

European Union Trade Mark Regulation

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Article-by-Article Commentary

edited by

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Foreword

We know from studies carried out by the EUIPO and the European Patent Office that industries using IP rights intensively support, directly or indirectly, 38 % of EU jobs – that is 82 million people – almost 42 % of the GDP and 90 % of external trade.

The same research demonstrated that several IP rights – trade marks, designs and patents – are often used in a bundled fashion. The smart phones in our pockets enjoy some kind of design protection, contain patented technology and are identified by a world-famous trade mark name.

While the differences between rights should be acknowledged, so too should their interdependence and the fact that the users of different IP rights dealt with by different IP offices are often the same people.

The EUTM and its accompanying design right, the RCD, along with the Unregistered Community Design, are part of a two-tier system of trade marks and design rights. Consequently, the EUIPO works closely with national and regional IP offices to provide a choice of national or EU-wide rights to entrepreneurs, depending on their business needs. This relationship has been reinforced by the success of the European Union Intellectual Property Network, which has built a wide range of shared IT tools to modernise the trade mark and design system and which is also working to converge practices.

We currently have seven areas of convergence, including two covering designs. Three additional convergence projects deal with the use of a trade mark in a form differing from the one registered; projects regarding 3D trade marks containing verbal or figurative elements and the disclosure of designs on the internet are under way.

This partnership approach needs to be maintained and extended to other IP rights such as patents if EU businesses are to get the support they need to capitalise on their creativity and innovation. Indeed, the requirements for cooperation and convergence go well beyond the borders of the [EU](#). For this reason, the EUIPO continues to work on behalf of the European Commission as the implementation agency for EU-funded TP projects in many global regions in order to encourage greater convergence, transparency and accessibility, particularly for the benefit of SMEs.

Against this background, there is an ongoing need for expert, updated and detailed analyses regarding the legislation underpinning EU trade marks and designs

Professor Hasselblatt is a well-known and highly respected figure in the IP world. He is a partner at the Cologne office of CMS Hasche Sigle, adjunct professor at the McGeorge School of Law, Sacramento, and the Chicago-Kent College of Law, and a member of GRUR's expert committee for trade mark and unfair competition law.

In addition to personally authoring a number of commentaries, Professor Hasselblatt has assembled an impressive list of co-authors for both volumes, including leading figures in European intellectual property law drawn from a wide spectrum of law firms, faculties and authorities.

The commentaries are written 'by practitioners for practitioners' and as such are a very welcome and useful addition to the canon of literature on IP, deserving a place on the bookshelf of any professional or student interested in the EU trade mark and design system.

António Campinos
Executive Director EUIPO
Alicante, June 2018

Preface

The international market for books in the field of intellectual property is largely saturated. There is, however, a noticeable void in the area of pan-European commentaries in the English language on both the European Union Trade Mark Regulation (EUTMR) and the Community Design Regulation (CDR). In fact, the low density of the available English language literature is in striking contrast to the commercial importance of the European Trade Mark and the Community Design. The present Commentary and the parallel work on the CDR aim to make a contribution to filling this gap.

This Commentary has been written by ‘practitioners for practitioners’, with a focal point on the application, registration and enforcement practice regarding EU Trade Marks. The authors of this work come from all walks of life and are all true trade mark experts; the band of authors encompasses practising lawyers, legal scholars, judges and EUIPO officials. Suffice to say that the Commentary reflects the personal views of the authors and should not be attributed to their respective law firms and clients or particular cases. In the case of EUIPO agents and officials, the views and opinions expressed do not necessarily reflect those of the Office.

Instead of reflecting the legal conception of one or a few Member States, the Commentary endeavours to interpret the EUTMR from a European perspective, focusing on the plethora of decisions rendered by the Office, the GC and the CJ, supplemented by important decisions handed down by the EU Trade Mark Courts, namely where such decisions were rendered in ‘landmark cases’.

The format corresponds to that of a ‘traditional’ German commentary, dealing with the entire text of the EUTMR on an article by article basis. As far as possible, the commentaries on the individual articles are for the most part structured identically so as to enhance the user-friendliness of the work. In addition, by way of cross references, the reader’s attention is called to systematics not only in the EUTMR, but also to similarities or differences in terms of the CDR. Where appropriate, the authors explain the practical implications of the provisions contained in the new so-called ‘delegated acts’ in accordance with Art. 290 TFEU, the EUTMR and the EUTMDR.

The EUTMR commentary under A. obviously constitutes the main part of the present work. However, the EUTMR does not regulate all of the proprietor’s rights but limits itself to the right to injunctive relief, the right to prohibit acts in relation to certain preparatory acts under Art. 10 and to the claim for reasonable compensation under Article 11 (2) EUTMR. The Regulation remains silent about all other claims. Under Art. 129 EUTMR, the courts are to apply their national law on all matters not covered by the EUTMR. This holds true, amongst others, to many remedies in infringement actions. Therefore, in order to achieve the quite ambitious goal of an ‘equal effect throughout the Union’, it is of paramount importance to establish and maintain uniform standards for the enforcement of the EUTMR in all EU Member States. At the same time, it has to be ensured that, as far as it is possible, these standards will be uniformly applied by the courts. In this respect, the Enforcement Directive (2004/48/EC) has proven to be quite valuable, as it provides for a harmonized body of law. As it is crucial for the proprietors of EUTM rights to be familiar with said legal framework, under B. this Commentary deals with those measures and remedies that are not regulated in the EUTMR.

