I. Current law and practice

**Please answer all questions in Part I on the basis of your Group’s current law and practice.**

1. **Is protection given to Partial Designs, and if so, are the laws for the protection of Partial Designs different to the laws for the protection of designs generally? If YES, please explain.**

   **Yes**

   **Please Explain**

   In Belgium, two legal regimes may apply to registered designs: (i) the Benelux Convention on intellectual property (hereafter “BCIP”), implementing i.a. the Directive 98/71/EC on the legal protection of designs (hereafter “Community Design Directive” or “CDD”) in Benelux law and (ii) Council Regulation 6/2002 on Community Designs (hereafter “Community Designs Regulation” or “CDR”).

   None of these legal regimes provide for a separate legal framework for partial designs. In other words, partial designs can be protected pursuant to the BCIP or CDR but will fall under the general regime for design rights.

   In general, and as discussed in the Belgian group AIPPI report in 2016, protection is granted to the appearance of the whole or a part of a product, which appearance results from the features, in particular the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation (Article 3.1 BCIP, Article 3.a CDR and Article 1.a CDD).

2. **How are Partial Designs specified, described and/or graphically depicted?**

2.a. **Is there a visual indication, e.g. by dotted or dashed lines, or shading or colouring, of those components that are not included in the Partial Design, i.e. of the Unclaimed Part?**
Yes, generally the features of a registered design which are disclaimed (and thus disregarded for the purposes of the validity and the infringement assessment) are indicated with dotted or broken lines. The EUIPO’s guidelines (although they are not binding) state that the features of a Community Design represented with dotted lines, boundaries or colouring or in any other manner make clear that protection is not sought in respect of such features[1].

Section 5.3 of the Examination Guidelines of 10 October 2017 states the following:

“5.3 Use of visual disclaimers to exclude features from protection

[...]

Use of a description, within the meaning of Article 36(3)(a) CDR, is not appropriate in this regard since a description ‘shall not affect the scope of protection of the design as such’ according to Article 36(6) CDR. Moreover, only an indication that a description has been filed is published, not the description as such (Article 14(2)(d) CDIR).

Disclaimers must therefore be apparent from the representation of the design itself.

In accordance with the Common Practice (CP6), visual disclaimers indicate that protection is not being sought, and registration has not been granted, for certain features of the design shown in the representation. Thus, they indicate what is not intended to be protected. This can be achieved:

• by excluding with broken lines, blurring or colour shading the features of the design for which protection is not sought; or

• by including within a boundary the features of the design for which protection is sought, thus making it clear that no protection is sought for what falls outside the boundary.”

This approach to dotted lines and unclaimed parts of a design has also been confirmed by some Benelux courts [2] as well as the General Court in its decision of 14 June 2011 with respect to a watch attached to a lanyard [3]. Also the Benelux Office explicitly states on its website that visual disclaimers can be used. With respect to a drawing, dotted lines are capable of showing elements that do not form part of the design. With respect to photographs, these elements in the photo can be blurred [4].

However, not in all circumstances do the dotted lines refer to the disclaimed part of a registered design. [5]

Footnotes

1. ^ EUIPO “Guidelines for examination in the Office for Harmonization in the Internal Market (trade marks and designs) on registered community designs: Examination of Design Invalidity Applications “, p. 35-36.

2. ^ President Court The Hague 8 July 2015, IEFbe 1425 (Kind Group tegen JPMC) and President Court Overijssel 22 February 2016, ECLI:NL:RBOVE:2016:600 (Modelrecht gedecoreerde klompen).


5. ^ GCEU, 28 January 2015, T?41/14, Argo Development and Manufacturing Ltd / OHIM and Clapbanner Ltd, para 59: “The applicant’s argument that the handles are in the same place in the designs at issue is manifestly not well founded in so far as, inter alia, the handle in the contested design is represented as a line of perforations to be pressed out, whereas the handle is attached in the earlier designs.”
Not necessarily, but it is possible.

**2.c** Can verbal disclaimers be used?*

* Verbal disclaimers may be used in Brazil. For example, in the case of a handle for a pan, the entire pan is shown but the applicant may indicate in writing that protection is sought only for the handle.

Yes

Please Explain

Yes under art. 36 (3)(a) CDR for “explaining the representation or the specimen”, although such information “shall not affect the scope of protection” (Article 36 (6) CDR).

**3** Can a Partial Design forming part of a Product X be infringed by the use of the same Partial Design on a Product Y? If so, please explain any required link or nexus between X and Y.

