

Consultation on Design Protection in the EU

Fields marked with * are mandatory.

Introduction

The main substantive aspects of national laws on the protection of designs are harmonized at EU level by the Design Directive[1] from 1998, which also aimed at maintaining a system for registering designs for businesses that only operate within an EU Member State. Alongside those national protection systems, the Community Design Regulation[2] from 2002 created an autonomous system for the protection of Community designs having equal effect throughout the European Union.

Designs are defined as appearance of the whole or a part of a product resulting from its features such as e.g. lines, contours, colours, shape, texture, materials used or ornamentation. Designs can be part of handcrafted or industrial goods, including among others also packaging, graphic symbols or even fonts. Designers can benefit from different forms of protection of their work in the EU. Their creations are protected without any registration or formalities for a period of three years as unregistered Community designs (governed by the Community Design Regulation) if they are made publicly available ('disclosed') within the EU. When longer protection of up to 25 years is wanted, designers have a choice of registering their designs separately in some or all of the EU Member States following the harmonized national rules (as specified by the Design Directive). Alternatively, they can register them once for the whole EU using the registered Community design (governed as well by the Community Design Regulation) managed by the European Union Intellectual Property Office (EUIPO). As yet another option, designers can protect their creations within or outside the EU through the Hague System for the International Registration of Industrial Designs, administered by the World Intellectual Property Organization (WIPO).

While procedures are not harmonized, the principal substantive conditions for registering a design are identical in all EU Member States as are the principal rights of design owners. Design is a property right and its owner decides who can use it, how and for what price. Protection covers unauthorized use or copying. In 2017, 94,000 registered Community designs were registered (6% more than in 2016, and 12% more than in 2015). The registration involves fees, which for the registered Community design amount to €350 including publication.

This public consultation aims at gathering views of all those affected by design protection in Europe in order to evaluate the performance of the Community and national systems and identify areas where changes may be necessary. The consultation builds on and follows previous research, analysis and targeted surveys carried out as part of two studies on [economic](#) (2015) and [legal](#) (2016) review of the design protection systems in Europe.

The questionnaire of the consultation is divided into several different sections. In principle respondents can choose to reply to a selection of these sections (one, several or all) according to their profile/type of

activity. However, different levels of knowledge and experience will be needed to be able to answer the individual questions. While the reply to general questions will require at least certain knowledge on design protection in the European Union, it will not be possible to answer a larger number of specific questions without having profound legal expertise and experience in the relevant field.

[1] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs

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

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- Gaelic
- German
- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation

- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Carolina

* Surname

Oliveira

* Email (this won't be published)

coliveira@inta.org

* Organisation name

255 character(s) maximum

International Trademark Association (INTA)

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

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| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Pierre and Miquelon |
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- Andorra
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- Anguilla
- Antarctica
- Antigua and Barbuda
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- Armenia
- Aruba
- Australia
- Austria
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- Bahamas
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- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- Former Yugoslav Republic of Macedonia
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- North Korea
- Northern Mariana Islands
- Norway
- Oman
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Swaziland
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
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- Tonga
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- Tunisia
- Turkey

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| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Lucia | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Martin | |

*What are the main areas of your activity?

at least 1 choice(s)

- Manufacturing
- Wholesale and retail trade; Repair of motor vehicles
- Information and communication
- Professional, scientific and technical activities
- Public administration
- Creative, arts and entertainment activities
- Other activities

If other activities, please specify:

200 character(s) maximum

INTA is a global not-for-profit association of brand owners and professionals, supporting trademarks and related rights, including designs, to foster consumer trust, economic growth and innovation

*Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only your type, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

* I agree with the [personal data protection provisions](#)

General questions to all

*** 1. Please indicate whether your knowledge of the design protection systems in the EU comes from the fact that you or members of your organization**

at least 1 choice(s)

- Create/own designs
- Use designs of others
- Give (legal) advice
- Work in intellectual property office, ministry, court or other authority
- Lecture/research the topic
- Other
- I don't have any knowledge of the design protection systems

*** If other, please explain**

1000 character(s) maximum

INTA is a global association of brand owners and professionals dedicated to supporting trademarks and related intellectual property (IP), including designs, to foster consumer trust, economic growth, and innovation.

INTA's members are more than 7,200 organizations from 191 countries. The Association's member organizations represent some 31,000 trademark professionals and include brand owners from major corporations as well as small- and medium-sized enterprises, law firms and nonprofits. There are also government agency members as well as individual professor and student members.

As a not-for-profit association, INTA's role is to serve its members and society as a trusted and influential advocate for the economic and social value of brands.

Headquartered in New York City, INTA also has offices in Brussels, Santiago, Shanghai, Singapore and Washington D.C. and representatives in Geneva and New Delhi.

*** 2. What do you generally think about the overall functioning of the design protection system in the EU (taking national design systems and the Community design regime altogether as a complementary whole and considering all relevant aspects of design protection)?**

- It works very well
- It works rather well
- It works rather bad
- It works very bad
- No opinion

* Please explain your answer:

5000 character(s) maximum

Please see our attached joint paper with ECTA and MARQUES (the "joint paper"), and our comments below.

3. Please evaluate the importance of the following objectives of the harmonization of national rules and of the creation of the Community design system.

between 9 and 9 answered rows

| | Very important | Important | Rather not important | Not important at all | No opinion |
|--|----------------------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| * Promoting innovation, creativity and development of new products in the EU | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing products to circulate freely in the internal market | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Providing the same protection of designs everywhere in the EU | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Serving the needs of all industry sectors | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Preventing counterfeiting and copying of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing for simple registration of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing for affordable registration of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Making Community design registration readily accessible to small and medium-sized enterprises as well as to individual designers | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing for a simplified enforcement of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

If there are other objectives that should be pursued, please let us know:

5000 character(s) maximum

Currently, a Registered Community Design (RCD) owner may get very different results depending on where proceedings are commenced. Harmonizing procedural rules, remedies and costs is therefore important to a single market.

4. Based on your knowledge of the design protection systems in the EU, how have the harmonization of national rules and the creation of the Community design system contributed to the achievement of those objectives since 2003?

between 9 and 9 answered rows

| | Helped a lot | Helped a little | Hindered a little | Hindered a lot | No opinion |
|--|----------------------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| * Promoting innovation, creativity and development of new products in the EU | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing products to circulate freely in the internal market | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Providing the same protection of designs everywhere in the EU | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Serving the needs of all industry sectors | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Preventing counterfeiting and copying of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing for simple registration of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing for affordable registration of Community designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Making Community design registration readily accessible to small and medium-sized enterprises as well as to individual designers | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Allowing for a simplified enforcement of unregistered Community designs | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

If you want to add any remark, please do so here:

5000 character(s) maximum

In respect of the last question under Q4, "Allowing for a simplified enforcement of unregistered Community designs":

Whilst the characteristics of the Community design rights have simplified enforcement at a national level, particularly in the case of the registered Community designs, there remains the obstacle of the lack of harmonization of national enforcement procedures and remedies. In particular, in most cases, it is still necessary for a designer to have to commence separate enforcement proceedings in each Member State in order to enforce the unitary right in those Member States, which is usually prohibitively expensive. We would therefore urge the greater harmonization of national enforcement procedures relating to Community design rights, and consider that the Court of Justice of the European Union's (CJEU) judgment in Joined Cases C 24 /16 and C 25/16 Nintendo Co., Ltd v Big Ben Interactive (EU:C:2017:724) was a move in the right direction to that end.

General questions to all

*** 6. In this context, to what extent do you agree that the harmonization of national rules and the creation of the Community design system is of added value compared to a situation where Member States would have (entirely) different rules on design protection and such protection would be available at national level only?**

- Strongly agree
- Agree
- Disagree
- Strongly disagree
- No opinion

If you want to add any remark, please do so here:

5000 character(s) maximum

*** 7. Are you aware of any unintended consequences or shortcomings of the Design Directive or the Community Design Regulation?**

- Yes
- No
- No opinion

*** If yes, please specify:**

5000 character(s) maximum

Please see the attached joint paper. In particular and as detailed there:

- We would prefer greater emphasis on the “design approach” as explained under point 2.1 of the joint paper. Therefore, we request amending the recitals of the Regulation and the Directive in order to emphasize the protection of the marketing value of a design as a rationale for EU design legislation;
- We are in favor of an European Union Intellectual Property Office (EUIPO) that is modern, efficient and effective. We believe that fee structures at the EUIPO and within the EU should aim at facilitating the parallel existing protection levels at national, EU and international levels. For details, please refer to point 2.3.6. of the joint paper;
- We believe that an increase of protection requirements is against the interests of designers, the design industry and design holders. We therefore support an amendment to the recitals specifically to note that, other than for component parts of complex products, a design does not need to be visible at any particular time or in a particular situation in order to attract design protection. For details, please refer to point 3.1. of the joint paper;
- Regarding the exclusion of computer programs from the definition of “products”, we would welcome a clarification (be it by way of recitals or by amending the law) to ensure that graphical user interfaces and parts thereof are not “computer programs” in the sense of Article 1 (b) of the Directive/Article 3 (b) of the Regulation. For details, please refer to page 16 of the joint paper;
- The relevant courts should be given the time to develop the concepts of informed user, individual character and different overall impression and provide guidance for member state courts. We do not see a need to introduce into the law clarifications on how to determine the individual character of a design. Particularly, there should be no amendment that reference should be made to factors such as the nature of the product concerned or the sector to which the product belongs. For details, please refer to point 3.2. of the joint paper;

- We are concerned that courts and tribunals are construing the technical function exception too broadly. We recommend an amendment to the recitals to the Regulation and the Directive to clarify that functional designs remain protected. For details, please refer to point 3.5. of the joint paper;
 - Harmonization is most important towards a quick and inexpensive design invalidity system in all member states. Thus, we request that office proceedings for invalidity should be made mandatory at national level by amending the Directive accordingly. For details, please refer to point 4.2. of the joint paper;
 - Declarations of non-infringement allow an economic operator who wishes to launch a product and who is uncertain whether a third party design right may thereby be infringed, to apply for a court order. Therefore, we recommend introducing such action as an EU law under the Regulation. Moreover, we recommend introducing an action against threatened infringement, so that design owners do not have to wait until infringement has commenced before taking action. For details, please refer to point 4.4. of the joint paper;
 - Substantial cost benefits can be achieved by multiple applications, which clearly lessen the burden on applicants, whereas in practice, the same class requirement works as means to reduce otherwise beneficial multiple applications. Accordingly, we request deleting the requirement for the same Locarno class in Art. 37 of the Regulation, and amending the Directive so that Member States may not provide for a same class requirement. For details, please refer to point 5.6. of the joint paper;
 - Differences in the availability of deferment of publication and in the deferment period are burdensome for designers and undertakings managing their designs. Because of that, we request to make the possibility of deferred publication mandatory at Member State level by way of amending the Directive. We believe that the deferment period should be set at 30 months, in line with the Regulation. For details, please refer to point 5.8. of the joint paper;
- In addition, we recommend:
- Harmonizing the presumptions of ownership and validity for registered designs across the EU. See the response to question 21;
 - Addressing the issue of design infringing products in transit through the EU or Member States, in line with the solutions adopted under the Trade Mark Regulation and Trade Mark Directive. See the response to question 41.
 - Clarifying in the Directive that product indication does not affect the scope of protection of the design. See the response to question 48.
 - Harmonizing the right of prior use. See the response to question 48;
 - Clarifying in the Directive that naming the Designer is optional for the registration of a design. Please refer to the responses to questions 21 and 47.

