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5th Session: Industrial designs and trade marks

‘Informed user – element of a complex product’

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Abstract

The presentation will cover two aspects of EU design law, which are of high practical relevance and have been a subject of recent ECJ case law: The “informed user” as referred to in Artt. 6 and 10 CDR and “elements of a complex product” as referred to in Art. 4 (2) CDR and the so-called “repair clause” in Art. 110 (1) CDR.

The informed user is a modern mystery of EU design law. Nobody has ever seen him, and yet he plays a decisive role in each and every invalidity and infringement proceeding, as it is to be decided from his viewpoint whether or not the designs at issue produce the same overall impression. Neither EU design law itself nor the respective legislative process give any clues as to who the informed user is, what he knows and how he perceives things. Is he a real person at all? Or is he a mere legal fiction? Over the last years, the ECJ has piece by piece unravelled many of the secrets of the informed user, most recently in *Easy Sanitary Solution v. Group Nivelles* – a milestone decision of EU design law, which inter alia gives guidance for cases where the juxtaposed designs relate to different industry sectors. However, some questions relating to the informed user still remain unsolved.

Elements of a complex product are subject to additional requirements in order to be eligible for design protection. Art. 4 (2) CDR stipulates the so-called “visibility requirement”, namely that the component part, when incorporated into the complex product, must remain visible during normal use, and that those visible features fulfil in themselves the requirements of novelty and individual character. The legal definition of “normal use” is provided in Art. 4 (3) CDR. The presentation will give a general outline on the role and construction of these controversially discussed provisions, address relevant case law and will also briefly touch upon the related “repair clause” in Art. 110 (1) CDR and the respective recent ECJ case law.