

# STUDY GUIDE

COURT OF JUSTICE OF THE  
EUROPEAN UNION -  
GENERAL COURT



Volkswagen Type

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**MODEL COURTS OF JUSTICE**



## **LETTER OF THE SECRETARY-GENERAL**

Honourable participants,

It is my utmost pleasure to welcome you all to Model Courts of Justice 2019, which is the eighth edition of this prestigious conference, as the Secretary-General. My name is Aziz Can CENGİZ and I am a junior student at Ankara University, Faculty of Law.

For the past few years, intellectual property has been one of our hallmarks in Model Courts of Justice. It was always very exciting for us to explore this highly technical area of law in different settings ranging from international arbitration to national courts. This year, we will bring a whole new dimension to our simulation of Intellectual Property Law with the Court of Justice of the European Union General Court.

Our case, "*Reid v. EUIPO Board of Appeals*" will revolve around the concept of employee inventions and designs, and will be supported by the extensive framework of the European Union. I am sure this will provide a unique opportunity for our participants to acquaint themselves with the unique legal area that is the European Union, as well as the relationships between the Union, businesses, states, and of course individuals.

Our case and the Study Guide for the Court of Justice of the European Union General Court was prepared by a lovely lady with a never-ending patience, Ms. Beyza Gökçen GÖK. She managed to create a fictional case from scratch, which is a task that becomes especially hard when it is a case concerning Intellectual Property Law. She endured all of the changes we had to make, and overcame all of the obstacles we faced along the process. Therefore, I would like to take the chance to thank her once again to say that I am glad that I had her in my team.

In order to get an adequate grasp of the case and to be able experience Model Courts of Justice as intended, I highly recommend every participant to read the Study Guide, the Handbook, the Rules of Procedure and the other documents available on our website.

Please do not hesitate to contact me via [secretarygeneral@modelcj.org](mailto:secretarygeneral@modelcj.org) in case you have any questions regarding the conference or the committee.

Best Regards,

Aziz Can CENGİZ

Secretary-General of Model Courts of Justice 2019 Conference



## **LETTER OF THE UNDER-SECRETARY-GENERAL**

Most Esteemed Participants,

My name is Beyza Gökçen GÖK and I am a sophomore student at Ankara University Faculty of Law. It is a great honour for me to welcome you to the Model Courts of Justice 2019, the eighth annual session of our conference. I have previously served as an academic trainee in the Model Courts of Justice 2018. This year, I will be serving you as the Under-Secretary-General responsible for Courts of Justice of the European Union General Court.

General Court is one of the two main courts under Court of Justice of the European Union and the appeals directed at the European Union Intellectual Property Organization (EUIPO) Board of Appeals are heard in General Court. This year at the Court of Justice of the European Union General Court, an intellectual property case that is an appeal for a decision of EUIPO Board of Appeals will be discussed. The regulations of the European Union regarding community design and the inventions of the employees will guide the court.

It is a great responsibility to be an Under-Secretary-General for such a successful conference. I believe that being nervous, questioning your work is in the nature of the mission as I wanted to keep up with the legacy of past Under-Secretaries-General who were responsible for the intellectual property courts and the Model Courts of Justice Conference. In order to serve you the best, I wanted to learn about intellectual property as much as I could. During my searches, I had the opportunity to learn about the history of intellectual property and I wanted to share what I learned with you participants because I believe researching about intellectual property and industrial design was the most enjoyable part for me. Firstly, I would like to offer my sincere thanks to our Secretary-General Mr Aziz Can CENGİZ and our lovely academic assistants Ms. Zeynep KHUDHUR and Mr. Ege ALTUNIŞIK for supporting me at every step. Also, I would like to thank to my fellow Under-Secretaries-General Ms. Nilgün Güneş AVCI, Ms. Sıla ALTINSOY and Mr. Deniz YONTUK, for always believing in me and giving me the joy of being in a team, preparing a conference that is bigger than us.

If you have any questions, please do not hesitate to contact me via [cjeu@modelcj.org](mailto:cjeu@modelcj.org).

Beyza Gökçen GÖK

Under-Secretary-General responsible for Courts of Justice of the European Union General Court



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## PART I: COURT OF JUSTICE OF THE EUROPEAN UNION (GENERAL COURT)

### A. INTRODUCTION

#### I. History

On 18 April 1951, six founding Member states (Belgium, Germany, French, Italy, Luxembourg and the Netherlands) signed the Treaty of Paris, establishing the European Coal and Steel Community (ECSC).<sup>1</sup> The Treaty of Paris entered into force on 23 July 1952 and expired on 23 July 2002 with the Lisbon Treaty.<sup>2</sup>

The Court of Justice of the European Coal and Steel Community was established by the Treaty of ESCS with the aim of setting up a judicial body responsible that Community law was observed and all the Member States applied it in a uniform manner.<sup>3</sup> After the entry force of the Treaties of Rome on 7 October 1958, it became the Court of Justice of the European Union.<sup>4</sup> The Court of Justice of the European Community implemented the provisions established by the Treaty of ECSC until it's expiration.<sup>5</sup> On July 2002, the court expired and became the Court of Justice of the European Union with the effects of Lisbon Treaty.<sup>6</sup>

The Treaty of Lisbon is an international agreement that forms the structure of the European Union (EU) as we know it today.<sup>7</sup> The Treaty consists of two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).<sup>8</sup> While TEU is a treaty that sets out principles of the EU, TFEU is a detail-oriented treaty providing provisions that are organisational and functional.<sup>9</sup> Lisbon Treaty changed the way EU uses its

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<sup>1</sup> The Court of Justice of the European Communities: Historic landmarks, buildings and symbols, PDF available at: [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-08/histoire\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-08/histoire_en.pdf) (last accessed on 15 October 2018)

<sup>2</sup> Ibid.

<sup>3</sup> History of the Court of Justice of the European Union, available at: <https://www.eui.eu/Research/HistoricalArchivesOfEU/News/2016/02-26-The-historical-archives-of-the-Court-of-Justice-of-the-European-Union-at-the-HAEU> (last accessed on 10 October 2018)

<sup>4</sup> Ibid.

<sup>5</sup> CURIA, Court of Justice Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7024/en/](https://curia.europa.eu/jcms/jcms/Jo2_7024/en/) (last accessed 10 October 2018)

<sup>6</sup> History of the Court of Justice of the European Union, available at: <https://www.eui.eu/Research/HistoricalArchivesOfEU/News/2016/02-26-The-historical-archives-of-the-Court-of-Justice-of-the-European-Union-at-the-HAEU> (last accessed on 10 October 2018)

<sup>7</sup> The Treaty of Lisbon, available at: <http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon> (last accessed on 15 October 2018)

<sup>8</sup> Ibid.

<sup>9</sup> The Treaty of Lisbon, available at: <http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon> (last accessed on 15 October 2018)



powers methodically by giving citizens more opportunities for participation and protection. It also created a new institutional set-up for the EU.<sup>10</sup>

The Treaty is especially important for the jurisdiction system of the EU as it renovated many grounds.<sup>11</sup> Distinctly from the Constitutional Treaty, the Lisbon Treaty does not regard Union law over national legislation.<sup>12</sup> However, referring to an opinion of the Legal Service of the Council reiterates consistent case-law of the Court.<sup>13</sup> The number of Advocates-General is increased from eight to eleven.<sup>14</sup> Also, individuals can apply to the Court.<sup>15</sup>

Court of First Instance of the European Communities (General Court after the Lisbon Treaty) was established as a court bound to the Court of Justice.<sup>16</sup> However, after the regulations the court became independent.<sup>17</sup> Both Courts ensure that the law is observed interpretation and application of the Treaty of the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).<sup>18</sup>

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> The Lisbon Treaty, brief overview of the key changes, available at: <https://www.lexology.com/library/detail.aspx?g=48a4327a-c5e8-41a7-8000-c93e90abe763> (last accessed on 15 October 2018)

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Lexology, The Treaty of Lisbon, available at <http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon> (last accessed 15 October 2018)

<sup>16</sup> The Lisbon Treaty, brief overview of the key changes, available at: <https://www.lexology.com/library/detail.aspx?g=48a4327a-c5e8-41a7-8000-c93e90abe763> (last accessed on 15 October 2018)

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

## II. Work and Jurisdiction

### a. Court of Justice of the European Union



**Image I:** Court of Justice of the European Union currently placed in Luxembourg.<sup>19</sup>

Court of Justice of the European Union is the main court of the European Union.<sup>20</sup> The CJEU is located in Luxembourg and it is divided into two courts: Court of Justice and General Court.<sup>21</sup> Court of Justice consists of 1 judge from each European Union country and 11 advocates in general, while General Court consists of 47 judges.<sup>22</sup>

Court of Justice of the European Union (CJEU) was established in 1952 with the aim of ensuring that the EU law is interpreted and applied the same in every EU country; ensuring countries and EU institutions abide by EU law.<sup>23</sup> Also, in certain circumstances individuals,

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<sup>19</sup> La Cour de Justice de l'Union européenne (CJUE), available at: <https://www.touteurope.eu/actualite/la-cour-de-justice-de-l-union-europeenne-cjue.html> (last accessed on 15 October 2018)

<sup>20</sup> Court of Justice of the European Union, available at: [https://www.ab.gov.tr/\\_45632.html](https://www.ab.gov.tr/_45632.html) (last accessed on 26 September 2018)

<sup>21</sup> Court of Justice Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7024/en/](https://curia.europa.eu/jcms/jcms/Jo2_7024/en/) (last accessed on 30 August 2018)

<sup>22</sup> Ibid.

<sup>23</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 30 August 2018)



companies or organisations can take action against European Union institutions by applying to the CJEU.<sup>24</sup>

Main legal texts that consist the provisions regarding the functioning and the actions of the European Court of Justice is the Treaty of European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).<sup>25</sup> Protocol on the Statute of the European Union Courts of Justice and Rules of Procedure of the Courts of Justice of the European Union are also significant legal texts that consists the functioning and the actions of the court.<sup>26</sup>

Interpretation of the EU law might display difference when interpreted by national courts of different countries.<sup>27</sup> In the situations that national court has questions regarding the interpretation or validity of an EU law or whether a national law conflicts with the EU law, national courts can ask for clarifications from the Court of Justice.<sup>28</sup>

If a national government fails to comply with the EU law, it is the duty of CJEU to enforce the law for the infringement proceedings.<sup>29</sup> European Commission or another member state of the EU can apply for this type of infringement.<sup>30</sup> For the cases in which a country is found to be at fault, it must put things right at once, or risk a second case being brought to the court.<sup>31</sup>

The Council of the EU, the European Commission, the European Parliament or an EU government can appeal to the CJEU if they believe an EU act breaches EU treaties or violates human rights.<sup>32</sup> The Council, the Parliament or the governments are not the only institutions who can apply to CJEU. In certain circumstances where their rights are infringed by the

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<sup>24</sup> Ibid.

<sup>25</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 30 August 2018)

<sup>26</sup> Thiennel, R., (2010), Organisation and function of the European Court of Justice (Court of Justice of the European Union) With special emphasis on the procedure concerning preliminary rulings, *Ritsumeikan Law Review*, p. 82

<sup>27</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 31 August 2018)

<sup>28</sup> CURIA, The Court of Justice of the European Communities: Historic landmarks, buildings and symbols, PDF available at [https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-08/histoire\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-08/histoire_en.pdf) (last accessed 15 October 2018)

<sup>29</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 31 August 2018)

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.



action or inaction of the EU or its staff, any person or company can take action against them through the Court for sanctioning EU institutions.<sup>33</sup>

In the cases where EU fails to take action (the Parliament, the Council, and the Commission) EU governments, other EU institutions or (under certain conditions) individuals or companies can file a complaint to the Court.<sup>34</sup> Private individuals who are concerned can also ask the Court for the abolishment of the act if an EU act directly affects an individual.<sup>35</sup>

Each case applied to the CJEU goes through two stages, the written stage and the oral stage, where they are assigned 1 judge (the '*judge-rapporteur*') and 1 advocate in general.<sup>36</sup>

In the written stage, the parties give written statements to the Court or EU institutions or national authorities submit observations.<sup>37</sup> After the parties give written statements to the Court or the observations are submitted by the national authorities - these authorities can be EU institutions and sometimes private individuals- the statements and observations are summarized by the judge-rapporteur.<sup>38</sup> Afterwards, the Court decides how many judges will deal with the case and whether an oral stage needs to be held or not.<sup>39</sup>

In the oral stage, lawyers from both sides can put their case to the judges and advocate general, who can question them.<sup>40</sup> The judges and advocate general question the lawyers. In the cases where an Opinion of the advocate general is requested by the Court, the questioning of the advocates occur weeks after the hearing.<sup>41</sup> Afterwards, the judges take a deliberation and finalize the process by adjudicating.<sup>42</sup>

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<sup>33</sup> Court of Justice of the European Union, available at: [https://eur-lex.europa.eu/summary/glossary/eu\\_court\\_justice.html](https://eur-lex.europa.eu/summary/glossary/eu_court_justice.html) (last accessed on 15 October 2018)

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Thiennel, R., (2010), Organisation and function of the European Court of Justice (Court of Justice of the European Union) With special emphasis on the procedure concerning preliminary rulings, p. 83

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Court of Justice of the European Union, available at: <https://ijrcenter.org/regional-communities/court-of-justice-of-the-european-union/> (last accessed on 24 October 2018)

<sup>40</sup> Ibid.

<sup>41</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 31 August 2018)

<sup>42</sup> Court of Justice of the European Union, available at: <https://ijrcenter.org/regional-communities/court-of-justice-of-the-european-union/> (last accessed on 24 October 2018)



There are 3 judges and no advocates general during the General Court procedure, except for specific cases that require more judges.<sup>43</sup>

## **b. Court of Justice**

The Court of Justice consists of 28 Judges and 11 Advocates General.<sup>44</sup> The Member States consult a panel responsible for giving opinion on the suitability of the prospective candidates in order to elect the judges and the advocates.<sup>45</sup> After a common accord is reached, the Judges and the Advocates General are appointed.<sup>46</sup> They serve for six years, and their service is renewable.<sup>47</sup> The Judges of the Court of Justice elect a President who will direct the Court and moderate the hearings and deliberations held in the Court or the Grand Chamber.<sup>48</sup>

The Advocates General are appointed and responsible to give an impartial opinion on the cases assigned to them.<sup>49</sup>

The Registrar manages the departments of the institutions under the authority of the President of the Court as the secretary general.<sup>50</sup>

The Court sits as a full-court for the particular cases stated in the Statute if the Court deems the cases as exceptional, legally complicated or important.<sup>51</sup> A full court consists of 15 Judges who serve in the Grand Chamber. Other cases generally require three to five Judges.<sup>52</sup>

The validity of decisions require different numbers of members during the deliberations.<sup>53</sup> Article 17 of the Statute of the Court of Justice of the European Union regarding to the organization of the Court of Justice as follows:

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<sup>43</sup> Court of Justice of the European Union, available at: <https://ijrcenter.org/regional-communities/court-of-justice-of-the-european-union/> (last accessed on 24 October 2018)

<sup>44</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 15 October 2018)

<sup>45</sup> Ibid.