*** 8. In general, do you think that there is sufficient awareness among designers and entrepreneurs (including small and medium-sized enterprises) of the availability, benefits and ways for protecting designs in the EU?**

- Yes
- No
- No opinion

*** If no, please specify where and in what respect you see deficiencies in the awareness:**

5000 character(s) maximum

There's not enough awareness of the importance, benefits and options available for protecting industrial designs. From our point of view, the main deficiencies are linked to the fact that designers, entrepreneurs and companies are not enough aware of the "design right" as a tool to improve creativity and innovation and

the economic value of such an asset. There is still a need to boost a 'design culture' among companies and designers, so that the same level of awareness to that of patents is established.

Moreover, the "Community design" should be better explained to entrepreneurs as a "system"; which are the main elements and how they interact (namely; grace period, unregistered and registered designs). We recommend that the terms "EU Registered Design (EURD)" and "EU Unregistered Design (EUUD)" be adopted in replacement of the current "Registered Community Design (RCD)" and "Unregistered Community Design (UCD)". We believe that correcting the terminology as indicated may also assist in awareness building.

***9. Do you consider that the unregistered Community design provides a useful legal protection against unauthorized copying of that design by a third party?**

- Yes
- No
- No opinion

*** Please explain your answer:**

5000 character(s) maximum

The most important benefit of the unregistered Community design is that there are no formality requirements so a designer will not miss out on the possibility of protecting their design either due to a lack of knowledge of the availability of registered design protection at the time of disclosure or due to not being able to afford a registered right. Another reason for not registering designs is a misperception that the protection afforded to a designer from a registered design is narrower than is in fact the case. This misperception partly reflects an outdated view of the scope of protection offered by national registered designs prior to the Designs Directive and Regulation, and (in the UK at least) misreporting and/or a misunderstanding of the actual reasons why the Supreme Court found against the claimant in *PMS International Group plc v Magmatic Ltd* [2016] UKSC 12 (which concerned the representation of the design applied for rather than the effectiveness of the registered Community design regime). The vast majority of designers do not apply to register their designs, so without an unregistered right they would be without any protection from their designs being copied.

The unregistered Community design is also useful for designers because, in general, it is quite easy to understand. In particular, terminology such as "same overall impression" is non-legalistic language which a lay person can understand. It is also helpful that the same terminology is used both to define whether or not the unregistered Community design right subsists (i.e. whether it has individual character) and whether the right has been infringed (same overall impression).

The main disadvantage of the unregistered Community design over a registered design is the requirement to prove copying which tends to make the cost of litigation significantly more expensive than the cost of relying solely on a registered design. However, this is not a fault of the EU Designs regime, since the cost of litigation is a matter for national courts.

It is also common for claimants to rely on unregistered designs in addition to a claim based on a registered design. This is done in order to provide alternative claims if there is a deficiency in the registered design being relied on (for example, if it turns out that it was disclosed more than 12 months prior to the date of application).

It is also common for a claim to be made for infringement of part of a design, and the nature of the unregistered Community design gives a claimant flexibility as to which part or parts of a design it wishes to rely on. This is not the case with a registered design which only protects the design as shown in the

registration, so a design holder has to decide in advance of any infringement which part or parts of its design it wishes to protect with a registered design. The designer is then limited to relying on just those parts in any court proceedings.

However, there is a need for clarification regarding the issue of how the disclosure of a design outside the Community affects the subsistence of an unregistered Community design right in that design when it is subsequently made available to the public within the Community. The German Supreme Court has ruled that first disclosure of a design outside the Community means that unregistered Community design can never subsist in that design, because the design was not first made public within the Community. Many do not agree with this conclusion, and argue that the correct interpretation of Art. 110a(5) of the Regulation is that unregistered Community design will not subsist UNTIL the design has been disclosed within the Community. A prior disclosure by a designer should therefore not prevent the valid subsistence of unregistered design right when it subsequently makes the design public within the Community.

See also the response to question 19 below.

More specific questions to all

We would now like to ask you questions that are more specific. These are best answered by those with greater knowledge or experience with the design protection systems in the EU.

Terms of protection

*** 14. An unregistered Community design is protected for 3 years after its first making available to the public. Do you think this term of protection is adequate?**

- Yes
- No, it is too long
- No, it is too short
- I have no opinion

*** 15. A registered Community or national design can be protected up to 25 years from the date of filing. Do you think this term of protection is adequate?**

- Yes
- No, it is too long
- No, it is too short
- I have no opinion

*** If no, please explain and specify what you would consider the most adequate period of protection:**

5000 character(s) maximum

We have ticked "No" because only that answer allows us to complete this text box. We do not believe that the maximum period of protection of 25 years is too long.

Under INTA's Model Design Law Guidelines (available at https://www.inta.org/Advocacy/Documents/2017/Model_Design_Laws_fv_11-30-17_CO.pdf), INTA's position, consistent with that of the Hague Agreement Concerning the International Registration of Industrial Designs (the "Hague Agreement"), is that the term of protection of registered designs generally should be at least 15 years from application. The term may be

made up of renewals after multiple shorter periods (for example, three terms of five years).

It is important to emphasize INTA's position that the grant or expiration of design rights should not preclude or alter trade mark or other intellectual property rights, so long as the requirements for enforceable trade mark or such other intellectual property rights are satisfied. A range of intellectual property protections may be available for a single product including utility patents for functional innovations, registered designs for aesthetic innovations, copyrights for artistic creations, and trade marks for signs which distinguish products sold in commerce. Trade mark rights may accrue on such features as they are recognized by the public as distinguishing the goods or services of one entity from another.

The bases, functions, purposes, and intents of these diverse intellectual property rights (including design rights, utility patents, copyright, and trade marks) are different and stand independent of one another. Therefore, in order to spur innovation and creativity, intellectual property rights owners should be free to pursue any and all available sources of protection, both limited-term protection in the form of designs, and unlimited-term protection in the form of trade mark and other intellectual property rights.

Spare parts protection

At the time of adoption of the Design Directive it was not possible to harmonize design protection for spare parts. The latter concern visible component parts used for the purpose of the repair of a complex product (such as a motorcar) so as to restore its original appearance (covering, in particular, body panels, integrated lighting and automotive glass).

While the majority of Member States extend design protection to such spare parts the other part does not do so.

*** 16. Are different rules on spare parts protection in the Member States a problem for you?**

- Yes
- No
- No opinion

*** Please explain your answer:**

5000 character(s) maximum

We have indicated "Yes" above only so that we can enter the following text in this box.

Knowing that the issue of spare parts is of high controversy, we urge that any failure to progress in this issue shall not delay the reform agenda triggered by the Legal Review on Industrial Design Protection in Europe ("the Review") and advocated for in the attached joint paper.

This issue is highly controversial. Importantly, we urge that any failure to progress this topic not delay the reform agenda set out elsewhere in the Review. Much can be achieved even without harmonization of the protection of spare parts. Importantly, we consider that the other reforms advocated by the Review should not be held up by ongoing disagreement on how to resolve the issue of spare parts. We therefore advocate for political agreement on spare parts, but if that cannot be reached, it should not be an impediment to the successful conclusion of appropriate amendments to deal with other issues.

*** 17. Should the rules on spare parts protection be the same in the EU?**

- Yes
- No
- No opinion

*** If yes, please explain your answer and tell us what should be the common rules:**

5000 character(s) maximum

See the response to the preceding question.

Specific questions to creators/owners of designs

*** 18. How do you (your members) protect your designs?**

at least 1 choice(s)

- I do not actively seek protection of my designs
- I rely on unregistered Community design protection
- I register them as national designs at the industrial property offices of Member States
- I register them as Community designs at the EUIPO
- I register them as international designs at WIPO
- Other
- I don't own any designs

*** If other, please specify:**

1000 character(s) maximum

INTA members are a diverse range of brand owners and professionals, including design owners who adopt different practices for protecting their designs. INTA advocates for the various ways in which designs can be protected: national, Community, and via the Hague Agreement.

*** 19. What are the reasons for relying on unregistered Community design protection?**

at least 1 choice(s)

- It is best suited to my needs
- Lack of any formalities
- Adequate territorial coverage
- Other

*** If other, please explain:**

1000 character(s) maximum

The most common reason for relying on an unregistered Community design is because the designer does not own a registered Community design. This is often because the designer is simply not aware of the existence of and/or the benefit to their business of obtaining a registered design. Some designers decide not to obtain registered designs because of the costs involved, or because they deal in numerous designs with short life spans so obtaining registered designs for each design would be too onerous and disproportionate. They therefore either choose to rely on unregistered Community design protection, or that is the only right available to them once the 12 month priority period has expired.

See also the answer to question 9 above.

*** 20. What are the reasons for registering your designs as national designs?**

at least 1 choice(s)

- It is best suited to my needs
- Easy procedures
- Adequate territorial coverage
- Lower fees
- Speed in processing my application
- Better service quality
- Other

*** If other, please explain:**

1000 character(s) maximum

For those specifically interested in design protection in only one/two specific EU countries, it may be more appropriate/cheaper to pursue separate national design applications in those countries, rather than an EU design application.

