

Summary Report

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2018 – Study Question – Designs

Partial designs

Introduction

Designs protecting the appearance of a whole product were discussed in AIPPI's Resolution on "Requirements for protection of designs" (Milan, 2016), hereafter referred to as the **Milan Resolution**. Partial designs, being a portion or portions of a whole product, were excluded from the Milan Resolution. The objective of this Study Question is to address such partial designs.

Reference is made to the Milan Resolution for the regime of protection for designs generally, and terms used in this Summary Report are the same as those in the Milan Resolution. At a minimum, novelty should be a requirement for protection of a registered design. In addition, in some jurisdictions there is a requirement that a design has **individual character**. A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public. The relevant set of prior designs which has been made available to the public, for the purposes of assessing individual character of a specific design, is referred to as the **design corpus** for that design.

The following additional defined terms are used in this Summary Report:

- a) a **Product** is an object or article of manufacture;
- b) a **Design** means the appearance of the whole or a part of a Product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the Product itself and/or its ornamentation;

- c) a **Partial Design** is a Design for a portion or portions of a whole Product¹;
- d) the **Unclaimed Part** of a Product is the part of a whole Product indicated not to be within the Partial Design;
- e) the **Surrounding Context** of an accused product is the part or parts of the accused product that do not correspond to the Partial Design, i.e. they are outside the Partial Design; and
- f) **Design Constraints** are constraints on design freedom arising from must fit / must match requirements, or the technical function of the object to which the design is applied. The term terms **functional** and **function** refer to technical functionality, not "aesthetic functionality", which has its origins in trade mark law in certain jurisdictions.

The copying of a part or even a substantial part of a design of a whole article might not infringe a registered design right. For example, in the EU, the test of infringement is whether the overall impression created by the accused product is not different to the overall impression of the design. If the accused product only has one feature (of several) taken from the registered design, the overall impressions may well be different. This makes it difficult to protect a part of a whole product as a Design, without a system of protection for Partial Designs.

There can be commercial value in the protection of parts of a Product (e.g. Partial Designs in wing mirrors, wheels, and other car parts; aesthetic additions to kitchen cabinets; the ornamental ends of an otherwise common bed; the clasp of a watch; the heel of a shoe; the base and stem of a wine glass), and it would clearly be advantageous for Partial Designs to be protected by the same legal rules across many jurisdictions. This would increase legal certainty while lowering costs.

Some of the key issues arising in relation to Partial Designs are:

- should Partial Designs be registrable?
- how should a Partial Design be indicated? For example, should there be a written indication, or graphical indication and if so what common standard would work best?
- what is the scope of a Partial Design? Should a Partial Design forming part of a larger product X, be registrable when the prior art contains the same Partial Design but forming part of a larger product Y?

¹ i.e. a Partial Design is a Design where less than the whole Produce *depicted* is claimed. Where the claimed design is depicted and described as being an entire Product, that design is not regarded as a Partial Design for the purposes of this Study Question.

The Reporter General has received Reports from the following Groups and Independent Members in alphabetical order: Argentina, Australia, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Hungary, Italy, Japan, Latvia, Malaysia, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Paraguay, Poland, the Philippines, the Republic of Korea, the Russian Federation, Singapore, Spain, Sweden, Switzerland, Taiwan (Independent Member), Turkey, the United Kingdom (**UK**), the United States of America (**U.S.**), Venezuela and Vietnam.

40 Reports were received in total. The Reporter General thanks the Groups and Independent Members for their helpful and informative Reports. All Reports may be accessed here:

<http://aippi.org/committee-publications/?committee-id=54307>

The Reports provide a comprehensive overview of national and regional laws and policies relating to Partial Designs set out in three parts:

- Part I – Current law and practice
- Part II – Policy considerations and proposals for improvement of the current state of the law
- Part III – Proposals for harmonisation.

This Summary Report does not summarise Part I of the Reports received. Part I of any Report is the definitive source for an accurate description of the current state of the law in the jurisdiction in question.

This Summary Report has been prepared on the basis of a detailed review of all Reports (including Part I) but focuses on Parts II and III, given AIPPI's objective of proposing improvements to, and promoting the harmonisation of, existing laws. As it is a summary, if any question arises as to the exact position of a particular Group in relation to Parts II or III, please refer to the relevant Report directly.

