

The Role of Design in Branding: A Strategic Approach to Recent EU Legislative Reforms

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31.12.2025

ABSTRACT

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| Department of: Commercial Law | Type of work: Master's Thesis |
| Author: Rosa Joensuu | Date: 31.12.2025 |
| Title of thesis: The Role of Design in Branding: A Strategic Approach to Recent EU Legislative Reforms | |
| Abstract: <p>The research aims to identify the benefits and challenges that recent legal reforms in the EU bring to designers and SMEs. The study focuses on the new EU legislation on designs and geographical indications for craft and industrial products, while also considering the EU's sustainability objectives and recent changes in environmental legislation.</p> <p>The study discusses how the changes introduced by the reforms should be implemented in brand strategies and how companies should prepare for potential new challenges created by digitalisation, increasing internet sales, and counterfeiting, for example.</p> <p>The design field is highly IP-intensive, and design plays a crucial role in the circular economy and in the transition towards more sustainable production and circular products. The study considers the economic importance of design and the benefits of including design in brand protection and brand creation.</p> | |
| Keywords: intellectual property law, EU design law, geographical indications, SMEs, brand protection, brand strategy | |

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1 INTRODUCTION

1.1 Background

Intellectual property protection offers many possibilities for small and medium-sized enterprises, but is widely underused by EU SMEs. The Intellectual Property SME Scoreboard published by the European Union Intellectual Property Office (EUIPO) in 2022 showed that only 10% of SMEs own registered intellectual property rights.¹ On the other hand, the same study found that 93% of SMEs with registered IP rights have seen a positive impact resulting from the registration.²

SMEs are also not using their IP to the full extent. In assessments of firm value IP is one of the key indicators of technological and growth possibilities. However, knowledge-intensive SMEs often lack appropriate IP strategies and thus fail to valorise their intangible assets fully.³ This may also be due to the lack of support systems and easily accessible information.

Moreover, ever-growing online sales create problems as it is easier to distribute copies, replicas and counterfeit products. There is also a growing demand for those products due to phenomena such as the “Dupe-culture”, which refers to the recent trend of recommending cheaper replicas of branded products on social media platforms. The phenomenon creates various possible legal issues and causes significant economic damage to brands.⁴ Therefore, it is important for design businesses to protect their brands and creations by establishing

¹ 2022 Intellectual Property SME Scoreboard, European Union Intellectual Property Office 2022, DOI: 10.2814/28513, p. 48

² Ibid., p. 67

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Making the most of the EU's innovative potential, An intellectual property action plan to support the EU's recovery and resilience, COM(2020) 760 (final), p. 3

⁴ Baghetti, Massimo – Burdese, Paolo – Cei, Leone: *The "Dupe" phenomenon and the protection of intellectual and industrial property rights*, (<https://www.lexology.com/library/detail.aspx?g=ca794027-72f6-4882-882d-9322e8244e65>), p. 1-4

an IP strategy and by utilising industrial rights to the full potential they offer. The use and knowledge of intellectual property rights in the design sector is much lower than it ought to be.

Counterfeit products do not only pose a threat to design businesses, but the whole EU economy. A recent study by the EUIPO revealed the extent to which counterfeit goods hamper the EU market, taking jobs and opportunities away from competition. According to the study, EUR 16 billion in sales and nearly 200 000 jobs are lost annually due to counterfeit products. The study also revealed that the young generation considers it acceptable to buy counterfeit products.⁵

The Commission has set out many action points in promoting an effective use and deployment of IP, particularly targeted to SMEs. These actions include offering financial support for SMEs to protect their IP. The SME Fund has already helped many SMEs in the Union to protect their IP and to familiarise themselves with the importance of IP protection. The Commission plans to make IP advice and information more easily accessible, and to support SMEs in leveraging their IP when seeking financing.⁶ These support systems are a great way of engaging SMEs and spreading awareness of the importance of IP protection.

An analysis report of the IPR-intensive industries and economic performance in the European Union by the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO) revealed that IPR-intensive industries generated 29.7% of all jobs in the EU during 2017-2019, with 13% in design-intensive industries.⁷ This has also been acknowledged by the European Commission in its communication of 25.11.2020 ‘Making the most of the EU’s innovative potential - An intellectual property action plan to

⁵ Economic impact of counterfeiting in the clothing, cosmetics, and toy sectors in the EU, DOI: 10.2814/053613, (https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2024_Clothing_Cosmetics_Toys/2024_Economic_Impact_of_counterfeiting_in_clothing_cosmetics_toys_FuFul_en.pdf)

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Making the most of the EU’s innovative potential, An intellectual property action plan to support the EU’s recovery and resilience, COM(2020) 760 (final), p. 9-10

⁷ EUIPO & EPO Industry-Level analysis report (fourth edition) 2022: IPR-intensive industries and economic performance in the European Union, p. 18

support the EU's recovery and resilience', where the Commission mentions artistic and cultural creations and brands as examples of the intangible assets that are the cornerstones of today's economy. IP-intensive industries are essential for the EU economy and contribute greatly to overall EU employment.⁸

Design field is very IP-intensive, but many designers are not aware of their intellectual property rights or how to protect them. Research is needed to combine business and IP literature, and to further explore the potential of design in branding. The legal landscape for design has been undergoing major changes in the EU and internationally. In the EU, the design law reform was the biggest change in design law in 20 years, and internationally, WIPO has adopted a design law treaty with similar objectives to the EU design legislative reform, with the aim of making design protection more accessible and affordable for designers.⁹ The Treaty's main objective is to harmonise procedural and formalities aspects of industrial design applications.¹⁰

The EU design legislative reform brings new opportunities for designers and broadens the scope of designs that are protectable under the EU design system. For example, until now the EU design legislation has not addressed designs in the digital environment and it has been difficult to define the scope of protection for digital designs. Therefore, until the reform it was not likely that a design in a digital form would enjoy design protection. With the renewed definitions of "design" and "product" more designs will be protectable. This creates new opportunities for designers and design companies to broaden their IP portfolios.

Through a strong IP portfolio smaller companies can compete with large companies in the market and secure cashflow for their company, also by selling and licensing IP rights. However, many designers still deem IP protection costly, time-consuming, and difficult to

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Making the most of the EU's innovative potential, An intellectual property action plan to support the EU's recovery and resilience, COM(2020) 760 (final), p. 1

⁹ WIPO Diplomatic Conference to Conclude a Design Law Treaty Opens in Riyadh, Saudi Arabia, PR/2024/928, https://www.wipo.int/pressroom/en/articles/2024/article_0016.html

¹⁰ Recommendation for a COUNCIL DECISION authorising the opening of negotiations on the Design Law Treaty, 6.6.2024, COM/2024/232 (final), p. 2

obtain.¹¹ The new EU legislation seeks to address these concerns, ensure legal certainty and make the system more easily approachable for EU designers and SMEs.

In addition to the EU design legislative reform, there are other recent EU legislative changes that greatly affect the design field. For example, the EU protection of geographical indications (GIs) has been extended to also cover craft and industrial products.¹² This is a great advancement which will enable designers producing craft and industrial products in a certain geographical area to benefit from the protection provided and gaining new possibilities in marketing their products. This will also have a great impact on tourism and attract consumers to the areas where these products are produced, as well as secure employment in those areas.¹³

Moreover, the EU legal landscape is evolving as regards to legislation concerning sustainability. For example, the regulation on Ecodesign for Sustainable Products aims at improving sustainability of products placed on the EU market.¹⁴ While the sustainability legislation brings more requirements and challenges for designers, on the other hand, it also offers new possibilities for branding. An important part of designers' work is choosing materials and processes, and designers play an important role in making products and their production more sustainable. Designers also have a high level of expertise regarding the same.¹⁵

Therefore, design businesses should communicate their sustainability expertise and actions to their customers and note the potential it offers for their brands. However, the businesses also need to consider EU legislation on green claims and make sure their sustainability communication is in line with those requirements.

¹¹ Ornamo Art and Design Finland and The Bureau of European Design Associations Design Rights Survey 2024

¹² Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753

¹³ Ibid., recital 5

¹⁴ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC

¹⁵ <https://www.ornamo.fi/en/sustainabilityreport>

A lot of literature can be found as regards to brand protection, strategic use of trade marks, patents and copyright, but it seems that there is not as much literature addressing the huge potential of design protection and the overall importance of design in branding. The new legislative reform will broaden the scope and object of EU design protection and in the future it will offer even more possibilities for design businesses to compete in the market through protecting their designs and using them strategically as part of their business. This research aims to combine legal and marketing literature to explore the best ways for design companies to implement the new legislation into their IP strategies.

The focus on SMEs and design field is important considering that the Annual Report on European SMEs 2022/2023 showed that over 99% of businesses in the European Union are SMEs.¹⁶ Another study by the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO), *IPR-intensive Industries and Economic Performance in the European Union*, revealed that more than 47% of EU GDP is generated in IPR-intensive industries, of which design-intensive industries cover 16%.¹⁷

Research is needed to explore new marketing and business growth possibilities that the design legislative reform creates for the EU SMEs in the field of design. The importance of design protection is still not generally acknowledged among designers, and even in the intellectual property law literature it seems that design law is often a small chapter, something to mention but not something to highlight. Whereas a lot of literature can be found on patents and protecting technological innovations, design innovations and design protection have not been broadly studied by economists or management scholars either.¹⁸ This should be changed, as there is a vast potential for businesses and the EU market to benefit from.

¹⁶ Di Bella, L., Katsinis, A., Laguera Gonzalez, J., Odenthal, L., Hell, M. and Lozar, B., Annual Report on European SMEs 2022/2023, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/028705, JRC134336, p. 3, 13

¹⁷ EUIPO & EPO Industry-Level analysis report (fourth edition) 2022: IPR-intensive industries and economic performance in the European Union, p. 19

¹⁸ Filitz, Rainer, Joachim Henkel, and Bruce S. Tether: *Protecting Aesthetic Innovations? An Exploration of the Use of Registered Community Designs*, Research Policy 44, no. 6 (2015): 1192-1206, <https://doi.org/10.1016/j.respol.2015.02.004>, p. 1193

1.2 Research Questions

Firstly, this research seeks to find out what benefits and challenges are brought to designers and SMEs by the recent legal reforms in the EU. The aim is to examine the new EU legislation on designs and geographical indications for craft and industrial products and how it applies to design companies and SMEs in particular. Changes to the EU environmental legislation will be touched upon briefly to describe the effects on design companies and SMEs.

Secondly, this study seeks to answer how the new possibilities brought by the reforms should be implemented in brand strategies, and how companies should prepare for possible new challenges created by the digitalisation, internet sales and counterfeiting, for example. The focus is on design companies and the possibilities that are brought for designers to protect and commercialise their innovative works.

1.3 Methodology and limitations

The method of this research is legal-dogmatic, and economic analysis of law is used to examine how the recent legislative reforms affect EU SMEs. Whereas doctrinal research seeks to understand what the law is in a certain field¹⁹, economic analysis of law asks in what way should the law be applied to gain most benefit for economic welfare. The economic analysis of law can be divided to normative and descriptive analysis, the first answering the question how the law should be read to gain the welfare benefits, and the second merely observing the current legislation based on economic principles.²⁰

Economic analysis is needed for this study as doctrinal analysis does not address how the law should be applied²¹, and this study concentrates especially on the ways in which SMEs can gain most commercial benefits from the recent legal reforms. According to Smits, although economic analysis of law does not answer all legal questions and cannot be used as the only way of reasoning why a certain law should be followed, it helps with understanding the effects of certain implementations of those rules. Smits also points out

¹⁹ McConville, Michael - Chui, Wing Hong – ProQuest: *Research Methods for Law*, Edinburgh: Edinburgh University Press, 2007, p. 19

²⁰ Smits, Jan M: *The Mind and Method of the Legal Academic*, Edward Elgar Publishing Limited, 2012, p. 23

²¹ *Ibid.*, p. 62

that there are often economic goals behind certain legal rules²², as is the case with the recent EU legislative reforms. Both the design and GI legislative reform address the economic objectives and the need to support SME competitiveness in the EU market.

The focus will be on EU legislation and design protection at the EU level. Thus, neither the international aspects of the topic nor the national design legislations will be addressed in depth in this research. This research aims at providing brand and marketing strategy point of view, and therefore case law is not included broadly in this research, but rather seeking to find best practices for small and medium-sized companies for their brand and design strategies.

Doctrinal analysis is used to cover the main changes of the above-mentioned EU legislations and the rationale for the changes. EU legislation and preparatory documents are the primary sources for the part of the research examining how the EU legal landscape has changed and what the broader objectives of the changes have been. Textbooks, marketing and business literature, and articles are used as secondary sources to link the topic to commercial objectives and to examine legislative changes in the context of business and branding. These sources are relevant to the research, firstly, to understand what has changed, what is the broader EU economic aim of the changes, and then to prove the importance of SMEs using these systems in the design field, and how design can create competitive edge for companies.