<sup>46</sup> EUI, History of the Court of Justice of the European Union, available at <https://www.eui.eu/Research/HistoricalArchivesOfEU/News/2016/02-26-The-historical-archives-of-the-Court-of-Justice-of-the-European-Union-at-the-HAEU> (last accessed 10 October 2018)

<sup>47</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 15 October 2018)

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Formal Sitting Renewal of the Court of Justice, available at: [https://curia.europa.eu/jcms/jcms/p1\\_1351970/en/](https://curia.europa.eu/jcms/jcms/p1_1351970/en/) (last accessed on 15 October 2018)

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

*“Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations.*

*Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges.*

*Decisions of the Grand Chamber shall be valid only if 11 Judges are sitting.*

*Decisions of the full Court shall be valid only if 17 Judges are sitting.*

*In the event of one of the Judges of a chamber being prevented from attending, a Judge of another chamber may be called upon to sit in accordance with conditions laid down in the Rules of Procedure.”<sup>54</sup>*

One of the most important tasks of the Court of Justice is to give references for preliminary rulings from national courts on the interpretation of EU law.<sup>55</sup> A court of the Member State of the European Union may, and sometimes must, ask for an opinion of the Court of Justice to inquire if the law of the Member State conflicts with the law of the European Union.<sup>56</sup> They can ask also if a law of the EU is valid or not.<sup>57</sup> The response of the Court of Justice is not an opinion but a judgement.<sup>58</sup> The judgment has a binding effect to the courts of the national court which is addressed and to the other national courts if a dispute regarding the judgement arises.<sup>59</sup> Judgements given by the General Court can also be a subject to an appeal to the Courts of Justice on points of law.<sup>60</sup>

The difference between General Court and Court of Justice is the jurisdiction on giving references for preliminary rulings from national courts on the interpretation of EU law. Similar to the General Court, Court of Justice can also give verdict upon the cases where an action brought by an EU country or the Commission against an EU country for infringing EU

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<sup>53</sup> Organization of the Court of Justice, Statute of the Courts of Justice of the European Union

<sup>54</sup> Ibid.

<sup>55</sup> Court of Justice, available at: [https://eur-lex.europa.eu/summary/glossary/court\\_of\\_justice.html](https://eur-lex.europa.eu/summary/glossary/court_of_justice.html) (last accessed on 15 October 2018)

<sup>56</sup> Ibid.

<sup>57</sup> EUI, History of the Court of Justice of the European Union, available at <https://www.eui.eu/Research/HistoricalArchivesOfEU/News/2016/02-26-The-historical-archives-of-the-Court-of-Justice-of-the-European-Union-at-the-HAEU> (last accessed 10 October 2018)

<sup>58</sup> Ibid.

<sup>59</sup> Court of Justice, available at: [https://eur-lex.europa.eu/summary/glossary/court\\_of\\_justice.html](https://eur-lex.europa.eu/summary/glossary/court_of_justice.html) (last accessed on 15 October 2018)

<sup>60</sup> Ibid.



law.<sup>61</sup> Actions brought by an EU country for annulment of a measure adopted by an EU institution are also within its jurisdiction.<sup>62</sup> It is also a duty of the Court of Justice to ensure the laws of the European Union are interpreted and applied in the same way in the court of the Member States.<sup>63</sup>

### c. General Court

General Court was previously established as the Court of First Instance of the European Communities before the Lisbon Treaty.<sup>64</sup> The name change indicates a decentralisation and gives the court authority on the judgements regarding appeals of the judicial institutions similar to the Civil Service Tribunal.<sup>65</sup> Also, the conversion of judicial institutions into private courts is seen to be a significant progress.<sup>66</sup> Private Courts are established by a code agreed by the European Commission and the European Parliament with the ordinary legislative procedure.<sup>67</sup> The Judges elect the President of the Chambers amongst themselves for three years.<sup>68</sup> The General Court also uses the administrations and services of their own Registry and the court consists of at least one judge from each Member State who perform their duties in a total impartial and independent manner.<sup>69</sup> The elections of the Judges is the same as the Court of Justice.<sup>70</sup>

The duty of Advocate General is performed as a judge in some particular cases.<sup>71</sup> Unlike the Court of Justice, the General Court does not have a permanent Advocate General.<sup>72</sup> The cases that are legally complex or justified as important by the judges are heard in the Grand

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> “*Protocol on the Statute of the Court of Justice, Article 1*”, PDF available at [https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut\\_2008-09-25\\_17-29-58\\_783.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf) (last accessed on 15 October 2018)

<sup>64</sup> Alyanak, S. (2014). Avrupa Birliği Adalet Teşkilatlanması, *Ankara Barosu Dergisi*, 72(3), at p. 259

<sup>65</sup> Ibid.

<sup>66</sup> Alyanak, S. (2014). Avrupa Birliği Adalet Teşkilatlanması, *Ankara Barosu Dergisi*, 72(3), at p. 260

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> General Court, Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7033/en/](https://curia.europa.eu/jcms/jcms/Jo2_7033/en/) (last accessed on 30 August 2018)

<sup>70</sup> Ibid.

<sup>71</sup> General Court, Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7033/en/](https://curia.europa.eu/jcms/jcms/Jo2_7033/en/) (last accessed on 30 October 2018)

<sup>72</sup> The court of Justice of the European Union, available at: [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/) (last accessed on 31 December 2018)

Chamber (the term used to describe a chamber of fifteen judges).<sup>73</sup> Any other case is heard by five or three judges.<sup>74</sup>



**Image II:** Inside the General Court.<sup>75</sup>

The General Court can give a verdict upon these cases:

1. A legal or natural person can apply to the General Court against the acts of the European Union Intellectual Property Office or the Community Plant Variety Office.<sup>76</sup>
2. In certain situations where a legal or natural person is concerned by a direct act of bodies, institutions, agencies of the European Union, the concerned person can apply to General Court against these acts.<sup>77</sup>
3. The Member States can seek justice against the European Commission.<sup>78</sup>
4. In the cases where the Council implemented some act in the fields of trade protection measures, State aid, and exercising its power; the Member States can apply to the General Court.<sup>79</sup>

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> General Court, available at: <https://europeansanctions.com/2016/01/12/eu-increases-number-of-general-court-judges/> (last accessed on 15 October 2018)

<sup>76</sup> General Court, available at: <https://europeansanctions.com/2016/01/12/eu-increases-number-of-general-court-judges/> (last accessed on 15 October 2018)

<sup>77</sup> Ibid.

<sup>78</sup> General Court, available at: <https://europeansanctions.com/2016/01/12/eu-increases-number-of-general-court-judges/> (last accessed on 15 October 2018)

5. General Court can also give a verdict on the cases concerning disputes of employment relations between the institutions of the European Union and their staff.<sup>80</sup>
6. Compensation cases against the bodies, agencies or offices of European Union are also subject to jurisdiction for General Court.<sup>81</sup>
7. Some contracts made by the European Union gives jurisdiction to General Court directly. General Court also can give a verdict on the cases brought to them for or against the acts of these contracts.<sup>82</sup>

The decision of the General Court can be subject of an appeal to the Court of Justice within two months.<sup>83</sup>

The procedure of the General Court proceeds according to the Rules of Procedure of its own.<sup>84</sup> Same as the Court of Justice, there are two phases: written phase and the oral phase.<sup>85</sup>

Article 17 of the Statute of the Court of Justice of the European Union regarding the organisation of the Courts of Justice also applies to the General Court.<sup>86</sup>

An application commences the proceedings.<sup>87</sup> The Registrar sends the application to the other party, from the date the other party receives the application they have two months to file a defence.<sup>88</sup> The applicant may file a reply to which the defendant may reply with a rejoinder.<sup>89</sup>

The public hearings are essential for the oral phase. After the hearing of the lawyers, the Judges can ask questions to the representatives of the parties.<sup>90</sup> The Judge- Rapporteur

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> General Court, Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7033/en/](https://curia.europa.eu/jcms/jcms/Jo2_7033/en/) (last accessed on 30 August 2018)

<sup>82</sup> Ibid.

<sup>83</sup> Alyanak, S. (2014). Avrupa Birliği Adalet Teşkilatlanması, *Ankara Barosu Dergisi*, 72(3), at p. 260

<sup>84</sup> General Court, Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7033/en/](https://curia.europa.eu/jcms/jcms/Jo2_7033/en/) (last accessed on 30 August 2018)

<sup>85</sup> Ibid.

<sup>86</sup> Article 47 of the STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, pdf available at: [https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05\\_00.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf) (last accessed on 26 October)

<sup>87</sup> Article 47 of the STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION, pdf available at: [https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05\\_00.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf) (last accessed on 26 October)

<sup>88</sup> Ibid.

<sup>89</sup> General Court, available at: <https://europeansanctions.com/2016/01/12/eu-increases-number-of-general-court-judges/> (last accessed on 15 October 2018)



summarises the oral proceedings of the court.<sup>91</sup> Afterwards, the Judges deliberate on the draft judgement.<sup>92</sup> As the final act, the judgement is delivered during a public hearing.<sup>93</sup>

Recently, the General Court gave judgements on topics such as environment and consumer, freedom to provide services, law on EU institutions, intellectual and industrial property, competition, state aid, agriculture, and public health.<sup>94</sup>

### **c. The European Union Intellectual Property Office (EUIPO)**

The European Union Intellectual Property Office (EUIPO), formerly known as the Office for Harmonization in the Internal Market (OHIM) before undergoing some serious reforms, was founded in 1994.<sup>95</sup> EUIPO is in charge of the registration of the European Union trademark (EUTM) and the registered Community design (RCD).<sup>96</sup> Intellectual property rights given to EUTM and RCD are legitimate in every member state of the EU as these two registration unites property laws of nations under their names.<sup>97</sup>

EUIPO is comprised of 1 representative per EU country, 1 representative from the European Parliament and 2 representatives from the European Commission.<sup>98</sup> As a decentralised EU agency, EUIPO has its own legal, administrative, and financial autonomy over staffing and budgetary matters.<sup>99</sup>

EUIPO European Trade Mark and Design Network is a network system set up by EUIPO to help member states of the EU to share technical expertise and establish shared practices.<sup>100</sup>

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<sup>90</sup> Ibid.

<sup>91</sup> CURIA, General Court, Presentation, available at: [https://curia.europa.eu/jcms/jcms/Jo2\\_7033/en/](https://curia.europa.eu/jcms/jcms/Jo2_7033/en/) (last accessed 30 October 2018)

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> InfoCuria - Case-law of the Court of Justice, available at:

<http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&jge=&td=%3BALL&jur=T&etat=clot&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=574697> (last accessed on 15 October 2018)

<sup>95</sup> EU Trademark Law Reform Series: The New Face of OHIM available at:

<https://www.inta.org/Programs/Pages/main.aspx> (last accessed on 30 August 2018)

<sup>96</sup> Trade Mark Protection in the Eu, available at: [https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection\\_en](https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection_en) (last accessed on 31 August 2018)

<sup>97</sup> EUIPO for Journalists, available at: <https://euiipo.europa.eu/ohimportal/euiipo-for-journalists> (last accessed on 30 August 2018)

<sup>98</sup> European Union Intellectual Property Office, available at: [https://europa.eu/european-union/about-eu/agencies/euiipo\\_en](https://europa.eu/european-union/about-eu/agencies/euiipo_en) (last accessed on 15 October 2018)

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.



The Network enables members of EU to work together on systems, procedures, services, and tools such as databases and web-based platforms.<sup>101</sup>

Internationally, especially outside the EU, EUIPO implements projects designed to encourage intellectual property protection laws to work globally and rightfully.<sup>102</sup> The process is carried out with many international partners.<sup>103</sup> EUIPO also works with European Patent Office (EPO) and World Intellectual Property Organisation (WIPO) to raise awareness on the protection of intellectual property rights.<sup>104</sup>

The website of EUIPO provides many services for people who want to register their trade mark or design.<sup>105</sup> One of them is '*eSearch plus*' which is a tool that enables users to access EUIPO's database of European Union trade marks and registered Community designs.<sup>106</sup> The database of the other tool, '*TMview*', contains information from all of the EU national IP offices, the European Intellectual Property Office (EUIPO), and many international partner offices outside the EU on trade mark applications and registered marks.<sup>107</sup>

Trade marks are signs that are used in trade to identify products.<sup>108</sup> A trademark is the symbol which the customers may use to distinguish goods and services of companies from another.<sup>109</sup> Trademarks can be words, shapes, colour or pattern marks that are different and distinguishable from previously registered trademarks registered by different owners.<sup>110</sup>

There are two ways that a trade mark owner can follow for registration.<sup>111</sup> First one is the regional path where a trademark owner registers their trademark in the place they will use and the second one is the European path.<sup>112</sup> A citizen of a member state of the European

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<sup>101</sup> EUIPO for Journalists, available at: <https://euipo.europa.eu/ohimportal/euipo-for-journalists> (last accessed 30 August 2018)

<sup>102</sup> European Union Intellectual Property Office, available at: [https://europa.eu/european-union/about-eu/agencies/euipo\\_en](https://europa.eu/european-union/about-eu/agencies/euipo_en) (last accessed on 15 October 2018)

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Search availability, available at: <https://euipo.europa.eu/ohimportal/search-availability> (last accessed on 15 October 2018)

<sup>106</sup> Ibid.

<sup>107</sup> Search availability, available at: <https://euipo.europa.eu/ohimportal/search-availability> (last accessed on 15 October 2018)

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Trade marks in the European Union, available at: <https://euipo.europa.eu/ohimportal/trade-marks-in-the-european-union> (last accessed on 30 August 2018)

<sup>112</sup> Ibid.



Union can register their trade mark as a European Union Trade Mark (EUTM) in EUIPO for the usage of the trade mark in every country of Europe.<sup>113</sup> Despite the fact that national, regional and EU systems are complementary ones, and work in parallel with each other, national level trade marks do not provide protection on the trade marks.<sup>114</sup> Only EU trade marks provides protection available in all Member States of EU.<sup>115</sup>

Trade marks are internationally protected since The Paris Convention for the Protection of Industrial Property treaty.<sup>116</sup>

A design is defined as;

*“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”* in Article 3 of the Design Regulation.<sup>117</sup>

The packaging of products, composite products, parts of products, logos, computer icons, typefaces, drawings and artworks, get-ups, ornamentations, web designs, and maps are all recognized as designs in the Design Regulation.<sup>118</sup>

Community design is a unitary industrial design right that covers the European Union which is also protected under EUIPO.<sup>119</sup> It has both unregistered and registered forms.<sup>120</sup> The unregistered Community design was accepted valid by the EUIPO on 6 March 2002.<sup>121</sup> Afterwards, the registered Community design was made available on 1 April 2003.<sup>122</sup>

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<sup>113</sup> Ibid.

<sup>114</sup>Trade mark in the European Union, available at: <https://euipo.europa.eu/ohimportal/trade-marks-in-the-european-union> (last accessed on 15 October 2018)

<sup>115</sup> Ibid.

<sup>116</sup> Dr. Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, op. cit., at p.6 and p.7

<sup>117</sup> COUNCIL REGULATION (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1)

<sup>118</sup> What can be a Registered Community Design, available at: <https://euipo.europa.eu/ohimportal/what-can-be-a-registered-community-design> (last accessed on 30 August 2018)

<sup>119</sup> Designs in the European Union, available at: <https://euipo.europa.eu/ohimportal/designs-in-the-european-union> (last accessed on 30 August 2018)

<sup>120</sup> Ibid.