Another reason for pursuing a national design application includes instances where, for multiple-design applications, the designs are not in the same Locarno class, where some national design registries (e.g. the UK) allow such designs to be combined into a single application (unlike the EUIPO) thus making the application process cheaper in these instances.

Other reasons for pursuing a national design application include strategic reasons, for instance making the design harder to invalidate (since an application for invalidity is easier to pursue before the EUIPO than it is to necessarily pursue an invalidity action before a national office/court in the case of a national design application).

*** 21. What are the reasons for registering your designs as Community designs?**

at least 1 choice(s)

- It is best suited to my needs
- Easy procedures
- Adequate territorial coverage
- Lower fees
- Speed in processing my application
- Better service quality
- Other

*** If other, please explain:**

1000 character(s) maximum

Again, caveating the above ticks, the EUIPO generally provides an effective, cost-balanced, mechanism for achieving pan EU design protection in an expeditious and affordable way.

An added benefit of an EU design application before the EUIPO is the possibility to defer publication of the designs for up to 30 months from the priority date, which is not necessarily possible in national design applications in all EU countries. Other advantages include the presumption of ownership (Art. 17 of the

Regulation); the presumption of validity (Art. 85 of the Regulation) and the fact that naming the designer or submitting a statement of the designer's waiver of the right to be named is optional (Art. 36 (3) of the Regulation).

*** 22. What are the reasons for registering your designs as international designs?**

at least 1 choice(s)

- It is best suited to my needs
- Easy procedures
- Adequate territorial coverage
- Lower fees
- Speed in processing my application
- Better service quality
- Other

*** If other, please explain:**

1000 character(s) maximum

Particularly for those seeking 'total' design coverage in Europe, the Hague system often provides an effective mechanism for doing so, e.g. by designating the EUIPO along with Switzerland and Norway in one application.

At least comparing an EU design application with multiple designs, and a Hague design application designating the EU with multiple designs, the official filing fees can also sometimes be cheaper via the Hague route – particularly where each design in the application only contains one or two views. Depending on the number of designs in the application and the number of designated territories in the Hague application, it may also be cheaper at the renewal fee stage to pursue the Hague registration designating the EU over a separate EU design registration (noting the discrepancy in renewal fees between a Hague application designating the EU, and a separate EU design application).

*** 23. In your experience, what are the top three reasons for not obtaining a registered design?**

between 1 and 3 choices

- Protection by other intellectual property rights (e.g. trade marks, copyright) serves my needs
- Unregistered design protection is sufficient (e.g. useful life of my design is under three years)
- Possible refusal of the application
- Possible declaration of invalidity of the registration
- Not clear what can be protected
- It is too expensive
- Registration is too complicated
- I am not convinced about the added value of registering a design
- Enforcement is too complicated or expensive
- Other
- No opinion

*** If other, please explain:**

2000 character(s) maximum

INTA's membership is varied and there are many different reasons as to why registered design protection may not be pursued by members. Nevertheless, in general terms, cost is usually the number one barrier to

entry, particularly for SMEs and individuals. Cost in this regard includes not only the official fees associated with the filing/registration of the designs, but also the related professional fees for advice and representation in the design application process. Some of INTA's members may consider that they do not need registered design protection due to the short term life cycle of their product ranges (for example, in the fashion industry, where often unregistered designs may be the preferred option). Finally, it is undeniable that there is a lesser degree of knowledge of the existence, functioning and value of the design system amongst economic operators than there is, for example, of the existence and value of trademark rights.

*** 24. What do you perceive as the top three benefits of having a registered design?**

between 1 and 3 choices

- It gives me the right to prevent others from using it without my consent
- It allows me to prove the disclosure and ownership of my design
- I do not need to prove that an infringer has copied it
- It acknowledges and protects the marketing value of my design
- It contributes to obtaining a return on investments made
- It helps preventing misappropriation of research and development expense
- It increases the value of my products and strengthens my brand
- It serves as effective marketing tool
- It increases my competitive edge
- It rewards and encourages my innovation
- I can make money out of my designs (e.g. sell or license to other parties)
- A protected design facilitates cooperation with other parties (like suppliers)
- Other
- No opinion

*** If other, please explain:**

2000 character(s) maximum

The main benefits to have a registered design (also compared to have a non-registered right, such as a unregistered design or a copyright or similar) are the following:

A registered design rights prevents another entity from using a design and from infringing upon the design or elements of it. Registered design rights can therefore be used to protect one's business's products and/or technologies at rather low costs, especially compared to patent protection.

Registered design rights are easily obtainable at low cost. The registration procedure is simple and usually fast, which means that design rights are ideal for companies seeking to protect a wide variety of products. It is not necessary to prove that a third party has actively copied your product, a simple comparison between the registered design and the infringing design suffices.

Design rights also give companies a unique way to protect the marketing value of their design. Nowadays the technical capabilities of products resemble each other more and more which means that design becomes more and more important. Design gives value to the product and such value must be protected. With copyright protection it will always be necessary to prove that the third party has been aware of the copyright and has actively copied it.

Design rights are also ideally suited to protect digital images and other elements which are not protectable

by other means. Another reason to acquire registered design rights is the speed with which infringements on a design are remedied. This is crucial for fast-moving industries like fashion or electronics, which have a quick turnover.

*** 25. What do you perceive as the top three costs of having a registered design?**

between 1 and 3 choices

- Fees for application/registration, publication, renewal etc.
- Preparing documentation for registration
- Cost of legal advice
- Searching for prior art
- Time needed to register/maintain a design
- Monitoring the registers of industrial property offices for conflicting later filings
- Identifying those who use your design without permission
- Litigation costs for pursuing infringement cases/invalidity cases
- Costs of defence against applications for declaration of invalidity
- Other
- No opinion

*** If other, please explain:**

2000 character(s) maximum

We selected "Other" to be able to fill in this text box. In addition to the 2 selected, our third choice is "Cost of legal advice".

These are the costs that most design holders incur in when obtaining protection for their designs. Design holders have to pay application, registration, publication, and renewal fees in order to register and maintain a design.

As a considerable number of design holders have their designs protected with the assistance of outside counsel, they typically have to bear the costs for prior legal advice and for the preparation of the necessary documentation for filing the application.

The said costs are clearly defined, as opposed to e.g. the costs related to the time needed to register /maintain a design. That would typically be the costs incurred by an in-house counsel or other in-house staff in managing the design portfolio and therefore forms part of the personnel costs. As far as the time of external counsel for registration/maintenance of a design is concerned, such costs would fall into the categories of "preparing documentation for registration" and "cost for legal advice".

Renewals filed by outside counsel may certainly also be a relevant cost factor but are probably lower than the first three mentioned cost factors.

Searching for prior art prior to an application is not done on a regular basis, in our experience. The same applies to monitoring the registers of industrial property offices for conflicting later filings and identifying those who use a design without permission.

Litigation costs on infringement /invalidity cases can be a substantial cost factor but are only incurred on a case-by-case basis. Most design holders use the instrument very carefully so that the total litigation costs are typically lower than the costs for application/registration, publication and renewal.

The same as for litigation costs applies to the costs of defense against applications for declaration of invalidity.

26. Based on your experience, do the benefits of design protection outweigh the costs in cases of:

between 4 and 4 answered rows

| | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|
| | | | | | | | | | |
|--|--|--|--|--|--|--|--|--|--|

| | Benefits much greater than costs | Benefits greater than costs | Benefits equal costs | Benefits lower than costs | Benefits much lower than costs | No opinion |
|---|----------------------------------|----------------------------------|-----------------------|---------------------------|--------------------------------|----------------------------------|
| * Unregistered Community design protection | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| * Registered national design protection in a Member State | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Registered Community design protection | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * International design protection | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

If you want to add any remark, please do so here:

5000 character(s) maximum

We have indicated "no opinion" for Unregistered Community design protection because there is no cost of acquiring the right.

*** 27. How confident are you about the validity and scope of protection of your registered design(s)?**

- Very confident
- Rather confident
- Rather not confident
- Not confident at all
- No opinion

*** Please explain your answer:**

2000 character(s) maximum

We selected "rather confident" rather than "no opinion" to be able to complete this text box.

In our opinion, validity and scope of protection cannot be treated equally. Often, design holders are unsure about validity but quite sure about the scope of protection or vice versa. In addition, the technical field and purpose of the design, the proficiency of the design holder, and the concerned market are decisive for the evaluation of validity and scope of protection. Designers obtaining e.g. a red dot design award or who are very knowledgeable in the design area usually know more about the prior art and hence, about the validity and scope of protection. As a general rule, the more one designs and files the more one is confident.

As noted in the joint paper (pp. 19-20), in principle, we support the two-step test incorporated in Art. 7 of the Regulation and Art. 6 of the Directive: the first step is to assess whether there has been a prior disclosure act (burden of proof lies with the party asserting invalidity); the second step provides a relevancy test of that disclosure act (burden of proof lies with the design owner), i.e. only if that disclosure act was not too obscure that the prior design could be held against the validity of the design. We are however convinced that the

relevancy test should be taken more seriously in practice as a true relevancy filter. We consider the language of the law quite clear (e.g. “reasonably”, “normal course of business”, “circles ... operating within the EU”). Nonetheless, the CJEU paved the way for a far weaker relevancy test, as became clear in its decision in case C-479/12, H. Gautzsch Großhandel GmbH & Co. KG v Münchener Boulevard Möbel Joseph Duna GmbH. We therefore advocate for a clarification in the recitals, emphasizing that it should not be too easy for prior designs to pass the second step and to become potentially novelty/individual character destroying. See the suggested Recital wording in the response to question 39.

*** 28. Before registering your design, did you search for prior similar designs?**

- Yes
- No
- No opinion

Specific questions to both creators/owners and lawyers/legal advisors

*** 31. The EUIPO currently does not examine whether a design is new before registering it as registered Community design. This allows the EUIPO to keep formalities to a minimum and register a design within a couple of days.**

Despite the complexity and technical constraints in searching for conflicting prior art on a world-wide basis (e.g. due to existence of unregistered designs), do you think that the EUIPO should carry out some novelty examination?