The focus is on branding and marketing with an aim to create a strategic approach to the recent legislative changes. EU studies are used to understand the current status of design protection among EU designers and SMEs, for example studies published by the European Union Intellectual Property Office (EUIPO) on the economic impact of intellectual property protection on EU SMEs.

For the purposes of brand strategy, design protection is compared to trade mark protection and assessed how for example shape trade marks and design can be used in parallel to create strongest protection for design. However, trade mark legislation or questions relating to trade marks are not discussed in depth in this research.

²² Smits 2012, p. 66

2 EU DESIGN LEGISLATIVE REFORM

2.1 Background and Timeline of the Reform

Before the Community design system design protection was on a national basis and a need for a unitary system was clear to ensure free movement of design goods and to establish a system of undistorted competition within the Community market.²³ The Community design system was created and provided protection for Community Designs in parallel with the national systems.²⁴ The system became successful and both individual designers and companies started using it in addition to the design protection provided at national level.²⁵ With the increased offering of digital products and the rise of information technology the terminology and definitions in the Community Design Regulation 6/2002 became outdated.²⁶ Following the successful reform of the EU trade mark legislation, the Commission began to revise the EU design legislation and the need for a legislative reform.²⁷

The Community Design Regulation defined the term product as meaning any industrial or handicraft item, also providing a list of possible products covered such as parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces. While the list was not intended to be exhaustive, it did limit the scope of products that were protectable with the system and left room for interpretation. In practice, it was not clear what was meant by get-up, for example, or to what extent graphic symbols were protected. The increased offer and demand of digital products also created new issues as digital designs could easily be copied and used by others, but it was not clear to what extent they could be protected. The questions were especially whether design protection depended

²³ Explanatory Memorandum to Proposed Design Directive, COM(93) 344, December 23, 1993 [1993] O.J. C345/1, Paragraphs 1.1 and 1.2

²⁴ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ L 3, 5.1.2002, p. 1)

²⁵ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 4

²⁶ Ibid., recital 11

²⁷ Ibid., recital 7

on the production of a physical product, and if it would cover the different dimensions and changes between 2D and 3D designs, for example.²⁸

One of the main objectives of the EU design legislative reform was to modernise the design protection systems and to make them more attractive for individual designers and businesses, especially small and medium-sized enterprises (SMEs).²⁹ This was to be achieved by making the design protection systems more easily accessible, efficient and affordable, by simplifying and streamlining procedures, and adjusting and optimizing the level and structure of fees. The reform aims at promoting design excellence, innovation and competitiveness in the EU while considering challenges and possibilities offered by the digital age.³⁰

On 10 October 2024 the Council adopted the new EU Design legislative package and it was published in the Official Journal of the European Union on 18 November 2024. The Amending Regulation and the Recast Directive entered into force 20 days later on 8 December 2024. The Amending Regulation started applying in two phases, first with the core provisions becoming applicable in May 2025, and secondly the articles that need delegation and implementing becoming applicable as of 1 July 2026. As for the Recast Directive, Member States need to transpose it to their national legislation within 36 months and the transition period will end in December 2027.

2.2 Objectives of the Reform

The EU design legislative reform enhances legal certainty, making the system simpler and easier to use, more efficient, and adaptive to the needs of new technologies on the market.³¹

²⁸ Antikainen, Mikko: *Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs Under EU Design Law*, IIC (2021) 52:137–168 <https://doi.org/10.1007/s40319-020-01010-0>, p. 138

²⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002, COM/2022/666 (final), Explanatory Memorandum, p. 1

³⁰ *Ibid.*, p. 2

³¹ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recitals 5 and 7

While improving the EU design system, the reform also aims at improving and harmonising the national design systems. This contributes to ensuring legal certainty and equal conditions for design protection throughout the EU.³²

One of the objectives of the reform is to educate EU designers, businesses, and users of the design system about the protection available through registration. This will create a new responsibility for the European Union Intellectual Property Office in raising awareness and improving understanding of the possibilities and benefits offered by the EU design protection.³³

This is very important, as many EU designers and SMEs are not familiar with the EU design system or services offered by the EUIPO. In the EUIPO SME Scoreboard 2022, Small and Medium-Sized Enterprises were asked about their familiarity with IP rights. 64% of the respondents evaluated their familiarity with IP rights 4 or lower in the scale of 0 to 10 where 0 reflected 'not familiar at all' and 10 'very familiar'. The overall average familiarity was 3.5 out of 10.³⁴ These figures show the lack of awareness among the EU SMEs and designers.

2.3 Main Changes

2.3.1 Terminology

With the reform the terminology has been updated and adapted to align with the amendments introduced in the founding Treaties by the Treaty of Lisbon and the terminology used in Regulation (EU) 2017/1001 on the European Union trade mark. The term 'Community Design' is replaced with the term 'European Union Design' ('EU design'). Also the name 'Office for Harmonisation in the Internal Market' was renewed to its current

³² Ibid., recital 8

³³ Ibid., recital 10

³⁴ 2022 Intellectual Property SME Scoreboard, European Union Intellectual Property Office 2022, DOI: 10.2814/28513 (https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IP_sme_scoreboard_study_2022/IP_sme_scoreboard_study_2022_en.pdf), p. 45

form as 'European Union Intellectual Property Office'. The new legislation uses the term Union instead of the old term Community.³⁵

Among the key changes of the reform are the broadened and clarified definitions of design and product. The definition of design has been broadened to include animation, movement and transition, while product definition now also includes non-physical products. In accordance with Article 3 of the new Design Regulation, design shall mean

“the appearance of the whole or a part of a product resulting from the features, in particular the lines, contours, colours, shape, texture and/or materials, of the product itself and/or of its decoration, including the movement, transition or any other sort of animation of those features”.

The definition of product in Article 3 of the new Design Regulation reads

““product” means any industrial or handcraft item, other than a computer program, regardless of whether it is embodied in a physical object or materialises in a non-physical form, including:

- (a) packaging, sets of articles, spatial arrangements of items intended to form an interior or exterior environment, and parts intended to be assembled into a complex product;
- (b) graphic works or symbols, logos, surface patterns, typographic typefaces, and graphical user interfaces.”

With these new definitions the possibilities for design protection are broadened and can now be applied to a significantly wider range of products. According to Ornamo's recent study on the design companies' near-future business prosperities, scope of business activities, development areas and corporate responsibility showed that digital design

³⁵ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 9

already accounts up to 73% of the design sector's turnover in Finland.³⁶ As the digital design field grows its importance, the updates brought by the reform are essential for designers to be able to protect their work and for companies to benefit from their design assets.

2.3.2 New Technologies and 3D Printing

As mentioned in the previous chapter, the new definitions allow protecting virtual and digital design as the protection no longer requires a physical product, and movement, transition and other animation of the features are included in the definition of design. Even before the legislative reform the EUIPO allowed protection for visible elements of computer programs such as designs of screen displays, icons, and graphic user interfaces.³⁷ However, there was still uncertainty of what can be protected and the legal reform brought clarity to that.

The use of 3D printing technologies has also grown vastly and new ways of deploying 3D printing have been developed in different industries. Some of these technologies also utilise artificial intelligence, which can be very useful in many industries. However, this also creates problems to design right holders as it becomes even more difficult to prevent illegitimate copying. In the light of this, the new design legislation provides that the creation, downloading and making available of any medium or software which records the design for the purpose of reproduction of a product that infringes the design falls under the definition of use of design which requires the design right holder's authorisation.³⁸

3D printing is an easy and low-cost way of creating infringing products and it is difficult to interfere with the creation of these products as they can be created whenever and wherever, for example in a private home and sold online. Also tracking the infringers thus becomes even more difficult. 3D printing also offers the possibility of customisation. Using the original design as a base for a customised product can create added value, but also difficult

³⁶ Ornamo Yrityskatsaus 2024, available at <https://www.ornamo.fi/meista/tutkimukset/muotoiluala>, p. 15

³⁷ EUIPO, 'Guidelines for Examination of Registered Community Designs' (2024), Examination of the Substantive Requirements, Chapter 4.1.3, <https://guidelines.euipo.europa.eu/2213908/1926295/designs-guidelines>

³⁸ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 14

situations to assess the extent to which the design owner can interfere and when they have the right for royalties, for example.³⁹

The legislative reform considers the use of 3D printing technologies in different industries and the difficulty for design right holders to prevent illegitimate copying with the fast-evolving artificial intelligence driven new environment. The EU Design Regulation clarifies that creation, downloading, copying and making available of any medium or software which records the design for the purpose of reproduction of a product that infringes the protected design, constitutes use of the design.⁴⁰

There has also been discussions about how 3D printing can be used to create spare parts and if these printed spare parts should be considered infringing the original right holder's rights.⁴¹ If consumers can use 3D printing technologies to create products they desire, using existing designs as a base to create customisations or spare parts, how should design owners respond? As this research seeks to provide a brand strategy point of view to the legal reform and these questions, this will be addressed in more detail later in Chapter 5.

2.3.3 Object and Scope of Protection

The object of protection has been clarified with the new Article 18a which states that the protection conferred by the EU design will cover those features of the appearance of the design that are shown visibly in the application. This addition brings an important update to the object of protection as the features of a design are not required to be visible in use to obtain protection, as has been required by EU design law previously. The change will add clarity and legal certainty as to what is protected in the register and what can be protected

³⁹ European Commission, Economic Review on Industrial Design Protection in Europe: Final Report (Publications Office of the European Union, 2015) <https://op.europa.eu/en/publication-detail/-/publication/4e62b2fd-f1c6-41ed-83bb-7c20370f6bf1/language-en>, p. 7

⁴⁰ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 14

⁴¹ European Commission, Economic Review on Industrial Design Protection in Europe: Final Report (Publications Office of the European Union, 2015) <https://op.europa.eu/en/publication-detail/-/publication/4e62b2fd-f1c6-41ed-83bb-7c20370f6bf1/language-en>, p. 8

with an EU design. It will likely make the design protection system more easily approachable for designers and SMEs.

The scope of protection has been broadened by adding Article 19(2)(d) which allows design holders to prohibit creating, downloading, copying and sharing or distributing any medium or software which records the design for the purpose of enabling a product in which the design is incorporated or to which the design is applied. Broadening the scope to cover copies made by using the 3D technologies is one example of allowing EU design holders to better interfere and prohibit the creation and distribution of counterfeit goods. The addition is in line with the aims of the reform, bringing the design legislation to the digital era, making the system more efficient, and adding legal certainty.

New Article 19(3) EUDR will allow the design holder to prevent entries of products from third countries into the EU if the design is identically incorporated or applied to the products, or cannot be distinguished in its essential aspects from such products. This is an important addition making it easier to interfere with counterfeit goods entering the EU market from third countries.

This does not only protect the design right holders, but also EU consumers as it prevents counterfeit products from entering the market. Counterfeit products pose a significant risk to the health and safety of consumers, as well as the environment, while also creating significant environmental risks.⁴² In accordance with recital 15 of the Amending Regulation, the holder of a registered EUD can prevent third parties from bringing products from third countries to the EU, without being released for free circulation there, if those products incorporate a design that is identical (or essentially identical) to the registered EUD or if an identical (or essentially identical) design is applied to the products and not authorised by the right holder.⁴³

⁴² Economic impact of counterfeiting in the clothing, cosmetics, and toy sectors in the EU, DOI: 10.2814/053613, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2024_Clo_Cloth_Cosmetics_Toys/2024_Economic_Impact_of_counterfeiting_in_clothing_cosmetics_toys_FullR_en.pdf

⁴³ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 15

Recital 16 further clarifies that the holder of an EU design may oppose infringing products entering the EU market even in situations where those products are not intended to be placed on the EU market.⁴⁴ The competence of customs authorities and more detailed processes are defined in the Regulation (EU) No 608/2013 of the European Parliament and of the Council.⁴⁵

In legal literature the position of designs originating from outside the EU has been discussed and possibility of conflicts with rights originating from outside the EU. Previously protection of unregistered designs, for example, was only applicable to designs that were first published in the EU, thus ruling out designs published outside the Union.⁴⁶

With the design legislative reform, the second sentence of Art. 110a(5) was deleted leaving the legal situation up for interpretation as previous case law had relied on that specific sentence. Although this deletion did not clearly result in a changed legal situation regarding the requirement of publishing the design within the EU, it will be interesting to see how this question will be interpreted in case law. Kur has also pointed out that denying protection of unregistered Community Designs (now EU Designs) may constitute a breach of the TRIPS agreement.⁴⁷

2.3.4 Repair Clause

Before the reform the question about spare parts lacked harmonisation and there were arguments for and against it. Promoting competition was one of the arguments used to justify market liberalisation based on the idea that innovation was already awarded in the

⁴⁴ Ibid., recital 16

⁴⁵ Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003

⁴⁶ Kur, Annette: *From "Local Privilege" to "Global Standard": Facilitating Design and Copyright Protection for Non-EU Product Shapes*, IIC - International Review of Intellectual Property and Competition Law 56, no. 5 (2025): 970-983, <https://doi.org/10.1007/s40319-025-01606-4>, p. 971

⁴⁷ Kur 2025, p. 979-980. See also Kur, Annette. "Finally Back to TRIPS-compliance? EU Design Law and the Criterion of Publication 'within EU Territory'." *Journal of Intellectual Property Law & Practice* 18, no. 1 (2023): 11-17. <https://doi.org/10.1093/jiplp/jpac112>

primary market, thus reasoning that the incentive function of IP would not be needed in the secondary market. On the other hand, IP rights were defended by the argument that they are not dependent on the differentiation between primary and secondary markets, and that it is the essence of IP rights providing exclusive rights on the market.⁴⁸

Due to the controversy and the ambiguities in interpretation, there was also much debate during the legislative reform on how spare parts should be treated.⁴⁹ Article 20a of the Amending Regulation and 19 of the EU Design Directive clarify how spare parts shall be viewed in the light of EU design legislation. Pursuant to these Articles, design protection shall not be conferred on a design that constitutes a component part of a complex product and is dependent on the appearance of that complex product, and which is used solely to repair that complex product to restore its original appearance.

