



Protecting aesthetic innovations? An exploration of the use of registered community designs



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ABSTRACT

A decade after their introduction, approximately three-quarters of a million European registered community designs (RCDs) have been filed, and recent court cases suggest firms regard them as important for competition. This paper reviews design protection in the European Union, discusses this legal instrument to protect designs and design innovations, and provides an overview of how RCDs are used by firms from different countries and industries. To develop a more detailed understanding of their usage, we also report an exploratory qualitative study on the use of RCDs by German firms in three industries: footwear, car manufacturing and tool-making. This revealed some important differences, notably between judicious filing and “all-you-can-file” strategies, which implies that future research using this instrument requires attention be paid to firm and industry level behaviors. We develop a set of propositions, and set out a research agenda.

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1. Introduction

The significance of design, and competing through design, hit the headlines worldwide when, in 2011, Apple accused Samsung of “slavishly copying” both aesthetic and technical aspects of its iPhone and iPad products.¹ Apple filed a number of lawsuits against Samsung worldwide, and succeeded in having an injunction placed on the sale of some Samsung products in Germany. Among these lawsuits was one that alleged Samsung’s infringement of Apple’s registered community design No 000181607-0001 related to its iPad products. The case was heard in the High Court in London in July 2012. While acknowledging the two products to be similar – with Samsung’s considered to be “less cool” – the judge ultimately found them to be insufficiently similar to constitute an infringement, and therefore ruled in Samsung’s favor. The verdict, which had EU wide jurisdiction, was upheld on appeal in October 2012. A

similar case reached the Supreme Court in The Hague, which also found in Samsung’s favor.

That Apple, Samsung and others² are willing to spend considerable resources contesting their rights to compete at least in part through the “look and feel” of their products testifies to the significance of product form, aesthetics and styling, all attributes directly related to design, and more particularly industrial design and ergonomics. Yet perhaps surprisingly, innovation studies have paid little attention to these matters. In Research Policy, for example, there is only a smattering of papers that are directly concerned with design and product form.³ A notable exception is Cappetta

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¹ Mail Online, at <http://www.dailymail.co.uk/sciencetech/article-1378490/Apple-sues-Samsung-slavishly-copying-iPhone-iPad-designs.html> (last accessed: 30 June 2014).

² Other celebrated cases of alleged infringement of registered designs include Procter & Gamble versus Reckitt Benckiser (air freshener spray container – 2007 & 2008) and Dyson versus Vax (vacuum cleaners – 2011). Hartwig, 2007, 2008, 2009, 2012a, meanwhile, has collected more than 300 decisions on design protection cases before European courts from diverse industries such as apparel, footwear, furniture, automotive, and electronics.

³ Design papers in Research Policy include Moultrie and Livesey’s (2014) study on design investments, Walsh (1996) on “design, innovation and the boundaries of the firm,” and Sanderson and Uzumeri (1995) on how Sony competed through managing design and product families. Ulrich (1995), a classic study on the role of product architecture in manufacturing firms is also relevant, but deals primarily with the functional or engineering aspects of design, rather than stylistic or aesthetic considerations (cf. Salter and Gann, 2003; Barlow and Köberle-Gaiser, 2008; Gil and Tether, 2011).

et al. (2006), who examine “stylistic innovation” directly and relate this to the longitudinal development of the fine fashion industry. In other journals, product design (Ravasi and Stigliani, 2012), design innovation (Rubera and Droge, 2013), design newness (Talke et al., 2009), aesthetic innovation (Eisenman, 2013) and stylistic innovation (Tran, 2010) have been receiving recent attention.

We perceive that product form is an important yet relatively neglected aspect of how firms compete, and a relatively neglected aspect of innovation. If innovation involves changes to the characteristics of products (Saviotti and Metcalfe, 1984), then these characteristics should embrace both the inner workings of the product and its external expression – the latter constituting aesthetic or stylistic innovations.

Innovation scholars also have a tradition of seeking out new sources of data to provide new insights. In the early 1990s efforts were made to develop an output based measure of innovation drawn from the announcement of new products in the trade press (Coombs et al., 1996; Kleinknecht, 1993).⁴ Perhaps the dataset of European registered community designs (RCDs), over three-quarters of a million of which have now been filed since registration began in April 2003, offers a new opportunity to complement patent data and revive the object based approach, especially with respect to design, aesthetic or stylistic innovations, all of which may be particularly significant in the “lower-tech” sectors of the economy.

This paper therefore has four aims: (i) to provide an introduction to design protection and specifically RCDs; (ii) to explore the use of RCDs and firms’ rationales behind it; (iii) to assess their suitability as a source of potential information about design innovation and how firms compete through design; and (iv) to develop a research agenda for further studies of RCDs and design protection more generally.

