

## **Design Patent (German/European)**

April 2017

### **Conditions for protectability**

Two- or three-dimensional designs of objects (designs) produced industrially or by a craftsman are protectable as design patents according to national or Community law, if they are **novel** and display a **distinguishing characteristic**.

**Novelty** is given when the relevant design could not have been known to the circles of experts in the European Community that deal with the relevant economic sector. Actual cognizance is not the decisive factor, it is sufficient when a publication has been used before the filing date in a medium as usually used by the relevant circles of experts. Moreover, a publication containing deviations in merely insignificant details will also constitute a disclosure that is prejudicial to novelty. For a disclosure by the designer himself or his successor in title a **period of grace lasting 12 months** is granted.

The **distinguishing characteristic** is measured by the overall impression produced by the (non-technical) features predominantly responsible for the general appearance as perceived by the so-called "**informed user**" (not the person skilled in the art), allowance being made for the degree of freedom of design. The overall impression must significantly differ from forms hitherto known, the rule being that the more significant the distinguishing characteristic, the greater the scope of protection.

### **Extent and duration of protection**

The registration of a design patent at the German Patent and Trademark Office (DPMA) or the European Union Intellectual Property Office (EUIPO) has the result that others will need the consent of the owner of the protection rights if they wish to use a design that does **not evoke any other overall effect in the mind of the informed user**.

Usage without such consent represents an infringement calling for removal, forbearance, and damage compensation. However, the protective action involves the **risk** of possibly not being enforceable, since the **novelty and distinguishing characteristic are not officially examined when the protective right is registered**. Thus it may be subsequently found that an identical or only insignificantly dissimilar design was published prior to the filing date, as a result of which the protective action may possibly never have been valid and the protective right can subsequently be invalidated. Although this risk can be reduced by previous research on the part of the applicant, it can never be entirely ruled out. Protection commences with registration and ends **25 years** from the filing date, provided it is extended every fifth year by appropriate payment of maintenance fees.

### **Application requirements**

For an application (for Germany at the DPMA or for Europe at the EUIPO), **illustrations** of the design are required which **clearly show all of its determinative features**. Only the clearly filed features are covered by the protection granted. However, the illustration may not include any accessories.

Furthermore, a **statement** is required **concerning the product(s)** for which the design to be protected will be used or in which the design to be protected is to be included. This statement for administrative purposes only, i.e. it does not restrict the protection. The protection applies to the design as such, irrespective of the product.

### **Invalidity**

Upon the filing of a third party request with the responsible office (DPMA or EUIPO), the design patent can be cancelled due to non-protectability. In infringement litigation non-protectability can be raised as an objection by the potential infringer.

## Costs and Time Line

Years	Months
0	<p><b>Prior to</b> filing the application, at least one Internet search concerning the use of the design in the relevant sector should be made, in order to clarify the situation as regards protection requirements and to reduce the risk of infringement of the protective rights of others.</p> <p>Costs<sup>1</sup> for Power of Attorney, authoring the application documents and filing the application as a                      German design patent: (online) 510 €                      Community design patent: 1,850 €</p>
approx. 2-4	<p><b>Registration formalities</b>                      Formal examination only!                      Cost<sup>1</sup> relating to publication fees for registration as                      German design patent: <i>no more applicable since January 1, 2010</i>                      Community design patent: 320 €</p>
6	<p><b>Limit for foreign applications</b>                      Subsequent applications in foreign states can be filed up to 6 months following the initial date of application.</p>
5	<p><b>Renewal fees<sup>1</sup></b>                      for the 6<sup>th</sup> to 10<sup>th</sup> year:                      German design patent: 360 €                      Community design patent: 410 €</p>
10	<p>for the 11<sup>th</sup> to 15<sup>th</sup> year:                      German design patent: 400 €                      Community design patent: 460 €</p>
15	<p>for the 16<sup>th</sup> to 20<sup>th</sup> year:                      German design patent: 440 €                      Community design patent: 510 €</p>
20	<p>for the 21<sup>st</sup> to 25<sup>th</sup> year:                      German design patent: 480 €                      Community design patent: 560 €</p>
25	Termination of the maximum term of protection

### “Unregistered Community Design Patent”

By Community law there is a special case to the effect that, under certain circumstances, (restricted) protection can be granted **without a formal procedure**. Such a Community protective right (having validity in the entire zone of EC) is known as an “unregistered Community design patent”.

Protection **arises automatically** for a design that is novel and possesses an individual character with the first instance of **public notification** thereof.

However, the term of protection lasts for not more than **three years**. It is **only effective against imitation**, i.e. when in cognizance of the protected design, but not against parallel creation by others without such cognizance. Such cognizance must, if necessary, be proved.

This protective right is, in particular, interesting for short-lived designs, which would not achieve a copyright status by reason of their poor creative level and for which the acquisition of a registered, formal protective right would be too laborious. Nevertheless, the enforcement of such a protective right is no simple matter and should only be seriously considered with a good body of evidence.

<sup>1</sup> The costs cited include official costs and net attorney's fees