However, considering a situation where a product requires repair, it is not only design rights that need to be considered. Other IP rights such as trademarks, copyright, patents and utility models need to be taken into account as well, possibly creating difficult situations up for interpretation of exhaustion rules or exceptions to exclusive rights. However, it should be noted that there is not an EU-level repair clause covering all forms of IP.⁵⁰

The question about repair also relates closely to the European Green Deal and the EU's sustainability objectives. The Directive (EU) 2024/1799⁵¹ and Regulation (EU) 2024/1781⁵²

⁴⁸ Beldiman, Dana - Blanke-Roeser, Constantin: *European Design Law: Considerations Relating to Protection of Spare Parts for Restoring a Complex Product's Original Appearance*, IIC - International Review of Intellectual Property and Competition Law 46, no. 8 (2015): 915-919. <https://doi.org/10.1007/s40319-015-0426-9>, p. 917-918

⁴⁹ Kyrylenko, Anastasiia: *Design reform reaches its finale: it is now Regulation (EU) 2024/2822 and Directive (EU) 2024/2823*, (The IPKat, 19 November 2024) <https://ipkitten.blogspot.com/2024/11/design-reform-reaches-its-finale-it-is.html>, last accessed 5 January 2025

⁵⁰ Brancusi, Lavinia: *Not-so-great Expectations of the EU Directive 2024/1799 Promoting Repair and Its Nexus with IP Protection*, Journal of Intellectual Property Law & Practice, vol. 20, no. 10, 2025, pp. 645-653, <https://doi.org/10.1093/jiplp/jpaf049>, p. 649

⁵¹ Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828

⁵² Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC

both aim at driving production of products towards greater reusability, sustainability, and repairability.⁵³ However, although the different legislative instruments strive at the same goal of promoting sustainability and circular economy, application of these rules still involves interpretation as to, for example, the above-mentioned question of overlapping IP rights and their effect on spare parts, as well as the requirements of the Directive (EU) 2024/1699 and the Regulation (EU) 2024/1781.⁵⁴

2.3.5 Other Changes and Effect on SMEs

The reform has also aimed at making the fee structure simpler but maintaining a level of fees that ensures the budget of the registering Office and maintains a balance of the national and EU design systems, allowing both to coexist and complement each other. The fee structure takes into account the size of the market and considers the needs of SMEs.⁵⁵

To achieve the goal of the reform in attracting more SMEs to use the design system, the fees should be communicated clearly and information provided through channels where SMEs tend to interact. Furthermore, more SMEs need to be informed about the SME Fund, which offers funding for SMEs to protect their intellectual property rights. With the benefit of the SME Fund, SMEs can cover up to 75 % of the application costs for trademarks and designs at national, EU and regional level, and 50 % at the international level.⁵⁶

While the changes introduced in this chapter 2.3 add important possibilities for design holders to protect their design rights and to interfere with counterfeit products, it may still be difficult for designers and SMEs to monitor the market and react to unauthorized use and copying. Designers and SMEs do not often have the resources for that and the processes can be costly to prohibit counterfeit products from flooding the EU market. More support services should be offered especially for SMEs not only to raise awareness on the importance

⁵³ Brancusi 2025, p. 645

⁵⁴ Brancusi 2025, p. 653. See also Vrendenburg, Charlotte J S. "Durable Design: What Role for EU Design Law in the Green Transition?" *GRUR International (Print)*, vol. 74, no. 6, 2025, pp. 525-531, <https://doi.org/10.1093/grurint/ikaf052>.

⁵⁵ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002, recital 27

⁵⁶ <https://www.euipo.europa.eu/en/sme-corner/sme-fund/2025/how-to-apply>

of IP protection and registering their rights, but also to allow them to identify infringements and to react accordingly.

2.4 Possible Challenges

Among the key objectives of the reform are clarifying the EU design system and improving legal certainty. While the reform has succeeded in these objectives, however, there are still questions as to how the practice will be regarding the new types of designs that are protectable. For example, assessment of novelty and individual character become more complex as digital and virtual designs can be protected. Assessing novelty and individual character of an animation, for example, can be quite complex.

In his paper “Differences in Immaterial Details: Dimensional Conversion and Its Implications for Protecting Digital Designs Under EU Design Law” Antikainen has pointed out that physical and digital designs differ in the assessment of the freedom of designer. As for digital designs, the designer has a greater, nearly unlimited creative freedom. The digital world does not restrict the designer in a similar manner as the physical world does.⁵⁷ This is only one example of the differences between the physical and digital designs. These differences are likely to create several challenging interpretation situations.

There may also be challenges combining the application of the limitations to EU design rights with the objectives of protection. The limitations are needed to prevent the design right from being used too widely in a way that is contrary to its purpose, or to prevent use in situations where such use would hinder, for example, sustainable development or creativity.

It has been considered that acts such as making citations, teaching, referential use in comparative advertising, as well as use for comment, critique or parody are examples of limitations to the scope of exclusive rights provided by an EU design. Freedom of expression has been mentioned as an example of fundamental rights and freedoms that cannot be

⁵⁷ Antikainen 2021, p. 154-155

restricted by the rules on EU designs.⁵⁸ However, given the extension of design law to the digital environment, it can be challenging to define these limits in practical situations. Case law will ultimately determine where the boundaries lie, but for the sake of legal certainty, it would also be useful to have guidelines on this.

Uncertainty regarding the scope of design rights may also result in increased filings of design applications by competitors in the same product category. While it can be considered positive that awareness on design protection has been growing, ambiguity regarding the scope of design rights and the assessment of individual character and informed user, for example, can create problematic situations. For some producers, the motive of applying for design protection has been protecting the design allowing licensing, but later become a question of freedom to operate.⁵⁹ These are good examples of possible challenges that may arise also with the new legislation.

The new legislation obliges the European Union Intellectual Property Office (EUIPO) to raise awareness and promote the EU design system to increase awareness of the benefits of design protection.⁶⁰ The Office has already conducted this work for several years, but with this requirement set out in the new legislation the Office is invited to increase the ways in which it makes the design system visible and known. For both trademark and design law, a number of Common Practice documents have been produced to facilitate interpretation and increase harmonisation of practice in the EU. Further development of these common guidelines would also be desirable in the future.

There are some questions that remain with the legal reform. For example, music and sounds have not been considered constituting the appearance of a product and thus not complying

⁵⁸ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 18

⁵⁹ Heikkilä, Jussi – Peltoniemi, Mirva: *Great Expectations: Learning the Boundaries of Design Rights*, Research Policy, vol. 48, no. 9, 2019, p. 103795, <https://doi.org/10.1016/j.respol.2019.05.004>, p. 11

⁶⁰ Regulation (EU) 2024/2822 of the European Parliament and of the Council of 23 October 2024 amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002 (Text with EEA relevance), recital 10

with the definition of design.⁶¹ Design protection has been focused on the visual elements, thus not covering other elements such as sound or smell. As noted by Kur, Lee, and Tischner, this may not be in line with the designer's view of what constitutes a design.⁶²

Moreover, now with the new definitions this question is more complex. If the EUIPO will start accepting animation and video files, and these files contain sound, will it be disregarded or can it contribute to the appearance of the product and be considered within the definition of design? The restriction to visual elements is not clear based on the legislation, but expanding design to include other elements would notably change the scope of design protection. However, considering the circular economy and sustainability goals, it would be important to consider the need of new ways of protecting innovative design elements, especially those allowing repairability, recyclability, and refurbishment.⁶³

The effects on consumers and overall competition with expanding design protection to include new elements need to be considered carefully. However, designers play a key role in the circular economy and incentivizing innovation with allowing to protect also other than visual elements of designs seem to outweigh the risks, but this still needs more discussion.

⁶¹ EUIPO, 'Guidelines for Examination of Registered Community Designs' (2024), Examination of the Substantive Requirements, Chapter 4.1.5, <https://guidelines.euipo.europa.eu/2213908/1926295/designs-guidelines>

⁶² Kur, Annette - Lee, Nari – Tischner, Anna: *Fairness In Intellectual Property Law: Searching for a Uniform Concept*, Cheltenham, UK: Edward Elgar Publishing, 2024, <https://doi.org/10.4337/9781800883062>, p. 345

⁶³ *Ibid.*, p. 348-349

3 Geographical Indications for Craft and Industrial Products

3.1 Background

In addition to the design legislative reform, the possibilities for protecting geographical indications will be extended to craft and industrial products at the EU level. This is exciting for designers, design companies and other enterprises utilising design. As of 1 December 2025 it has been possible to protect names of, for example, textiles, jewellery, and woodwork with an EU level geographical indication.⁶⁴

This adds new possibilities for companies, especially SMEs, to utilise these rights in branding and combining with other possible forms of IP protection to gain strong protection and to increase consumer's brand awareness. GIs tell the story and origin of the products, which helps consumers to engage with the brand. In branding, trademarks, designs, and GIs can all contribute to building a brand image and informing consumers of the product origin and quality, each within their function.

The EU has had a protection system in place for geographical indications of wines, spirit drinks as well as agricultural products and other foodstuffs⁶⁵, but previously it has not been possible to protect the names of craft and industrial products originating from a certain geographical area at the EU level. The European Commission and the European Parliament recognised the importance of extending protection to these products through the 2020 Intellectual Property Action Plan to Support the EU's Recovery and Resilience⁶⁶ and in its

⁶⁴ Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, recital 5

⁶⁵ Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007

⁶⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Making the

Resolution of 11 November 2021 the Parliament supported the Commissions initiative to establish protection for geographical indications of non-agricultural products.⁶⁷

The new system is expected to bring many benefits to consumers, SMEs, competition, employment and overall economy. For consumers, it will make it easier to define authenticity of products. The new regime will increase competitiveness and thus benefit micro- and small and medium-sized enterprises. It will also positively affect development and tourism in rural areas.⁶⁸

Geographical indications are especially relevant for smaller producers producing culturally sensitive, labour-intensive products in a more niche category. Protecting these products from the geographical region where they originate from support rural development and sustainability goals as well.⁶⁹ Thus, stronger protection of geographical indications is important in supporting SME competitiveness and sustainability objectives.

3.2 What Can Be Protected?

The new system allows EU level protection for geographical indications for craft and industrial products such as textiles, lace, cutlery, glass, natural stones, porcelain, jewellery, woodwork, and hides and skins. Many EU Member States already have national systems for protecting craft and industrial product GIs, but those systems differ and only allow protection at the national level.⁷⁰

In accordance with Article 4(1) of the Regulation (EU) 2023/2411 on the protection of geographical indications for craft and industrial products, craft and industrial products mean products that are “produced either entirely by hand or with the aid of manual or digital

most of the EU’s innovative potential, An intellectual property action plan to support the EU’s recovery and resilience, COM(2020) 760 (final)

⁶⁷ Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, recitals 2 and 3

⁶⁸ Ibid., recital 5

⁶⁹ Moerland, Anke: *Geographical Indications Upgraded: An Overview of the Recent Changes in EU Legislation on GI Protection*, (July 17, 2025). Maastricht Faculty of Law Working Paper No. 01/2025, DOI: 10.26481/mup.law.rps.2501, p. 2

⁷⁰ Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, recital 5-6

tools, or by mechanical means, whenever the manual contribution is an important component of the finished product; or produced in a standardised way, including serial production and by using machines”.

