

Die Seite der AIPPI | La page de l'AIPPI

AIPPI Q278-SGL-D-2021 – Industrial designs and the role of prior art

Report of the Swiss Group

I. Current law and practice

1.

- a) Does your Group's current law provide for an intellectual property right (other than copyright, trade marks or trade dress), that specifically protects the outward appearance or ornamentation of an object or article of manufacture or other? Please answer YES or NO.

Yes.

- b) If YES to Q1.a), please identify that law and explain what that right is called. (e.g., registered design, industrial design, design patent, etc.).

The law governing the outward appearance or ornamentation of an object or article of manufacture is the Swiss Federal Act on the Protection of Designs (Design Act, DesA), of 5 October 2001, which was last amended on 1 April 2019, Classified Compilation No. 232.12. The right is called *design right*; the object of the right is called *design*.

2.

Please identify what features of the outward appearance or ornamentation are taken into consideration for a design, e.g., shape/contour, surface, texture, colour, etc.

The DesA considers features such as the arrangement of lines, surfaces, contours, colours and materials used (Art. 1 DesA, OERTLI/SCHRAMM, Design Rights, Functionality and Scope of Protection, AIPPI Law Series, 2nd ed., Aaphen aan den Rijn 2021 (in publication), p. 566). All visually perceptible features of a design are relevant for design protection, including material and colour. Two and three dimensional product designs of all types and forms can be protected, as long as they are used in relation to a product (not as object of fine art, which does not serve any objective beyond itself), and further provided the characteristic elements seeking protection are able to be rendered by graphical means (OERTLI/

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The english translation of the summary is included online only.

SCHRAMM, p. 566). Under the DesA, it is not a specific product that is the object of protection, but rather the visually perceptible design embodied in this product. The features must have been applied to a product in order to realise a visual effect. Features that can only be perceived by hearing, smelling or touching cannot be protected by the DesA.

3.

- a) Is prior art used to assess requirements for protection of a design prior to registration/issuance of a design, i.e., during substantive examination by an Intellectual Property («IP») Office? Please answer YES or NO.

No.

If you have answered YES to Q3.a), please proceed to answer Q3.b). Otherwise, please proceed to Q4.

- b) Referring to Q3.a), for which requirements for protection of a design is prior art used? Please tick all boxes that apply.

- Novelty
 Originality
 Individual character
 Non-obviousness
 Inventive step
 Aesthetic
 Ornamental
 Other, namely _____

- c) Referring to Q3.a) to Q3.b), please identify your national/regional laws or guidelines that give definitions of prior art or indications of what qualifies as prior art in this context.

Not applicable.

4.

- a) Is prior art used to assess requirements for protection of a design when validity of the design is contested in court or other post-registration/issuance venue? Please answer YES or NO.

Yes.

If you have answered YES to Q4.a), please proceed to answer Q4.b). Otherwise, please proceed to Q5.

b) Referring to Q4.a), for which requirements for protection of a design is prior art used? Please tick all boxes that apply.

- Novelty
- Originality
- Individual character
- Non-obviousness
- Inventive step
- Aesthetic
- Ornamental
- Other, namely _____
Art. 2(1) DesA.

c) Referring to Q4.a) to Q4.b), please identify your national/regional laws or guidelines that give definitions of prior art or indications of what qualifies as prior art in this context.