- Yes, even if it would considerably increase the fees and registration time
- Yes, but only if that examination would be offered as an optional, fee-based service
- No, but special tools could be offered to be able to conduct image searches in databases either for payment or free of charge
- No
- No opinion

32. What is your experience with design registration at the EUIPO?

between 8 and 8 answered rows

| | Very good | Rather good | Rather bad | Very bad | No opinion |
|--|----------------------------------|----------------------------------|----------------------------------|-----------------------|-----------------------|
| * General performance related to Community designs | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Supplied information on how to register a design | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Ease of application process and forms | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Possibility to do it electronically | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Transparency of registration process | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Speed of registration process | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Level of fees | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| | | | | | |

* Procedure for invalidating a registered design



*** Please explain your answer:**

5000 character(s) maximum

General performance related to Community designs – “Rather good”

INTA is generally happy with the EUIPO’s performance related to Community designs. It is a modern IP office with leading tools and efficient practices. Nevertheless, we feel that certain improvements could be made, particularly in relation to transparency in respect of Community design files and greater alignment with the EUIPO’s procedures relating to trade mark matters (where appropriate). Suggestions for further improvement are made throughout our responses to this Consultation.

*** Please explain your answer:**

2000 character(s) maximum

Supplied information on how to register a design – “Very good”

The general information on the EUIPO’s website as to what Community designs are and how to file them, as well as the EUIPO’s Guidelines for Community design matters, are comprehensive and accessible. We welcome the move to Guidelines in HTML format, which are indeed easier to navigate than the former PDF versions. We encourage the EUIPO to make the Guidelines even more interactive in the future (such as with links to case law).

*** Please explain your answer:**

2000 character(s) maximum

Ease of application process and forms – “Rather good”

The EUIPO’s filing process for Community designs is good, though there is some scope for further improvement. In particular, we would encourage a change to allow designs belonging to different Locarno classes to be filed in the same multiple application. Further, applications for renewal of multiple Community designs require each design in a multiple application to be added for renewal, without the possibility to renew all the designs in one go. The possibility to import all constituent designs for renewal should be added.

In addition, we suggest that, similarly to what was done with regard to EUTMs in the EU Trademark Reform, the ability to file an RCD at a national office is removed, as numerous errors have occurred in the transmission of designs from national offices to the EUIPO. Further, the EUIPO e-filing tool/wizard is available in all 23 EU languages and therefore we see no real need to do file RCD through national offices.

*** Please explain your answer:**

2000 character(s) maximum

Possibility to do it electronically – “Very good”

INTA considers the EUIPO’s e-filing tool to be straightforward and intuitive. INTA particularly applauds the availability of filing tips and best practices, which help applicants avoid common errors. INTA further applauds the communication and possibility of availing of the “fast track” option, which will suit many applicants, particularly SMEs without representation. INTA recommends, however, due to the loss in quality

in transmission by facsimile (fax), that the EUIPO phase out the use of this method for design applications, in favor of more reliable methods of secure electronic transmission, and is pleased to note that the EUIPO discourages use of this method in its Guidelines. One option could be to move to the approach taken recently in relation to trade mark applications, where the use of fax is limited to a back-up option where the e-filing tools are unavailable. Indeed, INTA views the expansion of the possibilities to rely on electronic communications as a positive development for users who can benefit from more efficient, expeditious and economical means of communication with the Office. Nevertheless, we believe that users should not be penalized for failing to file electronically where electronic filing is not possible (for example, in case of technical problems affecting either the user's or the Office's electronic system). For this reason, the maintenance of a back-up option where electronic filing is not possible is recommended.

*** Please explain your answer:**

2000 character(s) maximum

Transparency of registration process - "Rather bad"

In contrast to the situation with EU trade marks, the EUIPO's design registration process is not transparent as applicants do not have access to online files. It would be desirable to add to the "RCD file information" in the Office's "eSearch plus" database a "Correspondence" section as available for EU trade marks. Further, we note that designs filed through the Hague system and designating the EU are not readily searchable on the EUIPO's website, meaning a search of the EUIPO database is incomplete.

*** Please explain your answer:**

2000 character(s) maximum

Speed of registration process – "Very good"

The speed with which the EUIPO is registering Community designs is very impressive. Often design applications are examined and registered the same day of filing. We applaud the EUIPO for its efforts to maintain this impressive timeliness and urge the EUIPO to keep up its good work in this respect.

*** Please explain your answer:**

2000 character(s) maximum

Level of fees - "Rather Good"

As set out in the attached joint paper with ECTA and MARQUES, renewal fees are too high (see pages 9 and 10 of the attached). Notably, we agree with the Review that renewal fees are too high, and see no logical reason why the renewal fee should increase each time an RCD is renewed. The cost to the EUIPO of renewing an RCD does not depend on whether it is a first, second, third or fourth renewal. The increase in fees serves only to discourage further renewal of design rights, a notion unaligned with an innovation economy.

As per the attached joint paper, we support the Review's recommendation that a Fee Review Study be commissioned to recommend new fee levels and structures that take account of the goal of budget balance, and that those fee levels are reviewed periodically. We ask that the Fee Review Study examine the absence of a "bulk discount" for renewals. Currently, a filing of 9 designs in a single application costs €1750. There is no discount for the 2nd to 9th designs come renewal time – a total fee of €810. For the second renewal, that rises to €1080, and by the fourth renewal, the total is €1620.

As INTA advocated at the time of the EU Trademark reform, renewal fees should not be higher than

application fees, especially since they imply less administrative efforts for an office. The same can be said where RCD renewal fees are concerned. In addition, an increase in renewal fees would result in increasing the EUIPO's surplus, something that we believe should be avoided.

*** Please explain your answer:**

2000 character(s) maximum

Procedure for invalidating a registered design - "Rather Good"

The Invalidity Procedure should be made available on-line, so that applications can be e-filed.

If you want to share any other experience with design registration at the EUIPO, please do so here:

5000 character(s) maximum

33. What is your experience with design registration at the National Industrial Property Office(s)?

between 8 and 8 answered rows

| | Very good | Rather good | Rather bad | Very bad | No opinion |
|--|-----------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| * General performance related to national designs | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Supplied information on how to register a design | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Ease of application process and forms | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Possibility to do it electronically | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Transparency of registration process | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Speed of registration process | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Level of fees | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Procedure for invalidating a registered design | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

*** Please explain your answer and also indicate the Member State(s) to which you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"General performance related to national designs":

Portugal - Rather Good

The Portuguese IPO, taking into consideration all that is referred to below, is receiving, examining, publishing and granting designs in a expedited, consistent and efficient way.

Benelux - Rather Good

(No comment)

Italy - Rather Good

Our members submit and prosecute applications on-line and the entire process is very straightforward. Also, an applicant is very unlikely to receive office actions if the application includes a) Locarno class; b) technical drawings; c) owner; d) description when the products are difficult to be understood by the drawings only.

Spain - Rather Good

Electronic procedure is quite similar to that from EUIPO. However, the electronic platform is slightly more complicated than that from EUIPO and failures of the platform occur occasionally.

UK - Rather Good

(No comment)

Germany - Rather Good

(No comment)

*** Please explain your answer and also indicate the Member State(s) to which you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Supplied information on how to register a design":

Portugal - Rather Good

The Portuguese – IPO has, at its webpage, several published information guiding applicants.

Benelux - Rather Good

(No comment)

Italy - Rather Bad

There is a description of the process in the Italian PTO website and the subject matter is rather well described. However, the information is mainly in Italian and there is no guidance on the application process and on the technicalities.

Spain - Rather Good

Clear instructions about the whole process are available at the website of the SPTO.

UK - Rather Good

(No comment)

Germany - Very Good

(No comment)

*** Please explain your answer and also indicate the Member State(s) to which you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Ease of application process and forms":

Portugal - Rather Good

The E-platform developed under the European Trademark and Design Network (Cooperation Funds) and the process is practically equal to the e-filing of designs at EUIPO; otherwise it is possible to download a form and file the design application at the Office's premises. However, as the transition between the old system to the new developed system is still ongoing, there have been periods (ranging from hours to months) where the system has not been working properly (duplication of application numbers, republications, no issuance of official receipts). Although there is no knowledge of a lost filing, uncertainty may arise for this reason and direct contact with the IPO has been necessary for the regularization of applications.

Benelux - Rather Good

(No comment)

Italy - Rather Good

The on-line applications are - as said - very easy to be completed. The Italian PTO and the Chambers of Commerce on behalf of the Office are rather helpful with applicants.

Spain - Rather Good

The Spanish procedure is quite similar to EUIPO's. However it is slightly more complicated regarding payment, for instance, as more steps are to be taken compared to EUIPO's process.

UK - Rather Good

(No comment)

Germany - Rather Good

(No comment)

*** Please explain your answer and also indicate the Member State(s) you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Possibility to do it electronically":

Portugal - Rather Good

E-platform developed under European Trademark and Design Network (same comments as above).

Benelux - Rather Good

(No comment)

Italy - Rather Good

The e-filing is the main (probably only) source of design applications for attorneys as representatives and, unless there is a very extensive number of designs, the system works properly. However, in case of technical issues, that would be a matter of IT assistance. However, we have not experienced particular issues.

Spain - Very Good

E-filing is available at the SPTO, and is the major way for applying for national designs in Spain.

UK - Rather Good

(No comment)

Germany - Very Good

(No comment)

*** Please explain your answer and also indicate the Member State(s) you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Transparency of registration process":

Portugal - Very Good

An examination for formalities will be conducted followed by an absolute grounds of refusal examination; no relative grounds examination will be conducted unless an opposition is filed after publication of the application (two month period).

Benelux - Rather Bad

Very few information is available about timing, interpretation of formal requirements with respect to the depiction of the design, and suspension of publication.

Italy - Rather Bad

There is no official platform to look up for the registration process. Upon filing, design owners simply wait and see. However, despite the lack of the Internet-based source of information, there is an "Intranet" system accessible by going to the Office in person.

Spain - Very Good

Process is totally transparent for applicants as far as filing is concerned.

UK - Rather Good

(No comment)

Germany - Rather Good

(No comment)

*** Please explain your answer and also indicate the Member State(s) you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Speed of registration process":

Portugal - Very Good

If there are no oppositions nor formal defects to be corrected, a grant may be achieved in three months.

Italy - Rather Good

Lately, if no issue is raised, it takes around 6 months for an application (on e-filing track) to mature into registration.

Spain - Rather Good

It generally takes from 1 to 3 days to reach registration from the date of filing (provided that no formal objections occur).

