

Review of the European Framework for Design Rights

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I/ Introduction

Design rights protecting the appearance of a product are covered in the European Union as a distinct form of intellectual property. The current framework consists of a Directive (98/71/EC), harmonising registration of designs across the EU, and a Regulation (6/2002), which creates a unitary design right. Both of these are up for review in 2021 and could have important ramifications for business and the future of design protection in the EU.

Design rights grant the holder an exclusive right for the registered design for up to twenty-five years, or three years in the case of an unregistered design. Designs are an important, relatively simple form of protection which companies and individuals can attain to protect their investments into research and development. The registration process does not undergo a rigorous examination process as in the case with patents, although the design must satisfy certain requirements for novelty and individual character. In the end, designs form an important strategic asset for many businesses.

II/ Public Consultation

The current design rights framework is twenty years old, and is due for a review to check whether the system is still fit for purpose. The European Commission took the opportunity in its [2020 IP Action Plan](#), to signal that such a review of the framework would occur in 2021. To that end, the Commission published its [Inception Impact Assessment](#) on **24 November** and is currently undertaking a [public consultation](#) to gather feedback from interested stakeholders that will close **22 July 2021**.

The Commission indicates a clear intention with this review to focus on updating the framework to address three main issues:

- procedural inconsistencies and inefficiencies in the registration process
- updating the framework to properly account for the digital age in areas such as **3D printing**
- fragmentation in the spare parts market for **component parts used in the repair of complex products**



III/ Updating the Legislative Framework

With regards to updating the framework to account for the digital age, the rise of 3D printing raises a concern for some industry players. As patents have expired on 3D printing technologies that have been around for decades, the cost of 3D printers has decreased. This, in turn, has allowed for their broader adoption in the economy. Indeed, 3D printing poses both ethical challenges, such as the ability to 3D print weapons,¹ and commercial challenges for businesses which may see their design rights infringed by the reproduction of their designs by private users. Under the current framework, Article 20 1 (a) grants a limitation on the rights of the community design to acts done privately and for non-commercial purposes. The ability for consumers to quickly download 3D plans for objects to be printed at home not only raises concerns on infringement, it may also raise safety concerns if those objects are replacement parts which do not meet specific safety standards.

Another area where the framework may be updated is in protection of graphical user interfaces (GUIs). These include the familiar apps and icons which consumers use on their smartphones and computer devices every day. In the United States, GUIs are protectable under copyright, whereas in the EU there is some confusion as to whether they can be protected as designs. The Commission may therefore seek to update the framework to allow GUIs to be protected under design law.

A third area which the Commission draws attention to is the spare parts market, and the distortive effects that the design rights framework may have in the market. When the Regulation was originally passed there was still disagreement on the role of designs for components involved in complex products. The compromise appears in Art. 110 which grants an exception for the right to repair “until such time as amendments to (the) Regulation enter into force”. It seems that time has come. While historically, the major concern was the spare parts market in the automotive sector, others sectors ought to be on the lookout for how a revision of this provision may impact their sector. The European Green Deal and renewed energy behind the Circular Economy may feature heavily in this debate; a balance may need to be struck between rightsholders and the goals of these important public policies.

Finally, although not specifically mentioned in the Inception Impact Assessment, when reviewing legislation such as this, the Commission oftentimes seeks to incorporate the most relevant case law from the CJEU and other EU courts into the legislative framework in order to codify the law and create greater legal certainty. One area of particular interest is the area of cumulation. Cumulation is the idea that a single object may be covered (or not) by varying levels of IP protections. In short, can the same object be protected by more than one IP right. Following both the [Cofemel](#) and [Brompton Bicycle](#) decisions, the CJEU seems to have made clear that perfect cumulation between copyright and designs is possible. To create greater legal certainty the Commission may wish to look at codifying this as such in statute.

¹ <https://www.markey.senate.gov/news/press-releases/senators-markey-and-menendez-and-rep-deutch-reintroduce-ban-on-3d-printed-guns>

IV/ Conclusion

Stakeholders with an interest in protecting their design rights ought to have the review of EU design law high on their political agenda, as it could have significant ramifications for business. While the **Inception Impact Assessment** has been released, stakeholders still have ample opportunity to have their interests represented ahead of the Commission adoption of the legislative proposal(s), and beyond as the texts make their way through the normal legislative procedure.

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