The aim of the new regulation is to allow protection for a wide variety of products.⁷¹ The definition of craft and industrial products in the regulation is quite broad and many products could fall under the definition.

Article 6 of the Regulation sets down a requirement that the name of a craft or industrial product can only be eligible for GI protection provided that it originates in a specific place, region or country, and its quality, reputation or other characteristic is essentially attributable to its geographical origin. In addition, at least one of the production steps of the product must take place in the defined geographical area in question. The same article sets rules on products that are contrary to public policy and excludes them from GI protection.

The new system will allow using the Union symbol, indication and abbreviation on the packaging of the craft and industrial products designated by a GI and making it easier for consumers to identify those products. The symbol used will be identical to the one used on the packaging of agricultural products and foodstuffs, wines and spirits. This will also help with raising awareness among consumers and allows them to recognise these new types of products entering the EU geographical indications system.⁷²

3.3 Implications for Branding

Geographical indications are important for branding as well and have been described as a form of collective branding of products based on the geographical origin.⁷³ Geographical indications add value as they enhance consumer trust.⁷⁴

⁷¹ Ibid., recital 5

⁷² Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, recital 48-49

⁷³ Menapace, Luisa – Moschini, GianCarlo: *The Economics of Geographical Indications: An Update*, Annual Review of Resource Economics, vol. 16, no. 1, 2024-10-07, pp. 83-104, <https://doi.org/10.1146/annurev-resource-101623-092812>, p. 83

⁷⁴ Regulation (EU) 2023/2411 of the European Parliament and of the Council of 18 October 2023 on the protection of geographical indications for craft and industrial products and amending Regulations (EU) 2017/1001 and (EU) 2019/1753, recital 50

The economic importance of geographical indications is high and it is estimated that the unit sale value of products with geographical indications is approximately twice as high as that of comparable products without GIs. In the EU, for example, products with geographical indications amounted to a total value of €75 billion in 2017.⁷⁵ According to several studies, consumers are willing to pay a price premium for GI products and some associate higher price with higher quality. However, there has been differences between product categories concerning the price premium consumers are willing to pay.⁷⁶

It is important to note that geographical indications differ from trade marks in that they are not privately owned, but used by several, often competing, firms producing under the same geographical indication. However, towards consumers geographical indications and trade marks function in somewhat similar manner, providing information about the quality and origin of the products, and facilitating consumers' choice between products.⁷⁷ In fact, the quality promise is one of the main elements behind the rationale of GIs.⁷⁸

In addition to the price premium, geographical indications offer other benefits as well. For example, a study that compared two varieties of PGI and non-PGI beef showed that in addition to a price premium, GI products had better price stability and were less affected by crises. This stability was mostly due to consumers' trust being less affected than in the case of non-GI products.⁷⁹ This data is promising also for the craft and industrial product GIs, although the impact of the new system will be discovered with time.

⁷⁵ Menapace – Moschini 2024, p. 88

⁷⁶ Török, Áron - Jantyyik, Lili - Maró, Zalán Márk – Moir, Hazel V. J.: *Understanding the Real-World Impact of Geographical Indications: A Critical Review of the Empirical Economic Literature*, Sustainability 12 no. 22 2020-11-12, 9434 <https://doi.org/10.3390/su12229434>, p. 12-13

⁷⁷ Menapace – Moschini 2024, p. 88-89

⁷⁸ Calabrese, Bernardo: *Geographical Indications Used as Ingredients or Components: A Proposed Reform in 'sharp' Contrast with the Circular Economy (to Say the Least)*, Journal of Intellectual Property Law & Practice, vol. 18, no. 5, 2023, pp. 339-343, <https://doi.org/10.1093/jiplp/jpad009>, p. 342

⁷⁹ Bardají, Isabel - Iráizoz, Belen - Rapún, Manuel: *The effectiveness of the European agricultural quality policy: A price analysis*, Spanish Journal of Agricultural Research 2009, 7, 750–758, p. 756

There are also differences in benefits between the actors of supply chains. Some of the studies made for GI products have shown that in some supply chains the benefits are gained higher in the supply chain and the price premium does not benefit producers of the products on the same level as the actors higher in the supply chain. Distributors, for example, may gain extra profit from the geographical indications, leaving producers of the products with a lower level of benefits.⁸⁰ Another effect comes from the size of the geographical indication. Some studies suggest that a larger size of the geographical indication can have negative implications for the quality.⁸¹

Another way geographical indications benefit businesses is their importance for tourism. Many products traditionally produced in an area attract tourists and help promote tourism based businesses. Geographical indications also protect and promote cultural heritage, and provide incentive for producers and businesses to value the traditional methods and products.⁸²

The difference between geographical indications and trade marks is that geographical indications do not allow private companies exclusive rights as trade marks do also affect the market powers. There has been discussion on whether geographical indications, and granting a group of producers market power through the system, have positive or negative effects on consumers and welfare.⁸³ Between design protection and GIs, on the other hand, although they can be relevant for the same type of products, design protection giving exclusive rights to the appearance of the product or a part of it, whereas GIs protect the name of the product that can be used by several producers. Conflicts may arise in situations where several types of IP rights are relevant to the same product.

⁸⁰ Török – Jantyik – Maró – Moir 2020, p. 13

⁸¹ Deconinck, Koen – Swinnen, Jo: *The Size of Terroir: A Theoretical Note on Economics and Politics of Geographical Indications*, *Journal of Agricultural Economics*, vol. 72, no. 1, 2021-02, pp. 321-328, <https://doi.org/10.1111/1477-9552.12407>, p. 2

⁸² Török – Jantyik – Maró – Moir 2020, p. 17

⁸³ Menapace – Moschini 2024, p. 92

4 DESIGN VALUE AND ECONOMICS

4.1 Introduction

While design is often seen as the aesthetic value of a product, it overlooks the huge importance of design to a company's economy, competitiveness and brand. The design of a commercial product must consider production equipment, product packaging, and other factors that may limit the designer's freedom. On the other hand, the designer's professionalism adds considerable value to the product, as their expertise in material selection, design usability and consumer appeal increases the product attractiveness.⁸⁴

Bettina Von Stamm has defined design as “the conscious decision-making process by which information (an idea) is transformed into an outcome, be it tangible (product) or intangible (service).⁸⁵ This definition of design effectively communicates the importance and potential offered by design to any business while also considering the wide range of design in different fields. The vast increase of online commerce has made it increasingly important for businesses to consider their digital marketing and brand success in the digital environment. User Experience can create significant competitive advantage and it will be an increasingly important nominator for the success of a brand.⁸⁶

In marketing, design plays an important role. One of the rationales of the current EU design law system is that a design is considered a "marketing tool" that meets society's functional,

⁸⁴ Oesch, Rainer – Rinkineva, Marja-Leena – Hietamies, Heli – Puustinen, Karri: *Mallioikeus: muotoilun suoja*, Talentum 2005, p. 166

⁸⁵ Von Stamm, Bettina: *Managing Innovation, Design and Creativity*, 2nd ed. Hoboken, NJ: John Wiley & Sons Inc, 2008, p. 17

⁸⁶ Keller, Kevin Lane – Swaminathan, Vanitha: *Strategic Brand Management: Building, Measuring, and Managing Brand Equity*, Fifth edition, Global edition, Harlow, England: Pearson, 2020, p. 261-262

aesthetic and ergonomic needs.⁸⁷ However, it needs to be considered that the cost of investments made in design must be covered by the sales revenue of the product.⁸⁸ In this context, it is essential for the company to strategically protect the design and the investments made in it, so that these investments are returned to the company as a profit and third parties do not get to exploit the value of the company's investments in design. Allowing third parties to benefit from those investments is also detrimental to the whole brand.

4.2 Design as Part of the Brand

4.2.1 Design in Brand Protection

The debate on branding and brand protection often revolves around trade marks, but it would be welcome to include design more in these discussions and to include design protection in companies' brand building strategies.⁸⁹ A brand reflects – or should reflect – the company's values and beliefs, which in turn should reflect those of the company's customers. There are many opportunities for implementing design in the brand building process. Design can offer opportunities, for example, for the company's name, brand, mission statement, and corporate, business, or operational strategy, as well as customer operations.⁹⁰

When choosing products from the range of products offered by different companies, visual appearance is a key factor in determining which product a consumer will choose. Thus, well-designed products are an important competitive advantage for producers.⁹¹ Considering this importance and potential of design, it underlines the importance of protecting these assets.

⁸⁷ European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, (2016) *Legal review on industrial design protection in Europe: final report*. Publications Office, <https://data.europa.eu/doi/10.2873/056970>, p. 24

⁸⁸ Oesch et al. 2005, p. 167

⁸⁹ Oesch et al. 2005, p. 173

⁹⁰ Best, Kathryn: *Design Management: Managing Design Strategy, Process, and Implementation*, London, England: Fairchild Books, 2015, p. 28

⁹¹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 6/2002 on Community designs and repealing Commission Regulation (EC) No 2246/2002, COM/2022/666 (final), Explanatory Memorandum, p. 1

While we have considered brand protection earlier in relation to trade marks, we should also investigate the opportunities of building and protecting the brand through design and design protection.

There are current trends and phenomena such as the dupe-culture which have made it difficult for brand owners to protect and defend their rights relying on trade marks. One of the characteristics of the dupe culture is that brands less known to consumers mimic the appearance of designer products more known to consumers, but offering them for a more affordable price.⁹² These situations may not constitute a trade mark infringement and it may prove difficult to intervene with a trade mark alone, but in addition to trade mark registration, design registrations and the use of non-traditional trade marks could be one strategic solution.

In the creative field, if intellectual property rights are discussed, the conversation often revolves around copyright. For example, designers may not deem design protection necessary, as they consider copyright protection as a sufficient form of protection in case of an infringement. The possibility of combining different forms of IP protection and the various possibilities for licensing, for example, offered by registered rights are not broadly known either.

Design rights can offer many benefits compared to trade mark and copyright protection. For example, design protection can be possible for some designs that would not enjoy copyright protection, and they can be a stronger asset in an infringement situation compared to copyright. Furthermore, design protection is often faster and less expensive than trade mark protection.⁹³ While design protection offers these benefits compared to other forms of protection, the strongest protection is created by combining different applicable forms of protection. Complementing copyright protection with registered rights such as trade marks and designs helps creating a strong and lasting protection for a brand.

Deciding on the brand protection strategy and what role design plays in that, it is also important to consider the life-cycle of the products or services and the elements relating to

⁹² Baghetti – Burdese – Cei 2024, p. 1

⁹³ Antikainen 2021, p. 139

them. It may not be sensible for a business to protect all designs that are intended for a short campaign with a minimal reach, for example. However, this should be a conscious choice as to what to protect and how. If decided not to register the design, the protection offered for unregistered designs should not be forgotten and should be equally relied on in case of infringement. As the protection for unregistered designs is more limited than that of registered designs, it should be considered if that protection is sufficient, or if the design should be registered. The costs for design registrations in the EU are not high, making it a great form of protecting innovative designs.

4.2.2 Design in Brand Creation

Including design in a company's brand strategy has many benefits and can aid significantly in brand creation. There are various tools and methods for identifying design opportunities within a company. One of the tools that may be especially useful in brand creation is scenario planning. This exercise can be used to create scenarios identifying consumer behaviours, needs and desires to understand and imagine how potential customers would use a product or service. This can help the organizations to better understand if there are customer-needs that are not fulfilled and to develop new products and services through design.⁹⁴ For brand creation it is crucial for a company to identify their target audience, to understand the needs and desires of that audience and to respond to those needs in a way that appeals to the customer.

