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How to Elaborate and Interpret an Expert Report on the Design Area

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Additional information is available at the end of the chapter

<http://dx.doi.org/10.5772/68098>

Abstract

Design has become a strategic element for companies, and every year, there is a growing number of companies and designers who request for industrial property protection (trademarks, patents, industrial designs, etc.). However, all these protection efforts do not prevent cases of unfair competition, and we find many lawsuits and trials focus on possible plagiarism between two designs. Since not all judges or lawyers are trained in this discipline, it is essential to consult a design expert. The expert opinion is summarized in a report that is part of the materials used in the judicial process. This work focuses on these reports centered on design issues, like brands, packaging, graphic design, or industrial products, and has two goals: to give some guidelines for the elaboration of these reports to design experts and to set some keys to interpret and correctly understand this design reports to all that person not expert in design. Methodology, guidelines, and conclusions that appear in this chapter are the result of the work developed by the authors in the last 10 years. Conclusions focus on a set of guidelines to elaborate and interpret correctly an expert report on the design area.

Keywords: expert report, design, plagiarism, industrial property, unfair competition

1. Introduction

Today, design has become a strategic element of vital importance for companies. Whether it is applied in its brand, its products, its packaging, its communications, and so on, the design

becomes an essential part of its offer in the market. And in many cases, this design is the main motivation to purchase for the target audience.

It is therefore not surprising that every year there is a growing number of companies and designers who request protection for their designs through patents, industrial models, trademarks, utility models, and so on [1]. Since the design gives them so many benefits, it is normal to want to make sure that no one else can use it.

However, all these protection efforts do not prevent cases of unfair competition, where one company tries to take advantage of the design created by another and present a product or packaging with similar characteristics. And then, we find many lawsuits and trials focus on possible plagiarism between two design objects (brands, products, packaging, etc.).

Since not all judges or lawyers are trained in this discipline, in order to make a decision in this context, it is essential to consult a design expert to analyze the two objects and to determine if there may or may not be a possible confusion in the market. The expert opinion is summarized in a report that is part of the materials used in the judicial process.

This work focuses on these reports centered on design issues, like brands, packaging, or industrial products, and that are used as an essential part to determine if we are, or not, facing an unfair competition case. Basically, it is a written document that compares two designs and discusses the differences and similarities found between them.

There are guides on how to prepare an expert report in the criminalistics fields, forensic engineering, or psychology. However, in design discipline, this type of documents has not been found, and the expert only has the help of those generic documents that explain what an expert report is.

These reports are written by experts in design: collegial designers, professors, researchers, and so on, and they are addressed to people who are not experts in the graphic design field and who need to understand what values are integrated in it to make an appropriate decision on the subject.

Thinking about that, the work has two goals. On the one hand, to give some guidelines for the elaboration of these reports to all those experts who receive a request of this type. On the other hand, to set some keys to interpret and correctly understand this design reports to all that person not expert in design such as judges, court agents, and lawyers.

We believe that this work will be a great help to the designer who is commissioned to write a text of this type. Here you will find suggestions on how to proceed in the comparative analysis of the designs and what items you should compare, what other analyzes you can do, how to plan your work, and, finally, how to adequately and understandably present your conclusions in a written report.

In turn, it is also addressed to all legal professionals who commission the report or read its content. Lawyers, judges, prosecutors, and so on do not have deep knowledge about design and, therefore, need the opinion of the expert to approach this area correctly. They will find guidelines on how design works and how this operation can be used to discern whether or

not there is a likelihood of confusion in the marketplace. It will also serve to indicate how an adequate report should be in this area and will give them guidelines for carrying out the commission or guiding the expert in its development.

Methodology, guidelines, and conclusions that appear in this chapter are the result of the work developed by the authors in the last 10 years. Throughout this time, authors have elaborated several reports on design, including branding, graphic design, packaging, and product design. Most of the reports focus on the Spanish market, but some of them also deal with European and international markets. This experience will be reflected in the reference to concrete and real cases throughout the work to improve theoretical explanations.

Throughout the text, we will use the word “design” to refer to any product of the designer’s work that can be investigated in an expert’s report. Thus, when we say design, we will be referring to any of its applications: brands, packaging, graphic design, industrial design, and so on.

The chapter has five sections. The first and the second serve as an introduction. The first section is a brief tour through the intellectual property legislation and the legal concepts that are usually mentioned in a trial of these characteristics and that should be understood by the expert to be able to attend to the order that is made to him and to understand what is what is he ask for. It is a quick and brief review because we understand that the expert is an experienced person in design and not in legal issues, so he really does not need to know the entire complex of intellectual property legislation to be able to correctly perform a report.

The second section focuses on the expert report concept. Since no references have been found in the design field, it has sought in other disciplines how they have solved this issue to get from there what could be also applied to the design field.

The following sections are already focused on the expert report on design. The third section proposes a work methodology and diverse analyses to do in order to obtain a more reliable valuation of designs. The fourth section is a guide for the writing report, which discusses the style of writing, the graphic aspect, and the contents. By last, the fifth section of the chapter concludes the work and resumes a set of guidelines to elaborate and interpret correctly an expert report on the design area.

2. Protection of design and industrial property

When the design expert is faced with the task of making an expert report, he perceives that not only the knowledge he has about design is enough but he also needs to know some of the legal aspects involved in the process. To this, we are going to dedicate this first section that will also serve to connect the two disciplines with each other.