A design is not new if an identical design which could be known to the circles specialised in the relevant sector in Switzerland has been made available to the public prior to the filing date or the priority date (Art. 2(2) DesA). A design does not have originality (*Eigenart, originalité*) if the overall impression it produces differs only in immaterial features from a design that could be known to the circles specialised in the relevant sector in Switzerland (Art. 2(3) DesA). The concept of prior art is used to define novelty and originality *ex negativo*. Art. 2(2) DesA refers to prior art as destroying novelty of an identical design, while Art. 2(3) DesA refers to prior art as destroying originality of a new design that does not differ in material features from the earlier design. The Design Act does not otherwise define prior art or indicate what qualifies as prior art in this context. So the design of any type and class of products or of products manufactured in any material (except if the material is a specific feature of the protected design) can be relevant for determining novelty and originality of a new design, provided that design was known or could have been known to the relevant specialised circles, i.e., the persons interested in purchasing the so designed products. (R. M. STUTZ/S. BEUTLER/M. KÜNZLI, *Stämpelis Handkommentar zum Designgesetz [DesG]*, Bern 2006, DesG 2 N 54). Although the novelty test is a worldwide one, only shapes that could be known to the relevant public in Switzerland are to be taken into account.

5.

a) Is prior art used to assess requirements for protection of a design with respect to infringement proceedings or other legal situations not addressed by Q3 and Q4? Please answer YES or NO.

Yes.

If you have answered YES to Q5.a), please proceed to answer Q5.b). Otherwise, please proceed to Q6.

b) Referring to Q5.a), for which requirements for protection of a design is prior art used? Please tick all boxes that apply.

- Novelty
- Originality
- Individual character
- Non-obviousness
- Inventive step
- Aesthetic
- Ornamental
- Other, namely scope of protection.

c) Referring to Q5.b), please indicate in which context these requirements for protection are taken into consideration, e.g., before a judge in infringement proceedings or other legal situations not addressed by Q3 and Q4.

They are taken into consideration before a judge in infringement proceedings in two settings:

(a) The accused infringer may raise the objection of invalidity of the invoked registered design by contesting its novelty and originality. Without such objection, no requirements for protection are examined in an infringement procedure.

(b) The scope of protection of a design does not include those features with regard to which the design does not differ or differs only insignificantly from pre-existing design references. A design is protectable if, in the perception of the relevant public, the overall impression of a design differs significantly from the prior art. Accordingly, when comparing two designs, a prospective buyer will consider two products to be equal and equivalent with regard to the design if their main elements match. Normally, a prospective buyer will not pay attention to minor deviations. These assessment criteria are applied by the Swiss Federal Supreme Court both to determine the issue of protectability and the scope of protection under Art. 8 DesA, where it is also necessary to determine the overall impression on the buyer. The standard for assessing originality correlates with the one for determining the scope of protection.

The more a design stands out from the existing, the greater its originality, and thus also its scope of protection (STUTZ/BEUTLER/KÜNZLI, DesG 8 N 32).

d) Referring to Q5.a) to Q5.c), please identify your national/regional laws or guidelines that give definitions of prior art or indications of what qualifies as prior art in this context.

Same as above, Q4.c).

6.

- a) Do your national/regional laws or guidelines provide different definitions of prior art or indications of what qualifies as prior art for registration/issuance, validity, infringement, or other? Please answer YES or NO.
No.
- b) If YES to Q6.a), please briefly identify the differences, if not readily apparent from your responses to Q3 to Q5.

Criteria of prior art

7.

- a) What are recognized means of disclosure, i.e., which materials/documents, etc., can constitute prior art?
In Switzerland, basically all means of disclosure can constitute prior art provided they show a reproduction and have been made available to the public. Therefore, a design is disclosed notably if it has been distributed in trade or exhibited at trade fairs. In addition, illustrations in printed matter, brochures, magazines, published applications for industrial property rights, on television, or in the Internet are recognized means of disclosure (WANG, SIWR VI, Basel 2007, 93; STUTZ/BEUTLER/KÜNZI/DesG 2 N 71; P. HEINRICH, Kommentar zum DesG/HMA, 2. Aufl., Zürich 2014, DesG 2 N 21). However, notably in respect of use in the Internet, the question arises whether such use could become known to the circles specialised in the relevant sector in Switzerland. According to legal writing, advertising or digital marketing are to be taken into account in this respect (WANG, SIWR VI, 99; STUTZ/BEUTLER/KÜNZI/DesG 2 N 65; HEINRICH, DesG 2 N 21).
- b) Does the prior art have to be «printed» and if so, what does that mean?
No (see above).
- c) Does the prior art have to be «published»¹ and if so, what does that mean?
Prior art does not have to be «published», but «made available to the public» without any explicit or implicit confidentiality interest of the disclosing party and confidentiality obligation imposed on the receiving parties (see above). The novelty of a design is not destroyed by showing the sketches, i.e., a different way of presentation than a drawing or photograph, and by showing them for a short time, which does not give the perceiver the opportunity to copy or memorize the design (BGE 57 II 372).
- d) Have there been any recent updates or clarifications of prior art in your jurisdiction focused on intangible or other non-«printed» materials? Please provide those updates.
It appears that no Swiss Court decisions have been published in respect of intangible or other non-«printed»

