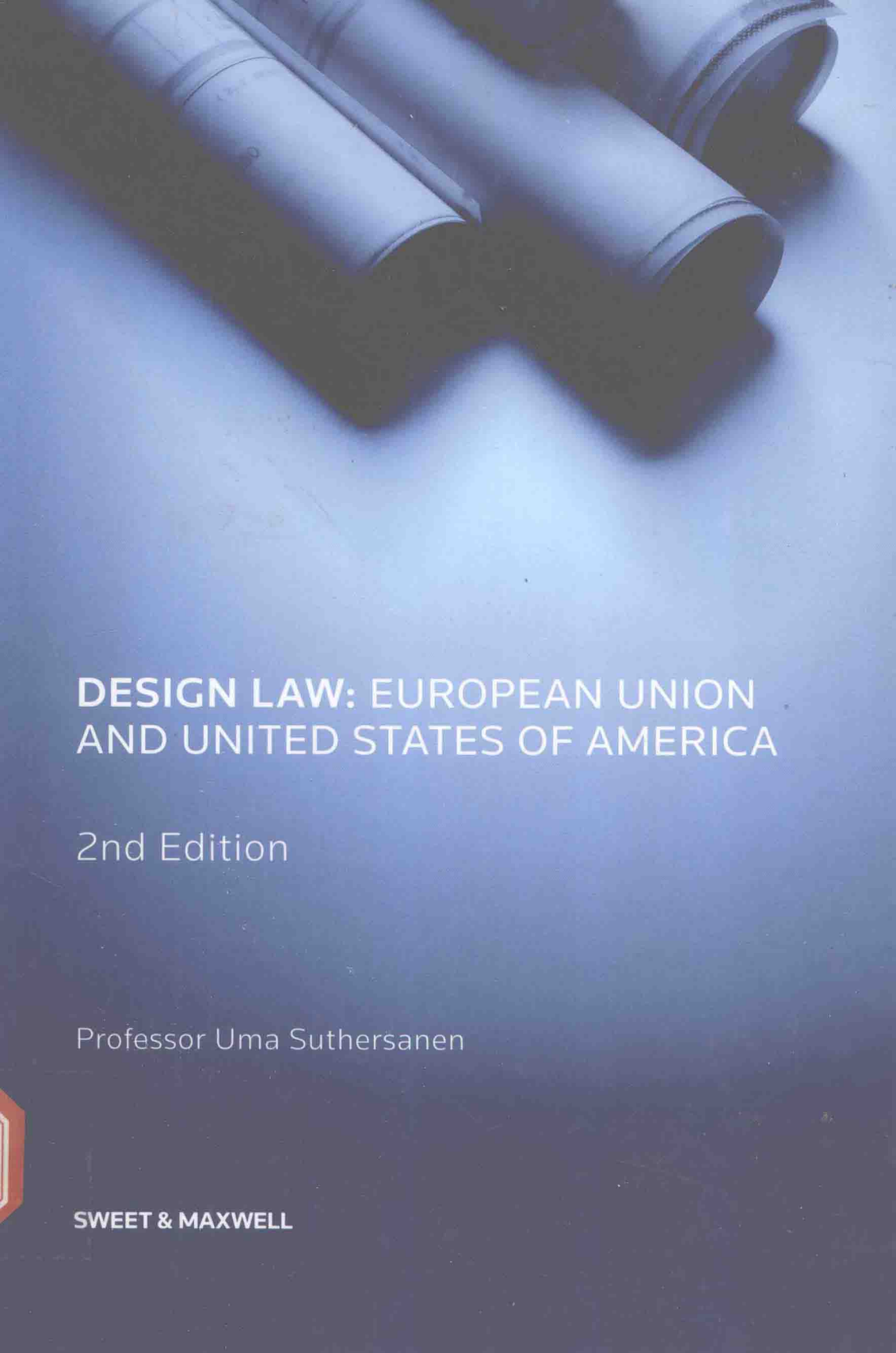




DESIGN LAW: EUROPEAN UNION AND UNITED STATES OF AMERICA

2nd Edition

Professor Uma Suthersanen



SWEET & MAXWELL

Design Law: European Union and United States of America

2nd Edition

by

Professor Uma Suthersanen

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PREFACE

Design history has had a convoluted past. Its importance was never underestimated. Rather, discussion of designs was often divided into various subaltern discourses within the larger discipline of decorative arts, (as opposed to fine arts). Indeed, anything outside the fine arts was known, interchangeably, as decorative, useful, industrial, applied or ornamental arts. With time, the notion of design became seen as something to do with functionality, problem-solving, and was caught between art and science. Most importantly, all the various discourses identified the close relationship between the concept of design with that of highly mechanised production and manufacture of artefacts aimed at a wide consumer market (as opposed to the discerning art or even craft connoisseur).¹

