

**AUSTRIA**  
**Design Law**

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## **I. General Provisions**

### **Section 1 Subject of Design Protection**

(1) Under this Federal Law, design protection may be obtained for designs that are new and have individual character (sections 2, 2a) and are neither contrary to section 2b nor to public order nor to morality. Designs that are contrary to the prohibition on double protection (section 3) shall not be protected.

(2) A design within the meaning of this Federal Law means the appearance of the whole or a part of a product resulting of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.

(3) A product within the meaning of subsection 2 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; a computer program, however, shall not be deemed a product.

(4) A complex product within the meaning of subsection 3 means a product which is composed of multiple components which can be replaced permitting disassembly and re-assembly of the product.

(5) Design rights acquired by virtue of Regulation (EC) No. 6/2002 on Community designs, Official Journal No. L 3 dated January 5, 2002, p. 1, shall be equated with design rights acquired by virtue of this Federal Law, unless the provisions under Community law concerning design protection state otherwise.

### **Section 2 Novelty and Individual Character**

(1) A design shall be considered to be new, if before the date of filing the design application for registration or, if a priority is claimed, the date of priority, no identical design has been made available to the public. Designs shall be deemed to be identical, if their features differ only in immaterial details.

(2) 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 before the date of filing the application for registration or, if a priority is claimed, the priority date.

(3) In assessing individual character, the degree of freedom of the designer in developing the design shall be taken into consideration.

(4) A design applied to or incorporated in a product which constitutes a component part of a complex product, shall only be considered to be new and to have individual character, if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter, and to the extent that those visible characteristic features of the component part fulfill in themselves the requirements as to novelty and individual character.

(5) Normal use within the meaning of subsection 4 shall mean use by the end user, excluding maintenance, servicing or repair work.

## **Section 2a**

(1) Within the meaning of section 2, a design shall be deemed to have been made available to the public if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Economic Area, before the date of the application for registration or, if a priority is claimed, before the priority date. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.

(2) A disclosure shall not be taken into consideration for the purpose of applying section 2, if the design has not been made available to the public earlier than twelve months before the date of the application or, if a priority is claimed, before

the priority date, namely:

1. by the creator or his successor in title or by a third party as a result of information provided or action taken by the creator or his successor in title, or
2. as a consequence of an abuse in relation to the creator or his successor in title.

### **Section 2b Designs dictated by their Technical Function and Designs of Interconnections**

(1) A design right shall not subsist in features of appearance of a product which are solely dictated by its technical function.

(2) A design right shall not subsist in features of appearance of a product which must necessarily be reproduced in their exact form and dimension in order 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.

(3) Notwithstanding subsection 2 a design right shall under the conditions set out in section 2 exist, which serves the purpose of allowing the multiple assembly or connection of mutually interchangeable products within a modular system.

### **Section 3**

A design shall be excluded from design protection, if it is in conflict with a prior design which has been made available to the public after the date of filing of the application or, if priority is claimed, the priority date, and which is protected from a date prior to the said date by a registered Community design or an application for such a design or a design registered under this Federal Act or an application for such a design right.

### **Section 4**

(1) A registered design shall confer on its owner the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market,

importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.

(2) The scope of the protection conferred by a design right shall include any design which does not produce on the informed user a different overall impression.

(3) In assessing the scope of protection the degree of freedom of the creator in developing his design shall be taken into consideration.

(4) A registered design shall not absolve anyone from observing the legal provision.

#### **Section 4a Limitation of the Rights conferred by a Design**

(1) The rights conferred by a registered design shall not be exercised in respect of:

1. acts done privately and for non-commercial purposes;
2. acts done for experimental purposes;
3. acts of reproduction for the purpose of making citations or of teaching, provided that such acts are compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design, and that mention is made of the source.

(2) In addition, the rights conferred by a registered design shall not be exercised in respect of:

1. the equipment of ships and aircraft that are registered in a third country when these temporarily enter the territory of Austria;
2. the importation in Austria of spare parts and accessories for the purpose of repairing such craft;
3. the execution of repairs on such craft.

#### **Section 5**

(1) The design protection shall have no effect against persons, who used in good faith a design included within the scope of protection of a registered design or took measures necessary for such use already before the priority date within Austria (prior user).

(2) The prior user shall be entitled to continue to exploit the design for which its use has been effected for the requirements of his own business in his own workshops or in those of others.

(3) This entitlement may be inherited or sold only in conjunction with the business.

(4) The prior user may claim his entitlement to be acknowledged by the design owner by issuing a certificate. On request of the prior user the acknowledged entitlement shall be entered into the design register.

(5) If such acknowledgement is refused, the Patent Office shall, upon request, decide and, if applicable, order the entry of the entitlement into the design register.

#### **Section 5a Exhaustion of Rights**

The rights conferred by a registered design shall not extend to acts relating to a product to which a design that falls under the scope of protection of the right to a design is incorporated or to which it is applied, if the product has been put on the market in the European Economic Area by the owner of the right or with his consent.

#### **Section 6 Period of Protection**

The design protection shall begin on the day the design is registered. The period of protection shall be five years beginning on the day of application. By paying a renewal fee in time, the owner of the right may have the period of protection extended four times by five years each, up to a total duration of 25 years from the day of the application. For payment of the renewal fee, in each case the last day of the month, which by its designation corresponds to the month, in which the application date falls, shall be deemed the end of the period of protection.