Furthermore, under C. the Commentary includes a section explaining the enforcement of intellectual property rights under the national laws in each of the 28 Member

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States. This entails the assertion of the proprietors' IP rights out of court as well as in litigation in summary and main proceedings. All of these 'country reports' are written by experts from the respective EU jurisdiction and follow a uniform structure.

The Commentary is rounded off by supplementary rules, such as implementing regulations and examination guidelines under D., followed by a Table of Cases under E., reflecting the decisions cited throughout this Commentary.

Since the release of the first edition of this book in spring 2015, quite a few important things have taken place in the realm of EU trade mark law. First of all, most of the reforms proposed in 2013 have now matured into law. By way of Regulation 2015/2424 of 16 December 2015, the CTMR was comprehensively amended and the Regulation on the fees payable to the Office repealed. Furthermore, the Trade Mark Directive was recast at the same time. This brought years of discussions to an end concerning the parallel proposals for a revision of the CTMR and a recast of the TMDir.

The reform was based, rightfully, on the assumption that the Community trade mark system had stood the test of time, but that there was a need to 'modernise the trade mark system in the Union by making it more effective, efficient and consistent as a whole and by adapting it to the internet era' as laid down in recital 7 of the preamble (Reg 2015/2424). The modifications of the EUTMR compared to the recast of the TMDir are less radical, although Article 1 Reg 2015/2424 alone contains a total of 145(!) amendments. Obviously, some amendments are merely terminological and do not include any substantive changes, such as the switch from the designation *Community Trade Mark* to *European Union Trade Mark* or from the term *OHIM* to *EUIPO*. With regard to substance and procedure, the EUTMR brings about a number of changes, some of which have mere clarifying character or merely adapt the wording of the law to established case law. It is needless to say that all changes of material or procedural nature will be dealt with in the respective context of this commentary. Reference is made by way of example to the elimination of the requirement of graphic representability, the extension of the list of absolute grounds for refusal, the significant broadening of the rights conferred by an EUTM, the first regulation of the acquisition of intervening rights on the EU level up to the introduction of the certification mark. With regard to increased user-friendliness, it has to be seen with gratitude that on 16 June 2017 a codified text was adopted. The codification of the EUTMR has to be welcomed for many reasons, last but not least in the interest of clarity and rationality, as pointed out in recital 1 of its Preamble. In light of all this, it is safe to say that it was high time for a comprehensive update of this book. Finally, owing to its importance, the consequences of Great Britain's – unprecedented – exit from the EU ('Brexit') is dealt with at some length, analysing conceivable scenarios and ensuing considerations for the advisory practice under Article 1 EUTMR mn. 11–23.

The authors, the publisher and the editor would be very appreciative of readers' comments and suggestions. Please send any feedback and criticism to gordian.hasselblatt@cms-hs.com.

Gordian N. Hasselblatt
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List of Abbreviations

acc.	according to
ACRR	(Polish) Act on Copyright and Related Rights
AIPPO	International Association for the Protection of Intellectual Property
All E.R.	All England Reporter
AnwBl	Anwaltsblatt (German law journal)
approx.	approximately
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Court of Justice)
BoA	Board of Appeal
BT	Bundestag (German Federal Parliament)
C&D	cease and desist
CD	Community Design
CDFR	Community Design Fees Regulation
CDIR	Community Design Implementation Regulation
CDPA (UK)	Copyright, Designs and Patents Act
CDR	Community Design Regulation (EC) 6/2002 of 12 December 2001 on Community Designs
cf.	confer (consult; see)
Ch D	Chancery Division (UK)
ch.	chapter(s)
CJ	Court of Justice
CJEU	Court of Justice of the European Union
cl.	clause
COM	Proposed legislation and other Commission communications to the Council and/or the other institutions, and their preparatory papers. Commission documents for the other institutions
Com.	Commission
Common Regulations	Common Regulations under the 1999 Act, the 1960 Act and the 1934 Act of the Hague Agreement
CTM	Community Trademark
CTMDir	Community Trade Mark Directive
CTMFR	Community Trade Mark Fees Regulation
CTMIR	Community Trade Mark Implementing Regulation
CTMR	Community Trade Mark Regulation
DDir	Design Directive
Dec.	Decision
Dir.	Directive
diss.op.	dissenting opinion
Drs	Drucksache (printed matter of the German Parliament)
Duke LJ	Duke Law Journal
E.C.D.R.	European Copyright and Design Reports
e. g.	exempli gratia (for example)
EnforcementDir	Directive on the enforcement of intellectual property rights
E.I.P.R.	European Intellectual Property Review
E.T.M.R.	European Trade Mark Report
ECHR	European Convention on Human Rights
ECR	Report of cases before the European Court of Justice and the General Court
EEA	European Economic Area/European Economic Agreement
EIPR	European Intellectual Property Review
ELJ	European Law Journal
EPC	European Patent Convention of 1973
EPLA	European Patent Litigation Agreement
EPO	European Patent Office
EuR	Europarecht (German law journal)
EU	European Union