Yes

Please Explain

As the Belgian Group is of the opinion that the assessment of infringement of a registered design and the assessment of novelty and individual character of the design at issue compared to a prior design are the two sides of the same coin, questions 3 and 4 will be considered together.

**4** Can a Partial Design forming part of a Product X be considered not novel in view of the same Partial Design in prior Product Y? If so, please explain any required link or nexus between X and Y.

Yes

Please Explain

The response to questions 3 and 4 depends first of all on the applicability of the so-called speciality principle in design law, according to which the validity assessment and the scope of protection of a given design are restricted to the same product or at least to the products belonging to the same sector as the product(s) as those indicated by the application or registration.

In its recent Groupe Nivelles judgment, pronounced on 21 September 2017, the E.U. Court of Justice stated in that respect and a.o. the following:

“96 In such circumstances, the General Court was right to hold in paragraph 116 of the judgment under appeal that, having regard to the interpretation of Articles 10, 19 and 36 of Regulation No 6/2002, a Community design cannot be regarded as being new, within the meaning of Article 5(1) of that regulation, if an identical design has been made available to the public before the dates specified in that provision, even if that earlier design was intended to be incorporated into a different product or to be applied to a different product. The fact that the protection granted to a design is not limited only to the products in which it is intended to be incorporated or to which it is intended to be applied must therefore mean that the assessment of the novelty of a design must also not be limited to those products alone.

129 In addition, as follows from paragraphs 98 to 103 of this judgment, the ‘sector concerned’, within the meaning of Article 7(1) of Regulation No 6/2002, is not limited to that of the product in which the contested design is intended to be incorporated or to which it is intended to be applied. [1]”

Nevertheless, the Court did not rule on the question whether the sector concerned is relevant for the purpose of assessing the individual character, within the meaning of Article 6 of Regulation No 6/2002, of a design [2].

The CJEU essentially based its decision on the text of Article 36 (2) and (6) CDR, titled “Conditions with which applications must comply”, which provides:
2. The application shall further contain an indication of the products in which the design is intended to be incorporated or to which it is intended to be applied.

[...

6. The information contained [...] in paragraph 2 [...] shall not affect the scope of protection of the design as such.”

This Article was viewed by the Court as excluding the application of the speciality principle, given that any information on the products in which the design is intended to be incorporated (and thus the category of products or the sector concerned) shall not “affect” the scope of protection of the design as such.

Hence, in the hypothesis of questions 3 and 4, both products X and Y should be considered, irrespective their natures. Product Y shall not be disregarded for determining whether the partial design incorporated in product X is infringed by its use on, or is regarded as not novel in view of, said product Y.

Footnotes


Please explain if your Group’s laws take into account elements outside the scope of the Partial Design (i.e. the Unclaimed Part) when considering the application of Design Constraints, such as must fit / must match exceptions.

Yes, as with all designs, the context, i.e. the industrial sector, product category and purpose, is relevant when assessing the Design Constraints of partial designs.

Are there aspects of your Group’s current law or practice relating to Partial Designs that could be improved? If YES, please explain.

Yes. The Belgian Group is of the opinion that the abandonment of the so-called speciality rule constitutes a negative development of EU design law as an industrial property law, a development whereby the latter comes closer to a copyright protection system (where the scope of protection is not limited by the nature of the products) and loses its specificity and usefulness for the design creators and users.

Although not legally binding, recital 14 in the preamble of the CDR should have been given greater consideration and weight in the interpretation of said regulation : “The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design” (own emphasis).

Furthermore, art. 36 (6) could have been interpreted as meaning that the information referred to (art. 36 (2) and (3) (a) and (d)) shall not affect the scope of protection in the sense that (i) the representation as such of the design (art. 36 (1)(c)) remains the decisive basis for validity and infringement assessments, and (ii) the notion of the informed user Is not limited to the specific products mentioned and the classification but can extend to the sector in which the user is knowledgeable.

From a policy point of view, it should be stressed that absent a speciality rule, it will become more difficult to obtain a valid design protection. Indeed, all shapes, forms and appearances of products in all sectors whatsoever will constitute novelty and individual character destroying prior art. For example, the registration or commercialisation of a pan handle for cooking utensils will prevent the design registration of a similar shape for a door handle, a spectacle case or a chocolate bar (which however might have a novel and individual character for that type of
products). In turn, the larger protection resulting from the absence of a speciality rule means that once (and if) a design is recognised as valid, the scope of protection is not limited while such extended protection is very often not needed. The abandonment of the rule makes the protection far more difficult to obtain and, if admitted, generally extending far beyond the actual need of the creator or the proprietor/user. It should be also stressed in that respect that if there is a need for a protection for multiple kinds of products, registration can be sought for in respect of each of them (apart from other legal ways of protection, e.g. copyright, with a more or less similar effect: see art. 96 CDR).