UK - Rather Good
(No comment)

*** Please explain your answer and also indicate the Member State(s) you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Level of fees":

Portugal - Very Good

The IPO accepts multiple design applications (up to 100 objects in the same filing) being the fees the same up to 5 objects (7 views per object): €106.61; a fee of €10.61 will be paid for each object from the 6th up to 100th. The value is a lump sum for filing, publication and grant.

Benelux - Rather Bad

The level of fees for a Benelux design is too high in comparison with the fees at EUIPO, which gives a pan-European title.

Italy - Very Good

There is an official fee of €50 (for a single design) €100 (for an unlimited number of designs) in connection with e-filing. The paper filing would be charged respectively €100 and €200 as official fees.

Spain - Rather Good

From our view, it is adequate and quite affordable for applicants. Additionally, the designation fee for Spain in case of international designs (through Hague Agreement) has recently decreased during 2018 and it is now the same to other European countries.

UK - Very Good
(No comment)

Germany - Rather Good
(No comment)

*** Please explain your answer and also indicate the Member State(s) you are referring to:**

5000 character(s) maximum

We have indicated "Rather Good" above only so that we can enter the following text in this box:

"Procedure for invalidating a registered design":

Portugal - Rather Bad

Until 30 June 2019, applicants for invalidity will have to file an invalidity action at the IP Court with mandatory representation (by lawyers). The process will take in general more than one year to reach a decision. From 1 July 2019 an invalidity chamber is to be created at the IPO where representation is not mandatory and with competence for trade marks and design invalidity applications.

Italy - Very Bad

Currently the only option for invalidation is before a court.

Spain (no option selected)

Revocation still must be claimed before courts.

UK - Rather Good

(No comment)

Germany - Rather Good

(No comment)

If you want to share any other experience with design registration at the National Industrial Property Office(s), please do so here:

5000 character(s) maximum

Benelux:

The number of design applications in the Benelux is very limited (less than 1,200 applications per year during 2013-2017). The difference between the level of fees for a Benelux design and the level of fees for Community design is rather small. This may be the reason why applicants seem to prefer a Community Design (for a much larger territory).

UK:

The above responses reflect our opinion that the information provided by the UKIPO on its website is very clear and easy to understand, and makes good use of online boxes and click-through pages which limit the amount of information which the user has to consider on each page.

*** 34. Based on your experience, do you consider that registered designs provide a useful protection against unauthorized use of those designs by a third party?**

- Yes
- No
- No opinion

Specific questions to creators/owners of designs

*** 35. Have you / members of your organization ever sued someone in the EU for unauthorised use of your design?**

- Yes
- No
- Not applicable

*** 36. If yes, on which form of protection did you base your legal action?**

at least 1 choice(s)

- Unregistered Community design
- National design registered in a Member State
- Registered Community design
- International design registered at WIPO

Other

*** If other, please specify:**

2000 character(s) maximum

Unfair competition; passing off; trademarks; copyright; UK unregistered design right; patents.

*** 37. Have you/members of your organization ever requested to invalidate a design because it was the same as or similar to the design you own/created?**

- Yes
 No
 No opinion

Specific questions to both creators/owners and lawyers/legal advisors

38. Based on your experience, please rank the forms of protecting a design in terms of your chances to win an invalidity or an infringement action (on the scale from 1 (best) to 5 (worst)).

between 4 and 4 answered rows

| | 1 | 2 | 3 | 4 | 5 | Impossible to say | No experience |
|--|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|-----------------------|
| * Unregistered Community design | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |
| * National design registered in a Member State | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |
| * Registered Community design | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |
| * International design registered at WIPO | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> |

Specific questions to lawyers/legal advisors, authorities and academia

The following questions are very specific and therefore require profound legal expertise and experience in order to be answered.

Subject-matter and scope of protection

39. Based on your knowledge of the design protection systems in the EU, please evaluate the following elements in the legislation and its application by industrial property offices and in courts.

between 3 and 3 answered rows

| | Very clear | Clear | Not clear | Very unclear | No opinion |
|---|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
| * The definition of a "design", a "product" and a "complex product" | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

| | | | | | |
|---|----------------------------------|-----------------------|----------------------------------|-----------------------|-----------------------|
| * The requirements for protection (e.g. related to the need of being “visible”) | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * The scope of design protection (e.g. as to how to determine the individual character of a design) | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> |

*** Please explain your assessment and what specific changes in the legislation you would consider appropriate:**

5000 character(s) maximum

We indicated "not clear" above only so as to be able to include the following information:

Regarding scope of protection (question 39(3)): in line with the attached joint paper (pp.19-20), we support a clarification by way of recital amendment to the effect that too obscure prior disclosures should not be held against the design; there must be a true relevancy hurdle. We suggest introducing a recital into the Regulation and the Directive such as the following:

“Whereas in principle prior designs, which have been made available to the public, form part of the prior design corpus, such prior designs shall not be eligible to be held against a later design when assessing novelty and individual character if their making available took place under circumstances too obscure to be noticed by the circles concerned, operating within the EU, and thus did not reach a sufficient degree of relevancy. In this assessment, account should be taken of factors such as the normal course of events, the obscurity or public accessibility of the events leading to the making available as well as the reasonable and common practices in industrial and commercial matters.”

We would additionally support (pp. 20-21 of the attached joint paper) an amendment to the Recitals of the Regulation and the Directive to express that functional designs are still protected by EU design law, and that the exclusion for features of a design solely dictated by technical function should be narrowly construed – and that the threshold of “solely dictated by technical function” is not met in case of mere functionality of a design.

We generally, however, consider the concepts of the ‘informed user’, ‘individual character’, and ‘different overall impression’ to be largely satisfactory. We therefore consider that no amendments to the legislation in relation to the definition of these terms are required at this stage (p. 17 of the attached joint paper). Instead, a better approach is to allow case law to continue to develop. In particular, we disagree with the Review’s recommendation to introduce into the law clarifications on how to determine the individual character of a design. Notably, there should be no amendment that reference should be made to factors such as the nature of the product concerned or the sector to which the product belongs (pp. 17-18 of the attached joint paper).

On a final note, as noted in the attached joint paper (p. 23) we would also support any recommendation to allow a higher number of views to be included per design from an EU design application from the current maximum number of seven (either by lifting this maximum number or remove the maximum number of views restriction altogether).

Rights conferred

*** 40. Do you consider that the current scope of design rights, including limitations, provides sufficient protection against third parties copying a protected design by means of 3D printing?**

- Yes
- No
- No opinion

*** If no, please explain why and what specific changes in the legislation you would consider appropriate:**

5000 character(s) maximum

We indicated "no" above so as to be able to enter this text in this box.

As noted in the attached joint paper with ECTA and MARQUES (page 32), we consider it appropriate that a comprehensive review of 3D printing in the context of design rights be performed, and that on-going monitoring of the situation, and education of consumers and rights owners, would be useful.

*** 41. Do you think that the scope of design rights should allow preventing third parties from transiting counterfeit design goods through the Union territory even if the goods are not intended to be placed on the Union market?**

- Yes
 No
 No opinion

*** Please explain your answer:**

5000 character(s) maximum

According to the EUIPO and the European Patent Office's joint study on "intellectual property rights intensive industries and economic performance in the European Union" of October 2016, IPR-intensive industries generate about 28 % of all jobs in the EU (worth 60 million), including 12% in design-intensive industries. Besides employment and according to the same study, IPR-intensive industries contribute to economic output, as measured by gross domestic product (GDP). Overall, more than 42% of EU GDP is generated by IPR-intensive industries, with design-intensive industries accounting for 13%. Designs are therefore fundamental for the EU economy and should be protected against all kinds of infringements.

Considering the importance of designs to the EU economy, it is essential to safeguard design protection more effectively. For that purpose, design holders should be entitled, without hampering the free flow of legitimate international trade, to prevent third parties from bringing design infringing goods into the Member State/ the Union even if these infringing goods are not intended to be placed on the market in the Member State concerned/ the Union. To this effect, it should be permissible for design holders to prevent the entry of design infringing goods and their placement in all customs situations, including, in particular transit, transshipment, warehousing, free zones, temporary storage, inward processing or temporary admission, also when such goods are not intended to be released for free circulation in the Member State concerned /the Union.

The solution supported here would be in line with the one adopted in respect of trademarks, as part of the EU trademark reform (Directive 2015/2436 and Regulation 2017/1001). We therefore recommend including in the Designs Regulation and the Directive provisions similar to those of Art. 9 (4) of the Trade Mark Regulation and Art. 10 (4) of the Trade Marks Directive respectively, with the necessary adaptations.

Grounds for invalidity

*** 42. Do you think that lack of clarity and consistency in the representation should be an explicit ground for invalidity of a design?**

- Yes
 No

No opinion

*** Please explain your answer:**

2000 character(s) maximum

Since a design protects “the appearance of the whole or a part of a product resulting from its features such as e.g. lines, contours, colours, shape, texture, materials used or ornamentation”, its representation should be clear and consistent enough to define the design and its scope of protection.

That is why the visual representation of the design must be of good quality, clear, full and detailed so that all the features of the design can be clearly perceived, visible and distinguishable.

In addition, the visual content contained in the representations of a single design must be consistent, that is to say, it shall clearly relate to the same design. If two or more representations are inconsistent with each other regarding the level of detail shown in them, colors used, etc., it may create potential confusion to determine the scope of protection.

Therefore, the lack of clarity and consistency of a design should be considered a ground for invalidity to the extent that it does not allow to determine the design's scope of protection.

Procedural issues

*** 43. In your view, are the current requirements for the representation of Community designs under the Community Design Regulation and the respective Implementing Regulation (EC) No 2245/2002 (e.g. means of representation and their combination, static views, maximum number of views, neutral background) appropriate to show designs with sufficient clarity and precision, both for tangible products and non-tangible products (e.g. animated designs, graphical user interfaces)?**

- Yes
 No
 No opinion

*** Please explain your answer:**

5000 character(s) maximum

The current requirements for the representation of designs established in Regulations (CE) 6/2002 and 2245/2002, together with those examples established in the European Trademark and Design Network's Common Communication on Convergence on graphic representations of designs (CP6) related to colors, contrast, shadows/reflections as well as the guidelines for each type of view, may be considered sufficient for the applicant to fulfill the clarity and precision requirements in its design application.