<sup>121</sup> COUNCIL REGULATION (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1)

<sup>122</sup> Commission staff working document - Proposal for a Council Decision approving the accession of the Community to the Geneva act of The Hague agreement concerning the international registration of designs, adopted in Geneva on 2 July 1999 - Proposal for a Council regulation amending regulation (EC) no 6/2002 and (EC) no 40/94 to give effect to the accession of the European Community to the Geneva act of The Hague



#### **d. European Union Intellectual Property Office Board of Appeals**

The Board of Appeals are independent and not bound by any instructions.<sup>123</sup> In the cases where there is an appeal for the decision of EUIPO about trade marks or registered community designs, the responsibility of giving verdict belongs to the Boards of Appeal.<sup>124</sup> The decisions of the Boards are liable to actions before the General Court.<sup>125</sup> The grounds for such appeals taken to the General Court are laid down in Article 72(2) of the European Union trade mark regulation and Article 61(2) of the registered Community design regulation.<sup>126</sup>

Article 72(2) of the European Union trade mark regulation is as follows;

*'1. Actions may be brought before the General Court against decisions of the Boards of Appeal in relation to appeals.*

...<sup>127</sup>

Article 61(2) of the registered Community design regulation as follows;

*'1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.*

...<sup>128</sup>

Judgements of the General Court are also a subject to an appeal to the Court of Justice.<sup>129</sup>

Generally, if the case is not deemed exceptional by the judges, three Members who are legally qualified judge the case.<sup>130</sup> Some specific cases may require to be decided by the

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agreement concerning the international registration of industrial designs - Impact assessment {COM(2005)689 final} /\* SEC/2005/1749 \*/

<sup>123</sup> Boards of Appeal, available at: <https://euipo.europa.eu/ohimportal/boards-of-appeal> (last accessed on 30 August 2018)

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Regulation of the European Parliament And of the Council of 14 June 2017 on the European Union trade mark, PDF available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1001&from=EN> (last accessed 15 October 2018)

<sup>128</sup> Council Regulation of 12 December 2001 on Community designs, PDF available at [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/law\\_and\\_practice/cdr\\_legal\\_basis/62002\\_cv\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/cdr_legal_basis/62002_cv_en.pdf) (last accessed on 15 October 2018)

<sup>129</sup> Ibid.



Grand Board or by a single Member.<sup>131</sup> Board of Appeals may refer a case to the Grand Board if it believes the case is legally difficult, important or has special circumstances.<sup>132</sup> The cases which the Board of Appeals issues diverging decisions on a point of law can be given as an example.<sup>133</sup>

A natural or a legal person can apply in two months to the Boards of Appeal after the contested decision has been notified to them.<sup>134</sup> Applicants can file a statement of grounds within the four months from the date they received the notice.<sup>135</sup> The statement of grounds should profess the grounds of appeal, in facts and in law, which the appellant wishes to put forward in their appeal.<sup>136</sup> Once the application is received, the Registry of the Board of Appeals is the first instance.<sup>137</sup> If the Board does not consider the appeal acceptable and well-founded, the case will be sent back to the Board of Appeals.<sup>138</sup> The decisions of the Board may be subject to an appeal, within two months from the notification of the decision, before the General Court.<sup>139</sup> The judgments of the General Court are also subjects to a right to make a complaint to the European Court of Justice.<sup>140</sup>

### III. History of the Intellectual Property

‘*Intellectual property*’ is a generic term that refers to a group of legal regimes that confer rights of ownership in a specific subject matter.<sup>141</sup> The essence of intellectual property is comprised of copyright, patents, designs, trademarks, and protection against unfair competition.<sup>142</sup> The idea of intellectual property is old, however, within the scope of new developments in technology, the concept of it expands perpetually.<sup>143</sup> The twentieth century

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<sup>130</sup> Presidium of the Boards of Appeal, available at: <https://euipo.europa.eu/ohimportal/sk/presidium-of-the-boards-of-appeal> (last accessed on 15 October 2018)

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Appeal, available at: <https://euipo.europa.eu/ohimportal/appeal> (last accessed on 30 August 2018)

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Appeal, available at: <https://euipo.europa.eu/ohimportal/appeal> (last accessed on 30 August 2018)

<sup>139</sup> Ibid.

<sup>140</sup> Court of Justice of the European Union (CJEU), available at: [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last accessed on 30 August 2018)

<sup>141</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.1

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.



added the protection of computer software as a part of copyright and the patentability of the microorganisms as a part of patent law into the concept of intellectual property.<sup>144</sup>

From the beginning of intellectual property rights, national and international property laws have encouraged progress in scientific and technological fields.<sup>145</sup> Consistent with the development of bilateral treaties and efforts of the international organizations, patent rights have been given for abstract inventions such as laser, computers, photocopiers, and patentability of microorganisms.<sup>146</sup>

Intellectual property laws are essentially national.<sup>147</sup> Laws regarding the protection and exploitation of the intellectual property differ from state to state.<sup>148</sup> However, the internationality of the intellectual property laws is increasing due to globalization.<sup>149</sup> The idea of an international intellectual property system that enables the right holders to use their rights in different countries without different processes is not new.<sup>150</sup>

The idea of an international system for intellectual property started to gain popularity during the nineteenth century.<sup>151</sup> Firstly, bilateral treaties were signed between states in order to protect copyrights.<sup>152</sup> Between the European States, bilateral treaties were signed in order to protect different aspects of industrial property similar to copyrights.<sup>153</sup> Bilateralism led the main movement towards serious international co-operation on intellectual property, which arrived in the form of two multilateral pillars: the Paris Convention of 1883 and the Berne Convention of 1886.<sup>154</sup> The Paris Convention formed a Union for the protection of industrial

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<sup>144</sup> Guttag, E. (1974). *The Patentability of Microorganisms: Statutory Subject Matter and Other Living Things*, *University of Richmond Law Review*, 13(2) at p.247

<sup>145</sup> Kalanje, C. *Role of Intellectual Property in Innovation and New Product Development*, WIPO, PDF available at: [http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip\\_innovation\\_development.pdf](http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_innovation_development.pdf) (last accessed on 2 November 2018)

<sup>146</sup> Ibid.

<sup>147</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.3

<sup>148</sup> *Why You Need to Protect Your Intellectual Property*, available at: <https://www.bl.uk/business-and-ip-centre/articles/why-you-need-to-protect-your-intellectual-property> (last accessed on 30 August 2018)

<sup>149</sup> *What is Intellectual Property*, available at: [http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf) (last accessed on 30 August 2018)

<sup>150</sup> Ibid.

<sup>151</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.3

<sup>152</sup> Ibid.

<sup>153</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.6

<sup>154</sup> Ibid.



property and the Berne Convention formed a Union for the protection of literary and artistic works.<sup>155</sup>

The Paris Convention had its origins in a world fair for inventions which was planned to be held in Vienna in 1873.<sup>156</sup> The U.S. claimed that many inventions at the fair would end up benefiting the Austrian people without foreign inventors seeing any returns.<sup>157</sup> Thus, a German engineer persuaded the Austrian government to hold a Congress for Patent Reform in 1873.<sup>158</sup> After another Congress in 1880, the Paris Convention of 1883 was opened for signature.<sup>159</sup> It took approximately 25 years for leading nations in trading to join the Convention.<sup>160</sup>

The incompetence and complexity of bilateral copyright treaties led influential authors like Victor Hugo to establish an association called the International Literary Association in Paris in 1878.<sup>161</sup> In a regular meeting in 1878, the association produced a draft text for an international copyright agreement.<sup>162</sup> Afterwards, by using this draft text for the beginning of multilateral conventions, the Swiss government organized an international conference.<sup>163</sup> In 1886, Berne Convention was finalized and opened for signature.<sup>164</sup> Adoption of these conventions generally set a system of minimum rights which states have to recognize.<sup>165</sup>

In intellectual property, adoption of treaties accompanied the rise of international organisations.<sup>166</sup> The Paris and Berne Conventions saw the creation of international bureaus (secretariats) which were merged in 1983 to form the United International Bureaux for the

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<sup>155</sup> Ibid.

<sup>156</sup> The Paris Convention for the Protection of Intellectual Property, WIPO Intellectual Property Handbook: Policy, Law and Use, available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf>

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> The Paris Convention for the Protection of Intellectual Property, WIPO Intellectual Property Handbook: Policy, Law and Use, available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf>

<sup>160</sup> WIPO, *The Berne Convention for the Protection of Literary and Artistic Works, WIPO Intellectual Property Handbook: Policy, Law and Use*, WIPO Publications (2004)

<sup>161</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.6

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.7

<sup>165</sup> Ibid.

<sup>166</sup> WIPO - A Brief History, available at: <http://www.wipo.int/about-wipo/en/history.html> (last accessed 31 August 2018)



Protection of the Intellectual Property (known as BIRPI), was superseded by a new organization, WIPO.<sup>167</sup>

World Intellectual Property Organization (WIPO) is a specialized agency of the United Nations that was established in 1967 in the WIPO Convention with an identical aim in mind.<sup>168</sup> The main mission of the WIPO is to create and encourage a competent intellectual property system that supports innovation and creativity.<sup>169</sup> After the establishment of the WIPO, the idea of global intellectual property expanded throughout the world including the U.S.A.<sup>170</sup> During the 1980s, in the U.S.A., free-riding for pharmaceutical industries created a big issue.<sup>171</sup> Many companies wanted to know where in the world their product might be exploited and wanted to be sure that their intellectual property was protected.<sup>172</sup> The idea of linking intellectual property to trade started to develop in these times.<sup>173</sup>

On the Final Act of the Uruguay Round, which is the 8th round of multilateral trade negotiations, General Agreement on Trade & Tariffs had been completed with the signatures of more than 100 states.<sup>174</sup> Agreements on the Final Act established the World Trade Organization and the TRIPS Agreement.<sup>175</sup> The TRIPS Agreement that links trade mark to intellectual property is binding for all members of the World Trade Organization (WTO).<sup>176</sup> The TRIPS Agreement is the beginning of the global property.<sup>177</sup> Since the nations managed to link trade systems with intellectual property with TRIPS, the agreement reaches all the member states that uses multilateral trading systems.<sup>178</sup> Multilateral treaty-making in intellectual property became a strategy dominated, a complex game between companies,

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<sup>167</sup> Ibid.

<sup>168</sup> Inside Wipo, available at: <http://www.wipo.int/about-wipo/en/> (last accessed 30 August 2018)

<sup>169</sup> Ibid.

<sup>170</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.9

<sup>171</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.9

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.10

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.11

<sup>178</sup> Ibid.



groups, and nations who globally expanded their circle of authority over time.<sup>179</sup> Currently, considering the development of intellectual property, the roles of the market and governments increased in policy-making for intellectual property.<sup>180</sup>

As the largest economy of the world, the European Union is also a marketplace for intellectual property, not just for firms based within the Union, but also for companies from the rest of the world. One measure of the size of the marketplace of European Union is the interest in registering EU trade marks and designs, which facilitate access to this marketplace.<sup>181</sup>

### a. Patent

A patent is an exclusive right granted to an invention that provides a new way of doing something or technically solves a problem.<sup>182</sup> The invention can be in any field of technology, from a kitchen utensil to a nanotechnology chip.<sup>183</sup> However, there are some qualifications an invention must have in order to obtain a patent.<sup>184</sup> In many countries, mathematical methods, plant or animal varieties, scientific theories, aesthetic creations, methods for medical treatments or computer programs are not patentable.<sup>185</sup>

The element of novelty is the most important attribute that an invention must have to obtain a patent.<sup>186</sup> The invention also involves an ‘inventive step’ that makes the invention unable to be produced by a person having ordinary skill in the relevant technical field.<sup>187</sup> Also, the invention must not be a mere theoretical phenomenon, it must be capable of being used for an industrial or business purpose.<sup>188</sup>

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<sup>179</sup> Drahos, P. *The Universality of Intellectual Property Rights: Origins and Development*, Queen Mary Intellectual Property Research Institute, Queen Mary and Westfield College, (London, United Kingdom), p.12

<sup>180</sup> Ibid.

<sup>181</sup> EU Intellectual Property Office, *European Union Intellectual Property Office Facts and Figures*, 2015.

<sup>182</sup> Patents, available at: <http://www.wipo.int/patents/en/> (last accessed on 11 November 2018)

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Frequently asked questions: Patents basics, available at: [http://www.wipo.int/patents/en/faq\\_patents.html](http://www.wipo.int/patents/en/faq_patents.html) (last on accessed 11 November 2018)

<sup>187</sup> Ibid.

<sup>188</sup> WIPO, Patents, available at <http://www.wipo.int/patents/en/> (last accessed 11 November 2018)



A patent protects the invention from being commercially made, used, distributed, imported, or sold by others without the consent of the patent owner.<sup>189</sup> The owner of the patent can sell the right of the invention or give permission to other parties to use the invention.<sup>190</sup> Basics of the patent laws are generally similar worldwide.<sup>191</sup> However, there is no “universal patent” or “world patent”.<sup>192</sup> Patents are territorial rights.<sup>193</sup> The owner of the patent must file an application in each country which they seek patent protection.<sup>194</sup>

European Patent Office (EPO) is an example of some regional offices that accept regional patent applications, or grants patents.<sup>195</sup> The office is the organ of The European Patent Organization which is the public international organization created in 1977 by its contracting states with the aim of granting patents in Europe under the European Patent Convention.<sup>196</sup> A European patent takes effect in many countries of the European Union without the need of applying for a patent in separate countries.<sup>197</sup> Monitoring, identifying, and taking action against infringers of patents are the responsibilities of the patent owner.<sup>198</sup> However, if an infringement occurs, the court of law has the authority to stop the patent infringement.<sup>199</sup>

Recently, patent law has changed in favor of the employees in many countries.<sup>200</sup> For example, on 6 August 2015, France added new articles to the French Intellectual Property Code with the aim of encouraging growth, business and equalising economic opportunities.<sup>201</sup> A rapporteur of French National Assembly comments that Macron’s Law “*aims to promote transparency in relations between salaried inventors and their employers by requiring the latter to inform the employee when his invention is the subject of a patent application or the*

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<sup>189</sup>Frequently asked questions: Patents basics, available at: [http://www.wipo.int/patents/en/faq\\_patents.html](http://www.wipo.int/patents/en/faq_patents.html) (last on accessed 11 November 2018)

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> European Patents - The Basics, available at: <http://mewburn.com/resource/european-patents-the-basics/> (last accessed on 11 November 2018)

<sup>193</sup> Frequently Asked Questions: Patents, available at [https://www.wipo.int/patents/en/faq\\_patents.html](https://www.wipo.int/patents/en/faq_patents.html) (last accessed on 11 November 2018)

<sup>194</sup> FAQ - Patent & IP basics, available at: <https://www.epo.org/service-support/faq/basics.html> (last accessed on 11 November 2018)

<sup>195</sup> Ibid.

<sup>196</sup> The European Patent Convention, available at: <https://www.epo.org/law-practice/legal-texts/html/epc/2016/e/ma9.html> (last accessed on 11 November 2018)

<sup>197</sup> Ibid.

<sup>198</sup> Guide for applicants: How to get a European patent, available at: [https://www.epo.org/applying/european/Guide-for-applicants/html/e/ga\\_a\\_ii.html](https://www.epo.org/applying/european/Guide-for-applicants/html/e/ga_a_ii.html) (last accessed on 11 November 2018)

<sup>199</sup> Ibid.

<sup>200</sup> Kalanje, C. *Role of Intellectual Property in Innovation and New Product Development*, WIPO

<sup>201</sup> Ibid.



