

Hasselblatt (ed.)

Community Design Regulation

A Commentary

C.H.BECK · Hart · Nomos

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Community Design Regulation

Community Design Regulation (EC) No 6/2002

A Commentary

edited by
Gordian N. Hasselblatt

2015

C. H. BECK · Hart · Nomos

Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,
online at: www.hartpub.co.uk

and

Nomos Verlagsgesellschaft mbH & Co. KG Waldseestraße 3–5, 76530 Baden-Baden, Germany,
eMail: nomos@nomos.de

Published in North America (US and Canada) by Hart Publishing,
c/o International Specialized Book Services, 930 NE 58th Avenue, Suite 300,
Portland, OR 97213-3786, USA, eMail: orders@isbs.com

ISBN 978-3-406-65588-3 (Beck)
ISBN 978-1-84946-792-6 (Hart Publishing)
ISBN 978-3-8487-1283-0 (Nomos)

© 2015 Verlag C. H. Beck oHG
Wilhelmstr. 9, 80801 München

Printed in Germany by
fgb · freiburger graphische betriebe GmbH & Co. KG
Bebelstraße 11, 79108 Freiburg

Typeset by
Reemers Publishing Services GmbH, Krefeld

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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 800,000 applications for RCDs that have come from companies based all over the world since 2004.

Under the editorship of Professor Hasselblatt, the current book, and a companion volume on the CTM, 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 Community trade marks and designs 'provision by provision'.

The volume on the RCD has been prepared during a period when there is an upsurge in interest in the importance of design to businesses and the value of protecting design rights.

This value has been confirmed by a recent study on the economic contribution of IPR-intensive industry, carried out by OHIM through the European Observatory on Infringements of Intellectual Property Rights, in partnership with the European Patent Office, and with the help of a number of other authorities.

The study shows that 39 % of total economic activity in the EU – that is €4.7 trillion of GDP (\$6.3 trillion) – is provided directly by industries that use IP rights intensively.

Approximately 26 % of all employment in the EU directly depends on the IPR-intensive industries and another 9 % of jobs rely indirectly on these industries and they also account for 90 % of external trade.

The study, which for design data examined RCDs, shows a strong inter-dependence of IP rights, since they are often used in combination. Trade marks emerge as being the IP right that is most relied upon, followed by patents and designs, with these two rights making a similar contribution.

Looked at individually, design-intensive industries support 27 million employees, which is 12 % of total employment in the EU, and account for 12.8 % of GDP.

The Registered Community Design, and the Community Trade Mark (CTM), are part of a two-tier system of trade marks and design rights. Consequently, OHIM works in close partnership with National 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 Trade Mark and Design Network, which is building shared IT tools to modernise the trade mark and design system, and working to converge practices.

Foreword

Against this background, the increased interest in providing detailed analysis of the legislation underpinning these important IP rights is very welcome.

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

In addition to authoring a number of commentaries personally, Professor Hasselblatt has assembled for both volumes an impressive list of co-authors 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 Community trade mark and design system.

I commend him and his fellow authors for the scale and ambition of the work and am particularly pleased to see that the intention is to update both volumes regularly to keep pace with changes in legislation and practice.

António Campinos
President, OHIM

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 Community Trade Mark Regulation (CTMR). 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 Community trade mark. The present Commentary and the parallel work on the CTMR aim to make a contribution to filling this gap.

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 OHIM 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 OHIM 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 OHIM, 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 CTMR. Where appropriate, the authors explain the practical implications of the provisions contained in the CDR and the CDFR.

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 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

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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, December 2014

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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
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
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)

Abbreviations

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	Office of Harmonization for the Internal Market
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)
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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