Nevertheless, in line with the attached joint paper, we recommend that the current approach in relation to the number of representations under the EUIPO procedure be changed to allow a higher number of representations, or as some member states maintain, an unlimited number of representations. This promotes user choice, and enables designers properly to capture, as they wish, the design they wish to protect. Indeed, for moving designs, it may be that a video file better captures the design than does a series of static representations. Technology now allows it and therefore we consider that video files should be acceptable across the EUIPO and national offices (including the BOIP).

Moreover, we agree that 3D animated representations are helpful, and increasingly common, and advocate for their acceptance by the EUIPO and national offices. The technology is now available and has been trialed by the EUIPO. We suggest that it be extended to all national offices through the European Cooperation Projects. 3D filing should not be a mandatory requirement for users but an optional representation tool.

*** 44. Are you aware of any problems in relation to the option to file a description of a design under the Community design regime, national law or the international Hague system?**

- Yes
- No
- No opinion

*** If yes, please explain:**

5000 character(s) maximum

Whilst it is INTA's view that the availability of a description should be optional, it is important to note that a description can help clarify the features being claimed for protection or other aspects of the design and can help users of the system and enforcement bodies interpret the scope of protection of a design (without, it being said, the description defining such scope of protection in and of itself). Harmonization regarding descriptions would be desirable across the Community design regime and national law. Further, INTA is aware that the EUIPO imposes a 100 word limit on descriptions in relation to RCDs and, further, does not publish or translate the descriptions filed. Given the useful nature of descriptions, and in order to facilitate the proper searching of availability of designs and the likelihood of disputes, it would be preferable for the EUIPO to make descriptions more readily available on the register/on its electronic extract of the RCD in question.

*** 45. The Community Design Regulation allows for the filing of a specimen where the application is for a two-dimensional design (e.g. a piece of textile), and deferment of publication is requested. Do you consider this option still to be relevant and meeting current business needs?**

- Yes
- No
- No opinion

*** Please explain your answer:**

2000 character(s) maximum

INTA supports the continued possibility to file a specimen, especially where the design cannot be depicted using other means (for example, holograms).

*** 46. In your view, are there any specific provisions or requirements/conditions in the Community Design Regulation or the respective Implementing Regulation (EC) No 2245/2002 in relation to procedures before the EUIPO (e.g. for the application or registration of a registered Community design) which you consider to be inappropriately complex or rigid, or generating unnecessary burdens for users of the system?**

- Yes
- No
- No opinion

*** If yes, please explain:**

5000 character(s) maximum

As mentioned in the attached joint paper (5.6, pages 29-30), we consider that substantial cost and administrative savings can be made to users through the filing of multiple designs in a single application ("multiple applications"). We therefore applaud the RCD legal framework and EUIPO practices where multiple applications are allowed and strongly recommend that Industrial Property Offices allow the filing of such multiple applications.

However, we do not see any reason why the designs contained in a multiple application have to fall within the same Locarno class. That is hard to reconcile with Recital 18 of the Regulation.

It is uncertain whether the administrative burden of multiple applications for designs falling within the same Locarno class but designating different products within that class (which is permissible) may prove significantly different from the burden resulting from multiple applications with different Locarno classes. Clearly, multiple applications lessen the burden on applicants and can bring substantial cost benefits, whereas, in practice, the same class requirement works as means to reduce otherwise beneficial multiple applications.

We suggest deleting the requirement for the same Locarno class in Art. 37 of the Regulation.

Should this lead to a significant drop in application fee revenues at the EUIPO that should be dealt with at a fee level, not at a classification level. This is also a matter of transparency.

With a view to facilitating multi-jurisdictional filings, we support harmonization in the member states: all member states should offer multiple applications and there should not be the same Locarno class condition. Ultimately, it should be possible for users to use the same set of application materials at the EUIPO and any of the member states IP offices (and the BOIP). Therefore, we suggest introducing into the Directive provisions which render these procedural standards mandatory at member state level.

As noted in the attached joint paper (p. 23), we support the recommendation of the Review that the current approach in relation to the number of representations under the EUIPO procedure be changed to allow a higher number of representations, or as some member states maintain, an unlimited number of representations. This promotes users' choice and enables designers to capture properly the design they wish to protect. A higher number than the current 7 views should be allowed or the number restriction could be lifted altogether.

Other potential for improvement

*** 47. Are you aware of any (other) specific issue in relation to the protection, registration or enforcement of designs in respect of which you feel there is need for improvement or updating of the Community Design Regulation and/or the Design Directive?**

- Yes
- No
- No opinion

*** If yes, please explain the issue and the specific change in the legislation you would consider appropriate:**

5000 character(s) maximum

Please see our attached joint paper with ECTA and MARQUES and the above answer to question 7 which summarizes the areas where we believe that improvements could be achieved.

In addition:

- As noted in our responses to questions 7 and 48, we recommend harmonizing the right of prior use, by amending the Directive and introducing a parallel provision to Art. 22 of the Regulation.

- As mentioned in the responses to questions 7 and 21 and in line with INTA's Guidelines for Examination of Industrial Designs (available at <https://www.inta.org/Advocacy/Documents/2018/INTA-Guidelines-for-Examination-Designs-Nov-2018.pdf>) we believe that naming the Designer should be optional rather than mandatory for the registration of a design. Indeed, having to indicate the designer in the application may prove cumbersome for applicants who often struggle to identify the designer(s) and, if more than one individual, their exact contribution to the final result. Accordingly, we recommend that a provision be included in the Directive clarifying the optional nature of this requirement, in line with the rule for registered Community designs under Article 36(3) of the Regulation.

- We recommend that different sets of procedures which are currently not available both at EU and Member state levels be introduced:

1) Post-registration office proceedings for invalidity should be made mandatory at national level by amending the Directive accordingly, so long as invalidity can also be obtained in a main claim from national courts. Keeping both administrative and judicial options open can prevent multiplication of proceedings if, in addition to the invalidity of a national design, enforcement of contractual or extra-contractual claims is requested. Keeping the possibility to act before national courts also allows to efficiently direct one single action against several designs owned by the same defendant which is often not possible at office level where each design has its own proceedings and related costs. This is fully in line with the solution INTA supported in the EU trademark reform;

2) We recommend amending the Directive to introduce a mandatory counterclaim to invalidate a national design in infringement actions before the courts at Member State level, parallel to Article 84 et seq. of the Regulation;

3) In line with the attached joint paper (pages 25-26), we recommend introducing an EU law declaratory action for non-infringement under the Regulation.

Declarations of non-infringement allow an economic operator who wishes to launch a product and who is uncertain whether a third party design right may thereby be infringed, to apply for a court order. Article 81 lit. b of the Regulation attributes exclusive jurisdiction to the Community design courts for declaratory actions of non-infringement of Community designs as long as these actions are permitted under national law. We recommend that actions for declaration of non-infringement be provided for in the Regulation as a matter of EU law by way of deleting the words "if they are permitted under national law" in Art. 81 lit. b of the Regulation. We likewise recommend introducing an EU law action against threatened infringement by deleting the same wording in Art. 81 lit. a of the Regulation.

Degree of harmonization

48. Below is a list of design law aspects that are not (fully) harmonized by the Design Directive. For each item please let us know how do you assess the need for harmonization in view of potential obstacles for the internal market and the establishment of a level playing field for the registration of national designs.

between 16 and 16 answered rows

| | | | | | |
|--|--|--|--|--|--|
| | | | | | |
|--|--|--|--|--|--|

| | Very important | Rather important | Rather not important | Not at all important | No opinion |
|--|----------------------------------|----------------------------------|-----------------------|-----------------------|-----------------------|
| * Description of design and its legal relevance for the subject-matter of protection | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Product indication and the design's scope of protection | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Formal requirements to represent a design (e.g. number of views, neutral background) | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Deferment of publication | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Multiple applications and its conditions | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Right to the design | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Protection of unregistered designs | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Right of prior use | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * National designs as objects of property (transfer, rights in rem, levy of execution, licensing) | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Substantive grounds for refusal of registration | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Procedure for refusal of registration | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Responsible authority for invalidating a design | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Procedure for invalidating a design | <input type="radio"/> | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Refusal/invalidity based on earlier distinctive sign (optional in the Directive) | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Refusal/invalidity based on unauthorized use of a copyright protected work (optional in the Directive) | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| * Refusal/invalidity based on improper use of an item listed in Article 6b of the Paris Convention for the Protection of Industrial Property (optional in the Directive) | <input checked="" type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Description of design and its legal relevance for the subject-matter of protection - "Rather Important":

Whilst it is INTA's view that the availability of a description should be optional, it is important to note that a description can help clarify the features being claimed for protection or other aspects of the design and can help users of the system and enforcement bodies interpret the scope of protection of a design (without, it being said, the description defining such scope of protection in and of itself).

Harmonization of the filing approaches of the EUIPO and national offices (and BOIP) is an essential and valid goal. Having a single set of rules across the EU should aid design filings and thereby lead to more designs being filed. Unfortunately, there is no such harmonization across the EU at present in relation to design descriptions and the effect on the scope of protection.

In the EUIPO, a description of the design is optional but does not affect the scope of protection of the Community design (Art 36(6) of the Community Design Regulation). Instead it serves a purely administrative purpose by aiding the examiner in carrying out formalities examination by e.g. clarifying the nature/ purpose of some features of the design to overcome a possible objection. One example is if the views show the product in two different colors but the description provides an explanation that the color of the product changes when it is in use. Not requiring a description of the design helps to keep filing costs down and also prevents the design protection from becoming restrictive and unpredictable.

On the other hand, in the UK (for example), a design applicant can disclaim or limit particular elements or aspects shown in the representation(s), thereby enabling further definition of the design intended for protection. This can be in written form (by drafting and submitting a statement which explicitly states what is or is not intended for protection). Allowing a description which forms part of the registered design can assist in the interpretation of the images in the registered design, and can help to clarify the comparison of prior designs and the images filed that needs to be made when assessing 'novelty' and 'individual character'. In the Green Paper on the Legal Protection of Industrial Designs (1991), it was acknowledged that there might be a need to explain features which constitute the design, which are not easily perceived by the application. Descriptions and limitations can be particularly useful in explaining e.g. that protection is sought for the shape of the product alone or that the positive absence of surface decoration is to be protected (an "unadorned" design). A harmonized rule on the use of description and disclaimers could also address the uncertainty over the meaning of any dashed lines and could allow an applicant to pro-actively disclaim aspects of the design that are dictated solely by their technical function.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Product indication and the design's scope of protection - "Very Important":

In our view, it is very important that the scope of protection is harmonized in the entire EU. At EU level (EUIPO and EU courts), the product indication is not relevant for the scope of protection (see, in this sense, CJEU, 21 September 2017, C-361/15P and C-405/15P, EU:C:2017:720, Easy Sanitary Solutions, para. 96).