In addition to identifying the target audience and understanding its needs, it is important to consider the industry and the type of goods or services that are provided. This is crucial for a design strategy and benefitting of design in brand creation. For some goods, such as fast-moving consumer goods, packaging and brand design have great significance. For these products the packaging can become a part of the product itself and a factor that makes the consumers buy these goods based on the strength of the individual brand, without knowing the company behind the product.⁹⁵

⁹⁴ Best 2015, p. 32

⁹⁵ Von Stamm 2008, p. 238

This is interesting considering that trade marks serve to identify the commercial origin of goods and services, but on the light of the above, that may not always be the reason consumers decide to repurchase a product. It may also be the advertising or the packaging they remember and associate with the product they liked. In this design plays a key role. Design is not to be considered merely as something that makes the products beautiful or appealing. Design should be considered more broadly, as part of the whole brand experience, the usability of products, and the way for consumers to find their way back to the products they liked. Brands and marketing schemes are used to give consumers information and reasons to buy a product, but design and a good's packaging, among others, can significantly contribute to consumers' choice to buy a particular product rather than a competitor's product for other reasons than the price or quality.⁹⁶

For other types of goods than the fast-moving consumer goods, the approach may have to be different. For example, for goods such as electrical household appliances requiring input from engineering and industrial design, consumers' choice is driven by different factors. For these types of goods consumers tend to prioritise quality and reliability, and rely on the reputation of the manufacturing company. As these goods are often very technical, design aspects such as usability, aesthetics and functionality, may suffer. On the other hand, if a company manages to combine great technical quality, functionality and aesthetical aspects, they have an advance compared to their competitors.⁹⁷

From an economic point of view, we should consider which of these characteristics make consumers want to pay a premium, and if they are same for all products. Often that is not the case, and both the target audience and type of goods need to be considered in order to determine what in the brand in fact makes a consumer willing to pay a premium to acquire those goods or services. For the fast-moving consumer goods it may be the appealing product design or packaging, for the electrical appliances quality and reliability, and other goods such as luxury items it is the desire to be seen as belonging to a certain group of people using such products.⁹⁸

⁹⁶ Desai, Deven R. – Waller, Spencer: *Brands, Competition, and the Law*, BYU Law Review 2010, p. 1425-1499, p. 1443

⁹⁷ Von Stamm 2008, p. 239

⁹⁸ Von Stamm 2008, p. 239

The case of luxury products is slightly different, but brand design is highly important for those goods as well. If the creators of a brand manage to find ways of creating identity, differentiation and unique value to the consumers, they are more likely to succeed in creating a strong brand.⁹⁹

In brand creation it is important to communicate the key values and purpose of the brand to consumers. Brand is not only the way for consumers to identify the brand and interact with it, but also a way to communicate their values. Now that it is possible to protect more parts of the brand, even in the digital world through the legislative changes, these opportunities should be used.

4.3 Economic Importance of Design and Competitiveness of SMEs

It has been shown that companies that own intellectual property rights perform better than the companies that do not have those assets. Companies that have intellectual property rights generate 23.8% more revenue per employee compared to those without IPRs. The impact is even higher on SMEs, with 41% revenue advantage. It has also been shown that companies that own IPRs are able to pay higher salaries than those without IPRs. On average companies with IPRs pay 22% higher salaries than companies without IPRs, and among SMEs the number is up to 44%.¹⁰⁰ These numbers clearly show the vast impact and potential that IPR-intensive industries hold for the overall EU market but also for individual companies.

The same report shows that less than 10% of SMEs register their IP, while approximately 50% of large companies own at least one type of IPR. As for design statistics, only 1.1% of SMEs own designs compared to 10.7% of large firms. Design registrations are notably lower than trade mark registrations, statistics showing that 46.1% of large companies and 9.2% of SMEs own trade marks.¹⁰¹ The gap between SMEs and large firms is significant, but looking

⁹⁹ Keller 2021, p. 528

¹⁰⁰ EUIPO and EPO Intellectual property rights and firm performance in the European Union. Firm-level analysis report, January 2025

¹⁰¹ EUIPO and EPO Intellectual property rights and firm performance in the European Union. Firm-level analysis report, January 2025

at design registrations 10.7% for large firms is not a great number either. This shows again how underused the design protection system still is. Design protection offers many opportunities regardless of the size of the company, and it is very important to increase the use of design as part of brands.

Intangible assets are growingly important for companies and brands, but they are also increasingly interesting for investors. Intangible investments have become relative to tangible investments and have a growing part as a share of GDP. The importance of the intangible capital and the value of intellectual property can also be seen in the change of how companies manage their intangible assets and brands. For example, between 2005 and 2019 there was an increase of 20-25 percent in occupations managing brand capital, such as sales, marketing, and public relations managers.¹⁰²

Brand equity is the intangible capital that brings sustainable and gradual profitability to the firm that owns the rights to the brand.¹⁰³ Defining the value of brand capital may prove difficult, but an estimate can be reached by calculating the counterfactual discounted amount of future profits of the company apart from the commercial rights to the brand.¹⁰⁴ The impact of design and design protection on the value of a brand is less studied than the impact of trade marks, for example. In general, there is less research available on the economic effects of design innovation and design protection.¹⁰⁵ However, there are some studies showing that design protection can increase prices and create a way of gaining returns from innovations.¹⁰⁶

¹⁰² Bronnenberg, Bart J. - Dubé, Jean-Pierre – Syverson, Chad: *Marketing Investment and Intangible Brand Capital*, The Journal of Economic Perspectives 36, no. 3 (2022-07-01): 53-74. <https://doi.org/10.1257/jep.36.3.53>, p. 54

¹⁰³ Bronnenberg – Dubé – Syverson 2022, p. 55

¹⁰⁴ Bronnenberg – Dubé – Syverson 2022, p. 57

¹⁰⁵ Filitz – Henkel – Tether 2015, p. 1193

¹⁰⁶ Herz, Benedikt – Mejer, Malwina: *The Effect of Design Protection on Price and Price Dispersion: Evidence from Automotive Spare Parts*, International Journal of Industrial Organization, vol. 79, 2021, p. 102776, <https://doi.org/10.1016/j.ijindorg.2021.102776>, p. 18-19

SMEs have an important role in economic growth around the world. For the success and survival of SMEs, financing is crucial.¹⁰⁷ SMEs have been recognised to have various innovative capabilities that can boost their advancement, and authorities on the other hand can boost economic growth in general by supporting the economic activities of SMEs.¹⁰⁸ The EUIPO and Invest Europe November 2024 report ‘Protecting European innovation: Private equity’s role in European Intellectual property rights’, highlights that there is a connection between protected intellectual property rights and the likelihood of obtaining private equity and venture capital funding. The companies that have pre-existing IPRs are not only more likely to secure investment in general, but also to receive significantly higher investments.¹⁰⁹

In the report ‘The future of European Competitiveness – A Competitiveness Strategy for Europe’, regulatory burdens are mentioned as one of the greatest challenges for SMEs. The regulatory and administrative burdens are considerably costly for SMEs and unfavorable for innovation.¹¹⁰ These types of challenges for SMEs can also affect their possibilities and resources to protect and enforce their intellectual property rights.

The same report highlights the importance of making EU attractive for investors and makes recommendations of possible measures in achieving that. One recommendation is to make an impact assessment of the effect of digital and other regulations on SMEs, aiming at excluding SMEs from regulations that only large companies can comply with.¹¹¹ This is an

¹⁰⁷ Batrancea, Larissa M. – Balci, Mehmet Ali – Chermezan, Leontina - Akgüller, Ömer - Masca, Ema Speranta – Gaban, Lucian: *Sources of SMEs Financing and Their Impact on Economic Growth Across the European Union: Insights from a Panel Data Study Spanning Sixteen Years*, Sustainability 14, no. 22 (2022): 15318, <https://doi.org/10.3390/su142215318>, p. 2

¹⁰⁸ Batrancea – Balci – Chermezan – Akgüller – Masca – Gaban 2022, p. 15

¹⁰⁹ EUIPO and Invest Europe, ‘Protecting European innovation: Private equity’s role in European Intellectual property rights, November 2024, https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/news/Joint_report_EUIPO_Invest_Europe/Joint_report_EUIPO_Invest_Europe_en.pdf, p. 5-7

¹¹⁰ Draghi, Mario: *The Future of European Competitiveness—A Competitiveness Strategy for Europe*, European Commission, 2024, https://commission.europa.eu/document/97e481fd-2dc3-412d-be4c-f152a8232961_en, p. 8, 18

¹¹¹ Draghi, Mario: *The Future of European Competitiveness—A Competitiveness Strategy for Europe*, European Commission, 2024, https://commission.europa.eu/document/97e481fd-2dc3-412d-be4c-f152a8232961_en, p. 33

important point of view not only for individual SMEs, but has a great value for the overall EU economy. Therefore, these types of measures that support the competitiveness of SMEs and their ability to respond to changing regulations should be further strengthened.

Considering the relation between design and business, Zec and Burkhard have drawn a distinction between hard facts and soft facts. The hard facts, they say, are material and labour costs, prices and profits. The soft facts are efficiency and utility, the function and product appearance and cultural significance.¹¹²

If we look at different motivations for using design rights in business, various motives can be found. Firstly, a great motive for companies to use design rights is to protect their unique designs from imitation. However, this motive is not the only one. Businesses utilise design rights also to compete of the design space, to ensure freedom to operate, and to have possibilities of defending themselves in possible disputes. These motives also overlap and in some cases the motive is to signal competitors that it is not beneficial to sue if the other party owns design rights. However, design rights can also be overturned, not providing complete protection in all situations.¹¹³ Still, design rights offer companies, and especially SMEs, competitive edge and better possibilities to compete with larger enterprises.

Furthermore, taking into account the relatively low cost of obtaining design protection, it can be a great asset for a smaller company in case of alleged infringement. For example, considering a practical situation where a business is approached with a claim that they are infringing third-party intellectual property rights and a dispute over trade mark rights arises, should the other party have protected their brand also using design right their position can be significantly stronger in such a situation.

Design protection is not costly and in situations such as the one described it may save the company a lot of money. It can move the situation into a direction of settlement even if in the absence of design protection the counterparty would have had an incentive to go to court. Considering that design protection can offer this possibility and strengthen the

¹¹² Zec, Peter – Burkhard, Jacob: *Design Value - a strategy for business success*, Reddot 2010, p. 16-17

¹¹³ Heikkilä – Peltoniemi 2019, p. 9

negotiation power of a business if a dispute arises, makes it a form of protection a lot stronger than what it costs.

4.4 Challenges and Possibilities of Digitalisation for Design Brands

The rapid development of technology and its increasing role in marketing and consumer behaviour has had and will continue to have a major impact on brands. From a marketing perspective, the main object is to attract consumers and to satisfy their needs better than the competitors. Keller has predicted that marketers will move towards a more flexible fashion of employing brand elements and that through those creative and strategic changes it is possible to achieve greater consumer interest and engagement with the brand.¹¹⁴ As the EU design legislative reform provides more possibilities for design protection in the digital era, design businesses can use that strategically in marketing and brand building to attract new customers.

According to a recent report by Ornamo Art and Design Finland on the design companies' near-future business prosperities, scope of business activities, development areas and corporate responsibility showed that digital design is growing fast and already accounting up to 73% of the design sector's turnover in Finland. In the period 2018-2023, the statistics show that the growth in design sector was mainly driven by digital design, with an increase of 30 percent in turnover.¹¹⁵ Digital design also contributes vastly to employment, offering 71% of jobs in the design industry. Digitalisation does not only mean the electrification of processes but also the changes in the whole operating environment and ways of working.¹¹⁶

While digitalization offers many possibilities for design brands, it also offers challenges. It is easier to imitate the innovations of others, and creating copies is fast and cheap. This makes it even more important that businesses are aware of the means of protecting their

¹¹⁴ Keller, Kevin Lane: *The Future of Brands and Branding: An Essay on Multiplicity, Heterogeneity, and Integration*, *The Journal of Consumer Research* 48, no. 4 (2021): 527-540. <https://doi.org/10.1093/jcr/ucab063>, p. 529

¹¹⁵ Ornamo Art and Design Finland 2024 Yrityskatsaus, p. 15

¹¹⁶ *Ibid.*, p. 8

designs. Social media can be helpful and offer fast growth for brands, as algorithms help target the key consumer groups and a post can reach millions of people very fast.

However, this also creates problems, especially concerning design protection where novelty is required in order to register a design. Many designers post their new and innovative designs on social media before considering protecting them. The post can not only reach a lot of potential consumers fast, but also counterfeiters. It is important to raise awareness among designers of how the design registration system works and to highlight that a new design should not be published before protecting it.

5 STRATEGIC APPROACH FOR EU DESIGNERS AND SMES

5.1 Design in Brand Strategy

5.1.1 Introduction

An admired brand can benefit a company in many ways. It can for example generate revenue, increase customer loyalty and attract new customers, facilitate growth, build human-capital, facilitate alliances with desirable partners, and enhance a company's marketplace value.¹¹⁷ Design offers resources for companies in brand building by supporting the company's values and objectives and by offering tools to better understand and address the needs of customers, while also identifying and creating new opportunities for design within the company.¹¹⁸ Therefore, businesses should create a brand strategy fit for their company and to explore how to utilise design and to make the most out of their intangible assets, creativity, and innovation.