In this Summary Report:

- references to Reports of or responses by one or more "Groups" may include references to Independent Members;
- where percentages of responses are given, they are to the nearest 5%; and
- in Part IV below, some conclusions have been drawn in order to provide guidance to the Study Committee for this Question.

I. Current law and practice

For the replies to Questions 1) - 5) set out in the Summary Guidelines for this Study Question, reference is made to the full Reports. The Study Guidelines may be accessed here:

<http://aippi.org/wp-content/uploads/2018/01/Partial-Designs-Study-Guidelines-22Dec2017.pdf>

II. Policy considerations and proposals for improvement of your current law

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

20 Groups responded in the affirmative, with a great deal of variation between the Groups as to their reasons. These Groups were of the opinion that their laws could be improved, at least in some respects or to some extent. These are listed below, noting that some are contradictory.

- by adding rules on how to take the Unclaimed Part into consideration for infringement, the preference being to take it into consideration but give it less weight;
- by adding rules for the Unclaimed Part;
- by adding the possibility to use a verbal disclaimer;
- by removing the possibility to use verbal disclaimers;
- by allowing the possibility to protect Partial Designs;
- by adding improved rules in relation to infringement and validity;
- by better harmonisation internationally as to methods of depicting Partial Designs;
- by allowing unconnected Partial Designs with parts either “floating in space” or connected via a substrate formed from the Unclaimed Part;
- by reducing the impact of Design Constraints on Partial Designs; and
- by allowing non-Partial Designs and Partial Designs to be included in one application.

12 Groups were of the view that their respective laws do not need to be improved.

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

23 Groups (just over 50% of all responding Groups) believe that the way of specifying Partial Designs under their laws are satisfactory. The Australian Group is of the view that the ability to specify a Partial Design using the product name, statements of newness and distinctiveness, and the use of dotted or dashed lines is sufficient.

15 Groups were of the view that the way of specifying Partial Designs under their laws are not satisfactory. The reasons cited include:

- there are very few or no rules in relation to Partial Designs;
- there is a need to indicate the Unclaimed Part if photographs are used;
- there is a need for further methods of designating Partial Designs, over and above dotted lines;
- the rules on the infringement of Partial Designs are unclear;
- a requirement to specify the product name for Partial Designs creates difficulties with alleging infringement;
- international harmonisation is needed to ensure that methods of designating Partial Designs are consistent across jurisdictions;
- adding verbal disclaimers would be helpful; and
- boundary indications can be problematic;

8) Should the Unclaimed Part influence the protection of the parts of the design that are claimed?

Three Groups consider that the Unclaimed Part should not, in principle, influence the protection of the parts of the design that are claimed. In the view of 15 Groups, since no protection is claimed for the Unclaimed Part, the Unclaimed Part should not influence the protection of the parts of the design that are claimed.

21 Groups (just over 50% of all Groups) consider that the Unclaimed Part should influence the protection of the parts of the design that are claimed at least to some extent. This could be by using the Unclaimed Part to generally understand the claimed design, or more specifically by allowing the Unclaimed Part to be used to allow an appreciation of the design or overall impression of the claimed design. In the view of these Groups, the Unclaimed Part should be given less weight, and should have minimal influence in most cases unless it can be shown to affect the appreciation of the design or the overall impression of the design.

The point is made by the UK Group that designers, legal practitioners and courts ought to understand what is being protected from looking at the representations of the design. Designs do not (and should not) exist in a vacuum: for example, whilst the indication of the product should not affect the scope of protection, it indirectly does so. An important part of the debate is

identifying the correct definition of the product and the relevant design corpus. This may affect the overall impression of the design being considered. In the view of the UK Group, this still carries much less weight than the representations of the design which remain of central importance.

It follows that, by not showing the Unclaimed Part in the representations, the scope of protection is necessarily broader, for example a handle as compared to a saucepan handle. Whilst it is the Partial Design that ought to be compared to the infringing design (by way of a "like- for-like" comparison), a handle might have a broader design corpus making visual differences, say between the handle of a sieve, less significant and consequently more likely to produce a similar overall impression and therefore infringe. However, the Partial Design's individual character might be more open to attack.

Conversely, showing the whole saucepan in the representations makes it more likely that the product is identified as a "saucepan handle". This affects the design corpus making visual features more significant and less likely to infringe, albeit perhaps easier to prove individual character. Furthermore, the Unclaimed Part might help determine relative size, proportions or shape.