The same rule must apply in all EU Member States.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Formal requirements to represent a design (e.g. number of views, neutral background) - "Very Important":

Lack of harmonization regarding these matters (e.g. number of views, neutral backgrounds), may involve that the same design is granted in one Member State and denied in another one because of the discrepancies in the applied criteria. It also affects to the international extension of the design protection. The already mention European Cooperation Project CP6 has achieved significant harmonization.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Deferment of publication - "Very Important":

As mentioned in the attached joint paper, differences in the time period of the deferment of publication may cause legal uncertainty as there may arise confusion on the date of first disclosure of a design and this directly affects to the users' strategy in this regard. For designers and undertakings managing their designs, differences in the availability of deferment of publication and in the deferment period are burdensome. These differences can entail significant increases in portfolio management costs and seriously obstruct cross-border activities. Particularly for the interests of individual designers and SMEs, we consider this unacceptable.

Therefore, we advocate for harmonization, through amendments to the Directive, to ensure that deferment is available in all EU Member States, and to ensure that the deferment period is the same i.e., 30 months.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Multiple applications and its conditions - "Rather Important":

Differences in multiple applications conditions may favor some Member States against others. For instance, in Spain, up to 50 designs can be included in one single application, which may render a design application more expensive when applying for more than 50 designs, as the application has to be split. Currently, most countries adopt the practice of allowing just one Locarno class per application (plus ornamentation) with the purpose to avoid unfair treatment of the applicants among the Member States.

As mentioned in the response to question 46 and in accordance with our attached joint paper (5.6, pages 29-30), we do not see any reason why the designs contained in a multiple application have to fall within the same Locarno class. That is hard to reconcile with Recital 18 of the Regulation.

It is uncertain whether the administrative burden of multiple applications for designs falling within the same Locarno class but designating different products within that class (which is permissible) may prove significantly different from the burden resulting from multiple applications with different Locarno classes. Clearly, multiple applications lessen the burden on applicants and can bring substantial cost benefits, whereas, in practice, the same class requirement works as means to reduce otherwise beneficial multiple applications.

We suggest deleting the requirement for the same Locarno class. Should this lead to a significant drop in application fee revenues that should be dealt with at a fee level, not at a classification level. This is also a matter of transparency.

With a view to facilitating multi-jurisdictional filings, we support harmonization in the member states: all Member States should offer multiple applications and there should not be the same Locarno class condition. Ultimately, it should be possible for users to use the same set of application materials at the EUIPO and any

of the Member States IP offices. Therefore, we suggest introducing into the Directive provisions which render these procedural standards mandatory at member state level.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Right to the design - "Very Important":

Right to the design has to be harmonized to avoid conflicts between "first to file" and "first to create" actors.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Protection of unregistered designs - "Very Important":

Lack of harmonization in unregistered designs protection may cause legal uncertainty as some Member States may grant a right over the unregistered design which is not enforceable in other Member States. Moreover, the unregistered design scope of protection should be clarified for a uniform enforcement interpretation in all Member States.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Right of prior use - "Very Important":

Lack of harmonization regarding "prior use" conditions may cause differences in the legal strength of the same design in different Member States, which may lead to differences in marketing strategies. At the same time, it gives rise to some countries be safer than others.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

National designs as objects of property (transfer, rights in rem, levy of execution, licensing) - "Rather Important":

Harmonized treatment regarding transfer, licensing, etc., is highly recommended in order to favor commercial transactions between companies belonging to different Member States, strengthening the internal market.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Substantive grounds for refusal of registration - "Very Important":

Differences in the grounds for refusal amongst jurisdictions may cause legal uncertainty for the right holders, and may limit their marketing options available.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Procedure for refusal of registration - "Very Important":

The requirements that a design must fulfill to be granted should be the same in all Member States. Therefore, harmonization is needed in this matter to remove any obstacle that may arise when applicants want to extend their rights to other Member States.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Responsible authority for invalidating a design - "Very Important":

Harmonization in this matter is needed to avoid significant differences among the Member States in the amount of time and economic resources spent in an invalidation procedure by the parties involved. INTA supports administrative invalidity procedures as an alternative to court procedures. Further, in line with the attached joint paper, we also recommend amending the Design Directive and introducing the possibility of a counterclaim to invalidate a national design in infringement actions before the courts, as Art. 84 et seq of the Regulation provides for Community designs.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Procedure for invalidating a design - "Rather Important":

As stated in the previous question, lack of harmonization in the procedure for invalidating a design may cause unfair disadvantages for the parties involved and legal uncertainty.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Refusal/invalidity based on earlier distinctive sign (optional in the Directive) - "Very Important":

Lack of harmonization in this field may cause legal uncertainty that not only affects to the design but also trademark owners.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Refusal/invalidity based on unauthorized use of a copyright protected work (optional in the Directive) - "Very Important":

Taking into account that the legal force given to copyrights might be different depending on the Member State, harmonization is also welcome.

*** Please also explain the problems caused by the lack of harmonization:**

5000 character(s) maximum

Refusal/invalidity based on improper use of an item listed in Article 6b of the Paris Convention for the Protection of Industrial Property (optional in the Directive) - "Very Important":

Lack of harmonization in this field may cause legal uncertainty that not only affects to the design but also trademark owners.

If you consider other aspects in need of harmonization, please specify them and explain the problems caused by the lack of harmonization:

5000 character(s) maximum

Specific questions to lawyers/legal advisors, authorities and academia

*** 50. In terms of coherence, are you aware of any problematic inconsistencies or discrepancies in the provisions of the Design Directive and/or the Community Design Regulation, and/or between these two instruments, and/or between one/both of these two instruments with other Union legislation?**

- Yes
- No
- No opinion

*** If yes, please explain:**

5000 character(s) maximum

The specific differences to the EU legislation on trademarks are dealt with in response to Question 51. However, INTA considers greater harmonization between the Community design system and national laws, and between national laws themselves, to be desirable in the field of registered and unregistered designs. To name a few particularly important issues, INTA considers that the different availability of actions for declarations of non-infringement at national level result in an uneven playing field and encourage forum shopping. Further, from a procedural perspective, INTA considers that administrative proceedings should be available at national level to enable third parties to apply to have a registered design declared invalid.

*** 51. The Community Design Regulation and the respective Implementing Regulation (EC) No 2245 /2002 set out rules for procedures before the EUIPO which is also responsible to conduct procedures in European Union trade mark matters. Are you aware of any procedural discrepancies between these regulations which are not justified by the different nature of designs and trade marks?**

- Yes
- No
- No opinion

*** If yes, please specify:**

5000 character(s) maximum

Following (and even before) the reform of EU trademark law, there are some undesirable procedural discrepancies between the trademark-related laws and the design-related rules before the EUIPO. The most concerning is the lack of the concept/remedy of "continuation of proceedings" in relation to designs,

when in fact the consequences of missed deadlines in relation to designs – where novelty/individual character are requirements – may be all the more drastic. We also note that the EUIPO is now applying different rules for the renewal of trademarks (expiry now 10 years after the filing date, rather than the former “end of the month” rule) and designs (renewal payment may be made at the end of the month in which the design expires). This may generate confusion. Further, there is an inequality in the rights of representation, with non-EU, EEA-based, representatives permitted to represent at the EUIPO in trademark matters, but not design matters. In contrast, it is INTA’s position that there is a justification for permitting priority claims for design applications after filing the application (within no later than one month from the date of filing of the design application with the relevant documentation being submitted e.g. within three months). This is again due to the potentially drastic consequences of a loss of priority rights in the context of designs.

In addition, terminology should be aligned and the terms “EU Registered Design (EURD)” and “EU Unregistered Design (EUUD)” should be adopted in replacement of the current “Registered Community Design (RCD)” and “Unregistered Community Design (UCD)”.

*** 52. In your opinion, to what extent has the accession of the EU (2006) to the international Hague system, which allows EU applicants to obtain design protection in countries which are party to its Geneva Act, proved to be a useful complement to the available venues for obtaining design protection both within and outside the EU?**

- Very useful
- Useful
- Useless
- Completely useless
- No opinion

*** Please explain your answer:**

5000 character(s) maximum

INTA advocates user choice. The Hague Agreement provides a useful system for EU designers seeking design protection around the globe. The Hague System, established under the Agreement, allows industrial designs to be protected in multiple countries or regions with minimal formalities. In line with its core mission of promoting harmonization of trademark and related rights and in accordance with its Board Resolution of November 15, 2016 (available at <https://www.inta.org/Advocacy/Pages/Hague-Agreement-Concerning-the-International-Registration-of-Industrial-Designs.aspx>), INTA encourages countries, intergovernmental organizations, and non-member countries whose citizens are covered by the adherence of an intergovernmental organization to accede to the Hague Agreement.

*** 53. In this context, do you consider the accession of Member States to the international Hague system to be necessary to remove major obstacles to the internal market and the establishment of a level playing field?**

- Yes
- No
- No opinion

*** Please explain your answer:**

5000 character(s) maximum

As set out in INTA Board Resolution referred to in the preceding answer, and its “Accompanying Report” (available at [http://www.inta.org/Advocacy/Documents/2016/2016-09-28_INTA%20Report%20on%20the%](http://www.inta.org/Advocacy/Documents/2016/2016-09-28_INTA%20Report%20on%20the%20)

20Hague%20Agreement.pdf), INTA advocates that countries and intergovernmental organizations join the Hague Agreement, including where their citizens may already be covered.

Design owners domiciled in any Member State of the European Union, whether or not the country is a member of the Hague Agreement, can file a design application under the Hague Agreement for protection in the EU, but not in their country if this is not a member. This scenario does not involve any issue when the design applicant claims protection for the European Union. However, when the applicant seeks protection just for some Member States (both contracting and non-contracting parties of the Hague Agreement), the application must be filed through the Hague Agreement to designate those Member States which are contracting parties together with national applications for those Member States which are not part of this Agreement. This involves several applications, with different formal requirements, different languages, several fees in several currencies and, hence, resulting in several registrations.

