



Study Question

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Sarah MATHESON, Reporter General
Jonathan P. OSHA and Anne Marie VERSCHUUR, Deputy Reporters General
Yusuke INUI, Ari LAAKKONEN and Ralph NACK, Assistants to the Reporter General

Partial designs

Responsible Reporter(s): Yusuke INUI and Ari LAAKKONEN

National/Regional Group	Denmark
Contributors name(s)	Johan Løje, Jens Hemmingsen Schovsbo og Christopher Hjulsgaard
e-Mail contact	jl@iplaw.dk

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

The Danish Design Act is an implementation of the Directive 98/71/EC of The European Parliament and of The Council of 13 October 1998 on the legal protection of designs. The Design Act is formulated entirely in accordance with the Directive. The Danish Patent and Trade Mark Office does also closely adhere to EUIPO. Thus, there exists an EU-harmonization and references to Danish design law must be understood as EU-compliant.

In Denmark, the definition of a "design" is "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. Thus, it is possible to obtain design protection for a part of a product's appearance, even if the part in question does not constitute a product in itself.

The laws for protection of a partial design is no different from the laws for protection of the whole design.

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

The definition of a “product” – which is contained in the definition of a “design” – means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces. By this it is under Danish law (as in all EU-countries) possible to register a part of a product. As seen in the definition of a “product”, this is not only limited to physical objects.

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

Please Explain

When applying for a registered design at the Danish Patent and Trade Mark Office, the application must contain depictions of the design, cf. Executive Order 2008-11-20 no. 1099 on application and registration of designs, art. 2(1)(2).

These depictions must only show the design and can be photographs or drawings, cf. Executive Order 2008-11-20 no. 1099 on application and registration of designs, art. 4(1)(2). The application only covers those parts of the design which are shown in the depiction. It is also possible to submit a physical replica of the design instead of pictures.

A number of graphic measures may be used to indicate that the application covers a partial design.

- Broken lines may be used in a view either to indicate the elements for which no protection is sought or to indicate portions of the design that are not visible in that particular view, that is, non-visible lines.
- Boundaries may be used to surround features of the design for which protection is sought, the remaining parts being considered as having a purely illustrative purpose, that is, to show the environment in which the claimed features are placed.

Color shading and blurring may be used to eliminate parts that should not be covered by the application

2.b Is there a written description of the Product, of which the Partial Design forms part?

No

Please Explain

The application must contain an indication of the product for which the design is intended to cover, cf. Executive Order 2008-11-20 no. 1099 on application and registration of designs, art. 2(1)(3). This indication shall be short, accurate and may not contain any technical explanations. Just a description of the design, but with no depictions, is not sufficient for a design to be registered.

While it is possible to file a description of the design together with the design application, such description does not form part of the registration and has no influence on the scope of protection of the design. Thus, in evaluating the scope of protection of a design, courts will look almost exclusively at the representations covered by the registration.

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.*

No

Please Explain

Verbal disclaimers are not used in Danish design applications. The reason for this is that the scope of protection is almost exclusively based upon the representations covered by the registration, i.e. the depictions in either photographs or drawings.

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

In general, the scope of protection of a Danish design registration shall include any design which does not produce a different overall impression on the informed user, cf. the Danish Design Act, art. 9(2). As described above, the scope of protection is almost exclusively based upon the representations covered by the registration; not by the product on which the design is applied upon.

Thus, for a Partial Design forming part of a Product X to be infringed by the same use of the Partial Design on a Product Y depends on whether or not the design does or does not produce a different overall impression on the informed user. In that connection, the Courts would look to the representations of the partial design, and if they find the same design used on another product, even though it only forms part of that product, it would constitute an infringement.

Under Danish design law, protection for designs categorised as "must match" are allowed. However, this only relates to a design for a component part which is used to the reparation of a complex product. The duration of the protection is 15 years. In this regard, it should be noted, that if the interoperability is required due to technical or mechanical requirements, the design is still subject to art. 8(1)(2) on must fit-parts.

This is contrary to the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs art. 110, where protection as a Community design shall not exist for a design which constitutes a component part of a complex product used within the meaning of Article 19(1) for the purpose of the repair of that complex product so as to restore its original appearance. Thus it is possible to obtain an EU-design registration on a spare part, but this does not exclude third parties with the possibility to repair these spare parts.

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

A design will be considered to be new if it is not predated by an identical design disclosed, cf. the Danish Design Act art. 3(2). According to the Danish Patent and Trade Mark Office, a design is new if no identical or very similar design previously has been published. An identical design is understood so that the designs must differ on essential points from previously known designs. If a design differs sufficiently from a previous design, it will be considered new.

The issue, whether a Partial Design forming part of the Product X is considered not to be novel in view of the same Partial Design in a prior Product Y, is not discussed in Danish design law nor by the Danish Patent and Trade Mark Office. However, it must be assumed that the assessment and outcome would be the same as if the assessment was made on two Community designs at EUIPO.

Therefore, there is identity between the Partial Design forming part of Product Y and the Partial Design forming part of Product X if the latter discloses each and every element constituting the former. The framework of the comparison is limited to the features making up the Partial Design in Product Y. Thus it is irrelevant whether the Partial Design in Product Y discloses additional features.

5 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.

Under Danish design law it is not possible to register a design which subsists in features of appearance of a product which must necessarily be reproduced in their exact form and dimensions to permit the product in which the design is incorporated, or to which it is applied, to be

mechanically connected to or placed in, around or against, another product so that either product may perform its function, cf. the Danish Design act. Art. 8(1)(2). By this must fit exception, must fit-parts must be considered a special type of functional feature as appearance which are excluded from protection.

Even though it is not stated in the law, it is quite clear that the law will require an analysis of elements outside the scope of the partial design to decide, to what extent the question is of a must-fit part of the design.

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

No

Please Explain

Not really, since the protection is very flexible and quite far reaching.

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

Yes

Please Explain

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

No

Please Explain

No, because a protected element may be important in itself as a business identifier or a distinctive and valuable element, which is important for the whole design no matter, how the remaining elements of the whole design looks like .

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

No

Please Explain

No, since a partial design may be as important, valuable and costly to develop as the whole design and protection of a partial design will allow the creator to protect the elements of a whole design, which he or she believes are of most relevance to their business. Furthermore design constraint restrictions on partial designs could be used by infringers to add irrelevant elements to the remaining design and in that way limit the protection of the protected partial design.

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:

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

Yes

Please Explain

only to a very limited extent. However in some situations, the fact that the partial design forms part of a larger design with unclaimed parts, may be relevant.

0.b whether the Product is normally sold separately?

No

Please Explain

no, since that is not relevant

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

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III. Proposals for harmonisation

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

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

Yes

Please Explain

Yes we believe so. They may be as important as the whole design

13 Is harmonisation of the law of Partial Designs desirable?

Yes

Please Explain

Indeed

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.

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

n/a

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.

5.a SC is the same as UP

n/a

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

n/a

5.c SC is not the same as UP, but SC and UP relate to products that look the same

n/a

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

n/a

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

n/a

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.

n/a

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.

n/a

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

n/a

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

n/a