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

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and in particular Article 100a thereof,

Having regard to the proposal by the Commission[(1)],

Having regard to the opinion of the Economic and Social Committee[(2)],

Acting in accordance with the procedure laid down in Article 189b of the Treaty[(3)], in the light of the joint text approved by the Conciliation Committee on 29 July 1998,

(1) Whereas the objectives of the Community, as laid down in the Treaty, include laying the foundations of an ever closer union among the peoples of Europe, fostering closer relations between Member States of the Community, and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe; whereas to that end the Treaty provides for the establishment of an internal market characterised by the abolition of obstacles to the free movement of goods and also for the institution of a system ensuring that competition in the internal market is not distorted; whereas an approximation of the laws of the Member States on the legal protection of designs would further those objectives;

(2) Whereas the differences in the legal protection of designs offered by the legislation of the Member States directly affect the establishment and functioning of the internal market as regards goods embodying designs; whereas such differences can distort competition within the internal market;

(3) Whereas it is therefore necessary for the smooth functioning of the internal market to approximate the design protection laws of the Member States;

(4) Whereas, in doing so, it is important to take into consideration the solutions and the advantages with which the Community design system will provide undertakings wishing to acquire design rights;

(5) Whereas it is unnecessary to undertake a full-scale approximation of the design laws of the Member States, and it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market; whereas provisions on sanctions, remedies and enforcement should be left to national law; whereas the objectives of this limited approximation cannot be sufficiently achieved by the Member States acting alone;

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(6) Whereas Member States should accordingly remain free to fix the procedural provisions concerning registration, renewal and invalidation of design rights and provisions concerning the effects of such invalidity;

(7) Whereas this Directive does not exclude the application to designs of national or Community legislation providing for protection other than that conferred by registration or publication as design, such as legislation relating to unregistered design rights, trade marks, patents and utility models, unfair competition or civil liability;

(8) Whereas, in the absence of harmonisation of copyright law, it is important to establish the principle of cumulation of protection under specific registered design protection law and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred;

(9) Whereas the attainment of the objectives of the internal market requires that the conditions for obtaining a registered design right be identical in all the Member States; whereas to that end it is necessary to give a unitary definition of the notion of design and of the requirements as to novelty and individual character with which registered design rights must comply;

(10) Whereas it is essential, in order to facilitate the free movement of goods, to ensure in principle that registered design rights confer upon the right holder equivalent protection in all Member States;

(11) Whereas protection is conferred by way of registration upon the right holder for those design features of a product, in whole or in part, which are shown visibly in an application and made available to the public by way of publication or consultation of the relevant file;

(12) Whereas protection should not be extended to those component parts which are not visible during normal use of a product, or to those features of such part which are not visible when the part is mounted, or which would not, in themselves, fulfil the requirements as to novelty and individual character; whereas features of design which are excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection;

(13) Whereas the assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design;

(14) Whereas technological innovation should not be hampered by granting design protection to features dictated solely by a technical function; whereas it is understood that this does not entail that a design must have an aesthetic quality; whereas, likewise, the interoperability of products of different makes should not be hindered by extending protection to the design of mechanical fittings; whereas features of a design which are

excluded from protection for these reasons should not be taken into consideration for the purpose of assessing whether other features of the design fulfil the requirements for protection;

(15) Whereas the mechanical fittings of modular products may nevertheless constitute an important element of the innovative characteristics of modular products and present a major marketing asset and therefore should be eligible for protection;

(16) Whereas a design right shall not subsist in a design which is contrary to public policy or to accepted principles of morality; whereas this Directive does not constitute a harmonisation of national concepts of public policy or accepted principles of morality;

(17) Whereas it is fundamental for the smooth functioning of the internal market to unify the term of protection afforded by registered design rights;

(18) Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty;

(19) Whereas the rapid adoption of this Directive has become a matter of urgency for a number of industrial sectors; whereas full-scale approximation of the laws of the Member States on the use of protected designs for the purpose of permitting the repair of a complex product so as to restore its original appearance, where the product incorporating the design or to which the design is applied constitutes a component part of a complex product upon whose appearance the protected design is dependent, cannot be introduced at the present stage; whereas the lack of full-scale approximation of the laws of the Member States on the use of protected designs for such repair of a complex product should not constitute an obstacle to the approximation of those other national provisions of design law which most directly affect the functioning of the internal market; whereas for this reason Member States should in the meantime maintain in force any provisions in conformity with the Treaty relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance, or, if they introduce any new provisions relating to such use, the purpose of these provisions should be only to liberalise the market in such parts; whereas those Member States which, on the date of entry into force of this Directive, do not provide for protection for designs of component parts are not required to introduce registration of designs for such parts; whereas three years after the implementation date the Commission should submit an analysis of the consequences of the provisions of this Directive for Community industry, for consumers, for competition and for the functioning of the internal market; whereas, in respect of component parts of complex products, the analysis should, in particular, consider harmonisation on the basis of possible options, including a remuneration system and a limited term of exclusivity; whereas, at the latest one year after the submission of its analysis, the Commission should, after consultation with the parties most affected, propose to the European Parliament and the Council any changes to this Directive needed to complete the internal market in respect of component parts of complex products, and any other changes which it considers necessary;

(20) Whereas the transitional provision in Article 14 concerning the design of a component part used for the purpose of the repair of a complex product so as to restore its original

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appearance is in no case to be construed as constituting an obstacle to the free movement of a product which constitutes such a component part;

(21) Whereas the substantive grounds for refusal of registration in those Member States which provide for substantive examination of applications prior to registration, and the substantive grounds for the invalidation of registered design rights in all the Member States, must be exhaustively enumerated,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Definitions

For the purpose of this Directive:

(a) ‘design’ means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation;

(b) ‘product’ means any industrial or handicraft item, including *inter alia* parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs;

(c) ‘complex product’ means a product which is composed of multiple components which can be replaced permitting disassembly and reassembly of the product.

Article 2

Scope of application

1 This Directive shall apply to:

a design rights registered with the central industrial property offices of the Member States;

b design rights registered at the Benelux Design Office;

c design rights registered under international arrangements which have effect in a Member State;

d applications for design rights referred to under (a), (b) and (c).

2 For the purpose of this Directive, design registration shall also comprise the publication following filing of the design with the industrial property office of a Member State in which such publication has the effect of bringing a design right into existence.

Article 3

Protection requirements

1 Member States shall protect designs by registration, and shall confer exclusive rights upon their holders in accordance with the provisions of this Directive.

2 A design shall be protected by a design right to the extent that it is new and has individual character.

3 A design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character:

a if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter, and

b to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character.

4 'Normal use' within the meaning of paragraph (3)(a) shall mean use by the end user, excluding maintenance, servicing or repair work.

Article 4

Novelty

A design shall be considered new if no identical design has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details.

Article 5

Individual character

1 A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority.

2 In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.

Article 6

Disclosure

1 For the purpose of applying Articles 4 and 5, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the Community, before the date of filing of the application for registration or, if priority is claimed, the date of priority. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.

2 A disclosure shall not be taken into consideration for the purpose of applying Articles 4 and 5 if a design for which protection is claimed under a registered design right of a Member State has been made available to the public:

a by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer, or his successor in title; and

b during the 12-month period preceding the date of filing of the application or, if priority is claimed, the date of priority.