To contextualize the study, we begin with an overview of past research on design protection, finding this to be rather limited (Section 2). We then (in Section 3) outline the legal background to design protection in Europe, discussing its emergence and how it has recently been harmonized across the European Union. This section includes a summary of the various options available to creators of designs with regard to their protection. Section 4 then presents a descriptive analysis on patterns of RCD use across various countries, industries and firms. To complement this statistical data, we engaged in an exploratory study of how and why RCDs are actually used by firms. To this end, Section 5 reports a qualitative study undertaken across three industries (footwear, car manufacturing and tool-making) and here we discuss the findings of interviews with managers of German firms and their legal advisors. This qualitative study indicates that while RCDs have potential as an indicator of design innovation (among other things), they need to be examined with caution, and ideally with an understanding of the prevailing industry and firm level norms, as well as of legal issues. This section includes a set of testable propositions derived from our findings that concern the utilization of RCDs by firms. Section 6 then outlines a set of issues for further research on design protection in general, and the use of RCDs in particular. We perceive that there are a number of rich and practically important topics that

can be examined in relation to RCDs, and invite others to join us in this endeavor. Brief conclusions close the paper (Section 7).

2. Existing empirical research on design protection

In contrast to the substantial literature on technological innovation and patent protection, design innovation and design protection have attracted little scholarly attention from economists and management scholars. To our knowledge, the first systematic empirical studies examining the use of design protection were published in 2011 (Bascavusoglu-Moreau and Tether, 2011; BOP, 2011; Moultrie and Livesey, 2011) and 2012 (Ahmetoglu and Chamorro-Premuzic, 2012; Thompson et al., 2012). These studies are preliminary and focused on the UK, but they point to the as yet untapped potential of design rights as an empirical tool, as well as the need for further research in this area.

In an initial attempt to understand how design rights are used, Moultrie and Livesey (2011) surveyed a cross-sectoral sample of 32 UK firms and 10 design agencies. They report the level of awareness and utilization of design rights in the UK to be relatively low. Ahmetoglu and Chamorro-Premuzic (2012) extended this by conducting a psychometric analysis of survey data drawn from 63 UK companies, and finding that attitudes toward design rights were related to firms’ design innovation activities. They interpret their findings as showing the importance of effective design protection for promoting design innovation. BOP (2011), meanwhile, traced differences in the extent to which French, German and UK firms protect their product designs through registration. They attribute the low level of registration in the UK to legal and cultural traditions, and to the relative weakness of the manufacturing sector. Based on a matched-pair methodology, Bascavusoglu-Moreau and Tether (2011) examined performance differences between firms holding, or not holding, designs registered nationally in the UK and designs registered at the EU-level. Interestingly, a productivity premium associated with holding registered designs disappeared a few years after the introduction of European RCDs, suggesting firms had adapted to the changing landscape of legal design protection over the period of the study (1997–2007).

Other scholars have touched on the issue of design protection. In particular, design protection has been included in studies on the use and effectiveness of various appropriability mechanisms (e.g., Arundel, 2001; Sattler, 2003), though it has been left out in others (e.g., Cohen et al., 2000; Levin et al., 1987).⁵ The studies explicitly mentioning design protection (in general, rather than RCDs in particular) are mainly those based on the community innovation surveys (CIS) (e.g., Gallié and Legros, 2012; Laursen and Salter, 2005; Mairesse and Mohnen, 2004; Mercer, 2004; Robson and Haigh, 2008; Robson and Kenchatt, 2010; Sattler, 2003; Thomä and Bizer, 2013). Most of this work focuses on technological innovation, and firms’ choices between patents and informal modes of protection. Nevertheless, some findings with respect to the use of design protection can be identified.

First, in terms of its use, design protection is ranked, on average, at a level similar to that of other formal IP rights, such as trademarks and patents, and there are often strong correlations between the extent of use of these different legal IP rights (Gallié and Legros,

⁴ Note that this “object based approach,” where the primary unit of analysis is the product, or design, has received little attention of late however, in part because data is difficult to gather. In contrast, the “intermediate object based approach” which uses patent data has enjoyed great popularity, especially since these data became easily available. But this turns a blind eye to innovation in design. The “subject based approach” (where the primary unit of analysis is the firm) has also blossomed due to vast quantities and numerous rounds of community innovation survey (CIS) data produced by Eurostat and various national statistical agencies, but CIS data provides little insight into design innovation.

⁵ A common finding from surveys of firms is that informal modes of protection – in particular, lead time, complementary assets, and secrecy – are considered to be more effective than legal exclusion rights, except in discrete technology industries such as chemicals, although many firms combine legal and informal modes of protection. Recent studies in industries where no form of legal IP protection (except possibly trademarks) is applicable – gourmet cuisine (Di Stefano et al., 2013; Fauchart and von Hippel, 2008), magicians (Loshin, 2010), and comedians (Oliar and Sprigman, 2008) – have extended this list to comprise social norms as an informal means of IP protection.

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