Even though design and design protection can significantly increase the value of a brand and affect, for example, the price of products positively, many companies still have not adopted it in their brand strategies. There are also differences in the way that companies that have protected their designs exploit those assets, for example while considering pricing and the extent to which design protection can be included in pricing strategies.¹¹⁹

It is probably for that lack of awareness of the benefits the design system offers why it is highly underused. The EUIPO SME Scoreboard 2022 found that registered Community designs were among the least frequently owned IPR types, owned by only 2% of the SMEs.¹²⁰

¹¹⁷ Park, C. Whan, Deborah J. MacInnis, and A. B. Eisingerich. *Brand Admiration: Building a Business People Love*. Hoboken: Wiley, 2016, p. 5

¹¹⁸ Best 2015, p. 32

¹¹⁹ Herz – Mejer 2021, p. 3

¹²⁰ 2022 Intellectual Property SME Scoreboard, European Union Intellectual Property Office 2022, DOI: 10.2814/28513 (https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IP_sme_scoreboard_study_2022/IP_sme_scoreboard_study_2022_en.pdf), p. 51

The EUIPO and EPO report published on 9 January 2025 indicates similar results, showing only 1.1% of SMEs owning design rights.¹²¹

For SMEs in particular, reasons for not registering design can include bureaucracy and costs, not seeing threats in refraining from registration, not having enough time or considering the registration process too time-consuming, lack of knowledge of design protection, the fact that the registration needs to be renewed or simply not knowing how to do it. Copying design is easy, but the design process is long and requires specific skills. Thus, these efforts need to be protected by not allowing copying of models and designs that designers and companies have invested time and money in.

As Karl T. Ulrich points out in the essay “Design Is Everything?”, the origin of the word ‘design’ is in the Latin word ‘signum’, which means “to mark out”.¹²² This is an interesting point of view for branding. Often the discussion on brands revolves around trade marks and sometimes the two words are even used as synonyms. However, considering the definition of design and the fact that design plays a crucial role for the demand and attractiveness of products and services, it should be included in the core of branding and brand strategy.

Trade marks serve to indicate the commercial origin of goods and services, but brands mean more to consumers than the mere origin. Even though the source and quality are important for consumers, brands offer experiences, emotions, identity and self-worth. Consumers are willing to pay more to have these experiences, thus making it important for business strategists to understand what in the brand in fact makes consumers desire the goods or services and willing to pay a premium for certain traits.¹²³ Design contributes significantly to consumer experience and it can offer a variety of experiences and emotions. Therefore, design should be included in the core of a brand strategy.

¹²¹ Intellectual property rights and firm performance in the European Union. Firm-level analysis report, January 2025, p. 7

¹²² Ulrich, Karl T: *Design Is Everything?*, The Journal of Product Innovation Management 28, no. 3 (2011): 394-398. <https://doi.org/10.1111/j.1540-5885.2011.00809.x>, p. 394

¹²³ Desai – Waller 2010, p. 1425

Marketing studies on consumers' relationships to brands and brand commitment have shown that consumers tend to form relationships with brands which are important in determining the consumers' actions and affection to those brands.¹²⁴

Furthermore, when a great product or service is created, there will likely be interested competitors trying to come up with similar products or services to gain some part of that success. Some aspects of a brand may be duplicated by competitors, for example the product, price, place or promotion. However, the personality of a company is more difficult to copy. Next question to ask is how to build this personality and to create a brand strategy where the efforts in building such personality and brand image could not be copied by competitors. Design plays a key role in this, allowing companies to communicate their values to consumers through advertising and packaging, for example.¹²⁵

5.1.2 The Role of Design Thinking

For the purposes of brand strategy design should be understood broader than as the creation process of products or things. The definition of design by Bettina Von Stamm¹²⁶ referred to in chapter 4.1 considers both the tangible and intangible outcomes of a designer's work.

While design plays an important role as part of the brand in the meaning of the visual aspects of the brand, design thinking also offers many other business possibilities worth exploring. Design thinking as a concept has had many definitions and variations, and different understandings among experts of what in fact is meant by 'design thinking'. However, research has shown that some key elements have been agreed to be common to undertakings under the "design thinking" label, such as a strong focus on user needs, an understanding that the objective of design thinking is true innovation and that reframing is a crucial part of the process, along with multidisciplinary and positive communication culture.¹²⁷

¹²⁴ Fullerton, Gordon: *The Impact of Brand Commitment on Loyalty to Retail Service Brands*, Canadian journal of administrative sciences, 2005-06, Vol.22 (2), p. 97-110, p. 99

¹²⁵ Desai – Waller 2010, p. 1443

¹²⁶ Von Stamm 2008, p. 17

¹²⁷ Borja de Mozota, Brigitte - Valade-Amland, Steinar - Petersen, Morten U.: *Design: A Business Case : Thinking, Leading, and Managing by Design*. New York, New York: Business Expert Press, 2020, p. 58-59

Four main concepts have been identified in design thinking: customer focus and intimacy, experimentation, prototyping, and emotional connectedness. Customer focus and intimacy as an understanding of the customer's needs and desires, experimentation as a process of finding possible solutions, prototyping as a three-dimension expression of a concept, and emotional connectedness as making the results appeal to consumers at an emotional level.¹²⁸

These concepts identified as parts of design thinking are similar to the ones found of high importance in brand success. What kind of brands make customers happy? It has been suggested that it is the brands that enable, entice and offer enrichment to consumers that are able to provide happiness.¹²⁹ Finding ways of creating these positive feelings requires creativity, innovation, and understanding of the product and service area. The next chapters will dive deeper into the role of design in branding of different types of products and services, and how design can contribute to building a strong and desirable brand.

5.1.3 Product and Service Design

Moving from the possibilities offered by design thinking to a closer look on how design expertise enables companies to better address their customers through their products and services. Product design plays a key role in customer preferences and in creating brand equity.¹³⁰ Studies suggest that companies perform better in the marketplace if they have managed to create innovative design and provide superior consumer value.¹³¹ Design has an important role not only in creating new and innovative products and services, but also in making sense of them. For these objects it is crucial that the needs and desires of the users are understood profoundly. To achieve that goal, it is important to engage with stakeholders to better understand their needs.¹³²

¹²⁸ Von Stamm 2008, p. 22

¹²⁹ Park – MacInnis – Eisingerich 2016, p. 43

¹³⁰ Kumar – Townsend – Vorhies 2015, p. 716

¹³¹ Kumar, Minu - Townsend, Janell D. – Vorhies, Douglas W.: *Enhancing Consumers' Affection for a Brand Using Product Design*, *The Journal of Product Innovation Management* 32, no. 5 (2015): 716-730. <https://doi.org/10.1111/jpim.12245>, p. 716

¹³² Borja de Mozota – Valade-Amland – Petersen 2020, p. 81

This relation between design and the products or services, and understanding users' needs, is essential for branding. The experiences that consumers have with the products or services mold their attitudes towards the brand and also affect their loyalty to that brand. The relationships that consumers have with brands drive behaviours, such as positive word of mouth, that are desired in marketing.¹³³ Therefore, product and service design is an important topic for branding and an essential chapter to this study.

Product design is not an easy term to define as it has many different uses in practice, sometimes even depending on the region.¹³⁴ In some contexts, product design has been understood merely as the aesthetic of the product and thus research has focused on consumers' emotional reactions to those aesthetics. However, the role of product design should be understood in a broader context as the overall value of the product is embodied for consumers through product characteristics such as its form, function and the holistic properties of those.¹³⁵

Product design has evolved from historically being understood divided to industrial design focusing on the form and engineering design focusing on the product function to a new practice that is an elemental part of a company's strategy and success.¹³⁶ These two components are fundamental in design and understanding their differences and impacts on consumers is important for branding and marketing strategies. Some studies suggest that the form should follow the function. However, combining the two is not always easy. In some projects, these components are divided to different working groups. For example, there can be a group responsible for the engineering and another group responsible for the design. It can also depend on the industry whether the form needs to follow the function.¹³⁷

¹³³ Fullerton 2005, p. 107

¹³⁴ Ulrich 2011, p. 394

¹³⁵ Kumar – Townsend – Vorhies 2015, p. 719

¹³⁶ Luchs, Michael – Swan, K. Scott: *Perspective: The Emergence of Product Design as a Field of Marketing Inquiry*, *The Journal of Product Innovation Management* 28, no. 3 (2011): 327-345. <https://doi.org/10.1111/j.1540-5885.2011.00801.x>, p. 327

¹³⁷ Townsend, Janell D. - Montoya, Mitzi M. – Calantone, Roger J.: *Form and Function: A Matter of Perspective*, *The Journal of Product Innovation Management* 28, no. 3 (2011): 374-377. <https://doi.org/10.1111/j.1540-5885.2011.00804.x>, p. 376

Product and package design is often one of the key factors in brand recall. The elements in product or package design that influence recall include the visual, auditory, tactile and olfactory forms. Considering the elements of a design that make it most recallable tend to be cute or beautiful form or elements.¹³⁸

Sometimes it may prove difficult to draw a line between the definition of product and service. Many innovative products may contain elements of both. Reports show that services tend to be more profitable than products, making many companies eager to switch to offering services or to offer services along with their products.¹³⁹ However, it is difficult to protect services. Trade marks can be used to protect the service brand, but for example protecting intangible design has not been possible. The problem has also been that it is easy to copy or imitate service innovations.¹⁴⁰ With the new EU legislation extending protection to intangible designs, there are better possibilities to protect intangible innovations.

Moreover, in the broad sense of services many platforms offering different kinds of services have a certain design that affects the usability of the platform and therefore, also, the service. Design and design thinking should be considered in a broader sense, as the outcome of designers' expertise and creativity in making solutions and through those solutions offering higher quality of services, for example. Design thinking, as discussed in the previous chapter, focuses on understanding consumer needs and desires, creating results that appeal to consumers on an emotional level and finding solutions. All these aspects are crucial for both product and service brands.

5.1.4 Combining Different Forms of IP Protection

In design field, there are many possibilities to benefit from different forms of IP protection. In brand protection, it is important and commercially beneficial to assess which forms of

¹³⁸ Park – MacInnis – Eisingerich 2016, p. 120-121

¹³⁹ Von Stamm 2008, p. 359

¹⁴⁰ Ibid., p. 364

protection should be used and to bear in mind that the forms of protection are not mutually exclusive, but can be used together to build the strongest protection.

The same product may be protected by different forms of IP. For example, the shape of a product may function as a distinctive sign that can enjoy trademark protection, but at the same time be eligible for design protection or be protected as a work under copyright law.¹⁴¹ While this allows creating strong protection by combining different forms of protection, it can also result in problematic situations when the overlapping rights are owned by different parties. Furthermore, the possibility of creating long-lasting and strong protection for the appearance of a product has also been questioned as it may end up hindering competition in the market and allow the right holders to excessively restrict the activities of their competitors.¹⁴²

In brand strategy, it should be considered what are the elements of the brand and products that offer competitive benefits to the company and should be protected. Businesses should not protect everything without a strategic consideration or merely in an attempt to restrict competitors. Instead, it should be strategically evaluated which parts of the brand and product design are essential to protect. Businesses should also take into account sustainability and licensing possibilities. With the green transition companies owning IP should also consider how they can contribute to sustainable development through active licensing and waivers, for example.¹⁴³ Moreover, this can create goodwill that may be even more valuable for the brand than the strictly defended exclusive rights.

Thus, not all designs should be protected by all possible forms of protection. In brand strategy, a clear assessment and approach as to what should be protected and under which conditions needs to be established. For example, if there is a design or a product that forms a significant part of the brand or is intended to be sold for a long period of time, it should be protected broadly. On the other hand, designs that have a short life-cycle may not require

¹⁴¹ Kur – Lee – Tischner 2024, p. 375

¹⁴² Ibid., p. 376

¹⁴³ Vrendenbarg, Charlotte J S. "Durable Design: What Role for EU Design Law in the Green Transition?" *GRUR International (Print)*, vol. 74, no. 6, 2025, pp. 525-531, <https://doi.org/10.1093/grurint/ikaf052>, p. 531

extensive protection, and for example EU protection for non-registered designs may be relied on. However, all these should be conscious commercial decisions.

Whereas design protection can be used to protect the appearance of a product or a part of a product (physical or non-physical), trade marks serve to identify the commercial origin. Trade marks are often considered to be the brand name or a logo, but trade mark protection does not limit to word and figurative marks. There are several types of non-traditional trade marks that can also be used to protect the appearance of a brand, as long as all requirements for trade mark protection are met.

For example, it is possible to register a shape mark for three-dimensional shape in accordance with Article 3(3)(c) EUTMIR. These marks may also contain word and figurative elements. Other non-traditional marks, which may be used for branding and include innovative design choices, are pattern marks, colour marks, position marks, and even sound, motion, multimedia and hologram marks.¹⁴⁴ All of these forms of protection should be explored to build the best protection for a brand, especially covering the most distinctive parts of the brand.

