

Q278-SGL-G-2021



Q278 Industrial Designs and the Role of Prior Art

Name of contributing National/Regional Group or Independent Member

Dutch Group

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You are invited to submit a Report addressing the questions below.

Questions

I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

References to a "design" below are to be read as referencing the intellectual property right that specifically protects the outward appearance or ornamentation of an object or article of manufacture, irrespective of what it is called in your jurisdiction.

Note: If your answer(s) to Q1) to Q3) below is (are) the same as your answer(s) in reply to the 2016 Designs Study Question, you may simply refer to those answer(s).

- 1) a) Does your Group's current law provide for an intellectual property right (other than copyright, trade marks or trade dress), that specifically protects the outward appearance or ornamentation of an object or article of manufacture or other? Please answer YES or NO.

YES.

- b) If YES to Q1.a), please identify that law and explain what that right is called. (e.g., registered design, industrial design, design patent, etc.).

As the Netherlands are part of the Benelux, the applicable law is the Benelux Convention on Intellectual Property ("BCIP"). The BCIP applies to both trademarks and designs. The unofficial English translation provided by the Benelux Office for Intellectual Property ("BOIP") of Article 3.1 BCIP speaks of the single word "designs". However, the Dutch version of the BCIP speaks of 'tekeningen of modellen', which translates to 'drawings or designs'. Based on Article 3.1

BCIP, a design shall be protected to the extent that it is new and has individual character. Also, the appearance of the whole or part of a product shall be regarded as a design.

Also, as part of the European Union, Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (the “CDR”) applies in the Benelux as well. In the CDR, such a right is called a registered or an unregistered design right.

- 2) Please identify what features of the outward appearance or ornamentation are taken into consideration for a design, e.g., shape/contour, surface, texture, color, etc.

Based on Article 3.1(3) BCIP, the appearance of a product shall be imparted, in particular, through the features of the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.

Features of a product which are solely dictated by its technical function as well as features of a product which must necessarily be reproduced in their exact form and dimensions 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, are excluded from the protection of a design.

- 3) a) Is prior art used to assess requirements for protection of a design prior to registration/issuance of a design, i.e., during substantive examination by an Intellectual Property (“IP”) Office? Please answer YES or NO.

NO.

If you have answered YES to Q3.a), please proceed to answer Q3.b). Otherwise, please proceed to Q4).

- b) Referring to Q3.a), for which requirements for protection of a design is prior art used? Please tick all boxes that apply.

- Novelty
- Originality
- Individual character
- Non-obviousness
- Inventive step
- Aesthetic
- Ornamental
- Other, namely:

- c) Referring to Q3.a) to Q3.b), please identify your national/regional laws or guidelines that give definitions of prior art or indications of what qualifies as prior art in this context.

- 4) a) Is prior art used to assess requirements for protection of a design when validity of the design is contested in court or other post-registration/issuance venue?

Please answer YES or NO.

YES.

If you have answered YES to Q4.a), please proceed to answer Q4.b). Otherwise, please proceed to Q5).

- b) Referring to Q4.a), for which requirements for protection of a design is prior art used? Please tick all boxes that apply.

Novelty

Originality

Individual character

Non-obviousness

Inventive step

Aesthetic

Ornamental

Other, namely

- c) Referring to Q4.a) to Q4.b), please identify your national/regional laws or guidelines that give definitions of prior art or indications of what qualifies as prior art in this context.

As such there are no definite guidelines or definitions for the Benelux as to what qualifies as prior art in national/regional laws. Article 3.3 BCIP states that a design shall be considered new if no identical design has been made available to the public before the date of filing., which uses the same definition of prior art as the CDR. 'Prior art' therefore includes any design that has been made available to the public before the filing or priority date of a later design, insofar as this earlier design is relevant for the assessment of novelty or individual character of this later design.

Also, in the CDR, consideration 14 states the following:

"The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design".

- 5) a) Is prior art used to assess requirements for protection of a design with respect to infringement proceedings or other legal situations not addressed by Q3) and Q4)? Please answer YES or NO.

YES.

If you have answered YES to Q5.a), please proceed to answer Q5.b). Otherwise, please proceed to Q6).

b) Referring to Q5.a), for which requirements for protection of a design is prior art used? Please tick all boxes that apply.

Novelty

Originality

Individual character

Non-obviousness

Inventive step

Aesthetic

Ornamental

Other, namely: scope of protection.

c) Referring to Q5.b), please indicate in which context these requirements for protection are taken into consideration, e.g., before a judge in infringement proceedings or other legal situations not addressed by Q3) and Q4).