Fundamentally, the point made by the UK Group is that it is for the registration holder/designer to choose the level of generality at which its design is to be considered. The designer must perform a balancing exercise between identifying the nature and extent of the monopoly which they are claiming and trying to protect the design's validity. Therefore, its decisions as to including or excluding the Unclaimed Part on its application, ought to affect the resulting scope of protection. Even then, in the view of the UK Group, the impact of the Unclaimed Part ought to be given less weight than that of the Partial Design.

9) Should Design Constraints restrict the subsistence and scope of protection of Partial Designs?

14 Groups (around 30% of all Groups) consider that Design Constraints should not restrict the subsistence and scope of protection of Partial Designs, either because Design Constraints should not in principle limit a design, or because Design Constraints apart from functionality should not limit a design, or because functional designs should be allowed.

27 Groups (around 70% of all Groups) take the view that Design Constraints should restrict the subsistence and scope of protection of Partial Designs. This was either simply because such restrictions should be the same for Partial Designs as for Designs, with some Groups noting in this context that Design Constraints should not cause features to be eliminated altogether but may result in those features being given very little weight.

Since Partial Designs are a part of a larger product, they must necessarily and always integrate into the larger product and they must always “fit” into the larger whole. They may sometimes also “match” the larger whole. If these Design Constraints should always limit the valid scope of a Partial Design, it is inevitable that some parts of the Partial Design will be nearly always given little weight. This could be an undesirable result if a different way of sub-dividing the design of the larger whole product would give more protection, e.g. if the larger product can be divided into different Partial Designs with relatively small interfaces into the larger whole product. It could be considered unfair for the protection to be narrower simply because the borders between parts of a single design are drawn in different places.

Just over half of Groups stated that Design Constraints should be applied in the same way that they are applied for non-Partial Designs, and this approach logically results in some degree of limitation especially under a “must fit” analysis, if the Partial Design is applied in the same way in which it is linked to the Unclaimed Part. The unsurprising result, in the case of a design of a pan handle attached to a pan would be that the interface between the handle and the pan would appear to be subject to a “must fit” limitation.

However, if the Partial Design for a pan handle is applied to something else, e.g. a handle connected to a blade to form a knife, or a handle connected to an oval net with a wooden outer edge to form a tennis racket, using the same logic different limitations would be relevant, because the handle would fit differently. Of course, these types of limitations would only be discovered when the handle is used and the context in which it is used becomes known, which decreases legal certainty for the right holder in the sense that limitations due to Design Constraints can only be determined later, when the design is said to be infringed.

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:

the design as shown and any Unclaimed Part; and/or

32 Groups (80% of all Groups) agree that the assessment should take the Unclaimed Part into account, and six Groups disagree.

The French Group takes the position that when assessing novelty, only the design as shown should be taken into consideration, but when assessing overall impression/individual character/scope of protection, both the design as shown and the Unclaimed Part should be taken into consideration. This is because, in the view of the French Group, novelty is assessed objectively without taking the informed user into account, whereas the overall impression is a partly subjective construct because it refers to that same user which is determined by the function of the product in which the design is incorporated.

whether the Product is normally sold separately?

15 Groups agree that the question of whether the Product is sold separately should be taken into account, and 24 Groups (just over 50% of all Groups) disagree.

This question goes to the issue of whether a design without any express indication or suggestion that it is a Partial Design, should nonetheless be considered a Partial Design if the design is for an object that is not normally sold separately, with consequential limitations such as those imposed by Design Constraints. The question also touches on issues that are or have been relevant in many legal systems in which design protection has been limited to whole products/articles that are independently sold only, and parts or components not sold independently have not been protected by designs.

In the view of the French Group, whether the object is normally sold separately should be irrelevant. The validity of the design cannot be based on factors which depend on how the design is commercially used, and in particular commercial considerations do not have to be taken into account when assessing the freedom given to the creator.

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?

The Canadian Group states that clarification of possible exemptions from infringement for articles which “must fit” or “must match” would be helpful.

The Swiss Group believes that it is in the interests of the rights owner that design protection is available for Partial Designs in a broad manner, but there should be no design protection available for those features which are dictated solely by their technical function. In the view of the Swiss Group, other exceptions such as a must-fit/must-match exception or a replacement part exception should not be provided.

The Swedish Group explains that clarification is needed as regards to the scope of protection when the Partial Design for a part intended to be incorporated in a Product is used for a different Product.

III. Proposals for harmonisation

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

All but two Groups say that a Partial Design should be registrable as an independent design.