*grant of a patent. [It] also aims to keep to a minimum litigation that may arise, about the additional remuneration to which the employee is entitled when the invention realised during the course of employment is patentable.”*<sup>202</sup>

Intellectual Property Code of French classifies inventions into three categories: (1) an under mission invention; (2) a beyond mission invention; and (3) free inventions. If the invention is the result of the work of an employee that pursues an employment contract comprising an inventive mission (i.e. specifying that the employee is hired as an inventor to invent) corresponding to his effective functions or in the framework of studies entrusted to her by the employer are inventions under mission.<sup>203</sup>

Inventions under mission belong to the employer and give the right to the employee to ‘additional remuneration’.<sup>204</sup> According to some interpretations of the law, the additional remuneration should usually remain within the range of the employee’s salary, thus usually between 1 to 12 months salary, depending on the circumstances in which it was created.<sup>205</sup> However, some decisions have held that nothing in French intellectual property law requires additional remuneration to be calculated in relation to the salary of the employee as the value of the invention in the market can be out of proportion with the salary of the employee (Cour de Cassation, 21 November 2000).<sup>206</sup>

Inventions beyond mission are inventions that are performed by the employee during the execution of her functions or in the field of activity of the company by reason of knowledge or by use of technologies or specific means of the company or of data acquired by the company.<sup>207</sup> The employer has the right to request the assignment of the ownership of these inventions; otherwise these inventions belong to the employee.<sup>208</sup>

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<sup>202</sup> Takenaka, Toshiko. *Intellectual Property in Common Law and Civil Law*. Edward Elgar Pub. Ltd., 2013

<sup>203</sup> Ibid.

<sup>204</sup> Patents- law on employees’ inventions - French, available at:

<http://limegreenip.hoganlovells.com/article/119/patents-law-on-employees-inventions-French> (last accessed on 23 December 2018)

<sup>205</sup> Patents- law on employees’ inventions - French, available at:

<http://limegreenip.hoganlovells.com/article/119/patents-law-on-employees-inventions-French> (last accessed on 23 December 2018)

<sup>206</sup> Ibid.

<sup>207</sup> Odaki, Kazuhide. *The Right to Employee Inventions in Patent Law: Debunking the Myth of Incentive Theory*. Hart Publishing, 2018

<sup>208</sup> Véron, P. *Employees’ Inventions in France, Tackling the Challenges of Inventor Remuneration C5 conference*, London, 2006

It is required from employers to make a payment of fair price if employers ask their right of claim to transfer the ownership of invention or grant of licence.<sup>209</sup> The fair should be agreed on by both employee and the employer and it should reflect the value of the invention on the date the employer exercises its right of assignment.<sup>210</sup>

### **b. Trade Mark**

A trade mark is a sign, design, or expression capable of distinguishing the goods or services of one enterprise from others.<sup>211</sup> They can also be referred to as ‘brands’.<sup>212</sup> An individual, business organization or any legal entity can be an owner of trade marks.<sup>213</sup> A trade mark may be located on a label, a voucher, on a package or on the product itself.<sup>214</sup> A trade mark is one of the most important assets of a company.<sup>215</sup> It is the mark through which a business can attract customers and keep them, creating value and growth.<sup>216</sup> Trade marks also work as a great advertisement tool.<sup>217</sup> Trade mark keeps the company ever-present in the mind of the consumer when it is easily recognized and used consistently on all company advertising and communications.<sup>218</sup>

Trade mark can consist of a word or combination of words, letters, numerals, drawings, symbols, three-dimensional features such as the shape and packaging of goods, non-visible signs such as sounds or fragrances, or color shades used as distinguishing features.<sup>219</sup>

One of the earliest laws on intellectual property was on trade marks.<sup>220</sup> In 1363, bakers were already required to mark their products in England.<sup>221</sup> This tradition was followed by bottle makers and porcelain manufacturers, possibly influenced by Chinese porcelain, which bore

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<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Trademarks, available at: <http://www.wipo.int/trademarks/en/> (last accessed on 11 November 2018)

<sup>212</sup> Why are logos important in advertising, available at: <https://bizfluent.com/about-7238139-logos-important-advertising-.html> (last accessed on 11 November 2018)

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Trademark history, available at: <https://www.infoplease.com/trademarks-history> (last accessed 11 November)

<sup>220</sup> Madrid- the international trade mark system, available at: <http://www.wipo.int/madrid/en/> (last accessed on 11 November 2018)

<sup>221</sup> Guide to the international registration of marks, available at: <http://www.wipo.int/madrid/en/guide/> (last accessed on 11 November 2018)



markings indicating its origin.<sup>222</sup> However, the emergence of the first modern trade mark was in the late 19th century.<sup>223</sup> French passed the first comprehensive trade mark system into law in 1857.<sup>224</sup> Afterwards, different trade mark systems started to appear in different countries one by one.<sup>225</sup> To make the process of obtaining a trade mark easier, 118 countries signed the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to the Madrid Agreement in 1892.<sup>226</sup> The treaty failed to provide an international trade mark system due to lack of support from major countries like the United Kingdom, the United States, and Japan.<sup>227</sup> The agreement also lacked a home-registration process, which made the owners register their trade marks only on the international level.<sup>228</sup> It was logically impossible to police a mark internationally with no registration in the home country of the trade mark.<sup>229</sup> Taking into consideration the lacking parts of the previous treaty, WIPO issued the Madrid Protocol in 1989 with the same goal of providing an international system to trade marks.<sup>230</sup> The Madrid Protocol allows trade mark owners to file an international trade mark application that is based on a domestic trade mark registration.<sup>231</sup> The registration of a trade mark by Madrid Protocol gives the owner the right for protection in countries designated in the international application.<sup>232</sup>

Aside from an international trade mark, an owner can also register their trade mark only for European countries by using a different system if it is required.<sup>233</sup> In Europe, trade marks can be registered at the national level as a national trade mark or at EU-level as a ‘European

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<sup>222</sup> Declarations made under the Madrid System, available at:

<http://www.wipo.int/madrid/en/members/declarations.html> (last accessed on 11 November 2018)

<sup>223</sup> Ibid.

<sup>224</sup> Ibid.

<sup>225</sup> Inside WIPO, available at: <http://www.wipo.int/about-wipo/en/> (last accessed on 11 November 2018)

<sup>226</sup> Ibid.

<sup>227</sup> Inside WIPO, available at: <http://www.wipo.int/about-wipo/en/> (last accessed on 11 November 2018)

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> European Union Intellectual Property Office, available at: <http://euipo.europa.eu/en/> (last accessed on 11 November 2018)

<sup>231</sup> Ibid.

<sup>232</sup> Trade mark protection in the EU, available at: [https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection\\_en](https://ec.europa.eu/growth/industry/intellectual-property/trade-mark-protection_en) (last accessed on 11 November 2018)

<sup>233</sup> Trademark, available at: <https://www.britannica.com/topic/trademark> (last accessed on 11 November 2018)



Union trade mark' (EUTM).<sup>234</sup> The EUTM system grants the owner an exclusive right in all 28 EU countries with one single registration.<sup>235</sup>

### c. Copyright

Copyright is the legal term used to describe the writer have over their literary and artistic works.<sup>236</sup> Books, music, sculpture, paintings, films, computer programs are some of the examples of works that can be protected under the scope of copyrights.<sup>237</sup>

There are two main rights that the copyright provides to the owner: economic rights and moral rights.<sup>238</sup> Economic rights allow the owner to derive financial reward from the use of their works by others and moral rights protect the interests of the writer that are not economic.<sup>239</sup>

Copyright protection is obtained automatically without the need for registration or other formalities in the majority of the countries.<sup>240</sup> Nonetheless, most countries have a system in place to allow for voluntary registration.<sup>241</sup> Facilitation of financial transactions, disputes over ownership of creation, and transfer of rights can be solved with the help of registration.<sup>242</sup>

The roots of the copyright can be traced back to the 15th century.<sup>243</sup> The invention of printing press opened a new age for the world literature, proliferation of literacy rates, and international communication as well as free-riding.<sup>244</sup> The more literary works were produced the number of people using, printing, and selling copies of the works of other people increased.<sup>245</sup> Thus, the need to protect the work of author arose.<sup>246</sup> The first copyright law,

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<sup>234</sup> Ibid.

<sup>235</sup> European Communities Trade Mark Association (ECTA), available at: <http://www.ecta.org/> (last accessed 11 on November 2018)

<sup>236</sup> Copyright, available at: <http://www.wipo.int/copyright/en/> (last accessed on 11 November 2018)

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Frequently Asked Questions: Copyright Basics, available at: [http://www.wipo.int/copyright/en/faq\\_copyright.html](http://www.wipo.int/copyright/en/faq_copyright.html) (last accessed on 11 November 2018)

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> How did copyright come about, available at: <https://www.bbc.co.uk/copyrightaware/article-5955> (last accessed on 11 November 2018)

<sup>244</sup> Ibid.

<sup>245</sup> Ibid.



the Statute of Anne, was enacted in England in 1710 with this goal.<sup>247</sup> The Statute of Anne provided the writers with a right to choose whom to allow to copy their work for a period of 14 years.<sup>248</sup> They could also decide what to charge for the copies and choose their own printers.<sup>249</sup>

Legislation based on the Statute of Anne gradually started to appear in other countries.<sup>250</sup> The Copyright Act of 1790 was one of them.<sup>251</sup> However, the first international steps towards an international copyright system were taken in the 19th century.<sup>252</sup> The nations recognized copyright between nation states with The Berne Convention, in 1886.<sup>253</sup> The Berne Convention also does away with the need to register works separately in each country and includes provision for nations to promote the development of international standards for copyright protection.<sup>254</sup> The Convention has been adopted by almost all the nations of the world.<sup>255</sup> In all states party to the Berne Convention, the copyright protection is automatic.<sup>256</sup> There may be nuances to the particular applicable laws in these states, however, in general sense, there is a high degree of harmony.<sup>257</sup> For the nations that are not a party to the Berne Convention, the copyright laws are territorial.<sup>258</sup> If a writer wishes to protect their work internationally, they must make sure that they comply with the relevant legal requirements in the country in which they want their work to be protected.<sup>259</sup>

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<sup>246</sup> A Brief History of Copyright, available at: [http://www.iprightsoffice.org/copyright\\_history/](http://www.iprightsoffice.org/copyright_history/) (last accessed on 11 November 2018)

<sup>247</sup> How did copyright come about, available at: <https://www.bbc.co.uk/copyrightaware/article-5955> (last accessed on 11 November 2018)

<sup>248</sup> A Brief History of Copyright, available at: [http://www.iprightsoffice.org/copyright\\_history/](http://www.iprightsoffice.org/copyright_history/) (last accessed on 11 November 2018)

<sup>249</sup> Ibid.

<sup>250</sup> Bettig, Ronald V. *Copyrighting Culture The Political Economy Of Intellectual Property*. Taylor and Francis, 2018

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Bettig, Ronald V. *Copyrighting Culture The Political Economy Of Intellectual Property*. Taylor and Francis, 2018

<sup>254</sup> Berne Convention for the Protection of Literary and Artistic Works, available at: <http://www.wipo.int/treaties/en/ip/berne/> (last accessed on 10 November 2018)

<sup>255</sup> Ibid.

<sup>256</sup> Universal Copyright Convention, available at: [http://portal.unesco.org/en/ev.php-URL\\_ID=15241&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15241&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last accessed on 11 November 2018)

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.



#### d. Community Design

Humanity always valued craftsmanship, style, and elegance.<sup>260</sup> With industrialization, the creation of global markets and improved communications concept of design regarding the appeal of products were born.<sup>261</sup>

The definition of design is “*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*”.<sup>262</sup>

The list of items that are eligible for design protection includes packaging of products, a set of products, composite products, logos, computer icons, drawings, and artwork.<sup>263</sup>

The progression on the harmonisation of design law was rather slow compared to harmonization of patents and trade marks.<sup>264</sup> The Community Trade Mark (CTM), the unitary term that would protect trademarks under as a whole through the EU member states, came into force in 1996. However, the Design Directive was adopted in 1998.<sup>265</sup>

The Design Directive was based on the recognition that a harmonized design registration gained a great importance for the business with a rapid increase in globalisation.<sup>266</sup> The need to protect the appearance of a product became more pronounced.<sup>267</sup> The primary goal of The Directive was to provide a level field for every member state of EU by harmonizing the registered design law of the member states.<sup>268</sup>

The pan-EU rights, the term used to describe equal rights given to every member state of EU with the unification of certain legal codes, were created by the Council Regulation on Community designs in 2001.<sup>269</sup> This legislation paved the road for the creation of 25-year

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<sup>260</sup> Community Design, available at: <https://euipo.europa.eu/ohimportal/en/rcd-value> (last accessed on 2 November 2018)

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Ten years of EU design law, available at:

[http://www.wipo.int/wipo\\_magazine/en/2013/06/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2013/06/article_0006.html) (last accessed on 2 November 2018)

<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> Effective use of community design protection, available at: <https://www.iam-media.com/designs/effective-use-community-design-protection> (last accessed on 2 November 2018)



Registered Community Designs (RDC) and a short-term three years unregistered Community design right to protect high fashion design.<sup>270</sup>

OHIM (Office of Harmonization in the Internal Market), started accepting the applications for Registered Community Designs in 2003.<sup>271</sup> Since 2003, more than 450,000 designs are registered under the law of EU.<sup>272</sup> The Union also focuses on the demonstration of the effectiveness of these rights by developing a body of jurisprudence from superior courts.<sup>273</sup>

The term Community design came to effect with the Council Regulation (EC) No 6/2002 and implemented by Commission Regulation (EC) No 2245/2002.<sup>274</sup> As mentioned above, regulation on the unregistered community design was consummated on 6 March 2002 and the registered Community design was available since 1 April 2003.<sup>275</sup>

The regulation set grounds for a design to be registered.<sup>276</sup> In order for a design to be registered, the design needs to be novel, which is if no identical design has been made available to the public.<sup>277</sup> They need to have individual character, the user must be able to distinguish it from other designs.<sup>278</sup>

The regulation protects community design by registration.<sup>279</sup> Registered Community Designs can be base filling for priority under the Paris Convention for the Protection of Industrial Property, which is administered by WIPO.<sup>280</sup> The regulation also gives a right to not to register the design they disclosed to the public for 12 months.<sup>281</sup> This grace period provides

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<sup>270</sup> Ibid.

<sup>271</sup> Ten years of EU design law, available at:

[http://www.wipo.int/wipo\\_magazine/en/2013/06/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2013/06/article_0006.html) (last accessed on 2 November 2018)

<sup>272</sup> Effective use of community design protection, available at: <https://www.iam-media.com/designs/effective-use-community-design-protection> (last accessed on 2 November 2018)

<sup>273</sup> Ibid.

<sup>274</sup> European Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, pdf available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0006&from=EN> (last accessed on 2 November 2018)

<sup>275</sup> Ibid.

