



Queen Mary
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EU DESIGN REFORM

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Design Reform - Timeline

- 1998-2001 Directive 98/71 implemented
- 2002 Regulation 6/2002 implemented
- 2004-2014 Failed Commission proposal on spare parts **COM(2004)0582**
- 2011 Max Planck Report on the trade mark system
- 2015 “Economic Review” (Europe Economics)
- 2016 “Legal Review” (QM/timelex)
- 2016-2017 Implementation of the Max Planck trade mark reforms
- 2020 3DP report, Commission Staff Working Doc **SWD(2020) 265 final**
- Nov 2022 Draft Regulation and Directive **COM(2022)666, COM(2022)667**
- Dec 2023 Trilogue agreement
- *Mar 2024 Passing, then 3 year implementation period*

Practically Important Changes

1. Spare Parts – Repair Clause
2. Virtual and Animated Designs
3. Unregistered Community Designs
4. New Defences

Spare Parts – Status Quo

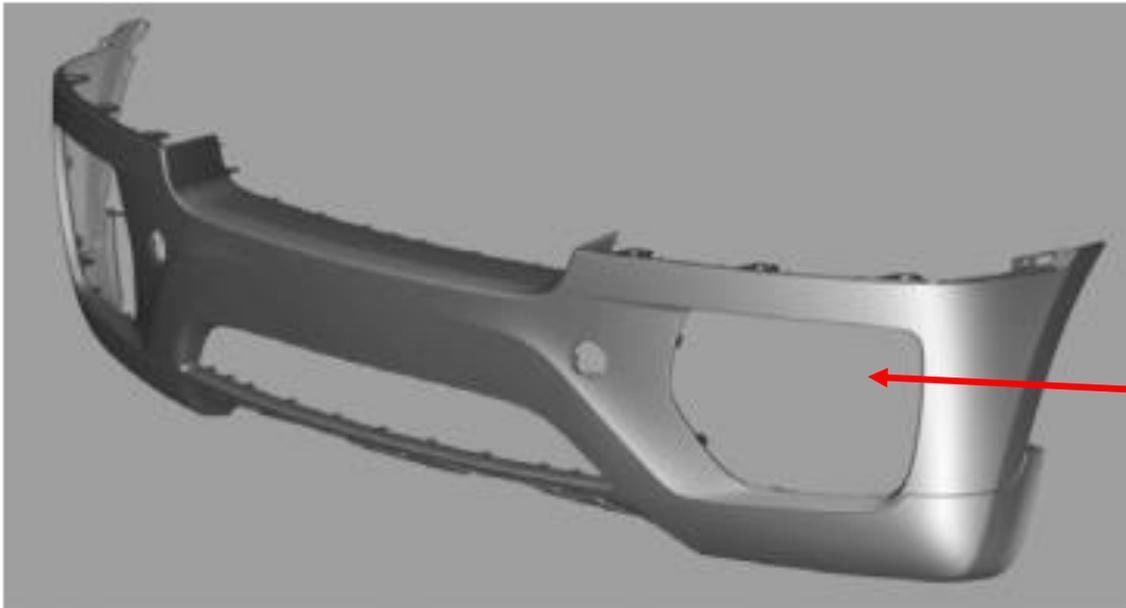
- REGULATION 6/2002 Art. 110:
 - protection as a Community design **shall not exist** for a design which constitutes a component part of a complex product used within the meaning of Article 19 (1) for the purpose of the repair of that complex product so as to restore its original appearance.”
- DIRECTIVE 98/71/EC (“Design Directive”) Art. 14 (“freeze-plus”)
 - requires member states to maintain “existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance”
 - and allows the introduction of changes “only if the purpose is to liberalise the market for such parts.”
- Recent: Germany, France introduced “repair clauses”

CJEU: Acacia C-397/16, C-435/16

- Art. 110 applies to all spares whether “must match” (i.e. “form dependent”) or not (in that case: wheel rims)
- The manufacturer / seller is “under a duty of diligence as regards compliance with the conditions” under Article 110 CDR.
- This includes
 - information duties,
 - use of contractual means,
 - obligation to refrain from certain sales.

“Must-Match”/form-dependent

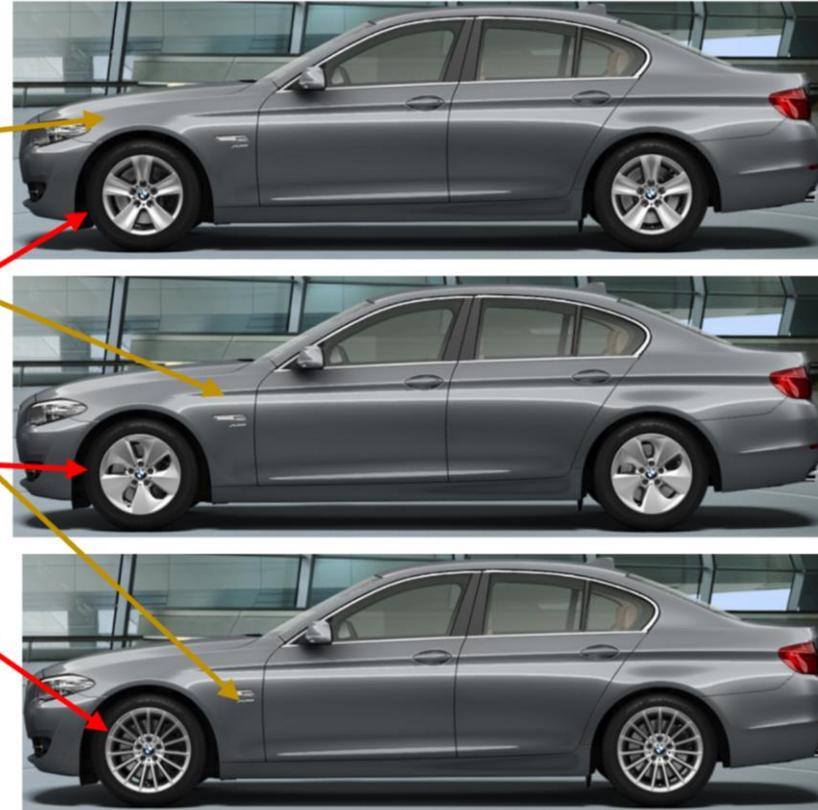
➤ bumper



Non-form-dependent

➤ vehicle wheels

Same vehicle
equipped with
different wheels



Commission Proposals

Article 19 Directive: Repair clause

(1) Protection shall not be conferred on a registered design which constitutes a component part of a complex product, upon whose appearance the design of the component part is dependent, and which is used within the meaning of Article 16 (1) for the sole purpose of the repair of that complex product so as to restore its original appearance.