13) Is harmonisation of the law of Partial Designs desirable?

All but two Groups say that harmonisation of the law of Partial Designs is desirable.

The New Zealand Group considers that New Zealand copyright law is sufficient for protecting Partial Designs, explaining that the NZ Copyright Act protects the shape of products (based on original drawings) for a period of 16 years – one year longer than the rights given by a registered design in New Zealand. Both the copyright in the shape of the product and the protection afforded by a registered design for the shape of that product exist concurrently. Consequently protection for a Partial Design is afforded by way of copyright in the part drawing as well as the entire article via the assembly drawing of that article.

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

23 Groups stated that this should be flexible and include current practice of stippled or dotted lines for the Unclaimed Part and solid line for the claimed part. However circling or colours showing the Unclaimed Part should also be acceptable, as should boundaries (the features for which protection is sought are clearly indicated/represented within the boundary, whereas all the features outside the boundary are considered to be disclaimed and therefore not protected) and blurring (obscuring the features for which protection is not being sought).

Two Groups stated that the same rules should be used for Partial Designs, as are used for non-Partial Designs.

Three Groups suggested that the Partial Design can be identified in words and by graphical depictions in the drawings.

The UK Group states that if claiming a Partial Design, the applicant should not have to show every side/feature of the Product as a whole within the views used for registration of a Partial Design. For example, the applicant should not have to include views which only show the Unclaimed Part. The applicant should be given a wide freedom to select only the images that best portray the individual character of the design for the design registration, and also clearly delineate the Partial Design.

15) 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.

- SC is same as UP**
- 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 look the same**
- SC is not the same as UP, but SC and UP relate to products that categorised in the same way when registering designs**
- SC is not the same as UP, and SC and UP are entirely unconnected.**

10 Groups say that all of the factors a. – e. are relevant when considering overall impression. Two Groups say that all factors a. – e. are relevant when considering overall impression, but the Unclaimed Part should be considered less important. A further six Groups identify factors a. – d. (but not e.) as relevant when considering overall impression. The Korean Group states that the proximity of the products in which the Partial Design is incorporated is a key issue, which indirectly involves the UP as well as the SC. Thus, a total of 19 Groups indicate that the UP and/or SC are relevant, at least to some extent.

The Spanish Group explains that the UP and/or SC are relevant because the assessment of the nature of the product and of the industrial sector carried out by the informed user (who is precisely defined as such), includes the applicative element as one of its analysis criteria.

A total of 14 Groups indicated that the UP and/or SC are not relevant.

- 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.**

A total of 16 Groups take the view that the Unclaimed Part should, in some way and to some extent, be taken into account when considering the overall impression:

- Only to the extent that infringement of the registered design only occurs in relation to products in respect of which the design is registered;

- The Unclaimed Part should be given less weight than the Partial Design;
- The Unclaimed Part is one of the relevant factors;
- The Unclaimed Part should be relevant to validity but not infringement.

A total of 11 Groups take the view that the Unclaimed Part should not be taken into account when considering the overall impression.

The Singaporean Group states that the Unclaimed Part should not be taken into account, but the Locarno classification (which to some extent reflects the Unclaimed Part) should.

Two Groups say that the Unclaimed Part can be used to understand the Partial Design.

The UK Group explains that an Unclaimed Part ought to be taken into account when analysing the overall impression to the extent that it helps inform the design corpus of the Partial Design and the design freedom in arriving at the Partial Design. This will determine the perspective and background of the informed user when making the comparison (whether for the purposes of individual character or infringement). It might also inform the user of the relative size and proportions of the Partial Design to be compared against that of the prior art or accused design.

The Italian Group takes the view that, as a general principle, when assessing novelty/individuality and infringement, the Unclaimed Part should be taken into account in order to define the scope of the right claimed/asserted. This is because, in the view of the Italian Group, the informed user should be linked to the market to which the Partial Design is relevant. The Unclaimed Part offers a clear indication of this market and should be taken into account for that purpose. This view is consistent with EU case law on the characteristics of the informed user.

The Japanese Group proposes that the Unclaimed Part, and more specifically, the following should be taken into account:

- Intended purposes and functions of the Unclaimed Part (similarities in intended purposes, industry, consumers etc.)
- The position, size and area of the Partial Design relative to the Product; and the position, size and area of the accused design relative to the Product,
- The overall impression in view of b) above.

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.