materials recently. In all decisions known to the group, the publication was either in kind (showing the design object) or in print (showing a rendition of the design object) to at least one other person who was not subject to a confidentiality obligation.

Time of disclosure

8.

- a) What is the relevant date of a prior art reference?
According to Art. 2(2) DesA, it matters whether a prior design has been made available «prior to the filing date or the priority date». In prevailing view, the last date when an item of prior art needs to be disclosed in order to destroy novelty or originality is the day prior to the filing date or the priority date (WANG, SIWR VI, 86; STUTZ/BEUTLER/KÜNZI, DesG 2 N 75; dissenting HEINRICH, DesG 2 N 62). A publication on the same date as the filing does thus not destroy novelty.
- b) Are design applications published, and if so, when?
No, the Swiss Federal Institute of Intellectual Property does not publish Swiss national design applications before registration.
- c) When and how are issued design patents or registered designs published?
Unless deferment of publication is requested, Swiss design registrations are published in the swissreg database (<www.swissreg.ch>) within a few working days following registration (and usually about four to six weeks from the application date).
- d) Does the publication of an issued design patent or registered design effect a publication of the underlying design application if not previously published?
The publication of the registered design does not effect a publication of the underlying design application. The drawing or photo of the design object published as part of the issued registered design must correspond to the drawing or photo deposited as part of the underlying application, save for instances of partial surrender (*Teilverzicht*).

Circumstances of disclosure

9.

Are the circumstances of disclosure relevant, e.g. (please tick all boxes that apply):

- geographic location
 type of location (e.g., during an exhibition)
 sector/type of products

¹ We assume that the terms «publication» or «printed publication» are being used in the sense given to them in 35 U.S.C. 102(a)(1) of the AIA and the Manual of Patent Examining Procedure, (MPEP) Section 2128, citing *In re Wyer*, 655 F.2d 221, 210 USPQ 790 (CCPA 1981).

- ☒ the person disclosing the prior art (e.g., disclosure by the applicant of a design does not automatically destroy novelty but lets a grace period start)
- ☒ the recipient of the disclosed prior art (if he/she is bound by a confidentiality obligation, the disclosure does not destroy novelty)
- ☒ other, namely
 - (a) disclosure by a third party which has disclosed the design in an abusive manner to the detriment of the entitled person does not automatically destroy novelty but lets a grace period start;
 - (b) the design must have been disclosed under such circumstances so that the design could be known to the circles specialised in the relevant sector in Switzerland.

Grace period

10.

Does your jurisdiction provide a grace period after a first public disclosure of a design for later filing for protection of such design? Please answer YES or NO. If answering YES, please explain the conditions (e.g., formal request, same applicant) and identify the length of time for the grace period (e.g., 6 or 12 months).

Yes.

Art. 3 DesA states that the disclosure of a design may not be invoked against the right holder during the 12 months preceding the filing date or priority date if:

- a) a third party has disclosed the design in an abusive manner to the detriment of the entitled person;
- b) the person entitled has disclosed the design himself.

Thus, a disclosure of a third party that has been done prior to the 12 months preceding the filing, or that has done during the 12 months preceding the filing or priority date but not in an abusive manner to the detriment of the entitled person, e.g., by a third party in good faith, constitutes prior art with regard to novelty and originality of the design.