Article 20a Regulation: Repair clause

(1) Protection shall not be conferred on an EU design which constitutes a component part of a complex product, upon whose appearance the design of the component part is dependent, and which is used within the meaning of Article 19(1) for the sole purpose of the repair of that complex product so as to restore its original appearance.

Parliament/Council Positions – Directive

Article 19 Directive: Repair clause Council 12714/23 ADD 1	Article 19 Directive: Repair clause JURI Report
<p>1. Protection shall not be conferred on a registered design which constitutes a component part of a complex product, <u>upon whose appearance the design of the component part is dependent</u>, and which is used within the meaning of Article 16(1) for the sole purpose of the repair of that complex product so as to restore its original appearance.</p>	<p>(1) Removal of “upon whose appearance the design of the component part is dependent” again</p>

Parliament/Council Positions – Regulation

Article 20a Regulation: Repair clause Council 12714/23 ADD 1

1. Protection shall not be conferred on an EU design which constitutes a component part of a complex product, upon whose appearance the design of the component part is dependent, and which is used within the meaning of Article 19(1) for the sole purpose of the repair of that complex product so as to restore its original appearance.

Article 20a Regulation: Repair clause JURI Report

(1. Protection shall not be conferred on **a registered** design which constitutes a component part of a complex product which is used within the meaning of Article **16** (1) for the sole purpose of the repair of that complex product so as to restore its original appearance. ***The use of that component part of a complex product for the purpose of enabling that complex product to be repaired will be presumed.***

1a. Paragraph 1 shall not apply to rims, covers and similar parts of a complex product the shape of which is not determined by the appearance of the complex product.

Other Spare Part Provisions

- Requirement for clear labelling as to origin (some differences of wording between Parliament and Council)
- Apparent agreement to introduce only after 8 years (compromise between 10 years and 3 years)

Virtual Designs

- **2022 Commission Design Law Proposals**

- *“‘product’ means any industrial or handicraft item other than computer programs, regardless of whether it is embodied in a physical object or **materialises in a digital form**” CDR Art 3(b), Dir Art 2(4)*
- *“The following, in particular, may be prohibited ... creating, downloading, copying and sharing or distributing to others any medium or software recording the design for the purpose of enabling a product ... to be made” CDR Art 19(1)(d), Dir Art 16(2)(d)*
- **Intent?** *“This proposal aims to align the RCD protection system in the EU with the digital age ... This would facilitate in particular the filing of **new digital design types**.”*

Virtual Designs – EU/UK Current Position

- Virtual Designs currently treated as registrable in EU, UK
- “Design” = “appearance of the whole or a part of a product” – CDR Art 3(a), Dir Art 1(a)
- “Product” = any industrial or handicraft article” CDR Art 3(b), Dir Art 1(b)
 - Including “typographical typefaces”, “graphic symbols”
 - Excluding “programs for a computer”
- Infringement by any “use” of the design, including making, selling a product to which it is applied

Council version

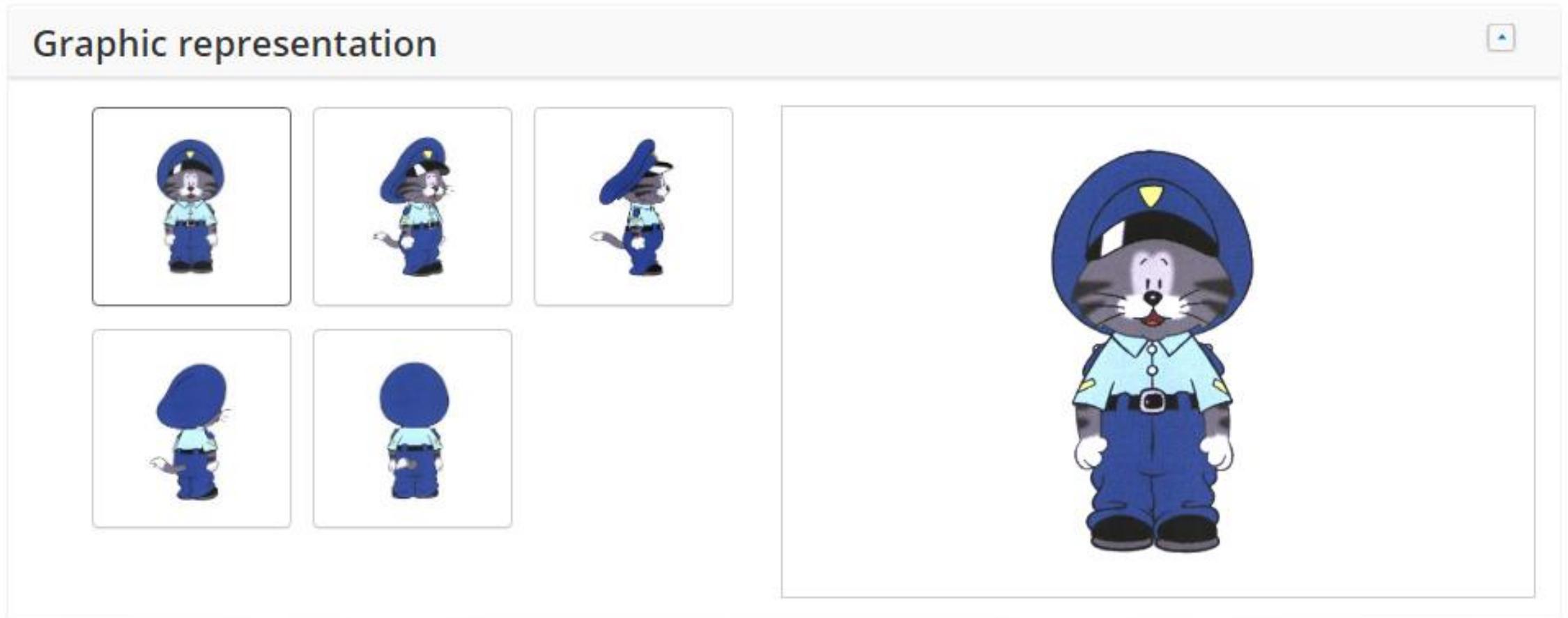
'digital' is replaced by 'non-physical'

Effects?