Design is as much a production of the mind or intelligence as a commercial activity; so, many companies make use of it to configure their offer in the market. As such, it is an activity that is protected by intellectual property laws.

"Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields" [2]. Traditionally, intellectual property is divided into industrial property and copyright. Inventions, industrial designs, trademarks, service marks, commercial names and designations, indications of source, and appellations of origin are collected in the first block, and literary, artistic, and scientific works in the second.

The protection of these creations is something that benefits not only its authors but also the recipients of these creations and the social and economic well-being in general. In fact, the Universal Declaration of Human Rights in its article 27.2 states that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

The regulations on intellectual property are extensive and cover not only national but also international areas, existing agreements that group several countries. There is also a global organization that deals with these issues: The World Intellectual Property Organization (WIPO), which is the global forum for intellectual property services, policy, information, and cooperation.

The first important agreement at the international level concerning the protection of industrial property rights is the Paris Convention, adopted in 1883. It uses the term industrial property in its broadest sense, including patent protection, drawings and industrial models, brands, and trade names.

More recent is the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which was signed in 1994. It contains a set of basic rules on intellectual property with the intention of harmonizing these systems between the signatory countries and in relation to the World trade.

At European level, Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 on the approximation of the laws of the Member States relating to trademarks should be mentioned. We also find the Treaty on the Law of Trademarks (TLT), adopted in 1994, and the Patent Law Treaty (PLT), adopted in 2005, expect to harmonize and streamline national and regional patent and trademark registration procedures, respectively.

From the point of view of design and expert reports, it is important to differentiate between the diverse fields of industrial property protection: trademarks, patents, utility models, industrial designs, and so on. Perhaps what is most characteristic and common to all these fields of industrial property is the requirement of novelty that is demanded for a design to be registered and protected. This requirement means that the design differs from the previous, that is, there is no relevant disclosure or the market does not know the existence of a similar prior design.

Legal design protection is fundamentally aimed at avoiding unfair competition, one of whose forms is any act capable of creating confusion, by any means whatsoever, with respect to the establishment, products, or commercial activity of a competitor (article 10bis Paris Convention for the Protection of Industrial Property). It is therefore essential the products be presented correctly differentiated, without the danger of an undue association between them.

In determining this likelihood of confusion or association, case law uses the term “average consumer” or “informed consumer.” It is a user “normally informed, reasonably attentive and insightful, taking into account social, cultural and linguistic factors” [3]. It is not a consumer without any information but also a professional consumer with a high capacity of discernment but has a normal but critical capacity to analyze the product.

3. The expert report

Many judicial processes deal with social, labor, technical, artistic, and psychological issues unrelated to the judge’s knowledge who is the one who should give an opinion in the end. In those cases, “when scientific, artistic, technical or practical knowledge is needed to assess facts or relevant circumstances in the matter or to acquire certainty about them” (Article 335 Law 1/2000, of 7 January, on Civil Procedure, 2015), the legislation usually contemplates the possibility of consulting an expert who contributes his vision of specialist on the subject.

The expert, through his work, “contributes to improve the understanding of the facts in dispute that the court must uphold” [4] and serves as a guide to the judge in his decision-making, providing “clear and substantiated responses to the specific and complex problems about which they are consulted” [5]. In a certain way, “they thereby help to make justice more effective” [5] by providing “the necessary technical knowledge for the assessment of the facts that are the subject of the controversy” [4].

The report drafted by this expert, the expert report, is part of a larger text: the judicial record, which brings together the different documents produced in the different phases of the trial. “It is not a public text but destined to a restricted number of actors: the judge, the lawyers and the court officials” [6].

The expert work is not open to any person, but it is required to demonstrate the knowledge in the subject on which the report is going to be made. In Spain, “the experts must have the official title corresponding to the subject matter of the judgment and the nature of it” (Article 340 Law 1/2000, of 7 January, on Civil Procedure, 2015). Therefore, it is the academic title that confirms the mastery of a certain subject and the greater degree this title has, greater consideration will also have the assessments expressed in the report.

When the report refers to disciplines not included in official professional titles, the existence of unqualified experts, who must be named among “understood persons” in the subject matter (Article 340 Law 1/2000, of 7 January, on Civil Procedure, 2015), is admitted. Therefore, although this possibility exists, “the use of non-official graduates is exceptional” [7].

In summary, we can understand by expert that person “technically suitable and capable, called to give opinion and judgment based on a process, about the verification of facts whose clarification requires special knowledge about a certain activity, technique or art, which is alien to the judge” [4].

At the European level, there is a consensus on the requirements that the expert is required to make in his report: “competence, independence, subjective and objective impartiality and a

strict standard of ethical conduct” [5]. The Spanish legislation focuses on the issue of impartiality because it literally requires the expert to submit his opinion when issuing his judgment, under oath or promise to tell truth, that he has acted with the greatest possible objectivity, taking into account both what can favor and what is liable to cause injury to any of the parties (Article 335 Law 1/2000, of 7 January, on Civil Procedure, 2015).

The expert therefore has to be impartial and “as a collaborator of justice, he must submit to the court a specialized aid in an objective, impartial and independent manner” [4].

Therefore, the aspects that should characterize both the expert and the expert report are professionalism, represented both by a broad knowledge of the discipline and by having proven experience in it; objectivity and impartiality, not to benefit one part to the detriment of the other; clear, rigorous, and orderly presentation of the ideas and the work process; and objective justification of all claims through the use of verifiable data.