The Swiss law does not require a formal request, i.e., notification to the national authority of prior disclosure, to be made in advance, in order to invoke the grace period of Art. 3 DesA.

Other

11.

Please indicate any other relevant criteria of prior art.

According to Art. 2(2) and (3) DesA, the relevant prior art for the assessment of novelty is restricted to prior art that could be known to the circles specialized in the relevant sector in Switzerland. The possibility of knowledge by the circles specialized in the relevant sector in Switzerland is dependent on a combination of the temporal and the territorial distance and of the groups of people involved.

A pre-publication needs to enable a reproduction of the design, in order to constitute possible novelty- or originality-destroying prior art. For example, a short presentation of a sketch, which is not as faithful as a drawing or a photograph, and which is not handed over, so that the receiver is not given the opportunity to copy or memorize the design, does not destroy the novelty of a design (BGE 57 II 374).

The use of prior art when assessing the requirements for protection of a design

12.

- a) **Does one single prior art reference have to disclose all features of a design in order to prevent its validity?**

No.

A distinction has to be made between novelty and originality of the design. According to Art. 2(1) DesA, both of these requirements need to be fulfilled for a Swiss design to be valid.

Novelty: If a design differs from a prior art reference, but only in barely perceptible details in the eyes of the public, it does not fulfil the requirement of novelty (BGE 134 III 205). Thus, if the prior art reference discloses all but one feature of the new design, and the missing feature only constitutes a detail whose presence or absence does not determine the appearance, the prior art reference can still be novelty-destroying for a design.

Originality: According to Art. 2(3) DesA, the overall impression of the design is the decisive criterion for assessing its originality. If, in view of the overall impression, a design differs only in immaterial features from a prior art design, it does not have originality. If the prior art discloses all features except for some immaterial features which do not determine the overall impression it gives, the design lacks originality and is thus not valid.

- b) **Can a prior art reference that differs only in minor details from a design prevent finding validity? If YES, please indicate what does only in minor details mean (is it, e.g., in a non-substantive way)?**

Yes.

In accordance to the answer to Question 12.a) above, if a prior art reference differs only in details that clearly do not distinguish the appearance from a design, that design still lacks novelty (BGE 134 III 205). Further, if a prior art reference differs from a design in only some details that are immaterial for their overall impression, this can prevent validity of a design due to lack of originality.

- c) **Can a prior art reference that discloses the entire design with additional features prevent finding validity?**

According to the explanations with respect to Question 12.a) above, if the additional features form barely perceptible details that do not affect the appearance in the eyes of the relevant observers, the prior art reference can render a design invalid due to lack of novelty. Further, if the additional features affect the appearance, but are im-

material in the sense that they do not affect the overall impression, the prior art reference can render a design invalid due to lack of originality.

- d) **Can a combination of prior art references be used to disclose the features of a design in order to prevent its validity? If YES, is there a limit to the number of prior art references that can be combined?**

No.

According to established Swiss case law, a pre-published design can only be identical and thus destroy novelty, or carrying the same overall impression and thus destroy originality, if the concrete combination of features in their entirety forms the design. It is not sufficient to show that each of the features had been known in isolation. Regarding originality, Swiss design law implies and the relevant legal literature (e.g., STUTZ/BEUTLER/KÜNZLI, Art. 2 DesG N 91; HEINRICH, DesG 2 N 88) confirms that a synopsis of two or more known prior art designs is not permissible for assessing the originality of a design. Even if a designer does nothing else than combining various elements known from different prior art designs, this can establish the originality of the new design if its overall impression differs in its entirety from the pre-existing ones. The evaluation of a design's originality must not stop at the consideration of the individual, albeit characterising elements, but must extend to their interaction.