- Not just EUIPO but national EU design systems
- Both likely to permit use of digital files for 3D products
- Expect new Guidelines, CP6 changes
- Will UK follow suit?
 - IPO was consulting on this
 - Labour committed to staying generally in step
 - Conservatives – who knows? So may have to await next election.

Example 3D virtual product: 1, Sgt Stripes

RCD 000070594-0001, 29 August 2003 ("Cartoon Characters", CI 99.00)



Example 3D virtual product: 2, “Eva Cash”, *D.i.R.T.: Origin of the Species*

RCD 000156807-0001, 16 March 2004 (“Video game characters”, CI 21.01)

Graphic representation



Example 3D virtual product : 3, 3D Flowers

RCD 009205073-0002, 13 October 2022 ("3D flowers for use in virtual environments", CI 14.04)



And More ...

RCD no. 015019470-0001 (AD 24/04/2023)
“3D Characters, Animated characters” (14.04, 1 view)



RCD no. 000292636-0001 “3D Characters” (99.00, 4 views)



Other changes to definitions

“Product”

- “Sets of articles” (confirming existing EU, UK practice)
- Interior layouts

“Design”

- “Movement, transition or any form of animation of those features”

Unregistered Community Designs

- **Legal Review:** “Amend [CDR Art 110a(5)] to clarify whether Unregistered Community Design exists if first disclosure is outside the EU” p127
- BGH I ZR 126/06 *Gebäckpresse II*: MUST be in the EU (on the basis of Art 110a(5))
- UK IPEC *Beverly Hills Teddy Bear* [2019] EWHC 2419 (IPEC): Not *acte claire* – reference to CJ (withdrawn)
- Legislative history unclear:
 - Green Paper, initial Commission Proposal mention disclosure anywhere
 - Revised Proposal clearly limited to EU disclosure
 - Final Council text of CDR not limited to EU disclosure
 - Art 110a added later to deal with EU expansions
- Proposal: Deletion of “**Pursuant to Article 11, a design which has not been made public within the territory of the Community shall not enjoy protection as an unregistered Community design**”

New Defences

- **Legal Review:** “the provisions in respect of defences, limitations of scope, and repair clauses applicable to design law do not currently align to those offered under copyright law” p151
- **Council Proposal:** add
- “(d) acts carried out for the purpose of identifying or referring to a product as that of the design right holder;
- (e) acts carried out for the purposes of comment, critique, or parody;
- where the acts are compatible with fair trade practices and do not unduly prejudice the normal exploitation of the design”

Effect of New Defences?

- Recital: “... such list of permissible uses should include acts of reproduction for the purpose of making citations or of teaching, referential use in the context of comparative advertising, and use for the purpose of comment or parody, provided that those acts are compatible with fair trade practices and do not unduly prejudice the normal exploitation of the design. Use of a design by third parties for the purpose of artistic expression should be considered as being fair as long as it is at the same time in accordance with honest practices in industrial and commercial matters. Furthermore, this Directive should be applied in a way that ensures full respect of fundamental rights and freedoms, and in particular the freedom of expression.”
- Enshrines C-24/16 *Nintendo v Bigben*; deals with *LV v Plesner* 2011 NL *Darfurnica* case (as against C-469/17 *Funke Medien*)



Legally Interesting Changes

1. Visibility
2. Technical Function
3. Indication of Product
4. Copyright for designs
5. Cultural Heritage
6. Conflict with prior designs

Visibility in Use

- **Legal Review:** *“The Design Directive should remove the confusion that has arisen with the national courts’ interpretation of design with the visibility criterion”* (recommendation: require visibility) p60

Visibility proposals (Directive version)

Council

(18) While design features need to be visible to benefit from design protection, it is not necessary for those features to be visible at all times or in a particular situation in order to qualify for such protection; as an exception to this principle,

Parliament

(18) Apart from being shown visibly in an application, design features do not need to be visible at any particular time or in any particular situation in order to benefit from design protection. As an exception to this principle,

Visibility – in Use and Otherwise: CJEU

- T-494/12 *Biscuits Poult v OHIM* “since only the visible characteristics of the product portrayed by the contested design may be taken into account in the assessment of its individual character (...), the applicant’s arguments relating to that assessment (...) cannot be upheld.”
- Case T-39/13 *Cezar v OHIM* “... it must be emphasised that visibility is an essential criterion for the protection of Community designs ...”
- C-123/20 *Ferrari* “For the appearance of that section to be protected as a Community design, it must, by definition, be visible”



Technical Function

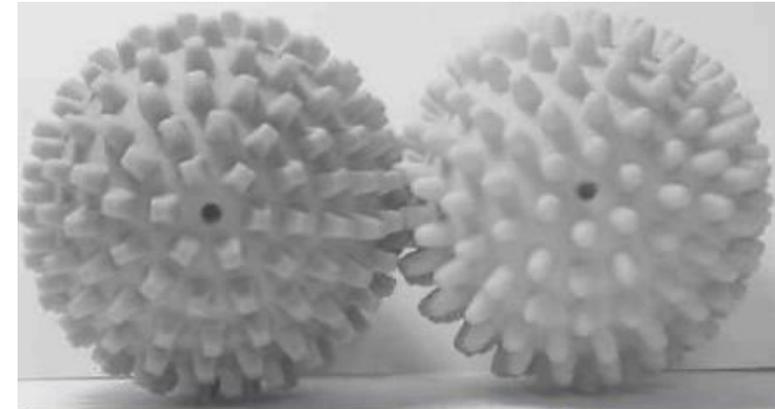
- “recommended that clear legislative guidelines be incorporated within the Design Directive, whether via the recitals or the amendment of Art.7(1)”
- Parliament proposal: add to Recitals “*and that designs with a technical function are not excluded from the design protection.*”