The Spanish legislation indicates that these opinions shall be made in writing, “accompanied, where appropriate, by other documents, instruments or materials adequate to present the opinion of the expert on what has been the subject of the expert” (Article 336 Law 1/2000, of 7 January, on Civil Procedure, 2015).

Regarding the contents of this document, at the European level, “a report should be expected to be built around three strands: the statement of facts (...), an analysis of the points at issue and an account of the approach taken by the expert leading to the reasoned position” [5].

Apart from the legal scope, the Spanish Association for Standardization-UNE has a technical standard named “General criteria for the development of expert reports” (UNE 197001) that establishes the structure and minimum requirements of an expert opinion or report in order to guarantee the quality and understanding of the conclusions drawn by the expert.

According to these regulations, an expert report is divided into four sections: identification, index, body of the report, and attached documents. The body of the report includes the contents of the expert’s work: objective or purpose of the report, scope or issues raised by the applicant, background, preliminary considerations for the research understanding and the methodology used, reference documents, terminology and abbreviations, analysis carried out, and conclusions.

If we focus on specific disciplines, some authors also address this issue. They propose, starting from the particular characteristics of each activity field, a series of steps or contents that must be contemplated by the expert in his work or in the writing of the report.

Noon [8] proposes that the working process to make a report of an accident, crime, catastrophic event, or failure is structured like a pyramid (**Figure 1**). There is a great deal of evidence and verifiable data at the base or at the beginning of the expert’s work. The analysis is then carried out and a smaller number of data is obtained. Finally, the union of evidence and analysis leads to even fewer conclusions.

According to this idea, this author proposes a report format consistent with the pyramid method of investigation (**Figure 1**) with the following sections: report identifiers, purpose,

Investigation pyramid

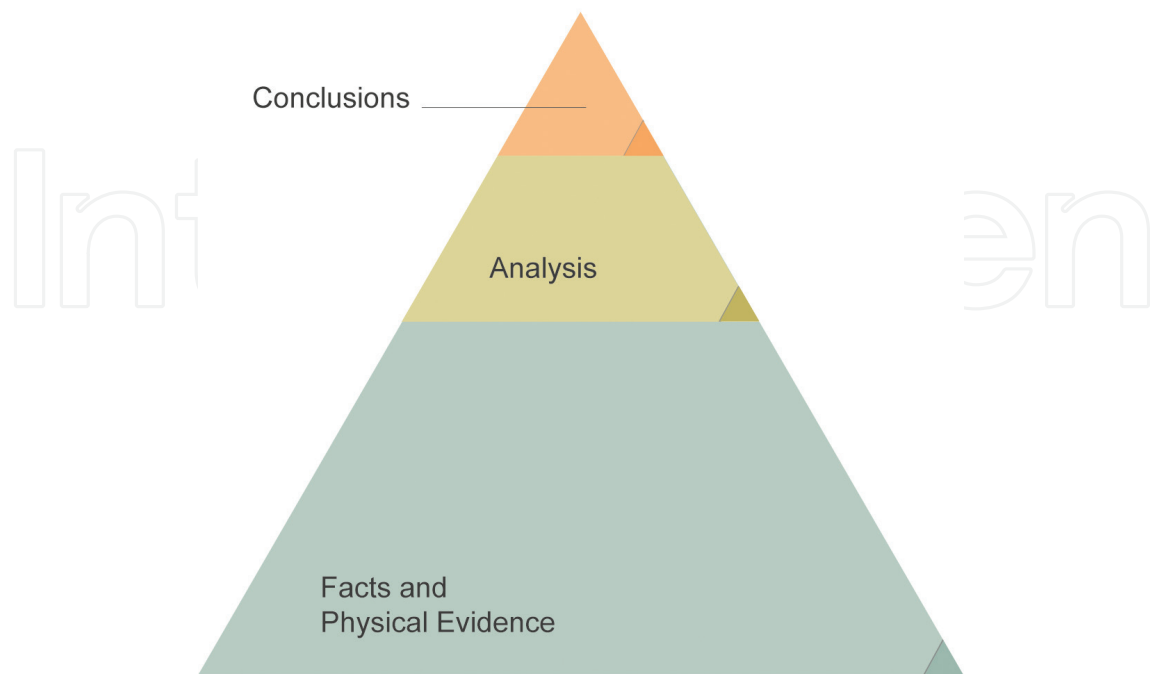


Figure 1. Investigation pyramid [8].

background information, findings and observations, analysis, conclusions, remarks, appendix and attachments.

In the area of criminal investigation, Bar [6] considers that a report should contain the following sections: technical foundations, operations carried out, objects subjected to expertise, and conclusions.

Ávila Espada [9] proposes the following contents for a psychological assessment: introduction, procedures used, derived conclusions and their discussion.

In the economic sphere, the expert report “must indicate what it intends, why, what documentation has been analyzed, what calculations have been made and why and to what conclusions has been reached” [10]. The sections that in this area should at least have a report are scope and understanding of the expert question, documentation analyzed, methodology analyzed, body of the report, and conclusions [10].

Although we find some differences, it seems that all the guidelines analyzed agree on a similar structure: background, documentation studied, methodology, analysis, and conclusions. We always start from a commission associated with a set of facts or documentation that needs to be analyzed. The accomplishment of this analysis and the applied procedures will depend on the habitual practices and own of each discipline. The expert must rigorously explain the processes performed to justify in this way the reliability of the results obtained. Finally, the process must end with the drafting of conclusions that help the judge to decide on the process,

since the expert function is not to reach conclusions regarding the sentence but to facilitate the specialized knowledge for the judge to elaborate it [11].