List of Abbreviations

EUIPO	European Union Intellectual Property Office
EUTM	European trade mark
EUTMRDR	European Union trade mark delegated regulation
EUTMIR	European Union trade mark implementing regulation
EUTMR	European trade mark regulation
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (German law journal)
EWCA	Court of Appeal for England and Wales
ExaminationGuidelines	Guideline for the Examination of Community Designs by OHIM
Fed.	Federal
fn.	footnote
FS	Festschrift (liber amicorum)
FSR	Fleet Street Reports: Cases on Intellectual Property Law (UK)
GC	General Court
GCA	German Copyright Act
GDA	German Design Act
Geneva Act.....	Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (German law journal)
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil (German law journal)
GRUR Prax	Gewerblicher Rechtsschutz und Urheberrecht, Praxis im Immaterialgü- ter- und Wettbewerbsrecht (German law journal)
GRUR-RR.....	Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungsteil (German law journal)
i. e.	id est
ibid.	in the same place
ICA	Italian Copyright Act
id.	idem, the same
IEHC	High Court of Ireland decisions
IIC	International Review of Intellectual Property and Competition Law
INID	Internationally agreed Numbers for the Identification of Data
INTA	International Trademark Association
Invalidity Guideline	Guideline for the Proceedings Relating to a Declaration of Invalidity of a Registered Community Design by OHIM
IP	Intellectual Property
IPC	(Italian) Industrial Property Code
IPL	(Polish) Industrial Property Law Act
IPLR.....	Intellectual Property Law Reports
IPR	Intellectual Property Rights
IR.....	International Registration
J	Judge
lit.	letter; littera
LOC	Locarno Classification
loc. cit.	in the place cited
Madrid Agreement.....	Madrid Agreement Concerning the International Registration of Marks of 14 April 1891
MarkenG	Markengesetz (German Act on the Protection of Marks and Other Designations)
Mitt.	Mitteilungen der deutschen Patentanwälte (German law journal)
mn./mns.	margin number/margin numbers
MPI.....	Max-Planck-Institut
Nice Agreement	Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957
nyp	not yet published
NZI	Neue Zeitschrift für Insolvenzrecht (German law journal)
OAPI	African Intellectual Property Organisation
Öbl	Österreichische Blätter für gewerblichen Rechtsschutz (Austrian law journal)
OECD	Organisation for Economic Cooperation and Development
Office	European Union Intellectual Property Office
OGH	Oberster Gerichtshof (Supreme Court of Austria)

List of Abbreviations

OHIM	Office for Harmonization in the Internal Market
OJ	Official Journal
para./paras	paragraph(s)
Paris Convention	Paris Convention for the Protection of Industrial Property of 20 March 1883
PatG	Patentgesetz (German Patent Act)
PCT	Patent Cooperation Treaty
PI	preliminary injunction
Protocol	Protocol Relating to the Madrid Agreement of 27 June 1989
pub.	publication
R	rule (WIPO)
RBC	Revised Berne Convention
Rc.	recital
RCD	Registered Community Design
Reg.	Regulation
RenewalGuidelines	Registered Community Design Renewal Guidelines by OHIM
Rope	Rules of Procedure
RPC	Reports of Patents, Designs and Trade Mark Cases
RTM	Registered Trade Mark
RTMA	Registered Trade Mark Attorney
s.	see
SCT	The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications
SEA	Single European Act
Sec.	section
SME	Small and medium sized enterprise
Stat.	Statute(s)
Swiss IPRG	Bundesgesetz über das Internationale Privatrecht (Swiss law on conflicts)
TEC	Treaty of the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Function of the European Union
TM	Trademark
TMR	Trademark Report
TMDir	Directive (EC) 2008/95 of 22 October 2008 to approximate the law of the Member States relating to Trade Marks
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRT	Trademark Registration Treaty
U.S.	United States Reports
U.S.C.	US Supreme Court cases
UCD	Unregistered Community Design
UDRP	Uniform Domain-Name Dispute-Resolution Policy
UKHL	UK House of Lords
UKSC	UK Supreme Court (decided cases)
UNCITRAL	United Nations Commission on International Trade Law
USPTO	U.S. Patent and Trademark Office
v	versus
VAT	Value Added Tax
WIPO	World Intellectual Property Organization
WM	Wertpapier-Mitteilungen (German law journal)
WRP	Wettbewerb in Recht und Praxis (German law journal)
WTO	World Trade Organisation
Yb	Yearbook
ZfRV	Zeitschrift für Europarecht, Int. Privatrecht & Rechtsvergleichung (German law journal)
ZGE	Zeitschrift für Geistiges Eigentum (German law journal)
ZUM	Zeitschrift für Urheber- und Medienrecht (German law journal)
ZUR	Zeitschrift für Umweltrecht (German law journal)