Indication of Product

- **Legal Review:** Add to Directive something like CDR Art 36(6); clarify whether indication can be used for technical function, individual character p69-71, 91, 123
- **Council Proposal:**
 - **Regulation & Directive:** *“Although product indications do not affect the scope of protection of the design as such, alongside the representation of the design they may serve to determine the nature of the product in which the design is incorporated or to which it is intended to be applied.”*
 - **Directive:** *“The indication of the products ... shall not affect the scope of protection of the design”*

Indication of Product Case Law

- R 1421/2006-3 *Casio*: “*The Board is therefore unable to rule out that the indication of the product may produce legal consequences*”
- UK *Green Lane Appeal*: “*With respect I am quite unable to agree.*”
- C-361/15 *Easy Sanitary Solutions*: No effect on novelty or scope
- But what about individual character, functionality?



Copyright in Designs

- **Legal Review:** Member States should now harmonise national laws to take account of C-168/09 *Flos*. “defences, limitations of scope, and repair clauses applicable to design law do not currently align to those offered under copyright law.” Recommendation “Clarify effect of *Flos* judgment” p127
- **Council Proposal:** “shall also be eligible for protection by copyright as from the date on which the design was created or fixed in any form provided that the requirements of Union copyright law [of that State] are met. [The extent to which, and the conditions under which, such a protection is conferred, including the level of originality required, shall be determined by each Member State]”

Copyright – Possible Effects?

1. “EU” copyright not national law => CJ has sole competence
2. So far *Flos*, *Cofemel*, *Brompton* only address the high-level subsistence question. Recent Swedish referral C-580/23 *Mio* asks detailed, relevant questions on threshold and scope.
3. Some copyright defences added to design law, but ...
4. Design defences and invalidity not incorporated:
 - a. Functionality: probably same result following *Brompton Bicycle*
 - b. “Must fit” probably likewise – no creative freedom
 - c. Repair defence (InfoSoc Directive) – optional and mostly not implemented
 - d. Experimental use?

Cultural Heritage

- **Council Proposal:** *“Any Member State may provide that a design shall be refused registration where it contains a total or partial reproduction of elements belonging to cultural heritage that are of national interest”*
- *“In order to prevent the improper registration and misappropriation of elements belonging to cultural heritage of national interest, including, for example, artefacts, handicrafts, costumes, monuments or a group of buildings, Member States should be free to provide for specific grounds for non-registrability and invalidity.”*
- **Lisbon Art 3(3):** EU "shall ensure the safeguarding and development of the European cultural heritage". **NOTE:** Italy has, and enforces, a national law
- **WIPO DLT 3(1)(ix):** *“disclosure of the origin or source of traditional cultural expressions ... utilized or incorporated in the industrial design;*

Agreed?

- “the co-legislators agreed on using the UNESCO definition of ‘cultural heritage’.” (Press Release 5/12/23)
- *"Cultural heritage includes artefacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance. It includes tangible heritage (movable, immobile and underwater), intangible cultural heritage (ICH) embedded into cultural, and natural heritage artefacts, sites or monuments. The definition excludes ICH related to other cultural domains such as festivals, celebration etc. It covers industrial heritage and cave paintings."*

Conflict with Prior Designs

- At present, a design can be:
 - Invalid over a design disclosed before the filing date
 - Invalid over an EU design filed before, and disclosed after, the filing date
- Difference in scope of attacks:
 - Prior disclosure: compare design with relevant parts of citation
 - Prior design right: compare citation with relevant parts of design
 - Probable Effect: prior right gives a broader attack – later design invalid if it would infringe.
- **Council Proposal:** broaden to disclosure “prior to or after” filing
- Earlier EU registrations could thus be cited on either basis

Prior Rights: example case

- R 1702/2010-3 Cited IR published years earlier
- *“The Board observes that Article 25(1)(d) CDR must not be interpreted solely on the basis of its wording ... A prior design which has been made available to the public prior to the date of filing of the application of the CDR (...) must enjoy protection which is at least as extensive as a prior design which has been made available to the public after ...”*
- *“In such a case the RCD must be considered to be in conflict with the prior design, because it falls within the scope of protection of the earlier right, notwithstanding the fact that it contains various and notable additional elements. The RCD consists of a design in which the prior design has been fully incorporated.”*



Procedural Changes

1. EU Multiple Designs
 - a) Removal of “Unity of Class”
 - b) Introduction of 50-design Cap
 - c) Simplification of Fees
2. Other EU Changes
 - a) New Remedies – e.g. “further processing” – in line with EUTMs
 - b) Fee Hikes?
 - c) “EU design” instead of “Community design”
3. National Procedures - LOTS of alignment with RCD
 - a) Harmonisation of Indication of Product
 - b) Harmonisation of Multiple Designs
 - c) Harmonisation of Deferment Period
 - d) Removal of Search
 - e) Possible Rollout of Administrative Revocation

Questions?

- Thank you!