4. Working methodology for a design expert report

The process of conducting an expert report begins with the assignment of the work and ends with its delivery and, if necessary, with the appearance of the expert before the judge to explain his expertise. Between both extremes, different tasks are carried out that conform the following methodology (Figure 2).

4.1. Definition of the objective

The first thing is to be clear about the purpose of the report, that is, what it is intended to achieve with it. Usually, this objective can be extracted from the words with which the work was commissioned.

Most reports in the design field deal with the comparison of two or more designs in order to determine their degree of similarity and thus answer the question of whether there is risk of error or confusion in the market. Therefore, the expert’s work is not limited to comparing the designs and to say whether they are the same or not, but to think about the using moment and consumption of the product and to determine if there could exist possibility of error in the consumer.

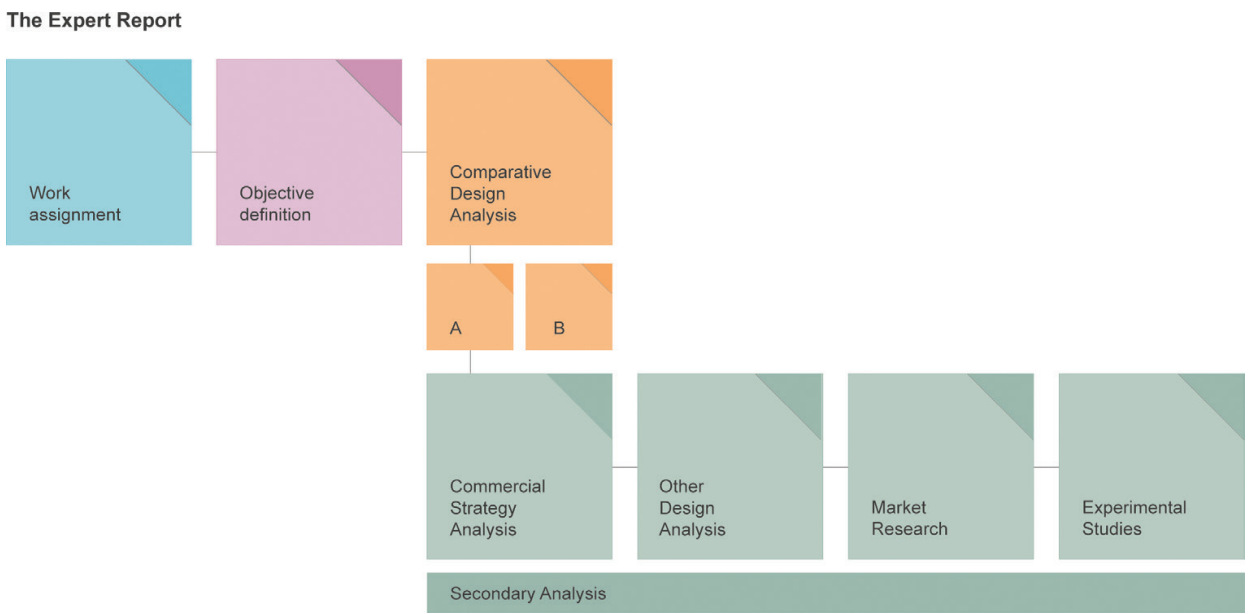


Figure 2. Working methodology for a design expert report.

Thus, a comparative analysis of two designs could establish enough differences between both, but if these are not significant enough, there would still be the possibility of creating confusion in an informed user. Conversely, there may also be few differences between designs but these reside in key aspects that would make a product perfectly distinguishable from another and therefore there would be no possibility of error.

4.2. Comparative design analysis

The first work developed by the expert is the comparison of the two or more designs under dispute to determine what differences and what similarities there are between them. These designs can be very different in nature: brands, illustrations applied to products, packages, products, and so on. Although they are all inserted in the design scope, they differ in nature and characteristics, so the comparative analysis will vary from one to another.

In the first place, the ideal scenario is that the expert can access to a physical sample of each of the designs that must be compared and that this physical sample means at its disposal throughout the expertise implementation process. The characteristics of the design will be better appreciated if he sees and manipulates it directly than if he does it through a photograph or a model.

If, because of the object bulkiness, it is not possible to always have it present, it is convenient to make detailed photographs of all the elements that make up the object taking into account different perspectives. So, we can turn to them at any time and fill in some way the lack of the physical sample.

Another information source for this comparative analysis is the design registration as a brand, industrial model, patent, and so on, if there was one. Typically, this document is delivered at the time of commissioning, but if this is not the case, the expert can request it or search it through the web at the registration offices. These documents provide a better understanding of the elements that make up the design and which are the most significant characteristics so that special attention can be given to them throughout the report.

To perform the comparative analysis in a more systematic way, it is recommended to start from the theoretical knowledge established in the design plot that we are analyzing: brand design, fashion design, packaging design, product design, and so on. This theory will tell us what elements are key in the design and on which of them we should focus our analysis. This procedure gives as much professionalism in the ideas presentation as exhaustiveness in the analysis approach.

We then write down the sections that each analysis should have according to the analyzed design discipline.

- Graphic design: Color, typography, images, layout [12].
- Branding: According to Costa [13], a brand has a verbal component, name, and three graphic components: logo, symbol, and color.