- e) **Does the assessment of validity differ where there is numerous prior art or very few prior art available?**

The assessment of novelty and originality of a design needs to be done with respect to each prior art design individually. The number of prior art designs is not relevant for determining novelty and originality (one may suffice, many may not suffice to destroy novelty or originality, but see answer to Question 13).

- f) **Does the assessment of validity differ with respect to designs for different industry sectors (e.g., textile design vs. GUI design)?**

In principle, the assessment of validity of design is independent from and does not vary between industry sectors.

According to Art. 2(2) and (3) DesA, for a prior art design to be relevant with respect to novelty and originality, it needs to be known to the circles specialized in the relevant sector in Switzerland. As a consequence, the fact that a prior art design originates from a different industry sector might lead or at least contribute to the conclusion that it is not known to the respective circles of the design of which the validity is assessed. For example, a display of a design object in a small and highly specialized store of a very specific industry sector might not be known to the relevant circles of a completely different, unrelated industry sector, thus, not constitute prior art in the assessment of the validity of a certain design.

A design is not linked to a respective category of products and, thus, may be invalidated by an earlier identical or similar design of another product group. For example, a known shape of a cigarette can invalidate the design of a lighter having the same shape, the long-known outlines of flower vases can invalidate the design of a laundry bag (DFT 92 II 202 ff. delib. 4, STUTZ/BEUTLER/KÜNZLI, DesG 2 N 41, dissenting WANG, Die schutzfähige Formgebung – Eine Untersuchung der materiellen Voraussetzungen des muster-, urheber- und markenrechtlichen Schutzes von Warenformen, Bern 1998, 190; HEINRICH, N 2.60 f. und N 2.82 f. DesG), provided as said above that the earlier design was known or could have been known to the persons interested in purchasing the products for which the newer design has been registered.

The influence of prior art on the infringement/scope of protection of a design

13.

Does the assessment of infringement/scope of protection of a design differ where there is numerous prior art or very few prior art? Please refer to earlier response(s) where applicable.

The scope of protection of a design is governed by Art. 8 DesA, according to which other designs that have the same essential features and produce the same overall impression as a registered design fall under the scope of protection of that design.

For the assessment of the overall impression, the «density» of the known prior art in the relevant field is to be considered: If the field of shapes in a product area is already densely populated, the relevant specialised circles are used to paying attention to small differences (BGE 134 III 205). This means that small details may suffice to obtain registration, but will also grant a correspondingly narrow scope of protection.

II. Policy considerations and proposals for improvements of your Group's current law

14.

Could any of the following aspects of your Group's current law relating to prior art be improved? If YES, please explain.

- a) **Defining criteria of prior art.**

No.

- b) **The use of prior art when assessing the requirements for protection of a design.**

No.

- c) **The influence of prior art on the infringement/scope of protection of a design.**

No.

15.

Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

No.

III. Proposals for harmonization

Please consult with relevant in-house/industry members of your Group in responding to Part III.

No, we have industry expertise within our group.

16.

Do you believe that there should be harmonization in relation to the definition of prior art and/or the use of prior art when assessing the requirements for protection?

No.

If YES, please respond to the following questions without regard to your Group's current law or practice. Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

17.

a) Should prior art be used to assess requirements for protection of a design prior to registration/issuance, i.e., during substantive examination by an IP Office? Please answer YES or NO.

No.

If you have answered YES to Q17.a), please proceed to answer Q17.b). Otherwise, please proceed to Q18.

b) Referring to Q17.a), for which requirements for protection of a design should prior art be used? Please tick all boxes that apply.

- Novelty
- Originality
- Individual character
- Non-obviousness
- Inventive step
- Aesthetic
- Ornamental
- Other, namely _____

18.

a) Should prior art be used to assess requirements for protection of a design during determination of validity when validity of the design is contested in court or other post-registration/issuance venue? Please answer YES or NO.

Yes.

If you have answered YES to Q18.a), please proceed to answer Q18.b). Otherwise, please proceed to Q19.

b) Referring to Q18.a), for which requirements for protection of a design should prior art be used? Please tick all boxes that apply.