Designs Reform - UK and WIPO

Jeff Lloyd, Deputy Director, Trade Marks and Designs Policy, IPO

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Designs Review – Context and State of Play

- Context:
 - High ambition review
 - Recognises that the designs system has not been reviewed in a comprehensive way in some time
 - Stakeholder engagement key – we are keen to deliver an improved experience for users of the designs system
- State of Play:
 - Call for views last year ran from January to March
 - Government response in July 2022 set out main themes for further exploration
 - REUL required a reprioritisation and slowing down of the work
 - Policy development work resumed in the summer
 - We aim to conclude that early in 2024 and then consult in mid-2024
 - The review remains wide-ranging

Designs Review – Key Issues

- Key Issues:

- Addressing complexity – multiple overlapping rights and overlap with copyright – can it be simplified without losing key elements of protection?
- Criminal sanctions for unregistered design infringement – differing views across stakeholders
 - Need for further evidence
- Post-Brexit issues – disclosure of unregistered designs, simultaneous disclosure
- Future proofing the system in an increasingly digital world
- Can we increase the value of registered rights e.g. through search and examination?
- Enforcement issues:
 - Changes to IPEC mentioned in our counter-infringement strategy
 - small designers think enforcement is expensive
 - criminal sanctions (already covered)
 - designs opinions

Proposed Design Law Treaty - Context

- Originally proposed over a decade ago at WIPO
- Formalities treaty to establish minimum global standards
- Negotiations stalled for several years
- WIPO General Assemblies in 2022 agreed to convene a Diplomatic Conference in 2024 to ideally (finally) agree a treaty

Proposed Design Law Treaty – State of Play

- Preparatory meetings in WIPO in October established processes for Diplomatic Conference
- Venue and dates agreed – 11-22 November 2024 in Riyadh, Saudi Arabia
- Preparatory meetings also added new proposals to the text so a lot to agree (and to analyse)
- No further formal negotiations currently scheduled between but we will work with other countries to try and establish common ground
- UK keen to agree a treaty in the interests of further harmonising global systems but not at any price
- Welcome input from stakeholders on current text

Australia's Design Law reforms 2.0: The story so far

Dr Tyrone Berger

11 December 2023

Background – How did we get here?

- Former Advisory Council on Intellectual Property (ACIP) delivered a final report on the *Designs Act 2003* that provided 23 recommendations
- Relate to amendments that propose to streamline the Design system
- Others respond to stakeholder concerns around international harmonisation
- Government accepted many of the ACIP review recommendations
- Some of the accepted recommendations were enacted in the *Designs Amendment (ACIP Response) Act 2021* (ACIP Response Act 2021)

 Australian Government
Advisory Council on Intellectual Property



Review of the Designs System

FINAL REPORT
March 2015

(Some of ...) Implemented ACIP Recommendations

Grace period

Provides applicants with a 12-month 'grace period', meaning that any publication or use of the design made within 12 months before the priority date, can be disregarded from the prior art base.

Infringement exemption for prior use

Introduces an exemption to protect third parties from infringing someone else's design if the third party starts using a design before the priority date of a registered design.

Relief from infringement before registration

'Innocent infringer' defence – prevents third parties being liable for infringing a design if they did not know the design was registered.

Exclusive licensees

Allow exclusive licensees to commence legal action against an alleged infringer without the permission of the design owner.

Australia's Design law reforms 2.0

The proposed redesign of Australia's designs law

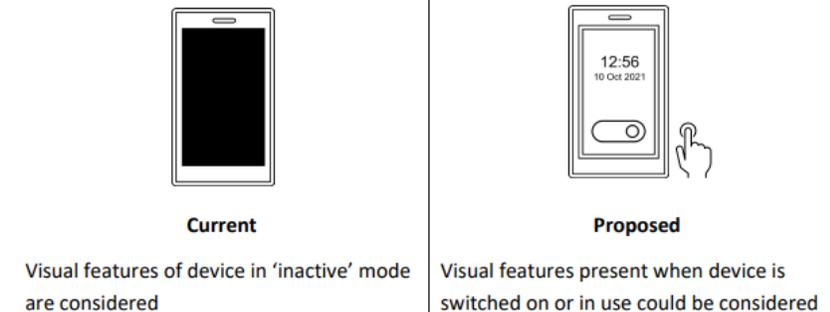
THE PROBLEM	THE KEY PROPOSALS	KEY IMPACTS & ISSUES
<p>VIRTUAL DESIGNS</p> <p>Unlike other jurisdictions, virtual designs are not protected under Australian law as they generally do not meet the legislative requirements for a registered design to be certified.</p>	<p>Updating the definitions in the Designs Act of 'product' and 'visual feature'.</p> <p>Updating how 'products' are identified in the application process.</p> <p>Providing flexibility in how design applicants indicate the visual features of a design in an active state.</p> <p>Introduce a new 'clarity requirement' for all registered designs.</p> <p>Clarify when a virtual product is 'made.'</p>	<p>What types of virtual designs should be included?</p> <p>How would the copyright and design overlap provisions work when virtual designs also qualify as 'artistic works'?</p> <p>Will the proposals improve design protection in practice and encourage investment?</p> <p>Are the proposals sufficiently technology neutral?</p> <p>Could the proposed changes be misused in any way and how could such misuse be prevented?</p>
<p>PARTIAL DESIGNS</p> <p>Unlike other jurisdictions, Australian law does not allow for the protection of one part of a design.</p>	<p>Extending the definition of a 'design' to include a 'partial design' under the Designs Act.</p> <p>Restricting protection of partial designs to specified products to which the design will be applied.</p> <p>Abolish the concept of 'common designs.'</p>	<p>What is the best way for applicants to indicate their partial design?</p> <p>Do we need a new 'clarity requirement' to specify the scope of protection for a partial design and how should we define 'clarity'?</p> <p>Would abolishing 'common design' concept make the system more or less confusing?</p> <p>Do we need to update how a 'product' is identified in the application process?</p> <p>Should we assess the 'newness and distinctiveness' of a 'partial design' differently?</p> <p>What should count as an infringement of a registered partial design?</p> <p>How should copyright law and the overlap provisions in the Copyright and Designs Acts be applied to a partial design?</p>
<p>INCREMENTAL DESIGNS</p> <p>Current Australian designs law fails to recognise the practical incremental nature of designing. This leads to uncertainty for designers on when to file a design application.</p>	<p>Provide designers an option to file a low-cost 'preliminary application' for a design and within 6 months, file a 'main application' that may include incremental changes made to the preliminary design during the design process.</p> <p>Provide designers with an option to link a subsequent incremental design to an earlier registered main design.</p>	<p>Would the concept of linking iterative designs make the system more or less complex?</p> <p>Should Australia instead simply allow designers to defer the publication of their designs, in line with other jurisdictions?</p>

Virtual designs

Several changes to the definition of a product:

- Current definition of a product includes “a thing that is manufactured or handmade”. Proposal involves adding virtual designs as an additional type of product – ‘virtual product’.
- Expression ‘visual features’ would need to be amended and broadened to protect virtual products such as icons, GUIs and screensavers.
- Design application must identify the products each design is for – eg virtual design described as: “user interface for a coffee machine” is okay, but “user interface” on its own would not be.

