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### **1. The "Europeanisation" of design law**

National design law was first harmonised under the provisions of **Directive 98/71/EC of 13th October 1998** on the legal protection of designs. Then a new, unified Community right was introduced under **Council Regulation (EC) No 6/2002 of 12th December 2001 on Community Designs**, which was effective throughout the Community and coexisted with national protection systems – the Community design right. In effect, the Community Design Regulation is the latest form of supra-national intellectual property legislation, with a unitary Community right administered and enforced at Community level.

### **2. Community design**

The appearance (external form) of a product or a product part, meaning any two- or three-dimensional object whether a handicraft or an industrial item, can be protected as a **Community design**. A **product** includes parts of a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excludes computer programs. This product appearance may result from shapes, lines, contours, colours, textures, structures, materials, or ornamentation. Shapes of food packages, designs for watches, jewellery, porcelain, tools, furniture, footwear, or clothes can be protected as Community designs.

Excluded from the protection of the Community design, however, are designs that are contrary to public policy or to accepted principles of morality, as well as parts not visible in normal use, features of the appearance of a product which are solely dictated by the technical function of the design, and interconnections (must-fits). Including these in the scope of protection would result in the monopolisation of the market by the manufacturers of products with such connections. However, designs serving the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system (the Lego bricks clause) are not excluded.

### **3. The protection of unregistered Community designs**

The novelty introduced by the Regulation is the protection of **unregistered Community designs**. Such a solution answers the needs of those sectors of industry that make short-term products, including the fashion and toy industries, for which the registration procedure is too time-consuming in relation to their protection needs. The protection of unregistered Community designs has been made available in the Community as from 6th March 2002. All designs available after this date within the Community and fulfilling the criteria for protection as provided for in the Regulation are automatically (without registration formalities) granted protection as unregistered Community designs for a period of 3 years from the first day they are made available to the public. The protection period of a registered Community design is 5 years, and this can be prolonged for further 5-year periods, up to a total of 25 years.

### **4. Requirements for protection**

A design shall be protected as a Community design if it is new and has individual character. It is considered new if no identical design was made available to the public before the unregistered Community design was first disclosed, or before the filing or priority date of the

registered Community design. Designs are deemed to be identical if their features differ only in immaterial details. A design can be made publicly available by entering it into the channels of commerce, publishing the design, or exhibiting the design so that it becomes known in the normal course of business to the circles specialising in the sector concerned and operating within the Community. When assessing novelty and individual character, a disclosure shall not be taken into consideration if the designer or his successor in title has made a design available to the public during the 12-month period preceding the date of filing of the application or the date of priority. Excluded from the assessment are also all disclosures made by third parties as a consequence of an abuse in relation to the designer. The **period of grace** makes it possible for the designer or another successor in title to test the products embodying the design in the market place before deciding whether the protection resulting from a registered Community design is desirable.

The design fulfils the criterion of **individual character** if the overall impression it makes on an informed user differs considerably from the overall impression made by designs made available earlier. In assessing individual character, the designer's degree of freedom will be taken into consideration. Where the designer has limited freedom, even little differences suffice to establish individual character. In the case of more freedom, larger differences are required. Individual character is assessed from the point of view of an informed user.

### **5. The right to the Community design**

The right to the Community design has a **unitary character** throughout the Community and is exhausted once a product embodying the design is placed on the market within the Community by the rightholder or with his consent. The right can be transferred or invalidated for the whole Community. The right to the Community design can be licensed in respect of the whole Community or part of it.

The scope of protection conferred by the Community design shall include any design that does not produce a different overall impression on the informed user. The registered design holder has an exclusive right to use the design and to prevent products incorporating it from being made, offered, put on the market, imported, exported, used or stocked for such purposes. The rightholder can enforce his rights against identical (or substantially similar) designs, including where the infringing design has been developed independently and in good faith. The rights of the unregistered design holder are more limited. He can only prevent acts of infringement if they are the result of copying or illegal imitation. Thus, such protection is similar to copyright protection. The rightholder, however, cannot prevent the use of the design which has been arrived at independently by any other designer, and which looks similar to his design.