#### **Section 7 Right to Design Protection**

(1) The right to design protection shall belong in principle to the creator of the design or to his successor in title.



(2) However, where the design of an employee falls within the field of activity of the company in which he is employed and if the activity that has led to the design belongs to the employee's duties or if the design has been created not under an employment relationship but on a commission, the right to design protection shall belong, where not otherwise agreed, to the employer or the commissioner or his successor in title.

### **Section 8 Designation of the Creator of the Design**

(1) The creator of a design shall be entitled to be designated as the creator in the design register on publication in accordance with section 17 and in the documents certifying priority to be issued by the Patent Office.

(2) The right shall not be assigned or inherited. Renunciation of the right shall have no legal effect.

(3) The request to be designated shall be made by the creator of the design, by the applicant or by the owner of the design. If several persons are entitled, the consent of the other persons entitled must be proved, unless the request is made by all entitled persons. If a person other than the one already designated as creator is to be designated as such in addition or instead of the person so designated, the consent of the person already designated as creator shall be proved.

(4) If the applicant, the owner of the design or the person already designated as the creator refuses to give his consent, the Patent Office shall decide on the claim to be designated as creator upon request. By virtue of a legally binding decision in favor of the request, the creator shall be designated pursuant to subsection 1.

### **Section 9 Relationship of Co-Owners of a Design**

The legal relationship of the co-owners of a design shall be governed by civil law. The right to allow third persons the use of the protected design shall, in case of doubt, be asserted only jointly by the co-owners; however, each co-owner shall have the right to solely take actions against infringers of the design right.

**Section 10 Transfer**

(1) The right arising from the application of a design and the design right may be transferred to others with respect to all or single products in the list of goods, either wholly or in proportionate shares.

(2) The design right shall not pass to the state (section 760 Austrian Civil Code).

## **II. Application Procedure and Design Register**

### **Section 11 Application**

An application for protection of a design shall be filed at the Patent Office in written form. The day on which the application is received at the Patent Office shall be regarded as the day of filing.

### **Section 12**

(1) The design shall be disclosed on filing by submitting a representation of the design or a design sample. If a design sample is submitted, a representation of the design shall always be submitted for the publication (section 17) and the registration (section 18(1)4) that shall reproduce the design sample as clearly as possible, but that shall not be taken into consideration for the disclosure.

(2) A description may be submitted to explain the design.

(3) The products, for which the design is intended, shall be listed in the order of the sequence of classes and subclasses of the Locarno Agreement Establishing an International Classification for Industrial Designs, Federal Law Gazette No. 496/1990 (list of goods).

### **Section 13**

Designs belonging to the same class may be comprised in one multiple application. Such multiple application shall not include more than 50 designs. However, the option of section 14 may only be availed of jointly for all designs comprised in one multiple application.

### **Section 14**

The sample and the representation of the design as well as the description may be submitted openly or in a sealed envelope (secret design). The envelope shall be opened:

1. upon request of the design applicant;
2. upon request of a third party, provided the latter proves that the design applicant cited the design against such third party;
3. ex officio eighteen months after the priority date of the

design.

### **Section 15**

The detailed requirements for the description and the list of goods, the number of copies thereof to be submitted, as well as the number, the nature and the dimensions of the representations and samples of the design to be submitted shall be determined by order of the President of the Patent Office, taking into consideration the requirements of the application procedure, the printing and the publication of the design.

### **Section 16 Examination of Conformity with the Law**

(1) The Patent Office shall examine each design application for conformity with the law, on filing in the case of openly-submitted designs and following opening of the envelope (section 14) in the case of designs submitted with a seal where not possible on filing. However, the application procedure shall not comprise examination as to whether the conditions of sections 2 to 3 are fulfilled, nor on whether the applicant is entitled to design protection (section 7).

(2) Where the examination results in objections to the registration of the design, the applicant shall be requested to comment thereon within an adequate time period. If the inadmissibility of registration is ascertained following comments made in time or after expiry of the time limit, the design application shall be rejected.

(3) Where no objections against the registration of the design exist, its publication (section 17) and registration (section 18) shall be ordered.

### **Section 17 Publication of the Design**

The design shall be published in the Austrian Design Gazette (section 33) on the registration date. Content and scope of the publication of the design shall be determined by order of the President of the Patent Office, taking into consideration the public need for information.

### **Section 18 Registration**

(1) The following shall be entered on registration in the

Design Register kept by the Patent Office:

1. the register number;
2. the filing date and, if applicable, the claimed priority;
3. the beginning of the protection (section 6);
4. a representation of the design;
5. if applicable, an indication that a sample of the design or a description has also been submitted;
6. the products for which the design is intended (list of goods);
7. the name as well as the residence (seat) of the owner of the design and, if applicable, of his representative;
8. if applicable, the person designated as the creator (section 8).

(2) The design proprietor shall receive an official confirmation (design certificate) of the entries in the Register according to subsection 1.

(3) The Design Register may be inspected by anyone. Upon request, a certified extract from the Register shall be issued.

