

# Privacy & Law Essentials of design and patent law

**Business**

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FH Zentralschweiz



## Learning objectives

You...

- know the **main features** of the provisions of the **Design Act** and the **Patents Act**
- know the **protection requirements** for designs and patents
- are aware of the **registration** and **term of protection** of designs and patents

## Design law: Legal basis (Article 1 Designs Act)

- The legal basis for the protection of designs is the Designs Act (DesA).
- In the legal sense, design is understood to be the **exterior form** of a **product or parts** of it.
  - It can be either **two-dimensional (a pattern)** or **three-dimensional**.
  - Its form is **characterised** by the arrangement of **lines, contours, colours** and **surfaces** or by the **material** used.
    - Examples of **three-dimensional** designs include e.g. cutlery, toothbrushes, chairs, lamps or locomotives.
    - Examples of **two-dimensional** designs include e.g. watch faces or bottle labels.

# Design law: Protection and advantages

## Why protect designs?

Design appeals to our senses, evokes feelings, creates identity and distinguishes itself. This is why design has become **one of the most crucial market factors** and why counterfeiting is subsequently a frequent occurrence in this field.

## What are the practical advantages?

- Owners of a design right can **prevent** others from **using** products with the **same or a similar design**.
- “**Using**” means in particular the manufacturing, storing, offering, putting on the market, importing, exporting or transiting of such products as well as simply being in possession of them.
- The import, export and transiting of commercially produced goods can also be **prohibited** if they are **for private use**.

# Design law: Protection requirements

## 1. Novelty

- Is is not yet known in Switzerland
- It was not presented to an open, numerically unlimited group of people.

## 2. Peculiarity

- There must be a distinction from previous similar designs
- A lower requirement for originality is required than for copyright ("individuality").

## 3. No reasons for exclusion such as

- technical function
- infringement of laws and treaties
- contrary to public policy or morality



# Design law: Protection requirement «Novelty»

## 1. Novelty

The design is **new**, which is the case when **no** other **identical** or **similar design** has been published before application.

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**.

**No examination** by the IPI of the design regarding **newness** or **distinctiveness** at registration.

# Design law: Protection requirements “Peculiarity” and “No reasons for exclusion”

## 2. Peculiarity

The design is **sufficiently different** from existing designs in major characteristics.

A design does not have individual character 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.

## 3. No reasons for exclusion

A design may not be protected if:

- the features of the design are dictated solely by the **technical function** of the product;  
E.g. the threads on a screw
- the design **infringes** federal **law** or international **treaties**;  
E.g. violation of coats of arms
- the design is **contrary** to public **policy** or **morality**.



## Design law: Import of infringed designs





## Design law: Registration for Switzerland (1/2)

- Registration for **Switzerland**: Swiss Federal Institute of Intellectual Property (IPI)
  - Submission of a **design application** to the IPI. Application forms can be **downloaded** from [www.ipi.ch/download-en](http://www.ipi.ch/download-en)
  - The registration should contain at **least one illustration** of your design suitable for reproduction.
  - Following registration, the design will be **published** on [www.swissreg.ch](http://www.swissreg.ch).
- Fees ([www.ige.ch](http://www.ige.ch))
- Guide for registering a design
- E.g. Registration of a graphic design (No. 142861) or a backpack (No. 144301)

## Design law: Registration for Switzerland (2/2)

- The design right arises with the **entry** in the design register.
- Filing **priority**: The design right belongs to the **first filer** of the design.
- The person who **created** the design, his **legal successor** or a **third party** who owns the right for another legal reason is **entitled** to **deposit** the **design**.

# Design law: International registration

Designs can be registered in other countries in two ways.

1. Applying **directly** to the **country concerned**. Be aware that the legal basis, filing formalities as well as examination and granting procedures vary from country to country.
  
2. **Several countries with one application.**
  - At the World Intellectual Property Organization (**WIPO**, [www.wipo.int](http://www.wipo.int)) in Geneva for countries that are members of the **Hague Agreement**.
  
  - At the European Union Intellectual Property Office (**EUIPO**, [www.euipo.europa.eu](http://www.euipo.europa.eu)) in Alicante, Spain, for the whole **European Union** area.