One can legitimately wonder whether such abandonment, and consequently the difficulty in obtaining design protection and the broader risk of infringing a prior design right, comply with the purposes of CDR as worded in its recitals 7 and 8, in particular “a more accessible design-protection” and the encouragement of the "innovation and development of new products and investment in their production".

Legal certainty would be better served by a system whereby the nature of the products at stake in taken into account.

This would also be also more coherent with the concept of informed user (who is not an average consumer, on the one hand; and nobody can be informed in all domains, on the other hand) and the statutory exclusion of features solely dictated by the technical function (art. 8 CDR), the verification of which should primarily consider the nature of the product(s) claimed.

The previous approach in Benelux design law, where the speciality principle was applied (although perhaps in a somehow too strict manner), is preferred.

Therefore, most members of the Belgian Group adhere to the application of the speciality principle, thus requiring the partial design to be examined in consideration of the type of product X as regards its function and purpose, or at least its sector, for the assessment of the novelty (and individual character) in front of a prior product Y or the infringement by a later product Y.

**7 Is the way of specifying, describing or depicting Partial Designs satisfactory?**

No

Please Explain

No, the meaning of dotted lines should be clarified in the statutory texts and case law.

**8 Should the Unclaimed Part influence the protection of the parts of the design that are claimed? Please explain why or why not.**

Yes

Please Explain

Yes, the Belgian Group in its majority recommends that registered design rights remain linked to their industrial application, their function and destination and thus the application of the speciality principle (for the reasons explained here above), general and this also in case of Partial Designs.

**9 Should Design Constraints restrict the subsistence and scope of protection of Partial Designs? Please explain why or why not.**

Yes

Please Explain

Yes, there is no reason to treat Partial Designs differently from designs for a whole product (except for spare parts, which are outside of the scope of this report).

**10 Should the assessment of whether a design is for a portion of a whole Product, i.e. that design is a Partial Design, take into account:**
Please consult with relevant in-house / industry members of your Group in responding to Part III.

II. Proposals for harmonisation

0.a. the design as shown and any Unclaimed Part; and/or

Yes

Please Explain

This question is irrelevant to the extent that Partial designs and Designs are assessed in a similar manner, given that the requirements for protection are identical. The Belgian group is in favour of keeping this system.

The Belgian group recommends adopting a clear definition of “Product” and “Partial Design” in relation to the products considered. In its view, a Partial Design may be limited to those portions of a product that are not normally sold separately. The group suggests that definition not be limited to sales (which is a commercial term) and to cover any separate use. To the extent the (partial) design can be separated from the Product, it may in itself be considered as a design of a Whole Product and registered as such. Alternatively, where the Partial Design constitutes an inseparable part of a Whole Product, it should clearly indicate (by means of dotted lines and/or the context given in the description of the registration) the Product in which it is incorporated.

The question then remains whether that indication will be taken into account for determining its function, its validity and any infringement thereof. The Belgian group believes that it should. In the example of the pan handle given above, the handle is normally not sold or used separately and should thus be considered as a Partial Design. However, the assessment of novelty, individual character and infringement should take into account its function, incorporated in kitchen appliances for the purpose of handling and lifting them. Hence, the exact same handle used on a sieve would be novelty defeating / infringing, but the exact appearance used on a door handle, could still enjoy design protection / would not infringe the design right in the (pan) handle.

0.b. whether the Product is normally sold separately?

Yes

Please Explain

cf. answer to 10.a.

11 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

Please Explain

III. Proposals for harmonisation

12 Should a Partial Design be registrable as an independent design?

Yes

Please Explain

13 Is harmonisation of the law of Partial Designs desirable?

Yes

Please Explain
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.

**Please propose a suitable framework for specifying, describing and/or graphically depicting (a) the Partial Design and (b) the Unclaimed Part.**

The Belgian Working Group considers the European rules to provide a good framework, to the extent some of the notions are further explained and clarified (such as the meaning of dotted lines or other graphical representations of Unclaimed Parts and the consequences of such graphical representation for the validity and infringement of the Partial Design, in particular in relation to the application of the speciality principle).