### **Section 19 Priority**

The applicant shall have the right of priority from the day on which the application for a design was duly filed.

### **Section 20**

(1) The rights of priority granted on the basis of intergovernmental agreements or on the basis of section 20a shall be expressly claimed. The day of filing of the application, the priority of which is claimed, and the country, in which that application has been made, shall be indicated (declaration of priority). Furthermore the number of that application shall be specified.

(2) The declaration of priority shall be submitted not later than two months after the receipt of the application at the Patent Office. Within this time limit the claimed priority may be corrected.

(3) If the maintenance of the design right depends on whether the priority was rightly claimed, the priority right must be

proven. The President of the Patent Office must issue a regulation specifying which documents are required for this proof (priority documents) in the proceedings before the Patent Office and in the appeal proceedings and when these documents must be submitted.

(4) If the declaration of priority is not submitted in time, if the priority documents are not lodged in time, or if the number of the application, the priority of which has been claimed, is not notified upon official request within the time limit set, the day of filing of the application in Austria shall count as the priority date.

#### **Section 20a.**

Within a time period of six months after the day of filing of an earlier design application filed at a filing office not coming under the scope of an intergovernmental agreement on the recognition of priority, the applicant shall be entitled to the priority of the earlier design application for a later filed design application concerning the same design in Austria, if a corresponding reciprocity with this filing office to be published by announcement of the Federal Minister for Transport, Innovation and Technology in the Federal Law Gazette exists. The requirements and the effects of this right of priority shall correspond to those of Article 4 of the Paris Convention for the Protection of Industrial Property, Federal Law Gazette No. 399/1973.

#### **Section 21 Entries in the Design Register**

In addition to the information mentioned in section 18(1), the end of design protection, the declaration of nullity, the assignments of design rights, liens and other rights in rem relating to design rights, licenses, the entitlement to prior use, the restoration of rights, declaratory decisions and entries relating to disputes as well as references to decisions communicated pursuant to section 36 shall also be entered in the Design Register.

#### **Section 22**

(1) Rights in rem relating to design rights as well as the design right itself in the event of a transfer (section 10)

shall be acquired upon entry in the Design Register.

(2) The application for registration must be accompanied by a copy of the document on the basis of which the registration is to be made. If the original of the document is not a public document, it must be signed by the person who owns the right. In the case of a transfer of the design rights, a mutual declaration of the parties or their representatives regarding the transfer may be submitted instead of the document.

(3) The application, the documents and the declarations are subject to examination by the Patent Office in terms of form and content. If reasonable doubts arise, the Patent Office may request originals or certified copies or other documents.

(4) Legal disputes concerning design rights shall, on request, be recorded in the Design Register (entry relating to disputes).

(5) Additionally sections 43(2)-(5) (entry in the Design Register), section 44 (encumbrances) and section 45(2) (entries relating to disputes) of the Austrian Patent Law 1970, Federal Law Gazette No. 259, shall apply mutatis mutandis.

(6) (2) and (3) as well as section 43(5) of the Austrian Patent Law 1970 shall apply mutatis mutandis to the transfer of rights arising from an application of a design.

### **III. Declaration of Nullity and Declaration of Lack of Title**

#### **Section 23 Declaration of Nullity of designs**

(1) A design right shall be declared null and void upon request, if

1. the design does not correspond to the definition under section 1(2), or
2. the design does not fulfill the requirements for protection of section 1(1) first sentence, or
3. the design falls under the prohibition on double protection (section 3), or
4. the owner of the design right is not entitled to design protection (section 7).

(2) The ground for declaration of nullity provided for in subsection 1 no. 3 may be invoked solely by the owner of the conflicting right.

(3) The ground for declaration of nullity provided for in subsection 1 no. 4 may only be invoked by the person who is entitled to the design.

(4) If one of the grounds for declaration of nullity provided for in subsection 1 applies only to a part of the list of goods, the latter shall be limited accordingly.

(5) If one of the grounds for declaration provided for in subsection 1 no. 2 applies only in part, the design may be declared null and void in part, provided it retains its identity. The partial declaration of nullity and maintenance of the design right may be made dependent on the submission of amended documents by the owner of the design, which may also include voluntary limitation (disclaimer).

(6) The legally binding declaration of nullity shall be retroactive to the day of filing of the design application. If the design right is declared null and void pursuant to subsection 1 no. 3, section 48(3) second sentence of the Austrian Patent Law 1970 shall apply mutatis mutandis.

(7) A right to a design may still be declared null and void



after its expiration or waiver on it.

**Section 25 Declaration of Lack of Title and Transfer of Designs**

(1) Any person who claims to be entitled to the design may - in lieu of the declaration of nullity provided for in section 23(1) 4 - request that the owner of the design be declared to lack title to the design right and request transfer of the design right to himself. The owner of the design may waive the design only with the petitioner's consent until the decision becomes legally binding.

(2) Where the ground for declaration of lack of title (subsection 1) applies only to a part of the list of goods, the design right shall be declared lack of title or transferred in part only.

(3) The claim against a bona fide owner of the design shall become statute-barred after three years from the entry of the design in the Design Register. Section 49(4), (6) and (7) of the Austrian Patent Law 1970 shall apply mutatis mutandis.