- Packaging: Hine [14] claims that a packaging has structural and graphics components. Therefore, we will divide the comparative analysis in these two sections: first discussing the structural aspects (shape, size, weight, material, etc.) and then the graphs (colors, typography, images, etc.).
- Product: In the Ulm school, regarding the product design, the design methods were evaluated, in which all the factors that determine a product were considered: functional, cultural, technological, and economic factors [15].

Once the items to be compared are established, it is recommended to start by making an individual description of each object and then to compare them. In this way, we obtain a more objective and detailed analysis that includes all the elements and characteristics of each design and not only those with more evident differences and similarities. Subsequently, the expert will decide which of them are most significant and relevant to the informed consumer and, therefore, in which to focus their conclusions.

After this analysis, we can proceed to establish whether or not there is risk of confusion in the market and terminate the work. However, in many cases, the expert is required to complement this main analysis with some others that will allow clarification and reinforcement of the comparison findings. We will see what types of analysis can be realized in the following sections.

4.3. The commercial strategy analysis

At the moment, the designs are not used in an isolated way but within a commercial strategy that configures its presentation to the market and, therefore, the image that the consumer has of them. Thereby, if the expert has to decide if there is a risk of confusion in the market, he needs to go beyond the comparison of the designs and also study the commercial strategy that surrounds them.

The commercial strategy of any product (or design) is basically composed of what in 1960 Jerome McCarthy called marketing-mix: product, price, place, and promotion [16]. This concepts combination shows us that the product is not alone, but its presence in the market, in front of its possible consumer, is complemented by a price, a point of sale, and advertising messages.

The data needed to know the marketing-mix of the studied designs can be obtained by going to the company itself or, if this is not possible, by consulting its website, generic or specialized publications, social networks, and so on. In this way, we can know aspects about the product: price, ingredients, packaging, personality, commercial name, color, flavor, and so on; on the price: if it is more or less expensive than the one of the competition; on its distribution: type of stores, places where it is marketed; and about its communications or advertising: media in which it advertises, campaigns messages, and so on.

In order to complete this information, we will also be interested in knowing the type of consumer the design is directed to. This way, we can understand how he perceives the product, how he interacts with it, and what elements are most important at the time of purchase and use.

All this commercial information will allow the expert to judge both designs in a more real way (not isolated from the other elements of the marketing-mix) and, therefore, to decide with greater certainty if there is, or not, possible confusion in the market. Since a design does not exist in an abstract or isolated way, but it is always immersed in a particular commercial situation, it is important to assess this circumstance when issuing any conclusion.

To clarify more how this information helps in making an expert report, we can put as an example the report developed for two brands in the textile sector that used a graphic mark that, according to the lawsuit filed by one of them, could lead to confusion in the consumer. After the initial study comparing both brands, the market situation of each of them was also analyzed. It was then found that each one was concerned to a different market segment and this was reflected both in the characteristics of the product as in its price, in the stores decoration, in the graphic elements, and the style of communication used in the websites, catalogs, advertising, and so on. Therefore, although there was some similarity in the graphic aspect of both brands, its commercial strategy and, thereupon, its presentation to the consumer were totally different. On the basis of this fact, the findings of the report focused not only on the similarities or graphic differences between the brands but also on the different commercial strategy of each to determine the reduced risk of confusion in the market.

4.4. Other designs analysis

In some cases, the expert will find it useful to also carry out the analysis of other designs of similar characteristics to those in dispute. In this way, he could determine if the similarities he has found between them are due to a clear intention to copy by one of them or that they belong to the same product category or have followed a similar design process.

For example, the expert report on two margarine packaging was completed with a study of other margarine packages on the market. After the analysis, it was determined that all the margarine packages used a structural design, a box with similar characteristics, and that what differentiated some brands from others was the graphics. This allowed the expert to reduce the importance of the similarities found in the structural aspect and to focus his conclusions on the similarities of the graphic aspect.

In other cases, the similarity between two designs may try to justify itself by saying that in the creation process, the same concept has been taken as a reference. The expert should analyze other designs inspired by this concept to determine whether or not the designer has a wide range of design possibilities to represent that idea and, therefore, the similarity between designs is not justified.

In both cases, the work process is similar. We begin by compiling designs that have the characteristics we want by noting in detail which sources we have consulted and then being able to include them in the report. The greater the category and relevance of these sources within the scope of design, the greater the validity of the conclusions that we obtain. Then, a file is made with the parameters to be measured from each design and each one is analyzed. Finally, the conclusions are established indicating the characteristics that the studied designs share.

4.5. Market research

Taking into account the market research used in the marketing field to know the users' opinions, the expert can also raise an inquiry of this type to verify if there is risk or not of confusion in the market. The goal will be to ask informed users if they are able to differentiate between the designs.

In order for the results of this research to be considered valid and reliable, it is recommended to consult a commercial research expert who can guide us on how to choose the sample, how to raise the questionnaire to avoid any kind of bias, how to develop the fieldwork, and, finally, how to analyze the data and draw conclusions.

Raising a reliable market research requires a good investment in time and resources that it may not be willing to take on. In any case, it must be remembered that, if it is possible to do so, its results will be a good help in drafting conclusions and will constitute further evidence on which to base the opinion.

Another more affordable option is to design a smaller research, with fewer questions and a smaller group of users. In this case, it loses validity and reliability, but we have one more data to add to our report and conclusions.