Judge in infringement proceedings and in validity proceedings.

d) Referring to Q5.a) to Q5.c), please identify your national/regional laws or guidelines that give definitions of prior art or indications of what qualifies as prior art in this context.

None. This is based on a body of case law.

- 6) a) Do your national/regional laws or guidelines provide different definitions of prior art or indications of what qualifies as prior art for registration/issuance, validity, infringement, or other? Please answer YES or NO.

NO.

b) If YES to Q6.a), please briefly identify the differences, if not readily apparent from your responses to Q3) to Q5).

Criteria of prior art

- 7) a) What are recognized means of disclosure, i.e., which materials/documents, etc., can constitute prior art?

According to Article 3.3 sub 3 BCIP a design shall be deemed to be made available to the public if it has been published (following registration or otherwise), exhibited, used in trade, or otherwise disclosed.

Such availability may result from publication, display, commercialization, or any other form of disclosure, such as the public use of a product bearing the design or incorporating it.

- b) Does the prior art have to be “printed” and if so, what does that mean?

No, the BCIP does not contain such a requirement.

c) Does the prior art have to be “published” and if so, what does that mean?

Article 3.3. sub 3 BCIP determines that in order to assess novelty and individual character, 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 specialized in the sector concerned, operating within the European Community or the European Economic Area (“EEA”), before the date of filing or the date of priority. As to Benelux designs Dutch courts, these will apply the landmark rulings of the CJEU such as CJEU 13 February 2013, Case C-479/12 (Gautzsch/Duna). 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. The foregoing implies that the prior art does not have to be “published” per se. A design registration with an earlier priority or filing date can constitute non-published prior art if it is published only after the filing or priority date of a later application.

d) Have there been any recent updates or clarifications of prior art in your jurisdiction focused on intangible or other non-“printed” materials? Please provide those updates.

No, there is hardly any case law regarding national (i.e., Benelux) design law. Most Dutch cases are initiated on the basis of European Registered Community Designs. Furthermore, most Dutch case law revolves around the landmark rulings of the CJEU. Notwithstanding the above, on November 3, 2020 the Court of Appeal of The Hague - ECLI:NL:GHDHA:2020:2101 - ruled that screenshots of a design originating from various websites may also be used as evidence to show that there exists relevant prior art.

Time of disclosure

8) a) What is the relevant date of a prior art reference?

In order to qualify as prior art, the publication date of the reference should - following Article 3.3 sub 1 BCIP - pre-date the date of filing of the application or the date of priority, or it should pre-date the 12 months grace period if applicable.

b) Are design applications published, and if so, when?

No, the BOIP publishes the registrations of Benelux filings in accordance with the implementing regulations, which normally takes place within 1-2 weeks.

c) When and how are issued design patents or registered designs published?

In accordance with Article 3.11 sub 1 BCIP the BOIP shall register, without delay, Benelux filings and international filings in which the Benelux territory is designated. The BOIP shall publish registrations of Benelux filings in the Benelux register in accordance with the implementing regulations as soon as possible. Publication takes place online. If the publication does not sufficiently disclose the features of the design, the applicant may request the BOIP to make another publication within the period specified for the purpose without charge (ex Article 3.11 sub 4 BCIP).

d) Does the publication of an issued design patent or registered design effect a publication of the underlying design application if not previously published?

No, the underlying design application is not published by the BOIP.

Circumstances of disclosure

9) Are the circumstances of disclosure relevant, e.g. (please tick all boxes that apply):

X geographic location - Disclosure can be made anywhere in the world (see Court of Justice of the European Union (“CJEU”) 13 February 2013, Case C-479/12 (Gautzsch/Duna)). There is one exception: disclosures which in the normal course of business could not reasonably have come to the knowledge of an insider in the sector concerned operating in the EU or EEA are not detrimental to novelty (General Court of the European Union 21 May 2015, Case T-22/13 (Senz/Impliva)). This exception should be interpreted strictly.

X type of location (e.g., during an exhibition) - A design shall be deemed to be available if it has been published (following registration or otherwise), exhibited, used in trade or otherwise disclosed. The word 'otherwise' implies that the type of disclosure is not limited to a type of location.

X sector/type of products - The protection of a design is not dependent on the nature of the product in which the design is incorporated or to which it is applied, and is therefore not limited to designs belonging to a particular sector. However, when assessing whether the design fulfils the requirement of novelty and individual, account should also be taken of designs already known in other sectors/industries (see CJEU 21 September 2017, C-361/15 and C-405/15 (Group Nivelles/Easy Sanitary Solutions)).