#### **IV. Competence and Procedure**

##### **Section 26 General**

(1) Unless this Federal Act stipulates otherwise, the Patent Office shall be responsible for taking decisions and performing other acts in matters of design protection. At the Patent Office, responsibility shall lie with the member of the Legal Department entrusted with such matters who is competent according to the allocation of duties, except where they are the responsibility of the President or Nullity Department.

(2) Sections 52 to 56, 57(2), 57b to 58, 60, 61, 64, 66 to 69, 76, 79, 82 to 86 and 126 to 137 of the Austrian Patent Law 1970 shall apply mutatis mutandis.

##### **Section 27 Authorized Employees**

(1) By order of the President, employees who are not members of the Patent Office may be authorized to deal with matters of a specific nature relating to applications and registered designs, provided that this is expedient in terms of the simplicity of the processing and the training of the authorized employees ensures that the processing is carried out properly. They are bound by the instructions of the member responsible according to the allocation of business. This member may reserve the right to deal with matters or take them over at any time.

(2) Section 76 of the Austrian Patent Law 1970 shall apply to the authorized employees mutatis mutandis.

(3) The decisions made by the employees authorized under section 1, may be appealed like those of the competent member.

##### **Section 29 Proceedings before the Nullity Department and the Supreme Patent and Trademark Chamber**

(1) A legally qualified member of the Nullity Department shall decide on requests for the recognition of the entitlement to prior use (section 5(5)), for designating a person as creator (section 8(4)), for declaration of nullity (section 23), for declaration of lack of title and transfer (section 25) and for declaratory decisions (section 39).

(2) The Nullity Department shall debate the requests and claims mentioned in subsection 1 by applying sections 112(2) to 114a, 115(2) to (4), 116(2) to 5, 117 to 120 and 122 to 125 of the Austrian Patent Law 1970 mutatis mutandis. However, an oral proceeding shall be ordered only if deemed necessary by the competent member or requested by one party.

(3) If, in the case of a request for complete declaration of nullity of the design (section 23), the owner of the design fails to file a counterstatement within the time limit set to him pursuant to subsection 2 in conjunction with section 115(2) of the Austrian Patent Law 1970 the Nullity Department shall declare the design null and void.

### **Section 31 Inspection of Files**

(1) The parties involved in proceedings shall be entitled to inspect the files relating to the proceedings.

(2) Anyone may inspect files relating to registered designs.

(3) Third parties shall be entitled to inspect the files relating to non-registered designs only on approval by the applicant. The approval of the applicant shall not be required for any person against whom the applicant has cited his design application.

(4) The right to inspect the files shall also comprise the right to make copies thereof. These shall be certified by the Patent Office on request.

(5) Information and official certificates as to when, by whom and, if applicable, by which representative an application for a design has been filed, whether the application involves a secret design, the file number of the application, which priority has been claimed, the file number of the application on which priority is claimed, for which goods the design is intended (list of goods), the naming of the creator, if any, whether the application is still pending as well as whether and to whom the right of it have been assigned shall be supplied to any person.

(6) Records of consultations and parts of files relating solely to the internal official procedure shall be excluded from inspection. Upon request, parts of the files whose disclosure is not necessary for the information of the public may also be excluded from inspection if there is a business or trade secret or another reason worthy of consideration.

(7) To the extent that personal data is processed in the design register or in publicly accessible electronic information services of the Patent Office, there are no

1. the right to information in accordance with Art.15(1)c. of Regulation (EU)2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation: GDPR), OJ No.L119 of 4 May 2016 p.1, as corrected in OJ No.L314 of 22 November 2016 p.72.

2. the obligation to notify in accordance with Art.19 second sentence GDPR and

3. the right to restrict processing in accordance with Art.18 and the right to object in accordance with Art.21 GDPR, whereby the data subjects must be informed of this in an appropriate manner.

The right to receive a copy of these data pursuant to Art.15(3) GDPR is fulfilled by the fact that the data subject can inspect the design register or publicly accessible electronic information services of the Patent Office.

### **Section 32 Representatives**

(1) Anyone acting as representative before the Patent Office in matters of design protection shall have his residence in Austria; however, for attorneys at law, patent attorneys and notaries public the professional regulations shall apply. The representative shall prove his authorization by producing the original written power of attorney or a duly certified copy thereof. If a power of attorney has been granted to several persons, each of them shall be authorized to solely act as a representative.

(2) If an attorney at law, a patent attorney or a notary public acts as a representative, he may refer to the authorization

granted to him without actually producing documentary evidence.

(3) If a representative acts without any power of attorney or, in the case of subsection 2, without referring to the authorization granted to him, the procedural act taken by him shall be valid only on condition that he produces a duly executed power of attorney or refers to the power of attorney granted to him within a reasonable time limit set to him.

(4) Anyone who has neither a residence nor a place of business in Austria may only assert rights under this Federal Act before the Patent Office, if he has a representative who satisfies the requirements of (1). He may only assert these rights before the Nullity Division of the Patent Office if he is represented by a lawyer, patent attorney or notary. However, if the residence or place of business is in the EEA or the Swiss Confederation, the appointment of an authorised service agent residing in Austria is sufficient to assert rights under this Federal Act. The requirement of having a main residence in Austria does not apply to nationals of EEA contracting states if service is ensured by international treaties with the contracting state of the authorised service agent's residence or in some other way. It is not necessary to appoint a representative to use the Patent Office's service and information services.