Figure 2 — Example of visual features only observable when a product is in an ‘active’ state

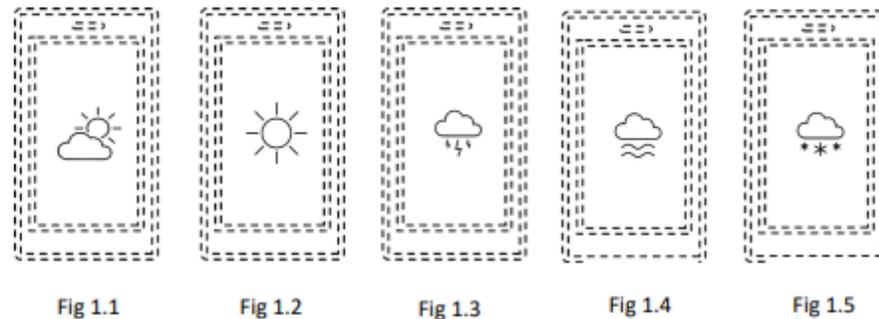


Virtual designs

Representations:

- Visual features need to be shown in their active state.
- Representations need to include digital images and pictures generated by computer-aided design (CAD).

Figure 3 — Example of representations of a dynamic design



Virtual designs

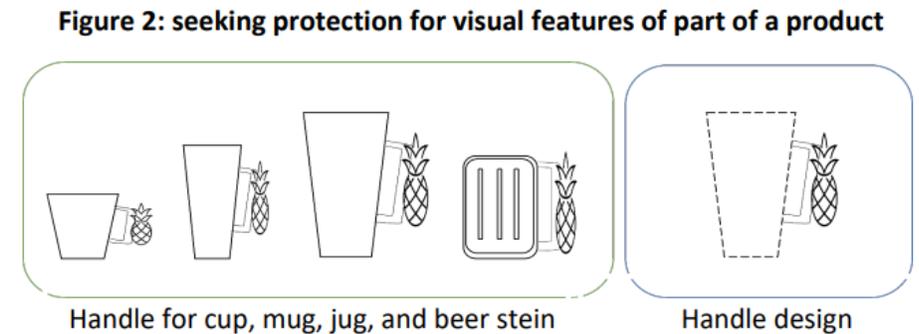
Infringement and overlap issues with the *Copyright Act 1968*:

- Registered design is primarily infringed by the making of a product. Virtual design could be **made** by writing and compiling source code that results in a program that, when run, produces certain visual features.
- Secondary infringement eg dealings with the product once made, IP Australia proposes a **list of exceptions** (study, testing, research etc) that would amount to an infringement exception on the basis of 'reasonable use'. ie mirror the provisions in the *Copyright Act 1968*.
- Overlap issues:
 - How the expression 'shape and configuration' would be interpreted in relation to 2D virtual designs
 - Whether virtuals could be considered to have the visual features of 'shape and configuration' in the same way as physical products
 - What 'applied industrially' would mean for intangible products since these are not manufactured in the traditional sense
 - Whether the Copyright/design overlap provisions should apply to virtual products in the same way as physical products

Partial designs

Changes necessary to implement partial designs:

- Definition of design: an expanded definition of design will include partial designs. Further, the proposal specifies that the partial design must be embodied in a product.
- Indicating the partial design: in addition to usual representations, an application will allow a 'written claim' specifying the part of the product for which protection is sought.
- Identifying products: any product in a design application must be identified clearly so that a familiar person can determine the product's nature and intended use.

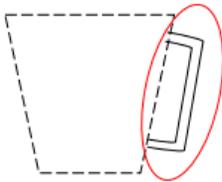
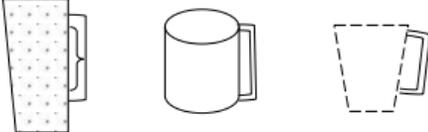
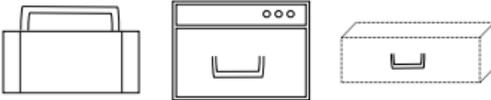


Partial designs

Changes necessary to implement partial designs:

- Assessing newness and distinctiveness: given the broadness of the prior art base with introducing partials, the proposal will limit it to designs or partial designs for products that are the same or similar to the product for which the partial design is registered (as opposed to all related products).
- Introduce a new 'similar products' test equivalent to trade marks.

Figure 8 — Prior art base of partial design

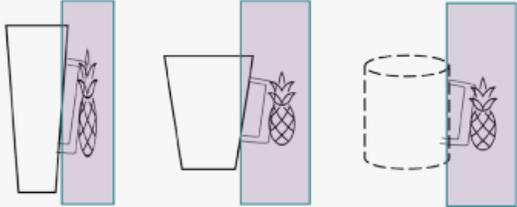
partial design	prior art	same / similar product?
 Product: cup handle		<ul style="list-style-type: none">✓ water jug✓ mug✓ cup (part of)
		<ul style="list-style-type: none">✗ briefcase✗ oven✗ drawer handle

Partial designs

Changes necessary to implement partial designs:

- Infringement: proposed that the existing test for infringement be adapted to partial designs ie infringing products could include any product similar to the product in the registration. Eg overall impression of the handle of the water jug, mug and cup would be relevant for assessing substantial similarity.
- Abolishing Statements of Newness and Distinctiveness (SONDs) and common design applications.

