

Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

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on Community designs

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission<sup>(1)</sup>,

Having regard to the opinion of the European Parliament<sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>(3)</sup>,

Whereas:

- (1) A unified system for obtaining a Community design to which uniform protection is given with uniform effect throughout the entire territory of the Community would further the objectives of the Community as laid down in the Treaty.
- (2) Only the Benelux countries have introduced a uniform design protection law. In all the other Member States the protection of designs is a matter for the relevant national law and is confined to the territory of the Member State concerned. Identical designs may be therefore protected differently in different Member States and for the benefit of different owners. This inevitably leads to conflicts in the course of trade between Member States.
- (3) The substantial differences between Member States' design laws prevent and distort Community-wide competition. In comparison with domestic trade in, and competition between, products incorporating a design, trade and competition within the Community are prevented and distorted by the large number of applications, offices, procedures, laws, nationally circumscribed exclusive rights and the combined administrative expense with correspondingly high costs and fees for the applicant. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs<sup>(4)</sup> contributes to remedying this situation.
- (4) The effect of design protection being limited to the territory of the individual Member States whether or not their laws are approximated, leads to a possible division of the internal market with respect to products incorporating a design which is the subject of national rights held by different individuals, and hence constitutes an obstacle to the free movement of goods.
- (5) This calls for the creation of a Community design which is directly applicable in each Member State, because only in this way will it be possible to obtain, through one application made to the Office for Harmonisation in the Internal Market (Trade Marks

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and Design) in accordance with a single procedure under one law, one design right for one area encompassing all Member States.

- (6) Since the objectives of the proposed action, namely, the protection of one design right for one area encompassing all the Member States, cannot be sufficiently achieved by the Member States by reason of the scale and the effects of the creation of a Community design and a Community design authority and can therefore, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (7) Enhanced protection for industrial design not only promotes the contribution of individual designers to the sum of Community excellence in the field, but also encourages innovation and development of new products and investment in their production.
- (8) Consequently a more accessible design-protection system adapted to the needs of the internal market is essential for Community industries.
- (9) The substantive provisions of this Regulation on design law should be aligned with the respective provisions in Directive 98/71/EC.
- (10) Technological innovation should not be hampered by granting design protection to features dictated solely by a technical function. It is understood that this does not entail that a design must have an aesthetic quality. Likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings. Consequently, those features of a design which are excluded from protection for those reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection.
- (11) The mechanical fittings of modular products may nevertheless constitute an important element of the innovative characteristics of modular products and present a major marketing asset, and therefore should be eligible for protection.
- (12) Protection should not be extended to those component parts which are not visible during normal use of a product, nor to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and individual character. Therefore, those features of design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection.
- (13) Full-scale approximation of the laws of the Member States on the use of protected designs for the purpose of permitting the repair of a complex product so as to restore its original appearance, where the design is applied to or incorporated in a product which constitutes a component part of a complex product upon whose appearance the protected design is dependent, could not be achieved through Directive 98/71/EC. Within the framework of the conciliation procedure on the said Directive, the Commission undertook to review the consequences of the provisions of that Directive three years after the deadline for transposition of the Directive in particular for the

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industrial sectors which are most affected. Under these circumstances, it is appropriate not to confer any protection as a Community design for a design which is applied to or incorporated in a product which constitutes a component part of a complex product upon whose appearance the design is dependent and which is used for the purpose of the repair of a complex product so as to restore its original appearance, until the Council has decided its policy on this issue on the basis of a Commission proposal.