(5) The power of attorney granted to a lawyer, patent attorney or notary to represent before the Patent Office authorizes him by law to assert all rights arising from this Federal Act before the Patent Office and - to the extent that he is legally empowered to do so - before the appeal courts, in particular to file designs, withdraw applications, renounce registered designs, file and withdraw applications and appeals to be dealt with by the Nullity Division, furthermore to conclude settlements, accept all types of service as well as official fees and the procedural and representation costs to be reimbursed by the opposing party, and to appoint a deputy.

(6) The power pursuant to subsection 5 may be limited to a particular property right and to representation in particular proceedings. It shall, however, expire neither on the death of the mandatory nor by any change in his capacity to act.

(7) If a representative who is neither an attorney at law, nor a patent attorney nor a notary public is to be authorized to waive, in whole or in part, a registered design, he must be expressly authorized to do so.

### **Section 33 Austrian Design Gazette**

The Patent Office shall periodically issue an official Design Gazette containing, in particular, publications according to section 17, publications concerning the expiry of design protection, concerning partial waivers, concerning changes of the company name and the person of the owner of the design as well as those publications to be affected according to section 26(2) applying sections 128 and 133(3) of the Austrian Patent Law 1970 mutatis mutandis.

## **V. Infringement of Design Rights and Requests for Declarations**

### **Section 34 Infringements of Design Rights**

Anyone whose design right has been infringed shall be entitled to injunction, elimination, publication of the judgment, adequate compensation, damages, surrender of profits, rendering of accounts and information on the origin and distribution networks. Even anyone who worries about such an infringement shall be entitled to injunction. Sections 147 to 154 of the Austrian Patent Law 1970 shall apply mutatis mutandis.

### **Section 35**

(1) Anyone who infringes a design right shall be condemned by the court to a fine of up to 360 times the per diem rate. Any person who commits such an act commercially shall be sentenced to detention not exceeding two years.

(2) Likewise the proprietor or manager of an enterprise who fails to prevent the infringement of a design right committed by an employee or agent in the course of the activities of the enterprise shall be sentenced.

(3) If the proprietor of the enterprise pursuant to subsection 2 is a corporation, a collective, an association or another legal entity which is not a physical person, subsection 2 shall apply to the organs, if they are guilty of having committed such an omission.

(4) Subsection 1 shall not apply to employees or agents, who acted on instruction of their employer or the ordering party if, due to their economic dependency, they cannot be expected to refuse to commit such acts.

(5) Prosecution shall take place only at the request of the infringed party.

(6) Sections 148, 149 and 160 of the Austrian Patent Law 1970 shall apply mutatis mutandis.

### **Section 36**

(1) The court of first instance shall forward to the Patent

Office for attachment to the files a copy of any judgment in which the validity or effectiveness of a design right has been judged, certified to be a legally binding decision. A notation shall be made in the Design Register (section 21) concerning such a judgment.

### **Section 37**

Any person who designates products in a manner likely to give the impression that they enjoy design protection shall, on request, provide information on what design right such designation is based.

### **Section 38**

(1) The Commercial Court of Vienna shall have exclusive jurisdiction for actions and injunctions under this Federal Law.

(2) Criminal matters under this Federal Law shall fall within the jurisdiction of the Vienna Provincial Court for Criminal Matters.

### **Section 39 Requests for Declaratory Decisions**

(1) Anyone who industrially produces, puts on the market, offers for sale or uses a product or intends to take such measures may request a declaratory decision at the Patent Office against the owner of a protected design or the exclusive licensee, that the product is covered neither wholly nor partly by the design right.

(2) The owner of a protected design or the exclusive licensee may request a declaratory decision at the Patent Office against any person who industrially produces, puts on the market, offers for sale or uses a product or intends such measures, that the object is covered wholly or partly by the design right.

(3) Request under subsections 1 and 2 shall be rejected if the opposing party proves that an infringement proceeding instituted earlier between the parties in respect of the same design right and the same product is pending or has been finally decided.



(4) The request shall be related to only one design right. The request shall be accompanied by four copies of a representation of the product; one copy shall be attached to the final decision.

(5) The procedural costs shall be borne by the requesting party, if the opposing party has not provoked the request by its conduct and has acknowledged the claim within the time limit set for its counterstatement.

## **VI. THE HIGHER REGIONAL COURT OF VIENNA AND THE SUPREME COURT AS APPEAL INSTANCES**

### **A Appeals against decisions of the Legal Department of the Patent Office**

#### **Section 40 Appeals**

(1) Decisions passed by the Legal Department may be contested by filing an appeal with the Higher Regional Court of Vienna.

(2) No legal recourse is allowed against instructions issued by a referee in preparation of a decision of Legal Department.

#### **Section 41 Procedure**

The provisions of the Non-Contentious Proceedings Law, BGBl No. 111/2003, shall apply mutatis mutandis to the appeal proceedings, with the exception of sections 44 and 49 Non-Contentious Proceedings Act and subject to the following specific conditions:

1 references in the Non-Contentious Proceedings Law to a court of first instance are understood to be references to the Legal Department.