4.6. Experimental studies

We call this way any more detailed analysis of the designs being studied and which involves a procedure other than the simple observation or tactile recognition of the object. In them, the expert can use his knowledge on the use of specialized software in design.

Thus, for example, in a case of comparison of designs applied to a footwear, the illustration that constituted the stamping of each boot was proceeded. The drawings were passed to the computer and different parts of the designs were compared by superimposing the strokes. In this way, it was possible to determine in which specific parts the second design imitated the first and did it in a practically identical way. Something that was visually intuited through this system could be technically demonstrated.

In another case, the photographs' color of both designs was also eliminated with a computer program of image edition. In this way, the similarity between the lines that made up the illustration could be better perceived and, with this documentary support, justify the presence of similarities between the designs.

5. Writing the expert report

Once all the analytical work has been done, the expert goes to write down his work process into a document and to propose a series of conclusions to answer the research objective stated at the beginning. In this section, we will deal with the topics of the writing style, graphic aspect, and contents of this report.

5.1. Writing style

In the writing of the text will be used a technical, understandable, and very didactic language. The expert must express himself as a skilled person in the subject and, therefore, will use the proper vocabulary and expressions to the design discipline in which the opinion is inserted. But he cannot forget that he is addressing people outside the world of design, judges and lawyers, who must understand his explanations and follow his reasoning, so he will try to be as clear as possible.

The technical words should be defined the first time they appear in the text, either by an insert in the paragraph itself or by a footnote. To include in the annexes, a glossary with the jargon used could also be chosen, but we consider that this is impractical because it slows down the reading process.

In the case of doubting between the use of a very technical term and a more popular one, it is convenient to use the second one so that the idea can be understood by the recipient without having to resort to a dictionary. Although it may seem that the academic or professional level is reduced, reading is also streamlined and the reader can focus on what is really important: not in learning new concepts but in the opinion expressed by the expert.

5.2. Graphic aspect

In these types of reports, it is essential to take care of the presentation. If, at the beginning of it, we introduce ourselves as design experts, this should also be present in the work layout, the fonts and colors choice, the images presentation, and so on. If the written document does not maintain a suitable formal appearance, the reader may doubt our knowledge of the design basics and does not correctly judge our judgments about designs.

In this regard, we recommend following the recommendations that any editorial design manual suggests to create a nice page to read and visualize. For example, use wide margins, a typographic font suitable for large texts, a legible font size, a suitable line length and line spacing, and so on.

It is also important to use good quality images (photographs, graphics, or infographics). In the case of photographs, it is not necessary to use a professional photographer, but at least take care and respect the following tips:

- It should be used light diffusers or, if the size of the object allows, use light boxes.
- To make a good composition, it is essential to use the tripod.
- The focal length should be greater than 35 mm to prevent lines from distorting.
- If reflections appear due to the material (metal, glass, etc.), we must repeat the photograph away from the object.
- Avoid fingerprints or specks on both the object and the lens used for the photograph.
- The resolution of the images should be between 220 and 300 pixels per inch so that they look correctly when printing the document.

5.3. Contents

Based on the sections that the authors consulted establish for an expert report of a general nature (UNE 197001) and of particular disciplines [6, 8–10], we establish nine sections that should be included in an expert report in the design field (**Figure 3**).

In cases where the report is very long, Noon [8] recommends including an executive summary at the beginning of the text. This summary should not occupy more than one page, and it presents the most important content of the research, highlighting the conclusions reached.

5.3.1. Cover page

The most important element of the cover is the title that defines and describes the report content. Usually, the name or the types of products at issue are mentioned. Together with the

Expert Report Contents

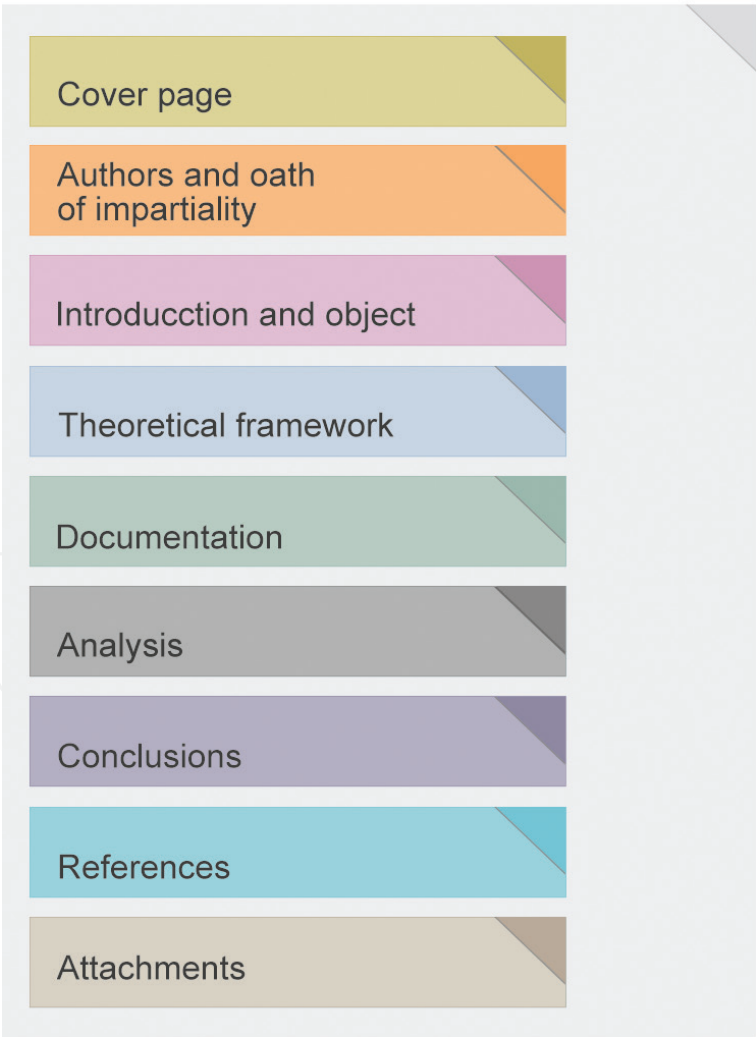


Figure 3. Contents for a design expert report.