The legal protection of design has been no less difficult to follow. The need to protect and reward authors and corporations for creative works is a clear *raison d'être* for the various forms of protection one finds within intellectual property law. Related to this need is the legislative and judicial focus on promoting competition within our consumer-based society and economy. Yet, the nature of protection remains elusive. The reward of authors of "fine arts" such as sculptures is unnaturally distinguished from the reward of authors of "industrial arts"; the protection of competition calls for trade dress and unfair competition protection, as well as property rights; conversely, guarding the competitive boundaries of other manufacturers requires courts to either employ competition law or to wield functionality doctrines within design, copyright or trade mark laws. Even when the form of protection is conclusive, as within the European Union, where the main form of protection is ostensibly the EU *sui generis* design regime, there is considerable doubt as to how one should interpret terms such as "individual character" and "informed user".

This book deals with these dilemmas, as did the first edition. Nevertheless, the second edition differs markedly from the first edition.

The first edition of this work was based solely on the legal situation in the European Union. That work analysed the EU Directive (two years old, and yet to be implemented throughout all Member States), and the then draft EU

¹ See the concise discussion in P. Greenhalgh, "The History of Craft", in P. Dormer (ed), *The Culture of Craft* (Manchester: Manchester University Press, 1987) pp.20–52.

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Regulation. A substantial part of the earlier edition also discussed copyright protection within the national laws of EU Member States, as well as the potential of utility model, trade mark and unfair competition protection.

In this edition, the work concentrates on EU and US laws. In Part One, the nature of design is discussed in terms of legal etymology, international protection, and competition law within the European Union and United States. Part Two concentrates solely on EU law, with a substantial discussion on the scope of the Community Design Regulation. We also look briefly at the protection of designs under the EU trade mark regime. Part Three of the book discusses protection of designs under US design patent, copyright and trademark/trade dress laws.

The rationale for the divergence in approach is due to the simple fact that much has changed in the last 10 years since the first edition. The potential of the “new” EU design regime has been realised. As of April 1, 2003, the Office for Harmonisation in the Internal Market (OHIM) began registration of Community Designs under the Community Design Regulation. To date, 400,000 designs have been registered at OHIM, at a rate of approximately 80,000 a year.² Moreover, the case law has been steadily streaming out from OHIM, setting down a line of jurisprudence in relation to the boundaries of the EU design regime. This year we saw the first EU General Court decision on key aspects of the Community design law. The role of design law in protecting consumer products has not only expanded within the European Union, but also across the Atlantic in the United States. The US Federal Circuit laid down new standards last year in relation to infringement, as well as novelty under design patent law. Interestingly, the demand for copyright, trademark and trade dress protection in the United States remains unabated. It is hoped that readers will appreciate the shift in direction between the first and second editions, with more than 75 per cent of this edition representing fresh, new writing and perspectives.

It has been, admittedly, difficult returning to this subject after a hiatus of 10 years. I am indebted to several persons who helped to ease that entry back. I appreciate the patience shown by Sweet & Maxwell editors as I offered my own interpretations of what constituted the “official deadline” of the book. I am obliged to Mr Malcolm Langley, Librarian and stalwart spirit of the Herchel Smith Intellectual Property Law Collection. I have benefited from his searches and acquisition for anything and everything published in the last decade in this area. More importantly, I am grateful for his patience as I clung on to books far beyond the permitted time.

James Michener wrote: “I’m not a very good writer, but I’m an excellent rewriter”. I do not claim either epithet, and instead give many thanks and due credit to Graham Dutfield who took time and energy to read vast amounts of the book, rewrite some bits, and to hear my moans. Finally, I

² <http://oami.europa.eu/ows/rw/pages/RCD/index.en.do> [Accessed July 2010].

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sincerely appreciated and was grateful for the unfailing humour and unstinting patience shown by my five year-old boy. Oliver did not so much lose a mother as gain a new family member who he promptly nicknamed "The Very Important Book."

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