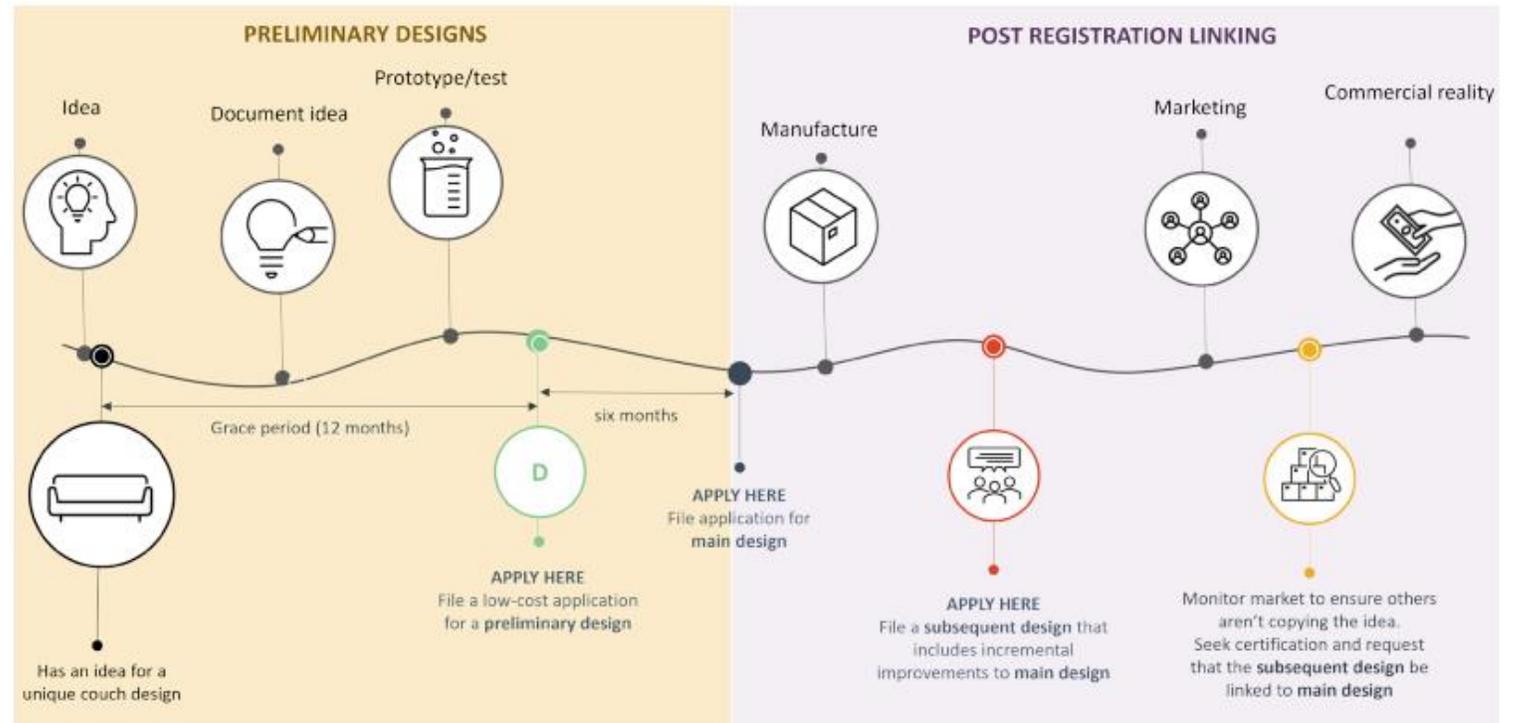
Figure 10 — Finding that a registered partial design is infringed

Registered design	Infringing products:	Product examples
 <p>Product name: Cup</p>		<ul style="list-style-type: none">• water jug• mug• cup handle

Incremental designs

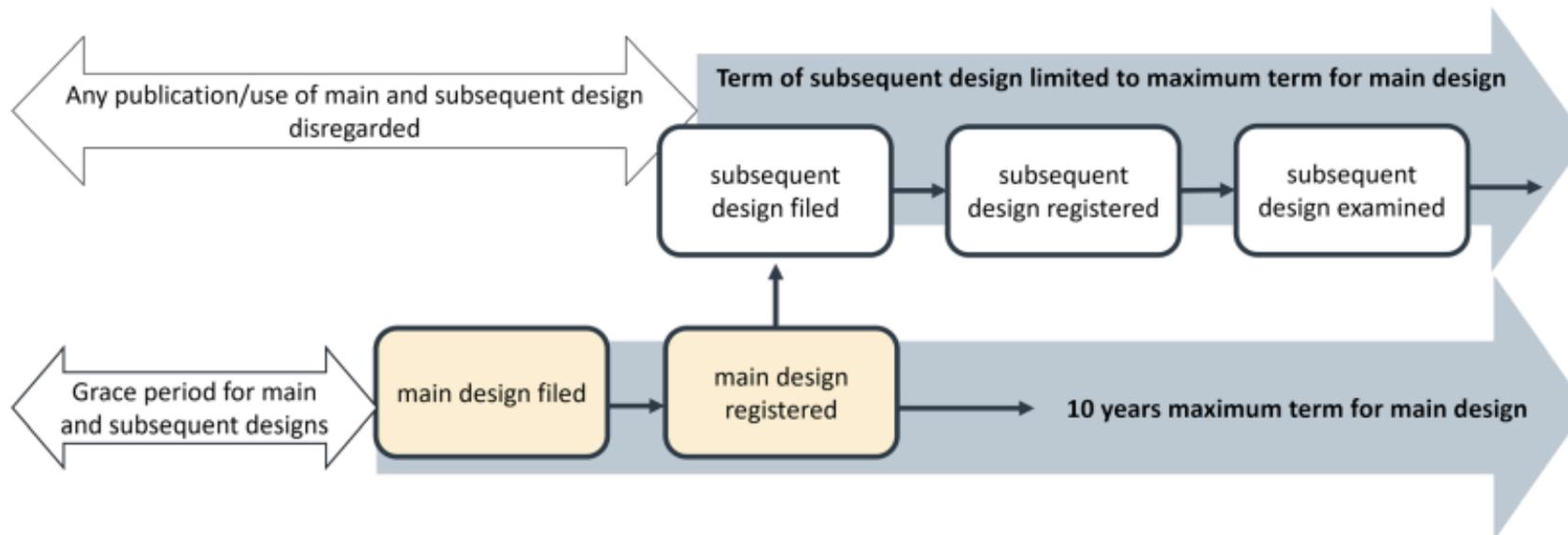
- Two proposals put forward: **Preliminary designs** and **Post registration linking**.
- After considering submissions to the consultation, the IP Australia has decided to drop Preliminary designs altogether.