<sup>276</sup> Registered community design, available at:

[http://www.wipo.int/edocs/mdocs/hague/en/ompi\\_di\\_san\\_11/ompi\\_di\\_san\\_11\\_14.pdf](http://www.wipo.int/edocs/mdocs/hague/en/ompi_di_san_11/ompi_di_san_11_14.pdf) (last accessed on 2 November 2018)

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Registered community designs, the basics, available at: <http://mewburn.com/resource/registered-community-designs-the-basics/> (last accessed on 2 November 2018)

<sup>281</sup> Ibid



an opportunity to commercialise their design and to see if the design warrants registered protection.<sup>282</sup>

Community Design law does not only protect the registered design.<sup>283</sup> An unregistered Community design is also protected from the date it has been made available to the public for three years.<sup>284</sup> Unregistered community design law is regulated especially for the protection of seasonal or high fashion products.<sup>285</sup> It does not require any kind of formality to obtain the protection of an unregistered community design.<sup>286</sup> Unlike the RCD, the unregistered Community Design only protects the design from copying.<sup>287</sup> Even an identical work is unable to infringe the design if it is created independently.<sup>288</sup> This is one of the main reasons the high fashion brands choose to register their design immediately after disclosure.<sup>289</sup>

Registration is always an important route to take because of the highly profitable nature of the designs.<sup>290</sup> Profiting from a form intellectual property owned by someone else has been an issue since the invention of printing machine.<sup>291</sup> According to Steve Jobs, good artists copy; great artist steal.<sup>292</sup>

The responsibility of protection of design highly falls on the owner, as they are responsible for enforcing their registered community design.<sup>293</sup> If someone uses their design, or one like it, without permission, it depends to them to take action to stop them.<sup>294</sup>

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<sup>282</sup> Design law in the European fashion sector, available at:  
[http://www.wipo.int/wipo\\_magazine/en/2008/01/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html) (last accessed on 2 November 2018)

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> Registered community design (RCD), available at: <https://www.awa.com/en/our-services/practice-areas/creating-ip-rights/designs/registered-community-design-rcd/> (last accessed on 2 November 2018)

<sup>286</sup> Registered community design (RCD), available at: <https://www.awa.com/en/our-services/practice-areas/creating-ip-rights/designs/registered-community-design-rcd/> (last accessed on 2 November 2018)

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Intellectual Property Theft: Everything You Need to Know, available at:  
<https://www.upcounsel.com/intellectual-property-theft> (last accessed on 21 November 2018)

<sup>291</sup> Ibid.

<sup>292</sup> Goodell, Jeff. "Steve Jobs in 1994: The Rolling Stone Interview." Rolling Stones, 1994.

<sup>293</sup> Community design, available at: <http://www.casalonga.com/documentation/Designs/modele-communautaire-224/?lang=en> (last accessed on 21 November 2018)

<sup>294</sup> Ibid.



### e. Industrial Design

In the legal sense, an industrial design comprises the ornamental or aesthetic aspect of an article.<sup>295</sup> Industrial design has many forms of variations from packages, containers, household goods, lighting equipment, jewellery, electronic devices, to logos and graphical user interfaces.<sup>296</sup>

Industrial design and patent are two forms of intellectual property that is similar and easy to be mistaken with each other.<sup>297</sup> A patent protects an invention that offers a new technical solution to a problem.<sup>298</sup> Technical or functional features of a product is not protected by an industrial design right in principle.<sup>299</sup> However, the features mentioned could be protected by a patent.<sup>300</sup>

Industrial design is protected under the unitary term community design as an intellectual property.<sup>301</sup> It is the professional practice of designing products that are to be manufactured through mass production.<sup>302</sup> In industrial designing, it is important to separate the design from the manufacture.<sup>303</sup> The appearance of the product, how it functions, is manufactured and ultimately the value and experience it provided for users.<sup>304</sup>

Industrial design has come a long way since its early inception and is thriving as a result of an expanded awareness of design in business, collaboration, and critical problem-solving.<sup>305</sup> History of the industrial design takes its roots from the production of devices and basic good craftsmen created before the Industrial Revolution.<sup>306</sup> From the beginning of the Stone Age, people exercised their minds to craft various objects that would help them reach their various

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<sup>295</sup> Industrial design, available at: <http://www.wipo.int/designs/en/> (last accessed on 7 November 2018)

<sup>296</sup> Ibid

<sup>297</sup> Frequently asked questions: Industrial designs, available at:

[http://www.wipo.int/designs/en/faq\\_industrialdesigns.html](http://www.wipo.int/designs/en/faq_industrialdesigns.html) (last accessed on 7 November 2018)

<sup>298</sup> Frequently asked questions: Industrial designs, available at:

[http://www.wipo.int/designs/en/faq\\_industrialdesigns.html](http://www.wipo.int/designs/en/faq_industrialdesigns.html) (last accessed on 7 November 2018)

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> Benton, Charlotte, "*Design and Industry*", Heskett John, *Industrial Design*, Thames & Hudson, 1980.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> A Brief History of Industrial and Interaction Design, available at

<https://www.oreilly.com/library/view/understanding-industrial-design/9781491920381/ch01.html> (last accessed on 26 October 2018)

<sup>306</sup> Ibid.



goals.<sup>307</sup> Until the Industrial Revolution, the goods made by humans were distinctive and unique as craftsmen made according to the wish of their customers within the scope of their skill.<sup>308</sup>

However, the system changed when the Industrial Revolution started to take place in Great Britain, then the industrialization and mechanization came to the marketplace.<sup>309</sup> The rise of industrial manufacture changed the way objects were made, urbanisation changed patterns of consumption, the growth of empire broadened tastes and diversified markets, and the emergence of a wider middle class created demand for fashionable styles from a much larger and more heterogeneous population.<sup>310</sup> It was during the Industrial Revolution purchasing goods became easier than making it themselves for the consumer.<sup>311</sup> Many industries are created to serve the needs of a growing consumer market by mass production, development of transportation and mass media.<sup>312</sup> It created a need for producers to find better ways to make their products and present their products in a unique, sophisticated way that speaks to various customer demographics.<sup>313</sup> Design is one of the main elements of a product that makes it attractive and appealing to consumer.<sup>314</sup> The choice of the customer is driven by design: the appearance of a product can be a key factor in the purchase decision of the customer.<sup>315</sup> The future success or a failure of product, at least partially, may be in rights of its design.<sup>316</sup>

Starting from the 1960s, markets in many industries became saturated with competition in marketing.<sup>317</sup> Marketing systems started looking for products that created emotional

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<sup>307</sup> Ibid.

<sup>308</sup> The importance of industrial design in product development, available at: <http://www.technologyrecord.com/article/the-importance-of-industrial-design-in-product-development-nx-plm-7575> (last accessed on 25 October 2018)

<sup>309</sup> Ibid.

<sup>310</sup> The importance of industrial design in product development, available at: <http://www.technologyrecord.com/article/the-importance-of-industrial-design-in-product-development-nx-plm-7575> (last accessed on 25 October 2018)

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Wipo Magazine, Designing for business success, available at: [http://www.wipo.int/wipo\\_magazine/en/2012/06/article\\_0004.html](http://www.wipo.int/wipo_magazine/en/2012/06/article_0004.html) (last accessed on 7 November 2018)

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> The evolution of marketing from trade to tech, available at: <http://historycooperative.org/the-evolution-of-marketing-from-trade-to-tech/> (last accessed on 25 October 2018)



connections with the user.<sup>318</sup> Industrial design, as much as it is a form of engineering, helps marketing for the companies by making their products distinctive and sophisticated.<sup>319</sup> Industrial designers merge all aspects of fit, function and form with the goal of optimising them to create the best user experience in mind.<sup>320</sup> They also create visually appealing designs and ensure that the product is ergonomically suited to fit the user, including how they will functionally relate, interface or live with the product.<sup>321</sup> Firms that leave industrial design completely to the engineering or ignore the importance of does not have much chance to become successful in consumer-driven markets.<sup>322</sup> Especially with the recent developments of globalization consumers are becoming more discerning and competition is always on a rise.<sup>323</sup>

Role of an industrial designer in the product development process is to corporate branding and identity, as well as to establish the design language of the product.<sup>324</sup> An industrial designer must bring together a creative design element with a much deeper understanding of markets and trends. In an increasingly globalised product market, this is more important than before.<sup>325</sup>

The first internationally-agreed legislative action towards the protection of industrial design is the Paris Convention in 1883.<sup>326</sup> The Convention applies to intellectual property in the widest-senses, including patents, trademarks, utility models and industrial design.<sup>327</sup> Regarding the industrial design, the Convention includes the provision below;

*“Industrial design must be protected in each Contracting State, and protection may not be forfeited on the ground that articles incorporating the design are not manufactured in that State”*<sup>328</sup>

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<sup>318</sup> Ibid.

<sup>319</sup> Heskett John, *Industrial Design*, Thames & Hudson, 1980

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

<sup>322</sup> Industrial design, available at: <http://www.wipo.int/designs/en/> (last accessed on 2 November 2018)

<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> The importance of industrial design in product development, available at: <http://www.technologyrecord.com/article/the-importance-of-industrial-design-in-product-development-nx-plm-> (last accessed on 24 October 2018)

<sup>326</sup> Summary of the Paris Convention for the Protection of Industrial Property (1883), available at: [http://www.wipo.int/treaties/en/ip/paris/summary\\_paris.html](http://www.wipo.int/treaties/en/ip/paris/summary_paris.html) (last accessed on 7 November 2018 )

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.



Paris Convention was a successful step for the internationalization of the intellectual property and many developments followed.<sup>329</sup> The industry grew rapidly parallel to the technological progression and the need for a unison regarding the laws surrounding intellectual property arose.<sup>330</sup> The establishment of WIPO, as mentioned above, and the adoption of the Hague System by WIPO are great examples.<sup>331</sup>

The Hague Agreement Concerning the International Deposit of Industrial Designs, also known as the Hague System aims to unify the registration of industrial property by providing a mechanism that is used in several countries.<sup>332</sup> The mechanism for registration includes a single application, filed in one language, with one set of fees.<sup>333</sup> The system is administered by WIPO.<sup>334</sup>

The Hague Agreement of 1925, the London Act of 2 June 1934, the Hague Act of 28 November 1960 and the Geneva Act of 2 July 1999 are the several separate treaties that form the system.<sup>335</sup> The countries who signed the 1960 Hague Act or the 1999 Geneva Act can become contracting parties and use the Hague system.<sup>336</sup> There are more than 60 countries and many nongovernmental organisations such as the European Union which became contracting parties.<sup>337</sup>

The system used in the Hague Agreement is similar to the system of the European Union.<sup>338</sup> The European Union also aims to set a ground for the intellectual property by establishing a unit that can be used by every Member State.<sup>339</sup> The registration of a trademark, community design or a copyright is valid and protected throughout the European Union. The Courts of

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<sup>329</sup> Ibid.

<sup>330</sup> FAQ on the Hague Agreement, available at: <https://euipo.europa.eu/ohimportal/en/faq-on-the-hague-agreement> (last accessed on 11 November 2018)

<sup>331</sup> Ibid.

<sup>332</sup> Hague: The international design system, available at: <http://www.wipo.int/hague/en/> (last accessed on 7 November 2018)

<sup>333</sup> Ibid.

<sup>334</sup> Hague Guide, Introduction, available at: <http://www.wipo.int/hague/en/guide/introduction.html> (last accessed on 7 November 2018)

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> The European Community Joins the Hague System, available at: [http://www.wipo.int/wipo\\_magazine/en/2008/01/article\\_0005.html](http://www.wipo.int/wipo_magazine/en/2008/01/article_0005.html) (last accessed on 11 November 2018)

<sup>339</sup> International design registration- the Hague Agreement, available at: <http://mewburn.com/resource/international-design-registration-the-hague-agreement/> (last accessed on 11 November 2018)



Justice and the General Court plays a big role in the protection of the system by ensuring the laws are applied the same in every Member State.<sup>340</sup>

## f. Automotive Design

*“Brand-differentiating design experts and their teams co-determine a brand's success”<sup>341</sup>*

The process and requirements of the automotive market for an automotive design are not much different from any other market that involves industrial design.<sup>342</sup> Automotive design is the process of developing the appearance, and some extent the ergonomics, of motor vehicles.<sup>343</sup> The primary concern of automotive design is developing the visual appearance of the vehicle.<sup>344</sup>

While the technological aspect of an automobile maintains its importance in the automotive industry, many designers agree that technology is not enough to remain competitive.<sup>345</sup> The design adds values across the entire spectrum of development of a product.<sup>346</sup> Peter Busch, who is the Distributed Ledger Technologies Mobility in Robert Bosch GmbH, says:

*“Today, bad cars do not exist anymore, just beautiful cars and less beautiful ones. Thus, styling has become one of the most important purchasing criteria for or against a specific car. Winning, retaining, and managing”<sup>347</sup>*

Colour and trim design of a vehicle and the exterior design of it go hand in hand, as they both bring individual aspects to the vehicle.<sup>348</sup> Exterior design is developed by the stylists who take care of the proportions, shape, and surfaces of the vehicle.<sup>349</sup> The colour and trim designer is responsible for the research, design and development of all interior and exterior

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<sup>340</sup> The Hague System for the International Registration of Designs and Models, PDF available at: [https://www.to.camcom.it/sites/default/files/regolazione-mercato/27467\\_CCIAATO\\_2742015.pdf](https://www.to.camcom.it/sites/default/files/regolazione-mercato/27467_CCIAATO_2742015.pdf) (last accessed on 11 November 2018)

<sup>341</sup> Growing Importance of Styling and Design in Automotive Industry, available at: <https://www.oliverwyman.com/media-center/2010/growing-importance-of-styling-and-design-in-automotive-industry.html> (last accessed on 7 November 2018)

<sup>342</sup> Ibid.

<sup>343</sup> Bullock, Alan, et al. *The New Fontana Dictionary of Modern Thought*. HarperCollins, 2000

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Growing Importance of Styling and Design in Automotive Industry, available at: <https://www.oliverwyman.com/media-center/2010/growing-importance-of-styling-and-design-in-automotive-industry.html> (last accessed on 7 November 2018)

<sup>348</sup> Bullock, Alan, et al. *The New Fontana Dictionary of Modern Thought*. HarperCollins, 2000

<sup>349</sup> Ibid.



colours and materials used on a vehicle.<sup>350</sup> To give the vehicle a unique exterior experience, the colour contrast, texture and pattern must be carefully combined.<sup>351</sup>

Designers make specific researches about global trends, they create trend boards from this research to keep track of influences as they relate to the automotive industry.<sup>352</sup> The designer then uses this information to develop them and concept that are further refined and test on the vehicle models.<sup>353</sup> Industrial design fields, especially automotive design, are competitive fields that require lots of experience and analysing. The registered designs may bring success to the companies, as much as they can bring failures.

The body of a vehicle can determine its success with the right marketing techniques as the consumer associates the body of the vehicle with positive attributes such as quality and sophistication.<sup>354</sup>

One of the good examples of a design management in the automotive industry is Ford Mustang 1967.<sup>355</sup> Ford Mustang was introduced on 17 April 1964 on World's Fair New York and was advertised on multiple television stations a few days prior to its release.<sup>356</sup> The release of the first Mustang was a game changer for classic cars as it also fuelled a large upcoming market full of stylish and fast muscle cars.<sup>357</sup> During this era, Ford produced the different variations of Mustang and these models were used in many famous movies.<sup>358</sup> Goldfinger (1964) and Diamonds are Forever (1971) are two James Bond movie classics that star the vehicle.<sup>359</sup>

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<sup>350</sup> The importance of agile design in automotive industry, available at: <https://www.manufacturingglobal.com/technology/importance-agile-design-automotive-industry> (last accessed on 24 October 2018)

<sup>351</sup> Ibid.

<sup>352</sup> Ibid.

<sup>353</sup> The importance of agile design in automotive industry, available at: <https://www.manufacturingglobal.com/technology/importance-agile-design-automotive-industry> (last accessed on 24 October 2018)

<sup>354</sup> Marketing cars, available at: <http://www.marketing-schools.org/consumer-psychology/marketing-cars.html> (last accessed on 2 November 2018)

<sup>355</sup> Ibid.