# Design law: Example of a registred design

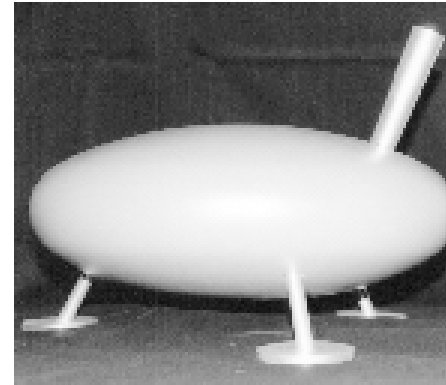
Air humidifier

Martin Stadler, Zug

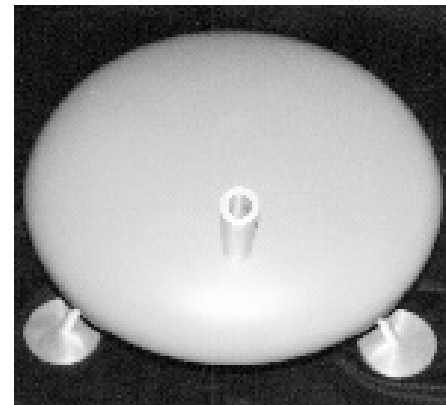
DM/047573

1. Novelty?
2. Peculiarity?
3. No reasons for exclusion?

1.1



1.2



## Design law: Nice to know

### **Alternatives** to design protection:

A design can also fall under the **protection of copyright** or be protected as a **trademark** (three-dimensional figurative trademark) provided that the requirements for copyright or trademark protection have been fulfilled.

Protection is **independent of the dimensions** i.e. a scale model enjoys the same protection as the original. This is why no measurements should be given in the illustrations.



## Design law: Term of protection

- **5 years** from the filing date
- Possibility of **extension** by 4 periods of protection of 5 years each
- **Maximum** design protection: **25 years**
- The **period** of protection begins on the **day** of **filing** the **application**.

## Patent law: Purpose

- Patent law protects **inventions** and grants the owner the **exclusive right to exploit the invention** protected by the patent **commercially**.
- This also means that the patent proprietor may **prohibit** all **others** from using the same invention.
- The protection of inventions is intended to promote **technical progress** in two respects:
  - On the one hand, the patent provides a **basis** and **incentive** for **investment** in research and development, since inventions are **protected** and rewarded by the patent.
  - On the other hand, the description of the invention in the **patent specification is publicly accessible**, which in turn is intended to **promote innovation**.

# Patent law: What is a patent?

- A patent is an **exclusive right** granted by the Swiss government for an **invention** in all fields of technology.
- Patent **eligibility**: an invention (in the legal sense) is a **technical solution** to a **technical problem**.
- **Patentability**: for an invention to be patentable, it must be:
  - 1. useful** (= can be commercially used / industrial application)
  - 2. a novelty**
  - 3. non-obvious** to a person skilled in the art

Inventions include:

- **products** (e.g. heatable ski boots, chemical compounds such as aspirin)
- **processes** (e.g. a process for freeze-drying coffee)



# Patent law: Protection requirements (1/2)

## 1. “Useful” = Industrial application

The invention must be manufacturable or applicable in some **commercial** sector.

## 2. Novelty

The invention must be novel. An invention is novel when it is **not already part of the prior art**.

Any knowledge which is publicly accessible in any form, **in any part of the world**, before an application for a patent has been filed is considered prior art.

## Patent law: Protection requirements (2/2)

### **3. Non-obvious**

- Inventive step – the invention must not result from the prior art in an obvious way and thus be trivial for a person skilled in the art.
- Unexpected features of a product or the refutation of a prejudice (i.e. “this can’t be done”) are often indications that there is an inventive step.

## Patent law: First file, then talk!

- Keep your invention **secret** as long as you have not applied for a patent. If you make your invention public in any form before you apply for a patent, it is no longer patentable!
- To be patentable, an invention must be **novel**. An invention is novel when it has not been made available to the public **anywhere in the world** before the application date. If you expose your invention at an exhibit or in a scientific publication before you file your patent application, it becomes so-called "prior art" (as of "state of the art") and is no longer considered novel when you apply for a patent.
  - Exception: Non-harmful disclosure with 6-month time limit
    - Evident abuse, e.g. breach of secrecy
    - Display at an officially recognized international exhibition
- If you want to patent your invention or protect the design of your product, do not put your **website** online until you've filed for protection. Publishing information about your product **destroys** the **novelty** of it and makes the invention or design **ineligible for protection**.

## Patent law: Alternatives to patent protection?

- Keep the invention **secret** is the cheapest form of protection. Date the drawings and plans, put them in a sealed envelope, and then mail them to yourself (do not open the envelope!). You can also have the documents notarized. That way, in the event a conflict arises at a later date, you will be able to prove the date of your invention (e.g., the steps in your inventive process).
- In industries with very fast development cycles, patent **protection** is maybe not **necessary**, as by the time competitors have copied the product, you will already be bringing the next product generation to the market.
- **Defensive publication:** If you do not want to protect your invention but at the same time want to **prevent third parties from patenting** it, you can **make** your **invention public**. In this way, it is no longer considered novel and therefore not patentable.
  - Publication date in the internet
  - Details at [www.protegas.com](http://www.protegas.com)

## Patent law: Limitations

Ideas, concepts, discoveries, scientific theories and mathematical solutions, algorithms, game rules, lottery systems, teaching methods and organisational work flows, diagnostic procedures, therapies and surgical procedures (on either humans or animals), plant varieties and animal breeds **are not patentable**.