In addition to design and trade mark protection, some design products can also be protected under the new EU Geographical Indication regime for craft and industrial products. The function of geographical indications differs from those of design and trade mark protection, serving to identify the name of a product that originates from a certain geographical area. Whereas trade marks serve to identify the commercial origin of products, geographical indications are independent of the company offering the products.¹⁴⁵ Despite these differences, both are used to distinguish goods and services on the market, and can be used simultaneously.

¹⁴⁴ EUIPO, 'Guidelines for Examination of EU Trade Marks' (2024), <https://guidelines.euipo.europa.eu/2214311/2199801/trade-mark-guidelines>, Part B, Section 4, Chapter 2.2

¹⁴⁵ EUIPO Study on EU Member States' Potential for Protecting Craft and Industrial Geographical Indications, DOI: 10.2814/764838, p. 11

As for trade marks, in addition to individual marks it is possible to register collective and certification marks. In accordance with Article 83(1) of the EUTMR, a certification mark is a mark distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods or services not certified. Some aspects are similar to geographical indication protection as to the material and quality characteristics for example. However, the function is again different and the purpose is not to identify the geographical origin of these products or services.¹⁴⁶

Pursuant to Article 74(1) EUTMR, EU collective marks on the other hand are marks that distinguish goods or services of an association holding the registration from those of other undertakings. These can be applied for example by associations of manufacturers, producers, suppliers of services, or traders. Article 7(1)(c) EUTMR prohibits registration of marks that consist exclusively of signs or indications which may serve to designate inter alia the geographical origin of the goods or services, but Article 74(2) provides an exemption to that allowing registration of such marks as EU collective marks.

However, the marks cannot be used to prohibit honest use of such signs in industrial or commercial matters, especially if a party is entitled to use the geographical name in question.¹⁴⁷ EU Trade Mark Directive requires Member States to allow registration of collective marks, setting out similar rules as the EUTMR, providing the same exemption as Article 74(2) EUTMR in Article 29(3) of the Directive.¹⁴⁸

One example of an EU collective mark consisting exclusively of the geographical origin is 'Solingen'.¹⁴⁹ Solingen scissors, knives and cutlery are produced in the Solingen area in Germany. The area is renowned for a long tradition of producing high-quality cutlery, and the origin of these products has been protected under German law as a geographical

¹⁴⁶ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (EUTMR)

¹⁴⁷ Ibid.

¹⁴⁸ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks

¹⁴⁹ Belson, Jeffrey: *Certification and Collective Marks: Law and Practice*, Edward Elgar Publishing, 2017, p. 162

indication. With the new EU legislation allowing protection of geographical indications for craft and industrial products, Solingen cutlery is one example of possible products eligible for protection.¹⁵⁰

It is important to make a distinction between the functions of geographical indications and EU collective trade marks designating the geographical origin of the goods or services. Whereas geographical indications serve to guarantee the geographical origin and special qualities of the goods linked to the geographical area, the function of EU collective marks is to distinguish goods or services of an association that is the proprietor of the mark from those of other undertakings. Thus, the collective marks inform consumers of the association that the proprietor belongs to, not of the geographical origin of the goods or services.¹⁵¹

All these forms of protection should be considered when creating a brand strategy. However, as mentioned before in this study, designers and SMEs often lack awareness of possibilities for IP protection. Although support systems have been increasingly available in the EU, it would be important to also add IP education in schools and to raise awareness of the different forms of protection.

5.2 New Possibilities Offered by the Legislative Reform and Strategic Considerations Especially in Digital Design

This chapter provides insight on how the strategy applies to different areas of design and what new opportunities it brings for different types of designs such as virtual spaces, digital design and light installations, among others. As mentioned earlier in this research, it is easier to copy or imitate intangible innovations, such as service innovations. However, whereas it may be easy to copy an innovation, it is more difficult to benefit from the

¹⁵⁰ EUIPO Study on EU Member States' Potential for Protecting Craft and Industrial Geographical Indications, DOI: 10.2814/764838, p. 140-143

¹⁵¹ Belson 2017, p. 162. See also T-624/13, *The Tea Board v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)*.

reputation, expertise, and customer experience by imitation.¹⁵² This is where the importance of design and brand is tied together again.

Consumers know the products by the brand, in which design plays an important role, creating a unique experience. If a consumer has deemed certain products or services to fit their needs, they are likely to repeat their purchase. This way what should be highlighted over protecting the mere innovation is finding a way to protect the brand experience as a whole through the means of intellectual property protection available in the current system. New virtual realities offer many possibilities for branding and these possibilities should be explored in marketing. However, marketers need to make conscious choices in the ways brands are entered into the virtual world and whether an existing brand should be extended to the virtual realm.¹⁵³

As discussed in this study, form and function are key components of product design. They affect consumer experiences and beliefs simultaneously, and are therefore essential players in how consumers consider those products and the brand. However, there is not a lot of research on these factors and questions such as how form and function affect the perceptions and what differences there are across countries and industries, for example.¹⁵⁴ Moreover, the research that exists on the topic is often divided to either focus on the form or the function. Luchs and Swan have called for an integrated perspective and research addressing both the form and the function simultaneously.¹⁵⁵

Digitalisation has changed the world of branding and online marketing has become increasingly important in recent years. If we look at some of the strongest brands worldwide, such as Amazon, Google, and Facebook, all of them were born and created online. What is common for the success of digital brands is that they have managed to position their brand well in the online environment while also finding unique ways to meet consumers' needs.¹⁵⁶

¹⁵² Von Stamm 2008, p. 364

¹⁵³ Ramanathan, Jayasankar - Keyoor Purani: *Brand Extension Evaluation: Real World and Virtual World*, The Journal of Product & Brand Management 23, no. 7 (2014): 504-515. <https://doi.org/10.1108/JPBM-04-2014-0559>, p. 511

¹⁵⁴ Townsend – Montoya – Calantone 2011, p. 377

¹⁵⁵ Luchs – Swan 2011, p. 340

¹⁵⁶ Keller – Swaminathan 2020, p. 44-45

The use of digital products and services has increased rapidly and with that the importance of the consumer experience in the digital realm. There is an increasing demand for User Interface and User Experience (UI/UX) designers as they play an important role in creating the online platforms to be more user-friendly and user-engaging. Design elements contribute greatly to the experience and are crucial factors for success in digital marketing.¹⁵⁷

Aspects of UI/UX design such as homepage design, navigation interface and ease of use are elements that impact the consumer satisfaction and willingness to make a purchase. Thus, good UI/UX design impacts sales, engages customers and offers competitive advantage.¹⁵⁸ As consumer engagement and satisfaction are in the essence of branding and marketing as well, UI/UX design should be used in e-commerce platforms to create brand image, engage customers, and develop brand admiration.

When a business invests in creating an attractive digital environment, it is also highly important to protect it. Trade marks offer one form of protection and non-traditional trade marks such as motion marks and multimedia marks can be used to protect digital brands. In accordance with Article 3(3)(h) EUTMIR motion marks are trade marks consisting of, or extending to, a movement or a change in the position of the elements of the mark. Article 3(3)(i) EUTMIR defines a multimedia mark as consisting of, or extending to, the combination of image and sound.

These marks must comply with the registrability criteria for trade marks and marks merely combining non-distinctive or descriptive elements may not be registered. The trade mark offices in the European Union have created a document Common Communication on New Types of Marks: Examination of Formal Requirements and Grounds for Refusal (Common Practice 11, April 2021) setting common guidelines on the assessment of registrability criteria on the new types of trade marks.¹⁵⁹

¹⁵⁷ Hasan, Tsabbita Isnina - Silalahi, Christine Irene - Rumagit, Reinert Yosua – Pratama, Galih Dea: *UI/UX Design Impact on E-Commerce Attracting Users*, *Procedia Computer Science* 245 (2024): 1075-1082. <https://doi.org/10.1016/j.procs.2024.10.336>, p. 1076

¹⁵⁸ Hasan – Silalahi – Rumagit – Pratama 2024, p. 1081

¹⁵⁹ EUIPO, 'Guidelines for Examination of EU Trade Marks' (2024), Part B, Section 4, Chapter 2.7, <https://guidelines.euipo.europa.eu/2214311/2199801/trade-mark-guidelines>

With the new EU design legislation, it is also possible to gain design protection on digital designs. This is a vast improvement in the possibilities of IP protection for intangible and digital products and services. As it will be possible to protect digital spaces and user interfaces, the new possibilities design protection offers to brand protection and brand creation increase significantly. To gain the strongest protection, trade mark protection and design protection should be used in parallel.

As for marketing, entering existing brands or new products into the virtual world may, however, require more spending in marketing communication and the choices in brand extensions from the earlier branding practices to virtual ones need to be carefully considered by the marketing teams. It is also important to understand the consumers' reactions and attitudes toward brand extensions to the virtual worlds.¹⁶⁰

5.3 Sustainability in Design

The European Parliament has underlined the importance of promoting sustainable, circular, safe, durable and non-toxic products and materials, and finding ways to make them the norm in the EU market. These products should be made an attractive and affordable choice for consumers. The Parliament has not only seen this as a solution to the environmental problems, but also to the economic crisis.¹⁶¹ The Ecodesign for Sustainable Products Regulation aims at achieving the EU climate, energy and wider environmental objectives. The aims of the European Green Deal also call for safety as to the chemicals, materials and products on the EU market.¹⁶²

The Ecodesign for Sustainable Products Regulation applies to all physical goods that are placed on the market or put into service, including components and intermediate products, with some exceptions as provided in Article 1 of the Regulation. The ecodesign requirements

¹⁶⁰ Ramanathan - Purani 2014, p. 510-511

¹⁶¹ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, recital 8

¹⁶² Ibid., recitals 9-10

concern, among other things, the durability, reusability, repairability, energy efficiency, recyclability, and carbon and environmental footprints of products.¹⁶³

Annex I to the Regulation specifies the product parameters that shall be used for improving product aspects. The ecodesign requirements are set out in Article 5 of the Regulation. In accordance with Article 5(11)(a), there shall be no significant negative impact on the functionality of the product, from the users' perspective. Applying these requirements needs the expertise of designers, to define how the ecodesign requirements can be applied to products without causing negative effects to the functionality. Designers have an important role in developing new materials and transforming production methods, but also in making products re-usable and ensuring that materials can be recycled.¹⁶⁴

Considering SMEs, new regulatory requirements can cause significant burden. Article 5(11)(d) and (f) set out that there shall be no disproportionate administrative burden on, or negative impact on the competitiveness of, the economic operators and actors in the value chain, including SMEs, and in particular microenterprises. However, SMEs still need to familiarise themselves with the requirements to be able to assess the needed actions, and to create various documentation and comply with information requirements. Therefore, the requirements inevitably affect SMEs and are likely to create higher burden than for larger enterprises.

Article 7 of the Ecodesign for Sustainable Products Regulation sets out information requirements. One of the information requirements is the requirement to make a digital product passport available as defined in Chapter III of the same regulation.¹⁶⁵ Pursuant to Article 9 of the Regulation, products can be put on the market only if a digital product passport is available, and the data in the digital product passport needs to be accurate,

¹⁶³ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, recital 16

¹⁶⁴ <https://www.ornamo.fi/en/sustainabilityreport>

¹⁶⁵ Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, recital 32

complete and up to date. Annex III to the Regulation specifies the data to be included in the digital product passport.

While these are positive advancements to the environmental and consumer safety in the EU, it must be carefully considered how the new requirements affect SMEs. Although there are EU support systems put in place for SMEs, adding requirements to SMEs also affects their ability to compete with larger companies, and it is important that the promise of supporting smaller enterprises in applying these new legislative requirements actually becomes a practice.

Although these requirements can cause administrative burden and require more resources from small and medium-sized enterprises to comply with the requirements, they can also be positive for smaller design companies. As mentioned before, designers play an important role in sustainability. They have expertise in making products better quality, choosing safe and high-quality materials, and creating products that are fit for purpose. In brand creation, designers should deem this as their asset and communicate their expertise to their customers.

However, companies need to be aware of other recent changes to the environmental legislation in the EU as well. For example, Directive (EU) 2024/825 adds new prohibitions to vague and greenwashing marketing claims that are not accurate and based on evidence. The directive adds requirements to protect consumers from misleading information and to ensure consumers can make sustainable consumption choices. The aim is to ensure that environmental claims are fair, understandable and reliable.¹⁶⁶

The Directive (EU) 2024/825 adds commercial practices considered misleading to Annex I of Directive 2005/29/EC.¹⁶⁷ Article 4 of the Directive sets a requirement for Member States

¹⁶⁶ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, recital 1

¹⁶⁷ For example, the following are added to the list of prohibited misleading practices in Annex I: “Displaying a sustainability label that is not based on a certification scheme or not established by public authorities; Making a generic environmental claim for which the

to adopt and publish measures necessary to comply with the Directive's requirements by 27 March 2026, which shall be applied from 27 September 2026.¹⁶⁸ All companies need to be aware of these requirements and consider them in their marketing.