<sup>356</sup> Ford Mustang history, available at: <https://www.mustangreloaded.com/ford-mustang-history/> (last accessed 2 on November 2018)

<sup>357</sup> Here to eternity: The 50 most iconic cars in the motoring industry, available at: <https://gearpatrol.com/2011/12/02/feature-here-to-eternity-the-50-most-iconic-cars-in-motoring-history/> (last accessed on 2 November 2018)

<sup>358</sup> Ibid.

<sup>359</sup> Ford Mustang movie stars, available at: <https://www.foraymotorgroup.co.uk/news/article/ford-mustang-movie-stars> (last accessed on 2 November 2018)

Heavy advertisement techniques that were used by the rapidly booming advertising industry and product placement in classic movies made Ford Mustang a success and face of classic cars today.<sup>360</sup>



**Image III:** A Ford Mustang advertisement from 1967, the advertisement is a classic form of advertisement as it tries to associate the vehicle with a beautiful woman.<sup>361</sup>

The Volkswagen Type 2, another great success of vehicle design, is a van introduced in 1959 by the German automaker Volkswagen as its second car model.<sup>362</sup> The van received numerous nicknames worldwide, including the ‘microbus’, ‘minibus’, and probably most popular of its nicknames ‘Hippie van/bus’.<sup>363</sup> The counterculture movement of the 1960s, commonly called as Hippies, known for their rejection of mass media, started in the United

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<sup>360</sup> Ibid.

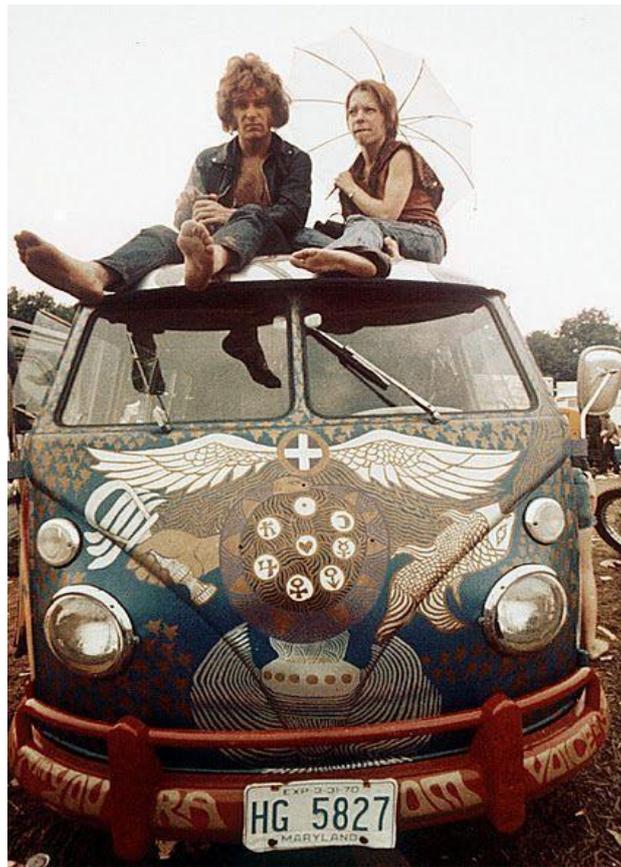
<sup>361</sup> 1960’s Ford Mustang ads, available at: <http://www.mustangandfords.com/news/1311-1960s-ford-mustang-ads/> (last accessed on 1 November 2018)

<sup>362</sup> History of Volkswagen bus, available at: <http://www.brinse.com/history-of-the-volkswagen-bus.html> (last accessed on 2 November 2018)

<sup>363</sup> Ibid.

States and spread through Europe quickly.<sup>364</sup> The well-known nickname of the van was the result of its popularity within Hippie culture.<sup>365</sup>

According to McKell Hagerty, who is a classic car expert and the CEO of Hagerty Insurance “*The hippie movement fell in love with the bus for a few reasons: It was cheap to maintain, easy to work on and big enough to live in.*”<sup>366</sup> Thus, the Volkswagen Type 2 became associated with the hippie movement and the imagery of peace signs, flowers paintings, and 1960’s.<sup>367</sup>



**Image IV: Woodstock Festival 1969<sup>368</sup>**

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<sup>364</sup> Youth: The Hippies, available at: <http://content.time.com/time/magazine/article/0,9171,899555-1,00.html> (last accessed on 2 November 2018)

<sup>365</sup> Ibid.

<sup>366</sup> Peace, love, and the V&W bus, available at: <https://www.popularmechanics.com/cars/trucks/a26207/volkswagen-microbus-vw-bus/> (last accessed on 2 November 2018)

<sup>367</sup> Ibid.

<sup>368</sup> Woodstock 1969, image available at: <https://www.n-tv.de/mediathek/bilderserien/unterhaltung/Woodstock-1969-article419865.html> (last accessed on 2 November 2018)

Another recent example of a success on design management aiming for consumers to associate the vehicle with quality and sophistication is S model of Tesla cars.<sup>369</sup> In 2008, Tesla Motors launched the Model S with cutting-edge battery and electric powertrain.<sup>370</sup> The car was the first ever premium all-electric sedan of the world.<sup>371</sup> The main difference between the Model S and other electric vehicles was the required time to replenish the battery of the car.<sup>372</sup> The Model S could go from empty to fully charged in about an hour with the help of its electric powertrain.<sup>373</sup> Tesla ramped up the production of the cars from 3,500 in a year to 50,000 cars in a year and thus, Tesla Motors changed the electric vehicle industry.<sup>374</sup> The stocks of Tesla Inc. increased its value over 12 folds since 2010.<sup>375</sup>



**Image V:** Tesla S Model 2012<sup>376</sup>

The vision of weaning the world off of oil use by offering a fully electric vehicle that people would want to own and could afford was behind the Model S and Tesla Motors.<sup>377</sup> The CEO

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<sup>369</sup> About tesla, available at: <https://www.tesla.com/about> (last accessed on 2 November 2018)

<sup>370</sup> Ibid.

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> Tesla Model 3 Tracker, available at: <https://www.bloomberg.com/graphics/2018-tesla-tracker/> (last accessed on 11 November 2018)

<sup>375</sup> If you invested \$1,000 in Tesla in 2010, here's how much you'd have now, available at: <https://www.cnbc.com/2018/06/01/if-you-invested-1000-in-tesla-in-2010-heres-what-you-d-have-now.html> (last accessed on 2 November 2018)

<sup>376</sup> Tesla model S, available at: <https://www.roadandtrack.com/new-cars/first-drives/reviews/a18312/2012-tesla-model-s/> (last accessed on 2 November 2018)

of the Tesla Inc, Elon Musk, is known for his visions for future and the selling point of the businesses of Musk is his ideas as he became one of the faces of the success of the 21st century<sup>378</sup>

### c. Protection of Design

In a world where many people take advantage of free-riding (an economic term used to define the act of utilizing something without giving any efforts or paying for it), the designs must be protected from bad willed individuals.<sup>379</sup> In order to protect their designs and investments that involve time and money to develop a recognized look the companies take action by registering their design.<sup>380</sup>

On asserting a community design protection against others, the scope of the design takes visual appearance as a whole.<sup>381</sup> There are two conditions for an infringement to occur.<sup>382</sup> The first one is that the alleged infringing design must be substantially the same as the registered design that it would confuse the consumer.<sup>383</sup> The second one is that the alleged infringing design must appropriate the point of novelty that allowed the design to be registered in the first place.<sup>384</sup>

In 1991, a dispute arose regarding the infringement of the body design of the Ferrari Testarossa.<sup>385</sup> Ferrari claimed the Miami Couple model vehicle of Roberts Company infringed the design of Testarossa Ferrari.<sup>386</sup> It was found Ferrari did not register the design, however, the provisions regarding the protection in the exterior shape and appearance of

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<sup>377</sup> A Brief History Of Tesla Cars In One Simple Infographic available at: <https://cleantechnica.com/2016/05/27/brief-history-tesla-cars-one-simple-infographic/> (last accessed on 2 November 2018)

<sup>378</sup> Elon Musk has a history of wild ideas — some of them have worked out, available at: <https://www.cnn.com/2018/05/24/elon-musks-wild-ideas-a-history-of-whats-worked.html> (last accessed on 2 November 2018)

<sup>379</sup> Free rider problem, available at: [https://www.investopedia.com/terms/f/free\\_rider\\_problem.asp](https://www.investopedia.com/terms/f/free_rider_problem.asp) (last accessed on 24 October 2018)

<sup>380</sup> Automobile Designs: Protecting An Investment In A Legend With Intellectual Property, available at: <http://ccbjournal.com/articles/5428/automobile-designs-protecting-investment-legend-intellectual-property> (last accessed on 2 November 2018)

<sup>381</sup> Ibid.

<sup>382</sup> Ibid.

<sup>383</sup> Ibid.

<sup>384</sup> Ibid.

<sup>385</sup> FERRARI S.P.A. ESERCIZIO FABRICHE AUTOMOBILI E CORSE v. CARL ROBERTS, available at: <https://cyber.harvard.edu/IPCoop/91ferr1.html>

<sup>386</sup> Ibid.



automobiles of an unregistered trade mark were applied to the case.<sup>387</sup> The opinion of the court was positive regarding the infringement, it decided that the automobiles of Ferrari and replicas of Roberts' were virtually identical in appearance.<sup>388</sup>

The opinion of the court on the *Pagliari v. Wallace China Co.*, which is as a similar case regarding the infringement issues, was used as case law on the case of *Ferrari v. Roberts' Company*. Quote on quote importance of the design of the product were given as: "*One of the essential selling features of hotel china, if, indeed, not the primary, is the design. The attractiveness and eye-appeal of the design sells the china. Moreover, from the standpoint of the purchaser china satisfies [\*\*33] a demand for the aesthetic as well as for the utilitarian, and the design on china is, at least in part, the response to such demand. The granting of relief in this type of situation would render Wallace immune from the most direct and effective competition with regard to these lines of china.*"<sup>389</sup>

## **PART II: REID v. EUIPO BOARD OF APPEALS**

### **I. Overview**

Claimant party Joanna Reid is an industrial engineer with a master's degree in industrial design who specialized in automotive designs during fifteen-years of her career. She began working for companies after her graduation from university and with time, she was able to build a rich portfolio that contains innovative and practical designs. Before she started working as the head of the research-development field of the Pyrosia Technologies (hereinafter referred as Pyrosia Tec) she worked for the Athoan Company as the assistant manager of the research-development field for seven years. The company and Reid decided to part ways on 20 January 2009. Reid started expanding her portfolio with designs that were not supported by any company during the time she was unemployed. She was severely indebted and in 2015, she was neither able to continue on her project, or support her family. Reid became acquainted with Michael Therman, the manager of the automotive design department of Pyrosia Tec on 10 April 2015 and she started working as the head of the research-development field of Pyrosia Tec on 09 May 2015.

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<sup>387</sup> Ibid.

<sup>388</sup> *FERRARI S.P.A. ESERCIZIO FABRICHE AUTOMOBILI E CORSE v. CARL ROBERTS, CYBER HARVARD*, Case No. 944 F.2d 1235

<sup>389</sup> Ibid.



Reid requested help from Pyrosia Tec regarding the modelling of the design and the windbreak she was previously working on and sent an email to Michael Therman on 30 September 2015. The help was provided from an atelier which belonged to the Holding and she finished her project eight months after being employed as the research-development field of Pyrosia Tec.

On 08 December 2015, as the head of the research-development department, Joanna Reid was tasked with supervising the design of “Atlas 2017”, the new model vehicle to be launched and she was assigned to work on, during the production process. She was sent to the factory responsible for the manufacture of vehicles in Toulouse, France. On 10 July 2017, Reid sent an email to Michael Therman regarding her task of managing the production process of the vehicle. However, she did not receive a reply from Michael Therman.

Pyrosia Tec introduced the design of “KineX4” on 27 July 2017 and began the advertisement process of the vehicle to be launched in late 2018. After Reid was informed of advertisement of “KineX4” and recognized the individual windbreak design she was working on previously, she came back to France. Reid signed her resignation on 13 August 2017.

Pyrosia Holding applied for registration of the design of the windbreak used in “KineX4” for the type of metal that would be used in the production, the shape, and the colour under the name of Holding on 03 January 2018 and registered it as community design on 30 May 2018. Joanna Reid applied to European Union Intellectual Property Board of Appeals (hereinafter referred as EUIPO Board of Appeals) on 01 June 2018. EUIPO Board of Appeals heard the case and decided on 10 December 2018. The board decided on Pyrosia Holding as the rightful owner of the financial and intellectual rights of the design with the reason that the design was finished when she was an employee under Pyrosia Holding. Reid applied to European Court of Justice General Court to appeal the decision made by EUIPO Board of Appeals on 15 December 2018.

### **I. Other Facts**

Athoan Company is a relatively smaller French company that markets industrial products. The company has been in the automotive market for approximately 20 years. During 20 years of their market time, the Company only designed and sold automotive vehicles in Austria and made a name for themselves for making low-cost, practical automated vehicles. Joanna Reid



resigned from the Company because visions of the company and her for the future were not compatible as she introduced innovative designs to the company and the company did not want to take any risk by changing their path of design.

Pyrosia Holding is an international European establishment based on France which works in many fields including technology, and industry. The holding introduced many designs and inventions under its name that became successful internationally. There are more than 4000 employees who work for the Holding. Previously, Pyrosia Tec, which is a branch of Pyrosia Holding, started manufacturing and selling cars. However, they failed to turn a profit from the car business. According to many car reviewers and customers; the motors of the car had a dull handling and lackluster engine power. Designing board of Pyrosia Tec was also criticized because designs lacked originality and were unidentifiable from its competitors. After their failure in the market, in 2015, Pyrosia Holding decided to hire more experienced engineers and designers for Pyrosia Tec. Different from the last time they launched their cars, new design “KineX4” was leaked to the media before it was even launched and gathered many praises for its revolutionary design that would make the car look pleasant and help with the movement of the car.

During the time period Reid was working as the head of the research-development department, the department worked on the outer and interior designs of “Atlas 2017” and “Eos” model vehicles. “Atlas 2017” was originally scheduled to be launched before “KineX4”, however, the company put a hold the manufacturing of “Atlas 2017” and started advertising “KineX4” as their first model to be launched in 2018. Pyrosia Tec, spent 6,000,000 € for the production of the new type of windbreak she designed.

