EUTMIR	European Union trade mark implementing regulation
EUTMR	European trade mark regulation
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i> (German law journal)
EWCA	Court of Appeal for England and Wales
EWPPC	European Workers' Participation Competence Centre?
FSR	Fleet Street Reports: Cases on Intellectual Property Law (UK)
fn.	footnote
GC	General Court

List of Abbreviations

GCA	German Copyright Act
GDA	German Design Act
GRUR Int	<i>Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil</i> (German law journal)
GRUR-RR	<i>Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungsteil</i> (German law journal)
GRUR	<i>Gewerblicher Rechtsschutz und Urheberrecht</i> (German law journal)
ICA	Italian Copyright Act
id.	idem (the same as something/someone previously mentioned)
i. e.	id est
IEHC	High Court of Ireland decisions
IIC	International Review of Intellectual Property and Competition Law
INID	Internationally agreed Numbers for the Identification of Data
IP	Intellectual Property
IPC	(Italian) Industrial Property Code
IPL	(Polish) Industrial Property Law Act
IPR	Intellectual Property Rights
IR	International Registration
lit.	littera (letter)
LOC	Locarno Classification
mn./mns.	margin number/margin numbers
Mitt.	<i>Mitteilungen der deutschen Patentanwälte</i> (German law journal)
MPI	Max-Planck-Institut
NZI	<i>Neue Zeitschrift für Insolvenzrecht</i> (German law journal)
OAPI	African Intellectual Property Organisation
ÖBl	<i>Österreichische Blätter für gewerblichen Rechtsschutz</i> (Austrian law journal)
OECD	Organisation for Economic Cooperation and Development
Office	European Union Intellectual Property Office
OGH	<i>Oberster Gerichtshof</i> (Supreme Court of Austria)
OHIM	Office of Harmonization for the Internal Market
OJ	Official Journal
para.	paragraph
PCT	Patent Cooperation Treaty
PI	preliminary injunction
R	rule (WIPO)
RBC	Revised Berne Convention
Rc.	recital
RCD	Registered Community design
Reg.	Regulation
RoP	Rules of Procedure
RPC	Reports of Patent, Design and Trade mark Cases (UK)
s.	see
Sec.	Section
Swiss IPRG	Bundesgesetz über das International Privatrecht (Swiss law on conflicts of law)
TEC	Treaty on the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TMD	Trade Mark Directive
TRIPS	Agreement on Trade-Related Aspects of intellectual Property Rights
U.S.	United States Reports
UCD	Unregistered Community design
UKHL	UK House of Lords
UKSC	UK Supreme Court (decided cases)
UNCITRAL	United Nations Commission on International Trade Law
U.S.C.	US Supreme Court cases
v.	versus
VAT	Value Added Tax
WIPO	World Intellectual Property Organization
WM	<i>Wertpapier-Mitteilungen</i> (German law journal)
WRP	<i>Wettbewerb in Recht und Praxis</i> (German law journal)

List of Abbreviations

ZfRV	<i>Zeitschrift für Europarecht, Int. Privatrecht & Rechtsvergleichung</i> (German law journal)
ZGE	<i>Zeitschrift für Geistiges Eigentum</i> (German law journal)
ZUM	<i>Zeitschrift für Urheber und Medienrecht</i> (German law journal)
ZUR	<i>Zeitschrift für Umweltrecht</i> (German law journal)

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