**Taking the example of a Partial Design for a handle for a pan, and an accused product consisting of a sieve with the same handle, the:**

- **Unclaimed Part (UP)** of the Partial Design is the pan without the handle;
- **Surrounding Context (SC)** is the part of the accused product without the protected Partial Design, i.e. the sieve without the handle.

Please explain whether differences between the SC and UP should be relevant when considering the overall impressions of the accused product and the Partial Design, in the following circumstances. In each case, please briefly explain why.

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<th>SC is the same as UP</th>
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Before discussing this question in depth, the Belgian group notes that the relevant sector would be the same in this particular example. Also the informed user would be the same. Both products are used in the kitchen and will fall under the sector of small kitchen appliances. This obviously has an impact on the group's answers to the following questions, which may have been different if the sectors were unconnected and the informed users were not the same.

The Belgian Group has interpreted the question as follows: does it matter whether or not an Unclaimed Part is shown? Does that limit the scope of protection of the registered design?

a) **SC is the same as UP**

In such case, the accused product is using the registered design in the exact same sector, and furthermore with the same function. Hence the infringement is established. SC is not the same as UP, but SC and UP relate to products that are used in the same way.

| SC is not the same as UP, but SC and UP relate to products that are used in the same way |

The group believes that is irrelevant whether a product is used in the same way or not, if that does not affect the definition of the relevant sector or informed user. For the question of infringement, what counts is the overall visual impression of the informed user. If the registered design is used in the same sector and in particular for similar types of products, the infringement should be established.
5. SC is not the same as UP, but SC and UP relate to products that look the same

Again, the relevant criterion here should be that of the “informed user” (cf. point b). The informed user may be defined by the purpose, functioning and sector resulting from the Partial Design registration at hand. The question then is whether the speciality principle should apply to Partial Design (cf. supra). The Belgian group believes that it should. This means that there would be no finding of infringement if for the informed user the overall visual appearance of the litigious product would not remind him of that of the registered design when considering the infringement. In the hypothesis at hand, a finding of infringement would be unlikely considering that the respective UP and SC relate to the same sector.

5. SC is not the same as UP, but SC and UP relate to products that categorised in the same way when registering designs

The Belgian Group refers to the proposed assessment criteria in (c): for there being an infringement, the purpose, functioning and sector, which determine the informed user, should be identical or similar to the extent that the industrial application of the design is the same.

5. SC is not the same as UP, and SC and UP are entirely unconnected.

No infringement should be established. The difference between SC and UP should play a role to exclude infringement.

16. In light of your answers to Question 15, please propose appropriate rules specifying whether and how the Unclaimed Part should be taken into account when analysing the overall impression of a Partial Design for both individual character and infringement.

The Belgian Working Group proposes to adopt the speciality principle in a harmonised manner, or at least for Partial Designs. As a consequence thereof, the UP may be taken into account to identify the type of product concerned and the relevant sector to which the product relates.

If the speciality principle would be adopted, Partial Designs will have a fairly limited scope of protection, narrowed down to the specific context and (type of) product included in the registration. Simultaneously however, the prior art which should be taken into consideration when assessing the validity of the Partial Design will be equally limited, thus favouring the novelty and individual character of the design.

Furthermore, the Belgian Group notes that if the speciality principle would not be accepted in a harmonised manner for all designs but only for Partial Designs, this might incentivize people to only register Partial Designs, because designs as such will become difficult to obtain / will have a too large scope of protection. Adopting the same rules for all designs seems preferable.

17. Please propose appropriate rules specifying whether and how Design Constraints arising from the Unclaimed Part should affect a Partial Design. In particular, please explain whether and how must fit / must match Design Constraints affect Partial Designs.

Design Constraints arising from the Unclaimed Part should affect a Partial Design if the speciality principle is applied. Conversely, if the scope of protection is not limited by the Unclaimed Part, and other products (with other technical functions) may be covered by the Partial Design, no Design Constraints resulting from the Unclaimed Part should be taken into account. The same goes for restrictions arising from the must fit with the Unclaimed Part (and thus the incorporation of the Partial Design in the Design as a whole).
Please comment on any additional issues concerning any aspect of Partial Designs you consider relevant to this Study Question.

None

Please indicate which industry sector views are included in your Group’s answers to Part III.

No industry members participated in the Belgian Working Group, which consists exclusively of practitioners. Nevertheless, the group tried to give an objective and unanimous opinion so as to make sure to incorporate a broad industry view.