**Computer programs as such are also not patentable**; they are protected under copyright. Inventions which depend on a computer program, however, are patentable (e.g. electronic control). Also excluded from patentability are inventions whose utilisation would violate public order or public morality (for example, certain biotechnological inventions).

## Patent law: Employee inventions (1/2)

«**Service inventions**» are inventions of the employee which he or she makes during the performance of **official duties** and in **fulfilment of a contractual obligation**, or in the production of which he or she participates (Art. 332 para. 1 CO).

➤Ownership with employer.

➤There is no entitlement to financial compensation from the employer.

«**Occasional inventions**» are inventions made by an employee in the course of his employment but **outside his contractual obligations**.

- **Without agreement:** rights with the **inventor** (employee) (Art. 332 para. 2 CO).
- **With prior (!) agreement:** Acquisition by **employer** possible for **appropriate compensation** (Art. 332 para. 2 CO).  
Deadline 6 months.
  - Circumstances for determining the appropriate compensation
    - the economic value of the employee invention,
    - the cooperation of the employer,
    - the use of auxiliary staff and the employee's expenses, and
    - its position in the company (Art. 332 para. 4 CO).

## Patent law: Employee inventions (2/2)

The «**free invention**» is not made during the performance of official duties and therefore also not during the fulfilment of contractual obligations. The invention therefore has no material connection with the contractual work activity.

- The property originates from the inventor, i.e. the **employee**.
- If the employee offers the free invention to the employer, this must be done on reasonable terms (Art. 332 para. 4 CO), as in the case of occasional invention.

## Patent law: case employee inventions

Mr. Meier is a mechanic and has to repair machines in the company. During working hours, Mr. Meier comes up with a brilliant idea of how these machines could be improved so that no more such repairs would be necessary.

What kind employee invention does this trigger?



# Patent Law: Registration

- **Registration principle:** an invention **only** obtains **patent protection** if it is **formally registered** as a **patent**.
- Patent protection is **territorial**
- **National** application for national patents: IPI
  - «CH 123456»
  - The patent application is published on [www.swissreg.ch](http://www.swissreg.ch) 18 months after filing
  - The patent examination does **not include novelty nor non-obviousness**.
- Application to the **European** Patent Office (EPO) for a European Patent
  - «EP 00123456»
  - The patent examination does **include novelty and non-obviousness**.
- PCT application for a national and/or European and/or **international** patent ([www.wipo.int](http://www.wipo.int))
- The World Intellectual Property Organization (**WIPO**) in Geneva offers an international patent application process, which is based on the so-called **Patent Cooperation Treaty (PCT)**.

## Patent Law: Term of protection

Inventions may be protected for a maximum of **20 years** beginning from the date of the patent application.

- **Exception:** Supplementary protection certificate of **+5 years** for medicinal products and plant protection products, due to long approval procedure

In order to maintain protection, the owner must pay **annual fees** from the fourth year following the date of filing.

# Patent law: Example of a patent application / «drop stop»

## Description of the invention

Sufficient detail to allow a third party with average expertise to apply or reproduce the invention

## Pictorial material

Drawings, plans, diagrams

## Patent claims

The invention is defined in the patent claims and thus the material scope of the patent is determined.

**The independent** patent claim defines the outer limit of the scope of protection and must contain all features essential for the invention.

Each specification of a patent claim is defined in a subsequent **dependent patent claim**. This thus concerns the particular form of implementation (or execution) of the invention.

Take the place of EP0160777 (art.136 of the EPC)

PCT  
WORLD INTELLECTUAL PROPERTY ORGANIZATION  
International Patent

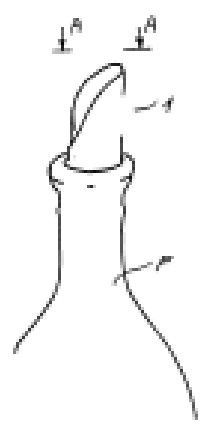
INTERNATIONAL APPLICATION PUBLISHED UNDER THE PATENT COOPERATION TREATY (PCT)