Seven Groups are of the view that the Unclaimed Part should affect the analysis of Design Constraints.

A total of 18 Groups take the view that the Unclaimed Part should not affect the analysis of Design Constraints:

- Because there should be no design constraint limitations at all;
- Design constraints should apply as for any Design by reference to the Partial Design and not the Unclaimed Part;
- Design constraints except must match should apply, as normal, by reference to the Partial Design and not the Unclaimed Part;
- Functionality based design constraints only should apply, as normal, by reference to the Partial Design and not the Unclaimed Part.

The Japanese Group explains that it is likely that the Unclaimed Part may affect freedom in creating a Partial Design for the claimed part. Therefore, it should be allowed to take into account Design Constraints, such as must fit / must match, arising from the Unclaimed Part when assessing the overall impression of the claimed Partial Design. In the view of the Korean Group, the effect of the Unclaimed Part should be minimal and limited when assessing Design Constraints.

The Swedish Group is of the view that:

- the Unclaimed Part should not directly influence the assessment of Design Constraints, but it may still have an evidentiary effect when assessing the freedom of the designer and Design Constraints.
- The Unclaimed Part may help to better establish what type of product the Partial Design is as it depicts its appearance in normal use. It may also serve as a basis of the circumstances under which the Partial Design was created, and may consequently be helpful when identifying possible constraints in the designer's freedom such as technical function.
- It is questionable to what extent the Unclaimed Part will be of any relevant evidentiary use when assessing must fit/must match, as those defences are to a greater extent dependent on objectively assessing the details on the actual physical products which has been put on the market. Although the Unclaimed Part may at least clearly indicate the designer's awareness of the Partial Design possibly being subject to must fit/must match.

18) Please comment on any additional issues concerning any aspect of Partial Designs you consider relevant to this Study Question.

No further issues were identified that relate directly to the focus area of this Study Question.

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

The responses also evidenced experience and expertise in advising particular industry sectors, including for example:

Packaging, Machines (valves), Cleaning products, Oil, Automotive, Aviation, Toy industry, Consumer goods, Building industry, Pharmaceutical industry, Software, Plastic manufacturers, Furniture designers, Electrical goods, Motorization for doors, gates, Home automation, Sports equipment, Motorcycle industry, Manufacturing jewellers, Household appliances, Stage decor design, Lighting, Fashion industry (footwear), Food industry (beverages), steel.

IV. Conclusions

From the Reports the conclusion can be drawn that a large majority of the Groups agree that harmonisation is desirable regarding at least some of the issues described above.

The main issue of principle that the Groups addressed was the scope of protection of a Partial Design. Some Groups considered that use of a partial design in a different context should infringe regardless of the context in which the design is used. However, the inevitable result of this approach is that more prior art will also be relevant to the design because the context of the prior art ought not to matter, making it more difficult to obtain a design registration that will prove to be valid. Other Groups took the view that the designer had the option, when seeking to register its design, of registering a non-Partial Design or a Partial Design. If they register a Partial Design together with its context (e.g., the handle of a pan depicted in solid lines, the Unclaimed Part – being the rest of the pan – depicted in dotted lines), then the context of the pan should have some effect both in terms of infringement and validity. If, however, they choose to register a handle of a pan as a Design in its own right, there will be no context to be taken into account, and indeed that Design should not be considered a Partial Design for the purposes of this Study Question if it is not depicted or described as being a Partial Design.

Should protection be independently available for Partial Designs?

All but two Groups agree that it should.

Should laws on the Partial Designs be harmonised?

All but two Groups agree that they should.

Should the Unclaimed Part be relevant when assessing the overall impression?

19 Groups support the proposition that the Unclaimed Part should be factored in, at least to some extent, when considering the overall impression of the Partial Design. 13 Groups are against. There is therefore support for this proposition from approximately 60% of Groups responding to the question.

Each viewpoint has a distinct set of advantages and disadvantages. Whatever matter is relevant to overall impression will also drive the breadth of the design corpus that is relevant to assessing whether the Partial Design has distinctive character, since a Partial Design will not have distinctive character if the overall impression it produces is not different to that of any design in the design corpus. Thus:

- If the Unclaimed Part is not relevant to overall impression, the design corpus for the Partial Design may be broader and include all kinds of components with the same characteristics regardless of how they are used. For example, in the case of design for the a heel for a shoe², the same heel in any other shoe (or even the same heel without a connected shoe, a square block alone, or a design for a cube or brick) could be part of the design corpus. Generally speaking, this makes it more difficult for the partial design to be distinctive over the design corpus, but if the partial design satisfies that condition then it is more easily infringed by anything else that contains the partial design regardless of context;
- If the Unclaimed Part is relevant to overall impression, the design corpus for the Partial Design may be narrower and include only the same or similar components in the same or similar types of product lines. This then generally speaking makes it more easy for the partial design to be distinctive, but more difficult to establish infringement.