- Novelty
- Originality
- Individual character
- Non-obviousness
- Inventive step
- Aesthetic
- Ornamental
- Other, namely _____

19.

a) Should prior art be used to assess requirements for protection of a design with respect to infringement proceedings or other legal situations not addressed by Q17 and Q18? Please answer YES or NO.

Yes with regard to scope of protection, No if the accused infringer does not contest validity.

If you have answered YES to Q19.a), please proceed to answer Q19.b). Otherwise, please proceed to Q20.

b) Referring to Q19.a), for which requirements for protection of a design should prior art be used? Please tick all boxes that apply.

- Novelty
- Originality
- Individual character
- Non-obviousness
- Inventive step
- Aesthetic
- Ornamental
- Other, namely scope of protection

c) Referring to Q19.b), please indicate in which context these requirements for protection should be taken into consideration, e.g., before a judge in infringement proceedings or other legal situations not addressed by Q17 and Q18.

Before a judge in infringement proceedings if the accused infringer contests validity.

Criteria of prior art

20.

a) What should recognized means of disclosure be, i.e., which materials/documents, etc., can constitute prior art?

Any form of disclosure that is sufficient to allow reproduction.

b) Should the prior art have to be «printed» and if so, what should that mean?

No.

c) Should the prior art have to be «published» and if so, what should that mean?

Yes, publication towards one person not bound by confidentiality obligations and potential publication suffice.

Time of disclosure

21.

What should the relevant date of a prior art reference be?

Circumstances of disclosure.

Any time and circumstances, provided publication was such that it could become and be known to the relevant specialised circles prior to the filing date or the priority date. The circumstances from which it can be inferred that the recipient was bound by confidentiality should be defined broadly, i.e., in any circumstances of collaboration in the development of a design, confidentiality should be presumed (but not of course in a situation of a mere offer for sale).

22.

What, if any, circumstances of disclosure should be relevant? Please tick all boxes that apply.

- geographic location
- type of location (e.g., during an exhibition)
- sector/type of products
- the person disclosing the prior art (e.g., the applicant of a design, a person bound by a confidential agreement, etc.) The applicant or its auxiliary person
- the recipient of the disclosed prior art: a person bound by an explicit or implicit confidential undertaking
- other, namely such circumstances that (a) it could become and be known to the relevant specialised circles, (b) allows for reproduction

Grace period

23.

a) Should there be a grace period after a public disclosure of a design for later filing for protection of such design? Please answer YES or NO.

Yes.

b) If the answer to Q23.a) is YES, please identify what the length of time for the grace period should be. Also, please explain what the conditions allowing for the benefit of the grace period should be (e.g., formal request, same applicant).

One year, no formal request.

Other

24.

Should there be any other relevant criteria of prior art?

No.

25.

Should the assessment of prior art differ for the different requirements for protection mentioned in Q17.b), Q18.b) and Q19.b)?

No.

The use of prior art when assessing the requirements for protection of a design

26.

a) Should one single prior art reference have to disclose all features of a design in order to prevent its validity?

No.

b) Should a prior art reference that differs only in minor details from a design prevent finding validity? If YES, please indicate what should only in minor details mean (is it, e.g., in a non-substantive way)?

Yes. Minor details are those that do not create a substantially different overall impression.

c) Should a prior art reference that discloses the entire design with additional features prevent finding validity?

Yes, if the overall impression is identical or substantially similar.

d) Should it be possible to contest the validity of a design on the ground of a combination of prior art references disclosing the features of a design? If YES, should there be a limit to the number of prior art references that can be combined?

No. The comparison can only be carried out between the new design and one item of prior art at the time (see answers to Q12.d)).

e) Should the assessment of validity differ where there is numerous prior art or very few prior art available?

Yes. In a crowded field of prior art, a small differentiation may suffice to make a new design protectable, albeit with a correspondingly narrow scope of protection.

f) Should the assessment of validity differ with respect to designs for different industry sectors (e.g., textile design vs. GUI design)?