2 The time limits for filing an appeal and for a writ of defence shall be two months; these time limits cannot be extended.

3 New facts or evidence may be introduced only to support or rebut facts or evidence submitted in time in the first instance.

4 If an appeal submitted on time shows defects, the member responsible must set the appellant a deadline for rectification. Appeals submitted late or appeals that are not improved within the set time limit shall be rejected by the member responsible. Appeals against decisions of the authorized officer shall be rejected by the member responsible.

5 Decisions in accordance with Section 50 of the Non-Contentious Proceedings Law are to be issued by the member responsible who issued the contested decision. If the decision has been issued by the authorized officer, the member responsible must make the decision.

6 Section 51(1) of the Non-Contentious Proceedings Law shall be applied subject to the proviso that the matter shall be referred, if appropriate, with an explanatory report.

7 Each party to the proceedings shall bear the costs they have incurred.

8 Rulings on the appeal by the court of recourse shall be served by the court of recourse.

#### **Section 42 Further appeal**

(1) A further appeal against a ruling issued by the court of recourse in appeal proceedings is allowed in accordance with section 62 of the Non-Contentious Proceedings Law.

(2) The provisions of the Non-Contentious Proceedings Law shall apply mutatis mutandis to the further appeals proceedings subject to the following specific conditions:

1 The time limits for filing a further appeal and for a writ of defence shall be two months; those time limits cannot be extended.

2 The further appeal proceedings as well as the requirements for admissibility must be filed with the court of recourse; any dismissal pursuant to section 67 of the Non-Contentious Proceedings Law shall be made by the court of recourse. Except in case of section 68(4) 2 of the Non-Contentious Proceedings Law, the writ of defence in the further appeals proceedings shall also be filed with the court of recourse.

3 Each party to the proceedings shall bear the costs they have incurred.

### **B Legal recourse against the decisions and rulings of the Nullity Department of the Patent Office**

#### **Section 43 Appeal**

(1) Final rulings passed by the Nullity Department of the Patent Office may be contested by filing an appeal with the Higher Regional Court of Vienna.

(2) The appeal proceedings shall be governed mutatis mutandis by the provisions of the Code of Civil Procedure (ZPO: RBGl. Nr.113/1895) with the exception of section 461(2) of ZPO and subject to the following specific conditions:

1. References in ZPO to a court of first instance are understood to be references to the Nullity Department.

2. The time limits for filing an appeal and for a writ of defence shall be two months; these time limits cannot be extended.

3. If an appeal submitted on time has defects, the member responsible must set the appellant a deadline for rectification. If

the defects are rectified within the deadline, the appeal shall be deemed to have been duly submitted.

4. Appeal decisions of the court of appeal shall be served by the court of appeal.

#### **Section 43a Appeal**

(1) No legal recourse is allowed against a preparatory order of the member responsible. Subject to subsection 2, no separate legal recourse is allowed against the decisions adopted by the Nullity Department in the course of the preliminary proceedings or during the hearing; such decisions can be attacked only by means of an appeal, provided that they had an effect on the final ruling.

(2) A appeal may be filed with the Higher Regional Court of Vienna against decisions to suspend proceedings, decisions by which an appeal is rejected, decisions pursuant to section 26 in conjunction with section 130(2) of the Patent Act 1970 (BGBl No. 259/1970) and decisions regarding claims based on the Fee Entitlement Law. Decisions issued by the court of appeals can be contested by recourse filed with the Supreme Court in accordance with section 519 of ZPO.

(3) The appeal proceedings shall be governed mutatis mutandis by the provisions of ZPO subject to the following specific conditions:

1. References in ZPO to a court of first instance are understood to be references to the Nullity Department.

2. Appeals pursuant to subsection 2, sentence 1, shall be filed with the Nullity Department, while appeals pursuant to subsection 2, sentence 2, shall be filed with the court of appeals.

3. If an appeal submitted in good time in accordance with the first sentence of (2) contains deficiencies, the legally qualified clerk of the Nullity Division shall set the appellant a deadline for rectification. If the deficiencies are remedied within the deadline, the appeal shall be deemed to have been submitted in time.

4. Rulings on the appeal by the court of recourse shall be served by the court of recourse.

#### **Section 43b Further appeal**

(1) Judgments of the court of appeals can be contested with an appeal pursuant to section 502 of the Code of Civil Procedure, while a decision issued by the court of recourse can be contested by a

further appeal pursuant to section 528 of the Code of Civil Procedure.

(2) The appeal proceedings shall be governed mutatis mutandis by the provisions of the Code of Civil Procedure subject to the following specific conditions:

1. The time limits for filing an appeal and for a writ of defence shall be two months; these time limits cannot be extended.

2. The appeal shall be filed with the court of appeal. Except for references relating to a referral to the court of first instance, any references to the court of first instance shall be understood to be a reference to the court of appeal. Except in case of section 507a(3) 3, sentence 2, of the Code of Civil Procedure, the writ of defence in the appeal proceedings shall also be filed with the court of appeal.

(3) The provisions of the Code of Civil Procedure shall apply mutatis mutandis for the further appeal proceedings, subject to the proviso that appeal must be filed with the recourse court.