- (14) The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.
- (15) A Community design should, as far as possible, serve the needs of all sectors of industry in the Community.
- (16) Some of those sectors produce large numbers of designs for products frequently having a short market life where protection without the burden of registration formalities is an advantage and the duration of protection is of lesser significance. On the other hand, there are sectors of industry which value the advantages of registration for the greater legal certainty it provides and which require the possibility of a longer term of protection corresponding to the foreseeable market life of their products.
- (17) This calls for two forms of protection, one being a short-term unregistered design and the other being a longer term registered design.
- (18) A registered Community design requires the creation and maintenance of a register in which will be registered all those applications which comply with formal conditions and which have been accorded a date of filing. This registration system should in principle not be based upon substantive examination as to compliance with requirements for protection prior to registration, thereby keeping to a minimum the registration and other procedural burdens on applicants.
- (19) A Community design should not be upheld unless the design is new and unless it also possesses an individual character in comparison with other designs.
- (20) It is also necessary to allow the designer or his 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. To this end it is necessary to provide that disclosures of the design by the designer or his successor in title, or abusive disclosures during a period of 12 months prior to the date of the filing of the application for a registered Community design should not be prejudicial in assessing the novelty or the individual character of the design in question.
- (21) The exclusive nature of the right conferred by the registered Community design is consistent with its greater legal certainty. It is appropriate that the unregistered Community design should, however, constitute a right only to prevent copying. Protection could not therefore extend to design products which are the result of a design

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arrived at independently by a second designer. This right should also extend to trade in products embodying infringing designs.

- (22) The enforcement of these rights is to be left to national laws. It is necessary therefore to provide for some basic uniform sanctions in all Member States. These should make it possible, irrespective of the jurisdiction under which enforcement is sought, to stop the infringing acts.
- (23) Any third person who can establish that he has in good faith commenced use even for commercial purposes within the Community, or has made serious and effective preparations to that end, of a design included within the scope of protection of a registered Community design, which has not been copied from the latter, may be entitled to a limited exploitation of that design.
- (24) It is a fundamental objective of this Regulation that the procedure for obtaining a registered Community design should present the minimum cost and difficulty to applicants, so as to make it readily available to small and medium-sized enterprises as well as to individual designers.
- (25) Those sectors of industry producing large numbers of possibly short-lived designs over short periods of time of which only some may be eventually commercialised will find advantage in the unregistered Community design. Furthermore, there is also a need for these sectors to have easier recourse to the registered Community design. Therefore, the option of combining a number of designs in one multiple application would satisfy that need. However, the designs contained in a multiple application may be dealt with independently of each other for the purposes of enforcement of rights, licensing, rights in rem, levy of execution, insolvency proceedings, surrender, renewal, assignment, deferred publication or declaration of invalidity.
- (26) The normal publication following registration of a Community design could in some cases destroy or jeopardise the success of a commercial operation involving the design. The facility of a deferment of publication for a reasonable period affords a solution in such cases.
- (27) A procedure for hearing actions concerning validity of a registered Community design in a single place would bring savings in costs and time compared with procedures involving different national courts.
- (28) It is therefore necessary to provide safeguards including a right of appeal to a Board of Appeal, and ultimately to the Court of Justice. Such a procedure would assist the development of uniform interpretation of the requirements governing the validity of Community designs.
- (29) It is essential that the rights conferred by a Community design can be enforced in an efficient manner throughout the territory of the Community.
- (30) The litigation system should avoid as far as possible 'forum shopping'. It is therefore necessary to establish clear rules of international jurisdiction.
- (31) This Regulation does not preclude the application to designs protected by Community designs of the industrial property laws or other relevant laws of the Member States,

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such as those relating to design protection acquired by registration or those relating to unregistered designs, trade marks, patents and utility models, unfair competition or civil liability.

- (32) In the absence of the complete harmonisation of copyright law, it is important to establish the principle of cumulation of protection under the Community design and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred.
- (33) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>(5)</sup>,

HAS ADOPTED THIS REGULATION:

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- (1) OJ C 29, 31.1.1994, p. 20 and OJ C 248, 29.8.2000, p. 3.
- (2) OJ C 67, 1.3.2001, p. 318.
- (3) OJ C 110, 2.5.1995 and OJ C 75, 15.3.2000, p. 35.
- (4) OJ L 289, 28.10.1998, p. 28.
- (5) OJ L 184, 17.7.1999, p. 23.

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