The excerpt regarding the payment made to Reid before she started working as employee and her determined salary is as follows, so as far as is relevant:

*“...The employer and the employee agreed on 8000£ of monthly salary. The employer is to pay employee 48000£ before she starts to work as the head of the research-development department...”*

The email of 30 September 2015 is as follows, so as far as is relevant:

*Dear Mr. Therman,*



*“I have showed you my portfolio and the sketches of my future projects on 10 April 2011. Regarding the project of windbreak I have the general design and calculation ready. However, I believe testing the design on a model made of steel might change a few calculations and solve some problems which I mentioned earlier. I request help from you to give me permission to utilize the atelier so I can see the difference between two-dimensional sketches and real-life model.*

*Respectfully,*

*Joanna Reid”*

The email of 10 July 2017 is as follows, so as far as is relevant:

*“Dear Mr. Therman.*

*I have been sent to the factory in Toulouse, France with the task of supervising the designs of “Atlas 2017” vehicle during production process. However, from the date arrived I have not been able to work and the appropriate working conditions were not provided for me. I request to be informed with the reason behind this situation and the date the factory will start to work on manufacturing Atlas 2017.*

*Thank You,*

*Joanna Reid”*



## **B. CLAIMS**

### **I. Claims of the Applicant**

- Applicant Party claims that mentioned 48.000 £ advance payment in the Contract was not specified as the payment for Joanna Reid selling the intellectual property right of her design used in KineX4.
- Applicant Party claims that the company made no substantive contribution in the creation of the design, therefore the design cannot be defined as one made under a Contract of Employment.
- Applicant Party claims that the subject of the community design was an unregistered community design under the regulation of EU, thus making it a subject of protection for three years, which includes the date Pyrosia Holding registered the design.
- Applicant Party claims that the company fraudulently registered the community design she had made beforehand, therefore the registration should be nullified and the community design should be registered under the Claimant's name.
- Applicant Party claims that Pyrosia Holding had applied to register the design as a community design even though a transfer contact for transferring the right of community design of her designs did not exist.
- Applicant Party claims that she had no intention of transferring the rights of her previous designs. However, Pyrosia Holding did not act in good faith and her design for the windbreak was used in "KineX4".



## II. Claims of the Defendant

- According to Pyrosia Holding, 48.000 £ advance payment was made to her as the additional remuneration of that is required under Article L611-7 and it was included in Article 8 of the Contract of Employment.
- The Defendant Party claims Pyrosia Holding has the right to own any design or invention Joanna Reid made during the time of her employment under the Pyrosia Holding as she signed the Contract of Employment.
- The Defendant Party claims that the subject of the community design was not finished before the Applicant was employed by Pyrosia Holding, therefore it could not be subject to protection as an unregistered community design.
- According to Pyrosia Holding, the subject of the community design was not finished during the period of time Joanna Reid was unemployed and the defendant party provided crucial technical help for the completion of the design; thus, making the subject of the community design a design that belongs to the company.
- The Defendant Party claims that in accordance with Article 14 of the Community Design Regulation, the subject of the community design is developed by an employee, therefore the right to the Community design shall vest in the employer.
- The Defendant Party claims that the design was used rightfully in the automobile models as the rights of the design already belonged to the company.



## C. APPLICABLE LAW

### I. Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs

A unified system for obtaining a Community design to which uniform protection is given with uniform effect throughout the entire territory of the Community would further the objectives of the Community as laid down in the Treaty.<sup>390</sup> “Community design” is directly applicable in each Member State, because only in this way will it be possible Office for Harmonisation in the Internal Market (Trade Marks and Design) in accordance with a single procedure under one law, to obtain, through one application made to the one design right for one area encompassing all Member States.<sup>391</sup>

#### a. Article 1-Community Design

Characters of community design and the differences between an unregistered community design and registered community design are defined under this article. Article 1 states that:

*“1. A design which complies with the conditions contained in this Regulation is hereinafter referred to as a "Community design".*

*2. A design shall be protected:*

*(a) by an "unregistered Community design", if made available to the public in the manner provided for in this Regulation;*

*(b) by a "registered Community design", if registered in the manner provided for in this Regulation.*

*3. A Community design shall have a unitary character. It shall have equal effect throughout the Community. It shall not be registered, transferred or surrendered or be the subject of a decision declaring it invalid, nor shall its use be prohibited, save in respect of the whole Community. This principle and its implications shall apply unless otherwise provided in this Regulation.”<sup>392</sup>*

#### b. Article 4 - Requirements for Protection

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<sup>390</sup> Bently, Lionel, et al. *Intellectual Property Law*. Oxford University Press, 2018

<sup>391</sup> ECLI:EU:C:2015:680

<sup>392</sup> Council Regulation, (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1)



A design needs to have a new and individual character in order to be registered. The rights for protection are given to the owner of the community design. Article 4 is as follows:

*“1. A design shall be protected by a Community design to the extent that it is new and has individual character.*

*2. 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.*

*3. "Normal use" within the meaning of paragraph (2)(a) shall mean use by the end user, excluding maintenance, servicing or repair work.”<sup>393</sup>*

### **c. Article 5 - Novelty**

In order for a design to be named as community design, the novelty of the subjected design is required.<sup>394</sup> Article 5 is as follows:

*“1. A design shall be considered to be new if no identical design has been made available to the public:*

*a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;*

*(b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.*

*2. Designs shall be deemed to be identical if their features differ only in immaterial details.”<sup>395</sup>*

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<sup>393</sup> Council Regulation, (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1).

<sup>394</sup> Ibid.



#### **d. Article 6 - Individual character**

Individual character required for design is established by the question of whether an informed user could distinguish between the new design and a similar product.<sup>396</sup> If the informed user would think that the design creates the same overall impression with a design that is previously made, the requirement for individuality is not considered as fulfilled.<sup>397</sup> Article 6 states that:

*“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:*

*(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;*

*(b) in the case of a registered Community design, before the date of filing the application for registration or, if a 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.”<sup>398</sup>*

#### **e. Article 14 - Right to the Community design**

This section briefly explains who holds the right to the community design within the application process.<sup>399</sup> Article 14 states that:

*“1. The right to the Community design shall vest in the designer or his successor in title.*

*2. If two or more persons have jointly developed a design, the right to the Community design shall vest in them jointly.*

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<sup>395</sup> Council Regulation, (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1)

<sup>396</sup> Design rights and the assessment of individual character, available at: <https://www.lexology.com/library/detail.aspx?g=1eb84e67-5872-405a-bd5b-4572f0d44f0e> (last accessed on 27 December 2018)

<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

<sup>399</sup> Council Regulation, (EC) No 6/2002 of 12 December 2001 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1)

3. *However, where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, the right to the Community design shall vest in the employer, unless otherwise agreed or specified under national law.*”<sup>400</sup>

Third section of the article where it states that the right of the design made by the employee belongs to the company is similar and based on a general principle regarding patent laws.<sup>401</sup> Generally, in most of the countries, inventions made by employees during their usual duties and employed will belong to the employer.<sup>402</sup> The employer has right to exploit the invention as the invention without requiring an assignment from the employee, is owned by the employer.<sup>403</sup> The employer also does not need to pay additional compensation to the employee.<sup>404</sup> However, some countries categorizes the invention and applies specific laws regarding these categories.<sup>405</sup> For example, in Finland, the inventions categorized as inventions resulting direct from the employment or through experience gained at work or as a result of carrying out a specific job and inventions that fall within the scope of the field of business of the employer but are made without any contact with the job requires different procedures from the usual invention made by employee under a contract of employment.<sup>406</sup> In these cases, Employees must notify the employer in writing about an invention and must explain the content of the invention.<sup>407</sup>

#### **f. Article 15 - Claims relating to the entitlement to a Community design**

Claims relating to the entitlement of the community design in Article 15 follows as:

*“1. If an unregistered Community design is disclosed or claimed by, or a registered Community design has been applied for or registered in the name of, a person who is not entitled to it under Article 14, the person entitled to it under that provision may, without*

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<sup>400</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Section 3, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018)

<sup>401</sup> Design law, <https://legal-patent.com/en/company/fields-of-law/design-law/> (last accessed on 13 December 2018)

<sup>402</sup> Lovells, Hogan, Patent laws on employees inventions, available at: <http://limegreenip.hoganlovells.com/article/109/patents-law-on-employees-inventions-united-kingdom> (last accessed on 13 December 2018)

<sup>403</sup> Ibid.

<sup>404</sup> Ibid.

<sup>405</sup> Employee Inventions: Rights of the company and the inventor, available at: <https://lindblad.fi/en/employee-inventions-rights-company-inventor/> (last accessed on 13 December 2018)

<sup>406</sup> Ibid.

<sup>407</sup> Ibid.



*prejudice to any other remedy which may be open to him, claim to become recognised as the legitimate holder of the Community design.*

*2. Where a person is jointly entitled to a Community design, that person may, in accordance with paragraph 1, claim to become recognised as joint holder.*

*3. Legal proceedings under paragraphs 1 or 2 shall be barred three years after the date of publication of a registered Community design or the date of disclosure of an unregistered Community design. This provision shall not apply if the person who is not entitled to the Community design was acting in bad faith at the time when such design was applied for or disclosed or was assigned to him.*

*4. In the case of a registered Community design, the following shall be entered in the register:*

*(a) the mention that legal proceedings under paragraph 1 have been instituted;*

*(b) the final decision or any other termination of the proceedings;*

*(c) any change in the ownership of the registered Community design resulting from the final decision.*<sup>408</sup>

#### **g. Article 16 - Effects of a judgement on entitlement to a registered Community design**

Effects of a judgement on entitlement to a registered Community design is briefly explained in Article 16 is as follows:

*“1. Where there is a complete change of ownership of a registered Community design as a result of legal proceedings under Article 15(1), licences and other rights shall lapse upon the entering in the register of the person entitled.*

*2. If, before the institution of the legal proceedings under Article 15(1) has been registered, the holder of the registered Community design or a licensee has exploited the design within the Community or made serious and effective preparations to do so, he may continue such exploitation provided that he requests within the period prescribed by the implementing*

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<sup>408</sup> Employee Inventions: Rights of the company and the inventor, available at: <https://lindblad.fi/en/employee-inventions-rights-company-inventor/> (last accessed on 13 December 2018)



*regulation a non-exclusive licence from the new holder whose name is entered in the register. The licence shall be granted for a reasonable period and upon reasonable terms.*

*3. Paragraph 2 shall not apply if the holder of the registered Community design or the licensee was acting in bad faith at the time when he began to exploit the design or to make preparations to do so.”<sup>409</sup>*

#### **h. Article 41 - Right of priority**

Right of priority is an intellectual property that is provided firstly by The Paris Convention in the case of patents (and utility models where they exist), marks and industrial designs.<sup>410</sup> This right means that, the applicant may who filed an application in one of the Contracting States within a certain period of time can apply for protection in any of the other Contracting States.<sup>411</sup>

Right of priority in community design follows in Article 41 as:

*“1. A person who has duly filed an application for a design right or for a utility model in or for any State party to the Paris Convention for the Protection of Industrial Property, or to the Agreement establishing the World Trade Organisation, or his successors in title, shall enjoy, for the purpose of filing an application for a registered Community design in respect of the same design or utility model, a right of priority of six months from the date of filing of the first application.*

*2. Every filing that is equivalent to a regular national filing under the national law of the State where it was made or under bilateral or multilateral agreements shall be recognised as giving rise to a right of priority.*

*3. "Regular national filing" means any filing that is sufficient to establish the date on which the application was filed, whatever may be the outcome of the application.*

*4. A subsequent application for a design which was the subject of a previous first application, and which is filed in or in respect of the same State, shall be considered as the first*

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<sup>409</sup> Employee Inventions: Rights of the company and the inventor, available at: <https://lindblad.fi/en/employee-inventions-rights-company-inventor/> (last accessed on 13 December 2018).

<sup>410</sup> WIPO, *The Paris Convention for the Protection of Intellectual Property*, WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO Publications (2004)

<sup>411</sup> Ibid.

*application for the purpose of determining priority, provided that, at the date of the filing of the subsequent application, the previous application has been withdrawn, abandoned or refused without being open to public inspection and without leaving any rights outstanding, and has not served as a basis for claiming priority. The previous application may not thereafter serve as a basis for claiming a right of priority.*"<sup>412</sup>

**i. Article 54 - Participation in the proceedings of the alleged infringer**

Participation in the proceedings of the alleged infringer is described in Article 54 is as follows:

*"1. In the event of an application for a declaration of invalidity of a registered Community design being filed, and as long as no final decision has been taken by the Office, any third party who proves that proceedings for infringement of the same design have been instituted against him may be joined as a party in the invalidity proceedings on request submitted within three months of the date on which the infringement proceedings were instituted. The same shall apply in respect of any third party who proves both that the right holder of the Community design has requested that he cease an alleged infringement of the design and that he has instituted proceedings for a court ruling that he is not infringing the Community design.*

*2. The request to be joined as a party shall be filed in a written reasoned statement. It shall not be deemed to have been filed until the invalidity fee, referred to in Article 52(2), has been paid. Thereafter the request shall, subject to any exceptions laid down in the implementing regulation, be treated as an application for a declaration of invalidity.*"<sup>413</sup>

**j. Article 58 - Interlocutory revision**

Interlocutory revision as defined in Article 58;

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<sup>412</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Title IV, Section 2, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018)

<sup>413</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Title VI, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018)



*“1. If the department whose decision is contested considers the appeal to be admissible and well founded, it shall rectify its decision. This shall not apply where the appellant is opposed by another party to the proceedings.*

*2. If the decision is not rectified within one month after receipt of the statement of grounds, the appeal shall be remitted to the Board of Appeal without delay and without comment as to its merits.”<sup>414</sup>*

#### **k. Article 65 - Taking of evidence**

Taking of evidence as explained in Article 65;

*“1. In any proceedings before the Office the means of giving or obtaining evidence shall include the following:*

*(a) hearing the parties;*

*(b) requests for information;*

*(c) the production of documents and items of evidence;*

*(d) hearing witnesses;*

*(e) opinions by experts;*

*(f) statements in writing, sworn or affirmed or having a similar effect under the law of the State in which the statement is drawn up.*

*2. The relevant department of the Office may commission one of its members to examine the evidence adduced.*

*3. If the Office considers it necessary for a party, witness or expert to give evidence orally, it shall issue a summons to the person concerned to appear before it.*

*4. The parties shall be informed of the hearing of a witness or expert before the Office. They shall have the right to be present and to put questions to the witness or expert.”<sup>415</sup>*

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<sup>414</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Title VII, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018)



## I. Article 67 - Restitutio in integrum

“Restitutio in integrum” means "returning everything to the state as it was before" in Latin.<sup>416</sup> Courts generally follows this principle in common law negligence cases while awarding damages.<sup>417</sup> The amount of compensation should be enough to bring the plaintiff back to the position as if no tort has been committed.<sup>418</sup>

Restitutio in integrum continues in Article 67 as;

*“1. The applicant for or holder of a registered Community design or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any rights or means of redress.*

*2. The application must be filed in writing within two months of the removal of the cause of noncompliance with the time limit. The omitted act must be completed within this period. The application shall only be admissible within the year immediately following the expiry of the unobserved time limit. In the case of non-submission of the request for renewal of registration or of non-payment of a renewal fee, the further period of six months provided for in the second sentence of Article 13(3) shall be deducted from the period of one year.*

*3. The application must state the grounds on which it is based and must set out the facts on which it relies. It shall not be deemed to be filed until the fee for the re-establishment of rights has been paid.*

*4. The department competent to decide on the omitted act shall decide upon the application.*

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<sup>415</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Title VIII, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018)

<sup>416</sup> Restitutio in integrum legal definition and meaning, available at: <https://definitions.uslegal.com/r/restitutio-in-integrum/> (last accessed on 12 December 2018)

<sup>417</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Title VIII, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018)

<sup>418</sup> Ibid.