## **C Common provisions**

### **Section 43c Legal aid**

Legal aid for legal recourse proceedings pursuant to this Chapter must be applied for at the Patent Office. The decision on the request for legal aid shall be issued by the Nullity Department through one of the chairpersons by means of an order. Section 7(2) of the Non-Contentious Proceedings Law, sections 63, 64, 66 to 73 of the Code of Civil Procedure, and section 45 of the Lawyers' Professional Code, LGBl No. 96/1868, shall apply subject to the proviso that references to the court are understood to be references to the Nullity Department. Instead of the appointment of an attorney, the Patent Office may also authorise the appointment of a patent attorney for the legal recourse proceedings before the Higher Regional Court of Vienna. A appeal may be filed against the decision within two weeks.

### **Section 43d Service, representation, joining the proceedings, inspection of records**

(1) In legal recourse proceedings pursuant to this Chapter, service of writs by the Patent Office shall be made in accordance with

Section 26(2) in conjunction with Sections 85 and 86 of the Patents Act 1970.

(2) In proceedings before the Higher Regional Court of Vienna, patent attorneys and notaries public are also authorised to represent the parties. Reference to a power of attorney shall substitute documentary evidence.

(3) In multi-party proceedings, the acquirer of a contested right may join the proceedings even without the consent of the opponent.

(4) Sections 31 shall apply mutatis mutandis to the right to inspect the records pursuant to this Chapter.

**Section 43e Composition of the boards**

Section 146(1) and (4) of the Patent Act 1970 shall apply mutatis mutandis to the composition of the senate at the Higher Regional Court of Vienna.

## **VII. Community Design**

### **Section 44a**

Applications for Community designs can be filed with the Patent Office in accordance with Article 35(1)(b) of Regulation (EC) No. 6/2002. The Patent Office will note the date of receipt on the application and will forward the documents without examination to the European Union Intellectual Property Office in Alicante within the two-week period provided for in Article 35(2) of this Regulation.

### **Section 44b**

(1) The Commercial Court of Vienna shall be the Community design court of first instance within the meaning of section 80(1) of the Regulation (EC) No. 6/2002. In legal matters, in which the Community design court has jurisdiction for actions, this Court shall also have sole jurisdiction for preliminary injunctions.

(2) The Vienna Provincial Court for Criminal Matters shall have jurisdiction in criminal matters concerning Community designs.

## **VIII. Final and Transitional Provisions**

### **Section 44c Transitional provisions**

(1) Sections 1, 2, 3, 12(1), sections 24, 25, 29 and 44(3) in the version valid before entry into force of the Federal Law, Federal Law Gazette I No. 81/2003, shall continue to be applied to design applications and registered designs, whose filing date lies before the entry into force of the aforementioned Federal Law. Sections 2a and 23 in the version of the aforementioned Federal Law shall not apply to such design applications and registered designs.

(2) Section 23 in the version valid before entry into force of the Federal Law, Federal Law Gazette I No. 821/2003, shall continue to be applied to proceedings concerning ex officio declarations of nullity that have been instituted before the entry into force of the aforementioned Federal Law.

(3) Insofar as acts could not be prevented before the day the Federal Law, Federal Law Gazette I No. 81/2003, entered into force by virtue of sections 4 and 5 in the version valid before the entry into force of the aforementioned Federal Law, claims from the design pursuant to sections 4 to 5 in the version of the aforementioned Federal Law cannot be asserted to prevent the continuation of such acts by a person that began such acts before the aforementioned Federal Law entered into force.

### **Section 44d**

(1) Section 150(3) of the Austrian Patent Law 1970 in the version valid before entry into force of the Federal Law, Federal Law Gazette I No. 149/2004, shall continue to apply mutatis mutandis to actions filed before entry into force of the aforementioned Federal Law.

(2) Section 40 in the version valid before entry into force of the Federal Law, Federal Law Gazette I No. 149/2004, shall continue to apply to applications filed before the entry into force of the aforementioned Federal Law.

(3) Section 42(1), (2) and (3) first sentence in the version valid before the entry into force of the Federal Law, Federal



Law Gazette I No. 149/2004, shall continue to apply to requests filed before entry into force of the aforementioned Federal Law. Section 132(1) and (3) of the Austrian Patent Law 1970 in the version valid before entry into force of the aforementioned Federal Law shall continue to apply mutatis mutandis to requests for restoration of rights filed before entry into force of the aforementioned Federal Law.

(4) Section 41 in the version valid before entry into force of the Federal Law, Federal Law Gazette I. No. 149/2004, shall continue to apply to designs, whose term of protection ends before the entry into force of the aforementioned Federal Law. This shall also apply to designs, whose term of protection ends after the entry into force of the aforementioned Federal Law, but for which the renewal fee has been already duly paid before the aforementioned Federal Law entered into force.

(5) Section 176b of the Patent Act 1970 and Section 4 of the Administrative Jurisdiction Transitional Act, GBG1 I No. 33/2013, shall apply mutatis mutandis.

#### **Section 45 Final provisions**

The federal provisions mentioned in this Federal Law shall be applied in their respective valid version.

#### **Section 45a**

All person related terms under this Federal Law shall relate to both sexes irrespective of the form chosen.