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(55) Priority Date: <b>12/7/90 14 September 1990 (04.09.90) DE</b>	(56) Designated States: AT, AT (European patent), AU, BE, BE (European patent), BF (OAPI patent), BR, BR (OAPI patent), CA, CA, CP (OAPI patent), CC (OAPI patent), CH, CH (European patent), CI (OAPI patent), CN (OAPI patent), DE, DE (Utility model), DE (European patent), DK, DK (European patent), ES, ES (European patent), FI, FI (European patent), GA (OAPI patent), GB, GB (European patent), GR (OAPI patent), GR (European patent), HU, HU (European patent), IL, IL (OAPI patent), IN, IN (OAPI patent), JP, JP (OAPI patent), KR, KR (OAPI patent), MX, MX (OAPI patent), MY, MY (OAPI patent), NZ, NZ (OAPI patent), NO, NO (OAPI patent), PL, PL (OAPI patent), PT, PT (OAPI patent), RO, RO (OAPI patent), RU, RU (OAPI patent), SG, SG (OAPI patent), SI, SI (OAPI patent), SK, SK (OAPI patent), SN (OAPI patent), SU, SU (OAPI patent), TH, TH (OAPI patent), TR, TR (OAPI patent), US, US (OAPI patent), VN, VN (OAPI patent), ZA, ZA (OAPI patent).
(57) Applicant for all designated states except US: MITSUBISHI & CO. LTD. (Tokyo) 23, 24-2500 Tokyo (JP).	(58) Inventor and (59) Inventor/Applicant for US only: JENSEN, Brian, Yang (DE/US), Resident 11, No. Vesper, DE-7799 Thurn (DE).
(74) Agent: MAGNUS JENSEN'S SUCCESSORS; P.O. Box 281, DE-638 Furth (DE).	Published With international search report.

(54) Title: DROP-CATCHER

(57) Abstract

The invention relates to a drip-catcher for, for instance, a bottle and is intended for preventing dripping and drops coming from the bottle orifice during pouring. The drip-catcher of the invention simply consists of a piece (1) of flexible and elastic foil material, preferably plastic material (2) having the thickness of 0.1-1 mm. The diameter of the piece of material may be 60-80 mm. When used as a drip-catcher the piece of material is rolled into an oblong cylindrical form and inserted in the orifice of the bottle. Due to its elasticity the piece of material will passively engage the orifice and constitute a tube-formed outlet spout. Due to the small thickness of the foil material and its liquid-repellent nature this outlet cuts off the air very efficiently and is also a very efficient drop-catcher. The drip-catcher of the invention is extremely simple and cheap. Its use is uncomplicated and it is universally applicable because the piece of material adjusts itself to the bottle orifice irrespective of its size. The effect of the drip-catcher is remarkable due to the small thickness and liquid-repellent surface of the material.



## IP Law: wrap up (1/2)

- While **copyright** protection **automatically** comes into existence with the creation of an original work, protection for **trademarks, patents and designs** must be **applied** for and periodically renewed. These requests are subject to certain conditions and formal regulations.
- “**First come, first served.**” IP rights belong to whoever registers their trademark, invention or design first.
- IP rights are granted **without any guarantee**. In Switzerland, for example, inventions are not examined for novelty.
- As a prerequisite for **novelty**, patents and designs should undoubtedly be registered before their release into the public domain (for example, by selling, at an exhibition fair or on the internet).
- **IP rights expire** following a maximum term of protection. Expired IP rights i.e. those that have been deleted after the maximum period of validity or have been withdrawn, are freely available. Exceptions to this are trademarks which can be renewed as often as required.

## IP Law: wrap up (2/2)

- IP rights are only **valid in a certain country** (the principle of territoriality). A trademark registered in Switzerland is therefore only protected in Switzerland. If the trademark should also be protected in other countries, then you must register it there too.
- Generally, only the **commercial exploitation** of an invention or creation is protected.
- The **scope of protection** is precisely defined. There are clear regulations that define the scope of protection for every IP right. For example, a trademark is not protected in general but only for those classes of goods and services for which it has been registered.
- **Free databases** are available on the internet in which you can carry out basic searches on IP rights. These include:
  - [www.swissreg.ch](http://www.swissreg.ch) – contains registered IP rights in Switzerland
  - [www.wipo.int/madrid/monitor](http://www.wipo.int/madrid/monitor) – allows for the search of international trademarks that are protected in Switzerland
  - <https://worldwide.espacenet.com> – contains more than 90 million patent documents worldwideBeware! These databases are not professional search tools. Therefore, searches in free databases cannot substitute a professional search.

## Sources

[https://www.ige.ch/fileadmin/user\\_upload/kmu/e/Pocket\\_Guide\\_Gedacht\\_Gemacht\\_Geschuetzt\\_en\\_2020\\_bf.pdf](https://www.ige.ch/fileadmin/user_upload/kmu/e/Pocket_Guide_Gedacht_Gemacht_Geschuetzt_en_2020_bf.pdf)  
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