Especially for SMEs and design companies, it is important that they know what kind of claims they can make and how they can communicate their sustainability to consumers. Although these new requirements can add burden on companies, they are positive advancements and likely to highlight positively the expertise of designers and the sustainability choices that are already made. Adding requirements regarding the claims is likely to hinder actors in the market that have tried to boost their business with false environmental claims, and the stricter requirements will allow for the real and evidence-based environmental claims to gain more significance and credibility.

These changes are positive, as they are to increase consumer trust in such claims. Hopefully, the direction will be towards more conscious consuming practices that value high-quality materials, design expertise and products that are fit for purpose and durable. However, it remains to be seen how consuming practices develop and how, for example, younger generations will deem the importance of the environmental choices made by companies.

As to the strategic approach for design SMEs, they should seek information and familiarise themselves with the rules on environmental claims, but also considering those as a competitive possibility for them.

trader is not able to demonstrate recognised excellent environmental performance relevant to the claim; Making an environmental claim about the entire product or the trader's entire business when it concerns only a certain aspect of the product or a specific activity of the trader's business; Claiming, based on the offsetting of greenhouse gas emissions, that a product has a neutral, reduced or positive impact on the environment in terms of greenhouse gas emissions.'; Falsely claiming that under normal conditions of use a good has a certain durability in terms of usage time or intensity; Presenting a good as allowing repair when it does not; Inducing the consumer to replace or replenish the consumables of a good earlier than necessary for technical reasons."

¹⁶⁸ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information

As mentioned previously in this study, it is crucial for brands to know their customers, to align with their values and to communicate those values clearly. Environmental and sustainability questions have a growing importance and brands should consider these things as part of their brand creation process. Being compliant with the environmental legislation is not only a requirement, but also a possible way of gaining goodwill for the brand. However, companies need to know the limits to making green claims and make sure that their marketing stays within those limits and that the claims that are made are accurate and can be backed with evidence.

6 POSSIBLE CHALLENGES IN THE NEW EU DESIGN SYSTEM

6.1 Assessment of Novelty and Individual Character

In accordance with the Community Design Regulation 6/2002 Article 5, remaining unchanged in the new regulation, a design is considered new if no identical design has been made available to the public. However, if the designs only differ in immaterial details, they will be considered identical. Article 6 of the same regulation states that a design has individual character if the overall impression produced on an informed user differs from the overall impression produced by another design. In this assessment the degree of freedom of the designer in developing the design shall be taken into consideration.¹⁶⁹

In accordance with the EUIPO Guidelines on registered EU designs that entered into force on the 1st of May 2025, individual character will be assessed using a four-stage examination process. Firstly, a sector will be decided to the products in which the design is intended to be incorporated or applied to. The sector will be determined solely in relation to the contested design. Secondly, the informed user of those products will be identified according to their purpose, and the degree of awareness of the prior art and the level of attention in the comparison of the designs. Thirdly, the designer's degree of freedom in developing the design, and fourthly, the outcome of the comparison of the designs taking into consideration the sector, designer's degree of freedom and the overall impressions produced on the informed user by the design and any earlier design made available to the public.¹⁷⁰

The EUIPO Guidelines are important in ensuring legal certainty and making the Office's practice predictable. With the new design system, however, it may be challenging to define these guidelines yet based on existing case law, as the characteristics of the new designs that can be protected are significantly different compared to before. As referred to earlier in this study, Antikainen has pointed out that for digital designs, for example, the designer has

¹⁶⁹ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

¹⁷⁰ EUIPO, 'Guidelines for Examination of Registered EU Designs' (2025), Chapter 5.7.2.2, <https://guidelines.euipo.europa.eu/2231430/2231846/designs-guidelines>

nearly unlimited freedom.¹⁷¹ The new virtual world, digital designs and animation may include characteristics that the existing case law has not even considered.

From a legal point of view, it will be interesting how the new system and definitions will be interpreted in practice. However, this creates a challenge for companies, especially SMEs, as it can be difficult to determine what can and should be protected. Novelty has been assessed quite literally with European courts until now. For example, the French Supreme Court considered that a shoe design that reproduced some characteristics of an earlier design could obtain design protection provided that no identical design had been previously made available to the public.¹⁷²

As the new legislation makes, for example, non-physical products protectable, it will likely make it fairly difficult for courts to draw the line with the requirements of individual character and novelty. The same challenges consider infringement cases. This is not only a challenge for the courts, but also for the users of the system. It may prove especially difficult for designers and SMEs, as they often do not have access or possibility to use experts to assess the registrability of their designs. This problem has been noticed and the EUIPO, for example, is offering services and funding for SMEs to support them in protecting their intellectual property.¹⁷³

A study examining companies' motivations for filing design applications showed that the primary motive for filing an application for a registered design was to prevent imitation. The same research showed that companies had positive experiences with the possibilities of deterring imitators through the protection provided by a registered design. Another motivation for filing was found out to be an approach of filing everything that is possible. As it was difficult to identify prior art for some designs, companies started to also file and enforce old designs, and considering also the low cost of design protection, filings started to grow to unnecessary amounts.¹⁷⁴

¹⁷¹ Antikainen 2021, p. 154-155

¹⁷² Burbidge, Rosie: *European Fashion Law – A Practical Guide from Start-up to Global Success*, Edward Elgar Publishing 2019, p. 85

¹⁷³ <https://www.euipo.europa.eu/en/sme-corner>

¹⁷⁴ Filitz – Henkel – Tether 2015, p. 1201

This is a challenge with the design system and also may threaten the goals of the new system. If companies start using this kind of “all you can file” strategy, the design register will be full of designs that may not actually be eligible for protection, but at the same time no one reacts to those registrations. This can lead to a growing amount of disputes where, for example, copyright and design rights are argued against each other and the designs in the register may actually end up hindering creativity and the freedom of designers to an unnecessary level.

It is important that a balance will be found and that also lawyers do not advise their clients to protect everything, but rather to create a strategy of protecting new and innovative designs that will be used for a longer period of time, as part of brand, and that are in fact novel and have individual character. Otherwise the design system could start working against its core objectives.

6.2 Possible Challenges Especially for SMEs

Although the new design system includes many positive updates and enhancements to the designers' and SMEs' possibilities of protecting their innovations and new designs, some of the challenges are still likely to remain. There is still a lot of work to be done by the EU in making the design protection system more attractive and easily approachable to designers. In that a key component is raising awareness on the benefits of design protection and the offered services especially for SMEs.

SMEs will probably still have similar doubts and questions than with the previous system, such as what to protect and when, how to use different types of intellectual property protection and what is the scope of protection, how to choose what should be protected, and how costly will it be.

Another challenge is that designers are often not aware of the novelty requirement. The social media and virtual world makes it possible to share designs quickly for an audience all

around the world. While this can also be a great advantage for marketing and international branding, it also makes the risk of copying and imitation higher. If the designers and companies utilising design are not aware of the novelty requirement, it can result in situations where a design that would have been eligible for protection cannot be protected as it has been published too early, and time has passed before the designer or the company became aware of the possibility of protection.

Furthermore, SMEs may find it difficult to enforce their rights even if they have protected them successfully. Legal advice and proceedings are costly, and the concern of the outcome of the dispute may often result in deciding not to react even to clear infringements. SMEs may also not have the resources to start these kinds of proceedings and therefore decide not to enforce their rights.

It would be important to add education on intellectual property rights in schools, especially in creative and other IPR-intensive fields, to ensure that designers and other professionals are aware of the value of their creations and the possibilities of protecting them. The key requirements for protection, such as the novelty requirement, should also be included in that education. In addition to the overall education, awareness should also be raised on the services offered for SMEs, such as the EUIPO SME Fund.

7 CONCLUSIONS

7.1. Final Remarks

This research has aimed at finding out what benefits and challenges are brought to design companies and SMEs by the recent legal reforms in the EU. The EU design legislative reform has modernised the design protection systems and enabled protection of new types of designs, such as animation, movement, and transition. As the definitions of design and product have been broadened, more designs are protectable under EU design law and this will offer new possibilities especially in the field of digital and UI/UX design.

Furthermore, the reform of EU design law adds clarity and legal certainty as to what is protected in the register and what can be protected with an EU design. Although, some questions relating, for example, to other than visual elements of designs and their protectability remain. Also, assessing the requirements for protection such as novelty and individual character are likely to become more complex with the possibility of protecting new types of designs. It will take some time until case law defines how the new rules should be applied in practice.

As discussed in the research, support systems for SMEs and low threshold IP advice are crucial in order to reach the objectives of the reform in attracting more SMEs to protect their IP, including designs. Designers have expertise in creating innovative products, materials and solutions, but are often not informed about the possibilities of protecting their innovations. IP education needs to be included in schools and universities to raise awareness of the possibilities for IP protection and how to utilise those rights in business and branding.

Another question this study sought to answer was how the new possibilities brought by the reforms should be implemented in brand strategies, and how companies should prepare for possible new challenges created by the digitalisation, internet sales and counterfeiting.

Furthermore, it was shown that including design thinking in brand strategy has many benefits.

SMEs should consider IP as an asset that allows them to compete with larger companies and design should be used more as a form of IP protection. With protecting designs it is important to also know how to leverage those assets through selling or licensing, for example.

As mentioned in Chapter 4.3, investors have an increasing interest in intangible assets. Companies that have pre-existing intellectual property rights are more likely to receive higher investments. In addition to attracting investments, design protection can increase prices and create a way of gaining returns from innovations.

New phenomena such as the Dupe-culture where the appearance of a product is imitated creates new problems for brand owners. As discussed in this research, these situations often do not constitute trademark infringement as the brand name is not used, but consumers recognize which brand is imitated based on the design of the product, packaging or other characteristics. Thus, companies need to find new ways to protect their brand's appearance. Design protection offers an excellent solution for that.

Still, as the statistics show, trade marks are used notably more than design rights in the EU. Even large companies do not seem to utilise design protection. It would be a positive outcome of the recent legal reforms if companies would begin to also consider design protection as a form of protection for their brand. The term brand should be understood broadly in this context, also including the appearance of products and interfaces, for example, based on which consumers recognise the brand.

As the world is changing through digitalisation, design field is also evolving and the importance of digital design keeps growing. Consumers want systems, applications and interfaces that are easy to use, clear and appeal to them also visually. The expertise of designers in this can create a great competitive advantage for a company, as consumers often choose products based on these characteristics. On the contrary, consumers may abandon products that they experience difficult to use or non-attractive visually.

As discussed in Chapter 5.1, for the purposes of brand strategy, design should be understood more broadly than as the mere visual appearance of products. Design thinking should be seen as a tool for understanding customer needs and desires, as a process of finding possible solutions, and as making the results appeal to consumers at an emotional level. All these things are at the core of branding and among the reasons why consumers desire a brand. Designers' creativity and expertise should be leveraged for branding, especially with the increased existence of brands in the digital world. Moreover, designers' expertise in sustainability solutions will be an important asset for companies in the future.

Design should be viewed as a way of achieving circular economy objectives, and the design protection system should be used for this purpose. Although the economic importance of design protection has been discussed in this research, it should not be seen as a way of increasing consumption regardless of environmental consequences. Ideally, design protection would be a way for designers to protect environmentally friendly creations and for consumers to recognise products on the market based on the design as part of the brand, helping to make more informed choices. As discussed in Chapter 5.1, design can also serve as indicating the origin of the products as consumers are increasingly paying attention on the appearance of products.

Although there are many new challenges for designers and SMEs, this research shows that the EU design legislative reform brings many benefits for designers and companies utilising design as the reform has clarified what can be protected and extended protection to cover many new types of design innovations.

7.2 Future Research

The new EU design system will start to mold through practice and eventually through case law. However, research is needed to further assess the possible challenges in interpreting the new rules and to seek to define how the new definitions should be interpreted. With the rapid development of new technologies and artificial intelligence, there is a need of

continuous monitoring and development of legislation to keep up with the fast-paced technological developments.

It should even be discussed if intellectual property law as we know it is fit for the requirements of the future. Modernising the intellectual property legislation and ensuring that it keeps up with the development of new technologies is crucial, but it should also be considered if we need new ways of protecting innovation and creative work, but also if the current rules are unnecessarily limiting and prohibiting innovation in some cases. It is also important to ensure that IP is not used to hinder sustainable development and environmental-friendly practices.

Finally, more research is needed on the economic effects of design innovation and design protection, and the ways in which design contributes to the success of brands. In addition, phenomena such as the Dupe-culture need to be considered and assessed if trade marks will continue to offer sufficient protection for brands. Protecting the appearance of products and parts of products is likely to grow in importance as consumers are increasingly recognizing products and brands based on their appearance.

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