#### **Section 46**

(1) This Federal Law shall enter into force on January 1, 1991.

(2) Orders on the basis of this Federal Law in its respective valid version may already be enacted on the day following the promulgation of the Federal Law to be implemented; they shall, however, not enter into force prior to the legal provision to be implemented.

(3) The following shall cease to apply on entry into force of this Federal Law:

1. the Design Law Act 1970, Federal Law Gazette No. 261,

2. the Order of the Federal Ministry for Trade and Reconstruction of November 11, 1959, on Certain Requirements for the Deposit of Designs, Federal Law Gazette No. 255,  
3. the Order of the Federal Minister for Commerce, Trade and Industry of November 11, 1969, on the Establishment of Design Deposit Offices and the Justification of Priority Right (Design Order), Federal Law Gazette No. 387.

(4) However, the legal provisions repealed under section 3 shall nevertheless continue to apply to designs deposited prior to January 1, 1991.

(5) Section 40(1), section 41(1), section 42(1) and section 43(1) in the version of the Federal Law, Federal Law Gazette I No. 143/2001, shall enter into force on January 1, 2002.

(6) Section 1, the title of section 2, sections 2, 2a, the title of section 2b, sections 2b, 3, 4, the title of section 4a, sections 4a, 5(1), the title of section 5a, sections 5a, 6, the title of section 11, sections 11, 12, 16(1), sections 17, 20(1) and (2), sections 20a, 21, the title of section 23, section 23, the title of section 25, section 25(1), section 26(2), sections 29, 31(2) and (3), section 32(1), (4), (5) and (7), section 41(1), Chapter VII, the title of Chapter VIII, sections 46a and 48 in the version of the Federal Law, Federal Law Gazette I No. 81/2003 shall enter into force at the beginning of the day following the promulgation of the aforementioned Federal Law. Simultaneously, the title of section 12, section 24 including its title and section 44(3) shall go out of force.

(7) The Order of the Federal Minister for Economic Affairs on the establishment of design application centers (Order on Design Application Centers - MASTV), Federal Law Gazette No. 175/1990, shall go out of force with the entry into force of the Federal Law, Federal Law Gazette No. 81/2003. The legal provisions, however, shall continue to apply to designs the applications of which have been filed prior to the entry into force of the aforementioned Federal Law.

(8) Section 20(2), section 25(3), section 26(2), the title of

section 27, sections 27, 28(1) to (7), section 30(2), (4) and (5), section 32(2), sections 34, 35, the title of Chapter VIII, the title of section 44c, sections 44c, 44d, the title of section 45, sections 45a and 47 no. 3 in the version of the Federal Law, Federal Law Gazette I No. 149/2004, shall enter into force at the beginning of the seventh month following the promulgation of the aforementioned Federal Law. Simultaneously, section 28(5), Chapter VI and section 47 no. 3 in the version valid before shall go out of force.

(9) Section 35(3) in the version of the Federal Law, Federal Law Gazette No. 151/2005, shall enter into force on January 1, 2006.

46a. Section 20(3) in the version of the Federal Law, Federal Law Gazette I No. 131/2005, shall enter into force on January 1, 2006.

(10) Sections 26, 27(2), the heading of Section 29, Section 29(2), Section 32(1), (4) and (5), the heading of Chapter VI, Sections 40 to 43e including headings, Section 44d(5) and Section 47 no. 2 in the version of the Patent and Trademark Law Amendment 2014, GBG1 I No. 126/2013, come into force on January 1, 2014. At the same time, Section 28 including heading and Section 30 in the previously applicable version become invalid.

(11) Section 20(3) and Section 22 in the version of the Federal Law, GBG1 I No. 124/2017 come into force at the beginning of the day following the publication of the aforementioned Federal Law.

(12) The heading of Section 31 and Section 31(7) in the version of the 2nd Material Data Protection Adaptation Act, GBG1 I No. 37/2018, come into force on May 25, 2018.

(13) Section 27(1), Section 31(6), Section 32(4) and Section 44a in the version of GBG1 I No. 51/2023 come into force on the day after publication in the Federal Law Gazette.

#### **Section 46a**

Section 20(3) in the version of GBG1 I No. 131/2005 comes into force on January 1, 2006.

**Section 46b**

Section 26(2) in the version of GBG1 I No. 71/2016 shall enter into force at the beginning of the tenth month following the publication of the aforementioned Federal Law.

**Section 47**

The following persons shall be entrusted with enforcing this Federal Law:

1. in terms of section 25(2) in conjunction with section 49(4) of the Austrian Patent Law 1970, as well as in terms of sections 34 to 38 in conjunction with sections 148 to 154 and 160 of the Austrian Patent Law 1970, the Federal Minister of Justice,
2. in terms of section 26(2) in conjunction with Section 126 of the Patent Act 1970 and Sections 40 to 43e, the Federal Minister for Transport, Innovation and Technology and the Federal Minister for Justice,
3. in terms of all other provisions of this Federal Law the Federal Minister for Transport, Innovation and Technology.

**Section 48**

By this Federal Law, the Directive 98/71/EC of the European Parliament and of the Council dated October 13, 1998, on the legal protection of designs, Official Journal No. L 289, dated October 28, 1998, p. 28, is implemented.