No.

The influence of prior art on the infringement/scope of protection of a design

27.

Should the assessment of infringement/scope of protection of a design differ where there is numerous prior art or very few prior art? Please refer to earlier response(s) where applicable.

Yes. See answers to Q13 and Q26.e).

28.

Please comment on any additional issues concerning any aspect of industrial designs and the role of prior art you consider relevant to this Study Question.

Features of prior art should not be excluded simply because they concern technical functions of the product.

29.

Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

Furniture.

Zusammenfassung

Gemäss dem schweizerischen Bundesgesetz über den Schutz von Design (Designgesetz, DesG) wird der Stand der Technik nicht zur Beurteilung der Schutzvoraussetzungen vor und in Verbindung mit der Eintragung herangezogen, sondern erst später, wenn die Gültigkeit des Designs vor Gericht angefochten wird, insbesondere zur Beurteilung von Neuheit und Eigenart des Designs. Im Einzelnen fehlt einem Design die Neuheit, wenn ein identisches Design, das den in der Schweiz beteiligten Verkehrskreisen auf dem betreffenden Gebiet bekannt sein könnte, der Öffentlichkeit vor dem Anmelde- oder Prioritätstag zugänglich gemacht worden ist. Und es fehlt einem Design an Eigenart, wenn es sich nur in unwesentlichen Merkmalen von einem Design unterscheidet, das den auf dem betreffenden Gebiet beteiligten Verkehrskreisen in der Schweiz vor dem Anmelde- oder Prioritätstag bekannt sein konnte. Der Stand der Technik kann auch für die Bestimmung des Schutzbereichs eines Designs von Bedeutung sein, denn je mehr sich ein Design vom vorbekannten Formenschatz an Designs abhebt, desto grösser ist seine Eigenart und damit auch sein Schutzbereich. Das ältere Design kann durch irgendeine Art und Weise der Offenbarung zugänglich gemacht worden sein, sofern dies an einem Tag vor dem Anmeldetag des neueren Designs in einer Art und Weise erfolgt ist, die eine Nachahmung des offenbarten Designs ermöglicht. Es gibt eine Neuheitsschonfrist von einem Jahr im Falle einer Offenbarung durch den Anmelder selbst oder bei einer missbräuchlichen Offenbarung durch einen Dritten.

Résumé

Selon la Loi fédérale suisse sur la protection des designs (Loi sur les designs, LDes), l'art antérieur n'est pas utilisé pour évaluer les conditions de protection avant et en relation avec l'enregistrement, mais seulement plus tard, lorsque sa validité est contestée en justice, en particulier pour évaluer la nouveauté et l'originalité du design. Concrètement, un dessin ou modèle est dépourvu de nouveauté si un dessin ou modèle identique, pouvant être connu des milieux spécialisés du secteur concerné en Suisse, a été rendu public avant la date de dépôt ou la date de priorité. Par ailleurs, un dessin ou modèle manque d'originalité s'il ne diffère que par des caractéristiques immatérielles d'un dessin ou modèle qui pouvait être connu des milieux spécialisés dans le secteur concerné en Suisse avant la date de dépôt ou la date de priorité. L'art antérieur peut également être pertinent pour déterminer l'étendue de la protection d'un dessin ou modèle, car plus un dessin ou modèle se distingue de l'ensemble des dessins ou modèles existants, plus son originalité est grande, et donc également l'étendue de la protection. Le dessin ou modèle antérieur peut être divulgué par tout moyen, à condition que cette divulgation ait eu lieu un jour avant la date de dépôt du dessin ou modèle plus récent et qu'elle ait été faite de manière à permettre la copie du dessin ou modèle divulgué. Il existe un délai de grâce d'un an en cas de divulgation par le demandeur lui-même ou par une divulgation par un tiers agissant de manière abusive au détriment de l'ayant droit.