The majority of Groups were in favour of the latter approach: making it easier for a design to be distinctive, but making it more difficult to establish infringement and monopolise many areas of design with a single registration for the design of a fundamental component.

A number of Groups sought to temper the disadvantages of this approach by proposing that the Unclaimed Part should be given less weight.

Should Design Constraints evident from the Unclaimed Part be relevant?

It almost goes without saying that if a Partial Design is a design for a part of a Product, then that part could well connect to the rest of the Product (unless the Partial Design is for an element that is “floating in space”, but even then, the distance, orientation and placement of the part is defined by the rest of the Product). If that part were to be protected as a standalone design (but without the context of the rest of the Product), then in all likelihood some part of the part could fall within must fit/must match exclusions (in jurisdictions having such exclusions), because when in use the element will connect to and must fit with the rest of the product. The Unclaimed Part could be a useful guide to relevant must fit/must match exclusions, when the part forms a part of a Product in the way envisaged by the designer. An additional benefit of using the Unclaimed Part to deduce whether there are Design Constraints that apply to the Partial Design is that legal certainty is increased since the evaluation is not product-specific and can be carried out based on information available in the design registration alone.

However, the majority of Groups (some 70%) take the view that the correct approach is to not take the Unclaimed Part into account when judging Design Constraints. Thus, the majority view is that Design Constraints will need to be judged from the way that the Partial Design is applied in each situation: e.g., whether it must fit with the particular product in which a part made to the Partial Design is used.

For example, if the Partial Design is for the base and stem of a wine glass, the must fit/must match analysis would be different if the base and stem are used by (a) connecting to a glass, (b) connecting to a candle holder to make a candle stick with a stem and base, and (c) using the stem as a miniature flagpole and attaching a flag to it. In each of these cases, the scope of the Partial Design would need to be adjusted according to the circumstances, the disadvantage being that the right holder would not know in advance what Design Constraints apply. The advantage would of course be that, in some situations such as the use of a wine glass base and stem as a flagpole, very few constraints would limit the Partial Design and unnecessary constraints would not be applied.

Representation of Partial Designs

There was substantial support for a clear and consistent system for identifying Partial Designs. This could include stippled or dotted lines for the unclaimed part and solid line for the claimed part. However circling or colours showing the unclaimed part should also be acceptable, and boundaries and blurring. The main point is that the same standard method should be used everywhere to avoid confusion and to reduce errors. If dashed lines indicate the Unclaimed Part in one jurisdiction, dashed lines should have the same function in other jurisdictions.

The Swedish Group proposed the framework set forth in EU guideline CP6 for visual disclaimers should be used, namely that:

- Graphic or photographic representations showing only the claimed Partial Design are preferred;
- However, visual disclaimers may alternatively be used to indicate an Unclaimed Part of the graphic or photographic representations. The visual disclaimer must then be clear and obvious, and the Partial Design and the Unclaimed Part must be clearly differentiated;
- The graphic or photographic representation of the design shall clearly indicate that protection is only sought for the Partial Design and not the Unclaimed Part;
- The graphic or photographic representation of the design shall show consistently the Unclaimed Part in all the views where the Unclaimed Part appears; and
- Where a visual disclaimer is used, broken lines are recommended for indicating the Unclaimed Part (and the Partial Design be indicated with continuous lines). Only when broken lines cannot be used due to technical reasons (for example, when they are used to indicate stitching on clothing or patterns; or photographs are used), other visual disclaimers can be used: colour shading, boundaries and blurring.

On a general level, the proposal of the Swedish Group encompasses the views of the Groups as a whole. There is some debate as to the utility of individual types of disclaimers (such as written disclaimers), and some doubts are expressed in a few Groups on the utility of boundaries and blurring. The individual elements finding the greatest support across most Groups are the use of visual disclaimers using broken lines and/or colour shading. The most important point, identified by all Groups, is a consistent system across jurisdictions in which a visual disclaimer has the same meaning in all jurisdictions.

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