Figure 2: Pathways for seeking protection of designs as they are developed.



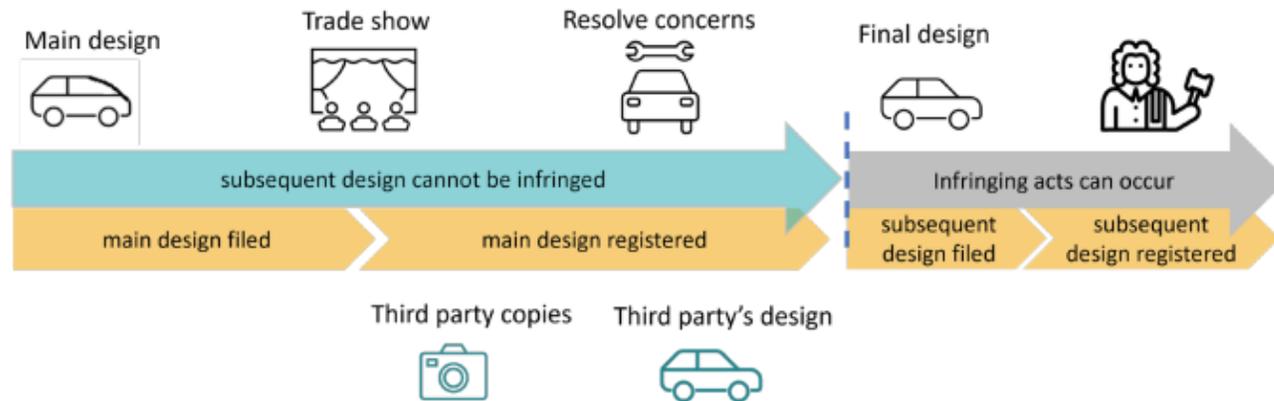
Incremental designs

Figure 5: Steps involved in the post-registration linking pathway.



Incremental designs

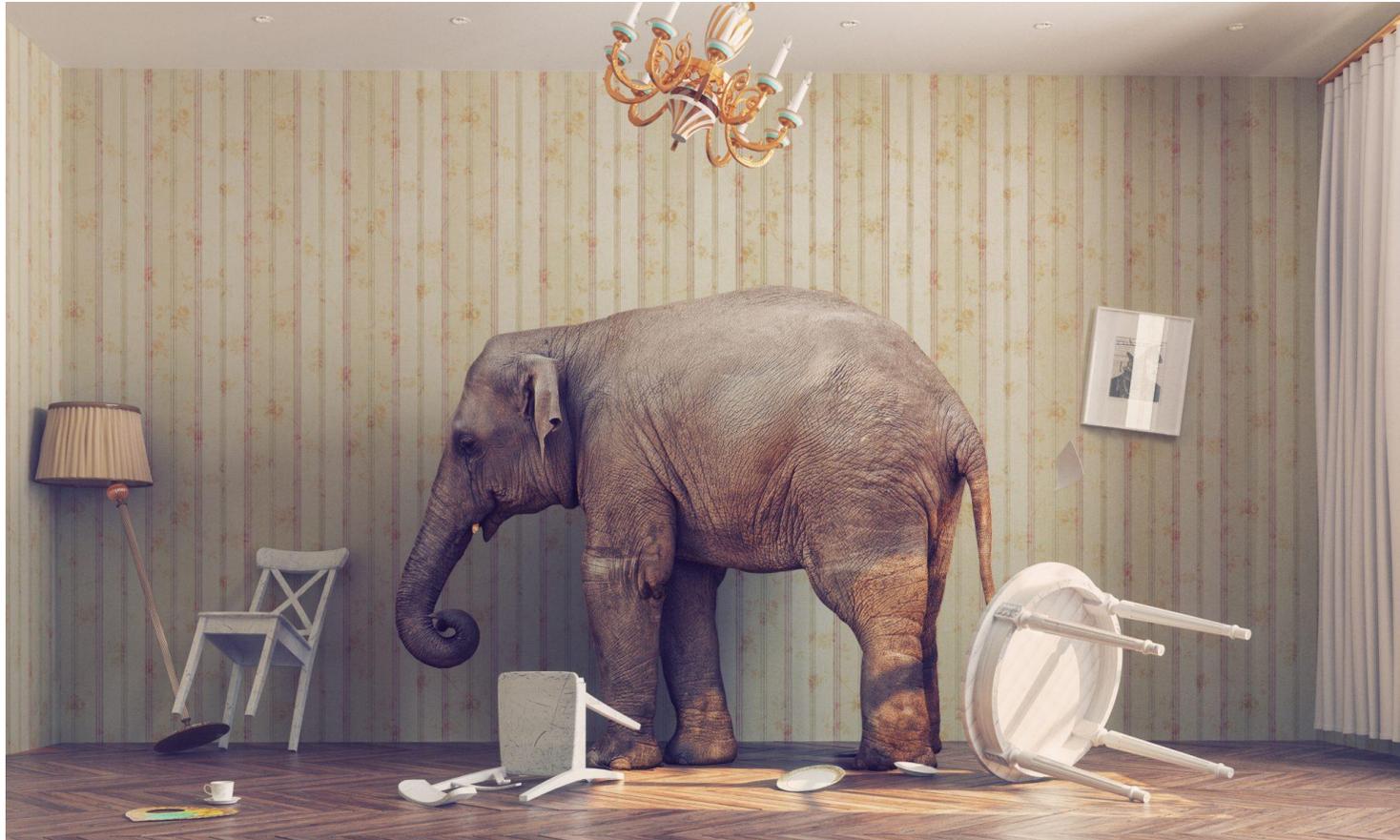
Figure 7: Example of how owners and third parties are impacted by linking two designs



Concerns about this proposal:

- Overall scope of the design registration may 'drift' from the main design.
- Nature and timing of the 'request to link'.
- 'Extended grace period' (main design) – Will it operate such that any uses of the main design during or after the main design's grace period will be disregarded for any subsequent design?

10+ Years on ...



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Thank you!

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