5. *The provisions of this Article shall not be applicable to the time limits referred to in paragraph 2 and Article 41(1).*

6. *Where the applicant for or holder of a registered Community design has his rights reestablished, he may not invoke his rights vis-à-vis a third party who, in good faith, in the course of the period between the loss of rights in the application for or registration of the registered Community design and publication of the mention of re-establishment of those rights, has put on the market products in which a design included within the scope of protection of the registered Community design is incorporated or to which it is applied.*

7. *A third party who may avail himself of the provisions of paragraph 6 may bring third party proceedings against the decision re-establishing the rights of the applicant for or holder of the registered Community design within a period of two months as from the date of publication of the mention of re-establishment of those rights.*

8. *Nothing in this Article shall limit the right of a Member State to grant restitutio in integrum in respect of time limits provided for in this Regulation and to be complied with vis-à-vis the authorities of such State.*<sup>419</sup>

### **m. Article 68 - Reference to the general principles**

Reference to the general principles as explained in Article 68;

*“In the absence of procedural provisions in this Regulation, the implementing regulation, the fees regulation or the rules of procedure of the Boards of Appeal, the Office shall take into account the principles of procedural law generally recognised in the Member States.”*<sup>420</sup>

## **II. GUIDELINES FOR EXAMINATION EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO)**

Directive of the council indicates the way of legal protection of the designs that would be implemented in all Member States.<sup>421</sup>

### **a. Part A: General Rules**

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<sup>419</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, Title VIII, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0006> (last accessed on 10 December 2018).

<sup>420</sup> Ibid.

<sup>421</sup> Ibid.



General rules constitute an index for sections and make a brief explanation about the last European Trade Mark Reform.<sup>422</sup>

### 1. Section VIII: *Restitutio in Integrum*

Section VIII explains the general principles, criteria for granting restitutio and the procedural aspects of the decision.<sup>423</sup>

General principles of the Section are based on the Article of the Community Design Regulation and Article 104 of the European Trade Mark Regulation.<sup>424</sup>

Section is as follows;

*“Parties to proceedings before the Office may have their rights reinstated (restitutio in integrum) if they were unable to meet a time limit vis-à-vis the Office despite taking all due care required by the circumstances, provided that the failure to meet the time limit had the direct consequence, by virtue of the provisions of the Regulations, of causing a loss of rights or loss of means of redress (judgment of 28/06/2012, T-314/10, Cook’s, EU:T:2012:329, § 16-17).”<sup>425</sup>*

*“Observing time limits is a matter of public policy, and granting restitutio in integrum can undermine legal certainty. Consequently, the conditions for the application of restitutio in integrum have to be interpreted strictly (judgment of 19/09/2012, T-267/11, VR, EU:T:2012:446, § 35).”<sup>426</sup>*

*“Restitutio in integrum is only available upon application to the Office and it is subject to the payment of a fee. If the party is represented, the representative’s failure to take all due care is attributable to the party that it represents (judgment of 19/09/2012, T-267/11, VR, EU:T:2012:446, § 40).”<sup>427</sup>*

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<sup>422</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, Title XI, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1506417891296&uri=CELEX:32017R1001> (last accessed on 11 December 2018)

<sup>423</sup> Ibid.

<sup>424</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, Title XI, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1506417891296&uri=CELEX:32017R1001> (last accessed on 11 December 2018)

<sup>425</sup> Constellation Brands v OHIM, CURIA Case No. T-314/10

<sup>426</sup> Video Research USA v OHIM (VR), CURIA Case No. T-267/11

<sup>427</sup> Video Research USA v OHIM (VR), CURIA Case No. T-267/11



The criteria for granting *restitutio* states as;

*“There are two requirements for restitutio in integrum (judgment of 25/04/2012, T-326/11, BrainLAB, EU:T:2012:202, § 36):*

- a) that the party has exercised all due care required by the circumstances; and*
- b) that the non-observance (of a deadline) by the party.”<sup>428</sup>*

Explanation of “all due care required by the circumstances”;

*“Rights will be re-established only under exceptional circumstances that cannot be predicted from experience (judgment of 13/05/2009, T-136/08, Aurelia, EU:T:2009:155, § 26) and are therefore unforeseeable and involuntary.”<sup>429</sup>*

The section also provides some examples of cases where the “all due care” requirement has not been fulfilled for various reasons;

*“Errors in the management of files caused by the representative’s employees or by the computerised system itself are foreseeable. Consequently, due care would require a system for monitoring and detecting any such errors (judgment of 13/05/2009, T-136/08, Aurelia, EU:T:2009:155, § 18).”<sup>430</sup>*

*“An erroneous calculation of the time limit does not constitute an exceptional event that cannot be predicted from experience (decision of 05/07/2013, R 194/2011-4, PayEngine / SP Engine).*

...

*A misunderstanding of the applicable law may not, as a matter of principle, be regarded as an ‘obstacle’ to compliance with a time limit (decision of 14/06/2012, R 2235/2011-1, KA).*

...

*Legal errors by a professional representative do not warrant restitutio (decision of 16/11/2010, R 1498/2010-4, REGINE’S / REGINA DETECHA, CH.V.D (fig.)). The deletion*

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<sup>428</sup> Brainlab v OHIM, CURIA, Case No. T-326/11

<sup>429</sup> Aurelia finance v OHIM, CURIA, Case No. T-136/08

<sup>430</sup> Ibid.



*of a deadline by an assistant is not unforeseeable (decision of 28/06/2010, R 268/2010-2, ORION).*

...

*Financial problems at the proprietor's business, its closure and the loss of jobs cannot be accepted as a reason for the proprietor not to be able to observe the time limit to renew its European Union trade mark (decision of 31/03/2011, R 1397/2010-1, CAPTAIN).<sup>431</sup>*

*"Failure to meet the time limit must have had the direct consequence of causing the loss of rights or means of redress (judgment of 15/09/2011, T-271/09, Romuald Prinz Sobieski zu Schwarzenberg, EU:T:2011:478, § 53).<sup>432</sup>*

*"However, restitutio in integrum does apply to the late response to an examiner's notification of provisional refusal if the application is not rectified by the time limit specified because in this case there is a direct relationship between failure to meet the time limit and possible refusal. Restitutio is also available for the late submission of facts and arguments and late filing of observations on the other party's statements in inter partes proceedings if and when the Office refuses to take them into account as being filed too late. The loss of rights in this case involves the exclusion of these submissions and observations from the facts and arguments on which the Office bases its decision. (In principle, the Office will disregard any statements filed in inter partes proceedings after the deadline has passed.)"<sup>433</sup>*

Proceedings to which restitutio applies stated in the law;

*"Restitutio is available in all proceedings before the Office. This includes proceedings under the EUTMR and proceedings concerning registered Community designs under the CDR. The respective provisions do not differ materially.*

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<sup>431</sup> EUIPO, Guidelines for Examination EUIPO, Part A, PDF available at: [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/trade\\_marks/draft-guidelines-2017-wp-lr2/09\\_part\\_a\\_general\\_rules\\_section\\_8\\_restitutio\\_in\\_integrum\\_tc\\_lr2\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/09_part_a_general_rules_section_8_restitutio_in_integrum_tc_lr2_en.pdf) (last accessed 11 December)

<sup>432</sup> Prinz Sobieski zu Schwarzenberg v OHMI, CURIA, Case No. T-271/09

<sup>433</sup> EUIPO, Guidelines for Examination EUIPO, Part A, PDF available at: [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/trade\\_marks/draft-guidelines-2017-wp-lr2/09\\_part\\_a\\_general\\_rules\\_section\\_8\\_restitutio\\_in\\_integrum\\_tc\\_lr2\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/09_part_a_general_rules_section_8_restitutio_in_integrum_tc_lr2_en.pdf) (last accessed 11 December)



*Restitutio is available in ex parte proceedings, inter partes proceedings and appeal proceedings.*<sup>434</sup>

Time limits excluded from restitutio in integrum stated as;

*“The priority period, which is the six-month time limit for filing an application claiming the priority of a previous design or utility model application pursuant to Article 41(1) CDR. However, restitutio does apply to the three-month time limit for providing the file number of the previous application and filing a copy of it, as specified in Article 8(1) CDIR.*<sup>435</sup>

The effects of restitutio in integrum according to the law;

*“Granting restitutio in integrum has the retroactive legal effect that the time limit that was not met will be considered to have been met, and that any loss of rights in the interim will be deemed never to have occurred. If the Office takes a decision in the interim based on failure to meet the time limit, that decision will become void, with the consequence that, once restitutio is granted, there is no longer any need to lodge an appeal against such a decision of the Office in order to have it removed. Effectively, restitutio will re-establish all the rights of the party concerned.”*<sup>436</sup>

The decision, the role of other parties in restitutio proceedings as stated;

*“The decision on restitutio will be taken, if possible, in the decision terminating the proceedings. If, for specific reasons, the Office makes an interim decision on the application for restitutio, it will generally not allow a separate appeal. The applicant for restitutio can appeal the refusal of its request for restitutio together with an appeal against the decision terminating the proceedings.”*<sup>437</sup>

## **b. Part E: Register Operations**

### **1. Chapter I: Transfer**

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<sup>434</sup> EUIPO, Guidelines for Examination EUIPO, Part A, PDF available at: [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/trade\\_marks/draft-guidelines-2017-wp-lr2/09\\_part\\_a\\_general\\_rules\\_section\\_8\\_restitutio\\_in\\_integrum\\_tc\\_lr2\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/09_part_a_general_rules_section_8_restitutio_in_integrum_tc_lr2_en.pdf) (last accessed 11 December)

<sup>435</sup> Ibid.

<sup>436</sup> Ibid.

<sup>437</sup> Ibid.



This chapter is based on Articles 27, 28 and 34 of CDR and Article 23, Article 69(1) and Article 69(3)(i) of CDIR.

Definition of the transfer according to the law;

*“A transfer is the change in ownership of the property rights in a European Union trade mark (EUTM) or an EUTM application from one entity to another. EUTMs and EUTM applications may be transferred from the current proprietor to a new proprietor, primarily by way of assignment or legal succession. Unless otherwise provided, the practice applicable to EUTMs is also applicable to EUTM applications.*

*Both registered Community designs (RCDs) and applications for an RCD may be the subject of a transfer. The provisions in the CDR and CDIR dealing with the transfer of registered Community designs (RCDs) are almost identical to the equivalent provisions of the EUTMR, EUTMDR and EUTMIR, respectively. Therefore, the following applies mutatis mutandis to RCDs. Exceptions and specifics for RCDs are detailed in paragraph 7 below.”<sup>438</sup>*

## **2. Chapter II: Licences, Rights in Rem, Levies of Execution, Insolvency Proceedings or Similar Proceedings**

Rights given to the owners of trade marks and community design owners stated below;

*“A right in rem or ‘real right’ is a limited property right that is an absolute right. Rights in rem refer to a legal action directed towards property, rather than towards a particular person, allowing the owner of the right the opportunity to recover, possess or enjoy a specific object. These rights may apply to trade marks or designs. They may consist, inter alia, in use rights, usufruct or pledges. ‘In rem’ is different from ‘in personam’, which means directed toward a particular person.”<sup>439</sup>*

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<sup>438</sup> Guidelines for Examination EUIPO, Part E, PDF available at: [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/contentPdfs/trade\\_marks/draft-guidelines-2017-wp-lr2/48\\_part\\_e\\_register\\_operations\\_section\\_3\\_eutms\\_and\\_rcds\\_as\\_objects\\_of\\_property\\_chapter\\_2\\_licences\\_rights\\_in\\_rem\\_levies\\_of\\_execution\\_and\\_insolvency\\_tc\\_lr2\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/draft-guidelines-2017-wp-lr2/48_part_e_register_operations_section_3_eutms_and_rcds_as_objects_of_property_chapter_2_licences_rights_in_rem_levies_of_execution_and_insolvency_tc_lr2_en.pdf) (last accessed on 11 December 2018)

<sup>439</sup> Ibid.



### III. French Intellectual Property Code

The French Intellectual Property Code, ‘*Code de la propriété intellectuelle*’ in French, is the law relating to intellectual and industrial property.<sup>440</sup> It was formalised by Law No 92-597 of 1 July 1992, replacing earlier laws relating to industrial property and artistic and literary property.<sup>441</sup>

#### a. Article L511-1

Similar to Community Design Regulation of European Union, the appearance of product is stated as eligible for protection as a design. Article L511-1 is as follows:

*“The appearance of the whole or a part of the product, resulting from the features of, and in particular its lines, contours, colours, shape, texture or materials, is eligible for protection as a design or model. These features can be those of the product itself or its ornamentation. It is deemed to be a product 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.”<sup>442</sup>*

#### b. Article L511-2

*“A design or model shall only be protected if it is new and has individual character.”<sup>443</sup>*

#### d. Article L511-4

*“A design or model has individual character if the overall visual impression it produces on the informed observer differs from that produced by any design or model disclosed before the date of the filing of the application for registration or before the date of priority claimed. In assessing individual character, the degree of freedom of the creator in developing the design or the model shall be taken into consideration.”<sup>444</sup>*

#### e. Article L511-5

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<sup>440</sup> French Intellectual Property Code

<sup>441</sup> Ibid.

<sup>442</sup> French Intellectual Property Code

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.



*“The design or model of a part of a complex product is only considered to be new and to present an individual character to the extent that:*

*a) The component part, once it has been incorporated in the complex product, remains visible during normal use of the latter by the end user, excluding maintenance, servicing or repair work;*

*b) Those visible features of the component part fulfil in themselves the requirements as to novelty and individual character. Is considered to be a complex product a product composed of multiple components which can be replaced.”<sup>445</sup>*

#### **f. Article L511-6**

*“A design or model shall be deemed to have been disclosed if it has been made available to the public through publication, use, or by any other means. No disclosure has taken place if the design or the model could not reasonably have become known, according to the normal course of business in the sector concerned, by professionals operating in the European Community, before the date of filing of an application for registration or before the date of priority claimed. The design or model shall not, however, be deemed to have been disclosed to the public due to the sole fact that it has been disclosed to a third party under an explicit or implicit condition of confidentiality. If this disclosure takes place within the twelve months preceding the date of the filing of the application or the date of priority claimed, it shall not be taken into consideration:*

*a) If the design or the model has been disclosed by the creator, his successor-in-title, or by any third person as a result of information provided or action taken by the creator or his successor-in-title;*

...<sup>446</sup>

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<sup>445</sup> Ibid.

<sup>446</sup> French Intellectual Property Code



## **D. CONCLUSION**

Community Design is a faster way to register a design throughout European Union for the owner of the design. European Board of Appeals is the Office responds to the any kind of appeals on the infringement of the trade marks and designs. General Court, as one of the main courts under the European Union, has jurisdiction on the disputes brought against European Boards of Appeal. Judges of the CJEU General Court are going to take Community Design Regulation, French Intellectual Property Code and some previous decisions into account, analyse the facts of the case and the legal arguments, claims and proofs of the parties to reach a binding decision.

The claimant shall provide factual and legal grounds, describe how the ownership of the community design belongs to the claimant, why her design should have been protected as unregistered community design before the company registered the design under its name, why the defendant should be considered to have no rights or legitimate interests in respect of the design, how the advance payment of the claimant has no legitimacy as the money paid for the rights of the design and prove why the help provided by the company is significant to the finalisation of the design.

The defendant shall respond to the statements and allegations made by the claimant based on factual and legal grounds, prove the importance of the help of the company during the finalisation of the design, why the contract of employment gives the right of the design to the employer and how the advance payment of the claimant is the money paid for the rights of the design.

The judges shall evaluate the circumstances of the case and legal arguments provided by the parties, but not limited with them, make their evaluation without taking any parts, and provide its reasoning and its decision on the claims of the parties.

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WIPO, *The Paris Convention for the Protection of Intellectual Property*, *WIPO Intellectual Property Handbook: Policy, Law and Use*, WIPO Publications (2004)