Taking into account that one of the main objectives of the European Union is to ensure smooth and efficient trade within the EU territory with no internal borders, this scenario may imply an obstacle since it does not allow to obtain protection for different Member States (individually considered) through just one international application (Hague Agreement), but it obliges the applicant to be aware of those Member States which are not contracting parties of the Hague in order to know all the particulars of their national design systems and, therefore, filing different national applications together with the international application.

Therefore and also in line with the recommendation in the attached joint paper with ECTA and MARQUES, we urge the European Commission to consider requiring EU Member States to adhere to the Hague System and domesticate its requirements, perhaps by way of amendment to the Directive. This would ensure EU designers to be all in the same position.

*** 54. Are you aware of any problems/issues which negatively influence the complementarity and interoperability between the Community design system, the national design systems and/or the international Hague system?**

- Yes
 No
 No opinion

*** If yes, please explain:**

5000 character(s) maximum

1. Representation of a design: In line with our attached joint paper with ECTA and MARQUES (point 4.1), we consider that harmonization between the EUIPO and the national offices (and the Benelux Office for Intellectual Property - BOIP) is an essential valid goal in and of itself. We support the European Cooperation project CP6 'Convergence on graphic representations of Designs' and its adoption and implementation by all relevant offices to enhance transparency and predictability, and thus user friendliness. For designers, especially individual designers and SMEs, having a single set of requirements across the EU will aid design filing, and should lead to more designs being filed.

We therefore support the first recommendation of the Review on page 102, i.e. that national offices should attempt to align their practices, where this is feasible in economic and institutional perspectives, with the Cooperation Programme run by the EUIPO. A harmonized approach to, for example, dotted and broken lines should be one potential outcome of that harmonization.

We see the value of incorporating the cooperation requirement into law, similarly to the position with respect to trademarks.

We also agree with the second recommendation on page 102 of the Review that the current approach in relation to the number of representations under the EUIPO procedure be changed to allow a higher number

of representations, or as some member states maintain, an unlimited number of representations. This promotes user choice, and enables designers properly to capture, as they wish, the design they wish to protect. Indeed, for moving designs, it may be that a video file better captures the design than does a series of static representations. Technology now allows it and therefore we consider that video files should be acceptable across the EUIPO and national offices (including the BOIP).

Further, we agree that 3D animated representations are helpful, and increasingly common, and advocate for their acceptance by the EUIPO and the national offices (including the BOIP). The technology is now available, and has been trialed by the EUIPO. We suggest it should be made available to all national offices (and the BOIP) through the cooperation projects. Although it is not expressly suggested by the Review, for the avoidance of doubt, we would not countenance a mandatory requirement that all designers file 3D representations of their designs: it should be an optional representation tool.

The harmonization of administrative practices in the member states is essential for the implementation, functioning and acceptance of the EU Design System. Whilst we support harmonization of practice between Community Design Courts, we do not agree that the convergence exercise should be extended to judges sitting in Community Design Courts.

Currently, the Cooperation Programs are coordinated by the EUIPO (which has no responsibility for design enforcement) working together with the national offices (and the BOIP) which have no responsibility for design enforcement, and some of which do not have responsibility for design validity. Without that experience, the EUIPO and the national offices are not well placed to attempt to converge issues more properly left for the courts to develop. We support a dedicated forum for judges to exchange views and share best practices on issues regarding design proceedings. (As also noted in the attached joint paper, we further support the EUIPO and national offices continuing to advocate for international harmonization, for example through the Design Law Treaty, ID5, WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications and the Hague Working Groups.)

See Question 59 below for a continuation of this response.

*** 55. If you wish to register the same design in the EU and in other countries outside the EU, what are the main difficulties in achieving it?**

at least 1 choice(s)

- Different scope of protection
- Different requirements for the design representation
- Different requirements for the product indications
- Different procedural rules
- Other
- There are no relevant difficulties
- I have no experience

*** If other, please explain:**

5000 character(s) maximum

INTA supports the work of WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications to progress on a treaty on filing requirements.

*** 56. In your view, is the current general level of fees for Community designs appropriate?**

- Yes
- No, fees are too high
- No, fees are too low

No opinion

*** If no, please explain:**

5000 character(s) maximum

As explained in our response to question 32 and in line with attached joint paper with ECTA and MARQUES, renewal fees are too high (see pages 7-10). The design protection system and its fee structures should be aimed at facilitating the choice of applicants between different protection levels in accordance with their individual needs, their budgets and the intended territorial scope of protection and offering effective design protection at low costs.

We support the Review's that a Fee Review Study be commissioned to recommend new fee levels and structures that take account of the goal of budget balance, and that those fee levels are reviewed periodically.

We agree that any fee reforms should not put at risk the EUIPO's high level of performance. We support a EUIPO which is modern, efficient and effective. For that matter, we support national offices which are also modern, efficient and effective. The terms of the further Fee Review Study should therefore include examining the "headline" filing fee of €350 for RCD applications, including reviewing any likely impact on the national offices (and the Benelux Office for Intellectual Property (BOIP)) were that fee to be reduced. The Fee Review Study should also look at the cost to the EUIPO of registering a design, so as to determine which aspects of the system might be cross-subsidizing other aspects. Setting the RCD application fee by reference to the costs of using three or more of the "top 5" offices requires further, empirical, economic justification.

Of course, lower RCD fees and lower filing fees at national level are in the interests of users of the design protection system. Fee schemes should aim to be at least balanced, without any undue disproportion and, certainly, any unjustified increase. At the same time, we are aware that providing a national design protection infrastructure is a resource intensive burden for some (smaller) member states. Therefore, cost reductions should not result in a dangerous imbalance between RCD and national fee structures; national design filings must remain attractive for applicants. That could put the parallel existing protection levels at risk, and ultimately encroach upon the freedom of choice of users between national, EU and international protection levels. Therefore, we agree with the Review's finding that even a permanent surplus at EUIPO level does not in itself justify a fee reduction for RCDs.

The Fee Review Study should also examine the fees charged for multiple filings. We support the current principle of "bulk discounts" for multiple filings. We do not accept (and the Study offers no evidence) that the "bulk discount" benefits only larger enterprises, nor that larger enterprises are being cross-subsidized by individual designers or SMEs.

We support the alignment of the fee regime for RCDs and for EU designations under the Hague System, so as not to distort filing behavior.

We agree with the Review that renewal fees are too high, and see no logical reason why the renewal fee should increase each time an RCD is renewed. The cost to the EUIPO of renewing an RCD does not depend on whether it is a first, second, third or fourth renewal. The increase in fees serves only to discourage further renewal of design rights, a notion unaligned with an innovation economy.

We also ask that the Fee Review Study examine the absence of a "bulk discount" for renewals. Currently, a filing of 9 designs in a single application costs €1750. There is no discount for the 2nd to 9th designs come renewal time – a total fee of €810. For the second renewal, that rises to €1080, and by the fourth renewal, the total is €1620.

In conclusion, fee structures at EUIPO and within the EU should aim at facilitating the parallel existing protection levels at national, EU and international level. We support commissioning a Fee Review study. Independent from that study, “bulk discounts” by way of multiple applications should be maintained. Also, we request a substantial reduction of renewal fees at EUIPO level.

*** 57. In your view, does the current structure of the various fees present any difficulties to applicants and holders of Community designs?**

- Yes
- No
- No opinion

*** If yes, please explain:**

5000 character(s) maximum

We refer to our response to question 56. In line with our attached joint paper with ECTA and MARQUES, we support a Fee Review Study which includes a review of the fee structure for RCDs to ensure that the fee structure supports the avoidance of any difficulties for applicants and registrants of designs, in particular with respect to a possible imbalance between RCD and national fee structures.

*** 58. In this context, do you think it is appropriate that all designs of a multiple application must refer to products in the same class of the International Classification for Industrial Designs (Locarno Classification) to be able to benefit from the current bulk discount?**

- Yes
- No
- No opinion

Invitation to all

59. If you wish to add any further information or views in relation to the design protection systems in the EU and their potential for improvement, which have not been covered by this questionnaire, please feel free to do so here:

5000 character(s) maximum

Continuation of response to question 54:

In line with the recommendations set forward in the attached joint paper with ECTA and MARQUES, we would like to add:

Invalidity proceedings (Section 4.2 of the attached joint paper): The Review notes that the member states have introduced a procedure for invalidating a design right. The major distinction which exists is between those member states where invalidity proceedings can be brought before the national office (e.g. Austria, Czech Republic, Germany) and those in which they may only be brought before a judicial body (e.g. the Netherlands and Sweden). We agree with the Review that the position should be harmonised across the EU, and that harmonisation is most important towards a quick and inexpensive design invalidity system in all member states. This has already been decided with respect to trademarks, and there is no reason why designs should differ. We therefore agree with the recommendations set out on pages 104 and 105 of the Review that it be made mandatory for national offices to offer a quick and inexpensive invalidation procedure. Given that national offices (and the BOIP) are currently implementing this change with respect to

trademarks, we do not see any reason why the implementation period for designs should not be coterminous with that for trademarks.

We also recommend amending the Design Directive and introducing the possibility of a counterclaim to invalidate a national design in infringement actions before the courts, as Art. 84 et seq of the Regulation provides for Community designs. In relation to member states without the requisite expertise, we see a role for the cooperation projects to assist in capacity building in this regard, and agree that, as an interim measure, it may be appropriate in some member states to invite special design experts as part of the judicial panel. We also agree that it could be further recommended that cooperation between the EUIPO and national offices (and the BOIP) be increased on this point.

In addition to the above recommendation, INTA would like to further note, with regard to the Hague Agreement: we note that with the expansion of the Hague System to the United States, Japan and other countries, uncertainties were introduced by allowing member states to adhere to national requirements which make the international design system difficult to handle (different representations required, need to file certified priority documents separately, no simultaneous protection for several representations of the same device, etc.). It is therefore of utmost importance that this system is harmonized.

60. Please feel also free to upload a concise document, such as a position paper or study. Please note that the uploaded documents will be published alongside your response to the questionnaire.

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

af60923d-2f67-4cce-8521-7fd870f020fa

/ECTA_INTA_MARQUES_Joint_Paper_on_Legal_Review_Designs_July2018.pdf

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