title, the date and place of realization and the authors are indicated. If the experts work within an organization (university, school, professional college, etc.) can also be included the brand of this institution.

5.3.2. Authors + oath of impartiality

On the next page and before the index, the name and surnames of the report author or authors will be recorded. Together with them, we will indicate their titles and/or positions, that will be what will value the content of the report. In this way, the experts are presented as connoisseur and experts in the subject on which the opinion will be based. We recommend to not include titles that are not related to the design discipline, in order to give more emphasize to those titles related to design.

Along with these names should be included the oath of impartiality of the experts. In Spain, it is included in article 335.2 of Law 1/2000, of Civil Procedure. Through this text, the experts state, under oath to speak the truth, that they have acted with the greatest possible objectivity taking into account both what can be favored and what is likely to cause harm to any of the parties, and that they know the Criminal penalties they could incur if they failed to do their duty as experts.

5.3.3. Index

It is recommended to write an index if the report consists of more than 10 pages. This makes it easier to read and, above all, re-read, so that you can quickly access the data or section you are looking for. This index also shows the structure that articulates the work.

5.3.4. Introduction and object

The next section should be an introduction that explains the subject of the report, the motivation, the objective or objectives that are pursued. The methodology used to achieve this objective will be explained, and, in the end, the sections contained in the report will be presented.

5.3.5. Theoretical framework

This point may be considered optional but, in certain circumstances, the expert may consider it useful to include a brief review of the theoretical corpus in which the report is inserted. It is not a scientific article and it is not necessary to explain everything, but we must indicate the most important and necessary so that the report can be properly understood. In a clear language, we can explain the parameters on which the expert report was based.

In order to decide which topics to introduce and which ones not to introduce, it will be useful to ask what aspects of the design discipline the report is about, the recipient needs to know in order to fully understand the text. For example, in the case of a brand, we can briefly explain the process of creation, the parts that make up a brand, how each is called, what requirements must be met, how the consumer perceives the brand, what media is included, and so on.

All this theory should be reinforced by reference to authors considered relevant in the subject. In this way, the expert demonstrates both the knowledge of the subject and that the expert analysis is based on established and recognized knowledge of the discipline.

If you choose to include this section, it should not extend beyond two pages. If it is necessary to be longer, it is recommended to place it as an attachment at the end so that it does not interrupt the reading of the report.

5.3.6. *Documentation*

The following is a list of each document used, following the same order in which they will appear later in the report. It is also advisable to identify each of them with a code or number so that they can be referred to in the text in a concise manner, without having to write the complete denomination.

It should also be indicated where each document comes from. Some will have been delivered together with the order but others will have been sought by the expert. In the latter case, it will be indicated how the collection work was carried out: sources consulted, search engines used, information collection system, and so on. In this way, we indicate the degree of reliability of the different documents and, therefore, of the conclusions which are based on them.

Also, if desired, you can include here images or photographs of documents consulted. But if the amount of graphic material is considerable, more than five documents, we consider it best to include all the graphic information in one or more attachments.

5.3.7. *Analysis*

Next comes the compilation of all the analysis work done by the expert to meet the objective marked in the order. Obviously, this section will be the most extensive of all, and, if several analyzes have been done, it is recommended to subdivide it into several sections to make reading and comprehension easier.

We must begin with the comparative analysis of the designs in dispute as it is the most important analysis and the one that the reader will pay the most attention. The rest of the analyses can be considered of secondary character, and their function is to reinforce or to qualify the conclusions drawn from the first one.

When comparing the designs with each other, we will begin by explaining and describing each design individually, identifying the characteristics of each one separately. Afterwards, the results of their comparison will be explained and the similarities and differences found will be exposed.

A two-column layout can be used to present the descriptive analysis of each design in a visual and easy way. On the left side, we would place the analysis relative to design 1 and on the right side, the analysis relative to design 2. Thus, the reader will appreciate more clearly the different items that have been compared and the differences or similarities between them.

After presenting the results obtained in each analysis, a brief summary of the conclusions will be made, citing both the similarities and the differences found, since, following the oath of impartiality, the expert should not emphasize one position more than another. In addition, in this section of analysis, the expert only describes the methodology of analysis followed and the results obtained, leaving the conclusions for later.

It is also advisable to attach photographs or diagrams to better understand the arguments being presented. If necessary, photographs can include numbers, arrows, or strokes to highlight the details being explained. So, for example, if you want to emphasize that one design has a circular shape and the other oval shape, we can superimpose a circle or an oval to the photographs so that the idea is better appreciated.

We can start the section with a general photograph of the designs, but then, as we comment on the analysis process, partial or detail images should be used to better understand each argument. So, for example, if we are comparing the wheels, we will locate an image where only the wheels are seen and not the whole product.

The secondary analyses that we include after the main comparative analysis (analysis of other similar designs, analysis of the commercial strategy, market analysis, etc.) should be less extensive and occupy less number of pages. The photographs of the documents analyzed are usually included in one or several annexes and within the text, only the methodology of analysis and the results obtained are explained, as well as their relation with the main analysis.

5.3.8. Conclusions

It is best to start by summarizing the documentation analyzed and the work process followed. The reader who goes directly to read the conclusions will know what analysis they come from, and the one who has read it from the beginning will be able to recapitulate and remember the most important of the previous chapters before proceeding to the conclusions.

Obviously, the conclusions try to answer the objective defined in the introduction, so it is better to read it again to remember it. It may also be a good practice, after writing the paragraph, to read the objective again and to verify if it has been clearly answered in the conclusions.

We begin the conclusions by listing and indicating the similarities and differences found between the two designs in the comparative analysis. Then we confront them with the rest of the information extracted from the secondary analyses and interpret the results again.

Finally, we try to respond directly to the research question or objective of the report. In most cases, it will be tried to explain if the existence of both designs could create confusion in the market. This statement should be reasoned as an expert, based on the data revealed by the analysis and providing technical and scientific parameters, so that it is not perceived as a mere personal opinion.

5.3.9. References

This section will indicate the bibliographic documents that have been consulted or taken as a reference both in the preparation of the report and in the analyses carried out. We refer to manuals, dictionaries, scientific journals, daily newspapers, and so on.

5.3.10. Attachments

It has already been mentioned in the previous paragraphs, the existence of a section of annexes where to include that information that does not “fit” within the main text. These are data of secondary or tertiary character whose presence within the text would only prolong without reading the latter. These are materials that you do not need to read to properly understand the report.

6. Conclusions

The increasing use of design as a distinctive element of the companies’ offer makes it often attacked. The industrial property regulations that try to protect it are infringed by actions of unfair competition. The judicial processes started to decide on these aspects usually include one or more expert reports that present the expert’s point of view on the case to judge.

There are documents with guidelines on how to make an expert report raised both from a generalist level and from a specific discipline such as criminalistics, forensic engineering, and psychology. However, it seems that the design field does not have texts of this type.

This chapter tries to fill this space and presents a series of indications on how to guide and present an expert report focused on design. We consider it very important that there be actions such as this to try to normalize, in some way, the preparation of an expert report and thus obtain professional and effective reports also in this area.

To do this, we have started from what has been exposed in other disciplines to adapt it to the characteristics of the discipline of design and also has taken as reference the expert reports on design drafted over the last 10 years by the authors. The result is a set of notes on how to propose an expertise in the field of design, which obviously do not present as a rigorous regulation that must be fulfilled in any case but rather as recommendations that the expert can take as a reference for, from them, build their own method of work.

We then summarize the recommendations that we consider to be most relevant either because they contribute greatly to improving the content of the report or because they are aspects of design that have not been found referenced in any other discipline.

The first one is the way to present the comparative analysis between the designs beginning with an individual description of each of them and then move on to the comparison and detection of differences and similarities. Throughout our experience in the development of expertise, this method of presenting the analysis has proved to be uniquely clear and systematic both from the point of view of the expert and from the point of view of the reader. The expert thus becomes more objective in explaining how he has performed the analysis and does so in an orderly manner and without forgetting any aspect. The reader, judge or lawyer, accesses

this information in a gradual way, by parcels, which allows him to bit by bit understand the succession of ideas expressed by the expert and perceiving the exhaustiveness with which the analysis has been carried out.

Second, the comparative analysis of designs should, whenever possible, be supported and nuanced by other analyses that describe how each design is presented in the market. We start from the fact that no design is alone but immersed in a commercial and competitive situation. Both the elements that accompany it in its presentation before the user, packaging, advertising, shops, uniforms, brand, and so on, like the rest of competing designs, influence the perception that the informed user has of a design.

If all products in a particular category tend to be red, then it is suspected that only the two products in dispute are green. But if all or the majority are green, then that circumstance ceases to be so peculiar and suspicious. The “green” characteristic is not a distinguishing sign of either product but of the whole category. Therefore, it is not a relevant similarity in determining whether there is a likelihood of confusion in the market.

Judging whether there is a possibility of confusion in an aseptic environment, where only these two designs are found, is unrealistic. Therefore, the expert must take into account the market situation of each design to correctly assess the differences or similarities between the designs. This results in including in the report the marketing-mix study of each design or the analysis of other similar designs.

When issuing the conclusions, it is important to evaluate the design from the user’s point of view, knowing which aspects are most relevant when deciding the purchase. The fact that the similarities founded are in those more relevant aspects will increase the severity of the copy that if the similarities lie in aspects less valued by the public.

The design is not only something graphic or object but it also enters the communicative field. Just as everything in a company communicates, the characteristics of a design also tell a lot about it. Therefore, the expert will take this into account when giving his opinion in the report.

Last, but not least, is the caring of the formal aspect and content of the report. We must not forget that the expert report is an instrument of communication between the issuer (the expert) and the appointees (judge, lawyers, etc.) and, therefore, must take care of especially everything that favors this communication. We talked about both the formal aspect and the content of the report. Since the expert presents himself as an expertise person in design, he can’t present a work that lacks it. In terms of content, a precise but understandable language will be used at all times, as the report is intended for non-experts in design.

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