X the person disclosing the prior art (e.g., the applicant of a design, a person bound by a confidential agreement, etc.) - If the person disclosing the prior art is the applicant or a person bound by a confidential agreement, the disclosure only qualifies as prior art if it pre-dates the 12 months grace period.

X the recipient of the disclosed prior art - If the recipient of the disclosure is explicitly or implicitly bound by confidentiality obligations, the disclosure does not constitute prior art.

X other namely: According to Article 3.6(a) BCIP, a Benelux design registration may be invalidated if the design is in conflict with a prior Benelux or Community design which was pending but not yet published on the priority or filing date of the later Benelux design.

Grace period

10) Does your jurisdiction provide a grace period after a first public disclosure of a design for later filing for protection of such design? Please answer YES or NO.

If answering YES, please explain the conditions (e.g., formal request, same applicant) and identify the length of time for the grace period (e.g., 6 or 12 months).

YES, In order to assess novelty and individual character, a disclosure ex Article 3.3 sub 4 BCIP shall not be taken into consideration if a design for which protection is claimed under a registered design right has been made available to the public during the 12-month period preceding the date of filing of the application or the date of priority:

a. by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer, or his successor in title; and

b. if the design has been made available to the public as a consequence of an abuse in relation to the designer or his successor in title (in which case the designer may claim the right to the Benelux application).

Other

11) Please indicate any other relevant criteria of prior art.

Design law is based on objective novelty. A designer is not entitled to protection if there is a (virtually) identical design that has already been made available to the public by someone else that the designer does not know of.

The use of prior art when assessing the requirements for protection of a design

12) a) Does one single prior art reference have to disclose all features of a design in order to prevent its validity?

Both Article 6 of the CDR and Article 3.3 BCIP determine that “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 or priority.

The CJEU ruled that Article 6 of the CDR must be interpreted as meaning that, “in order for a design to be considered to have individual character, the overall impression which that design produces on the informed user must be different from that produced on such a user not by a combination of features taken in isolation and drawn from a number of earlier designs, but by one or more earlier designs, taken individually” (CJEU 19 June 2014, Case C-345/13 (Karen Millen), para. 35). This means that, based on European design law, one single prior art reference has to disclose all features of a design in order to prevent its validity.

Dutch Courts take the CJEU’s Karen Millen decision as a basis for invalidity claims incurred against Community Designs (i.e. District Court The Hague, 10 February 2021, ECLI:NL:RBDHA:2021:1126, para. 4.5).

Whether Article 3.3 BCIP should be interpreted the same way, has not been confirmed by a Dutch Court. However, as the text of both Article 6 CDR and Article 3.3 BCIP are exactly the same and the CJEU is the highest court in the EU, it seems likely that the Dutch Courts will follow the CJEU’s Karen Millen ruling when interpreting Article 3.3 para. 2 BCIP.

b) Can a prior art reference that differs only in minor details from a design prevent finding validity? If YES, please indicate what does only in minor details mean (is it, e.g., in a non-substantive way)?

Yes, the second sentence of Article 3.3 paragraph 1 BCIP (and Article 5.5 paragraph 2 CDR) states: Designs shall be deemed to be identical if their features differ only in immaterial details. According to a ruling of BHIM (Board of Appeal, 2 November 2010, R1451), immaterial details are deemed to be minor details that are “of no material relevance to the appearance of the products at hand”. Therefore, whether something can be addressed as a minor detail or not, depends on the overall appearance of the design in question.

In a case concerning Benelux design rights, the District Court of East Brabant ruled that, when the differences in the prior art and the design in question are subordinate details, those

details will not directly stand out to the informed user. This means that the overall impression of the design will not differ from the prior art (District Court East-Brabant, 13 July 2020, ECLI:NL:RBOBR:2020:3525, para. 4.7 and 4.11). In this particular case the subordinate details were a different attachment of the back of a chair to its frame, where all other eye-catching details. Such as the round, slightly oval rounded back and seat in combination with the thin legs of the chair, were disclosed in the prior art. Therefore, a prior art reference that differs only in minor details from a design can prevent finding validity.

c) Can a prior art reference that discloses the entire design with additional features prevent finding validity?

According to the EUIPO Guidelines for Examination of design invalidity, if the contested Community design reproduces only certain aspect views, for instance the front view, a comparison is made only with the corresponding view of the earlier design. Any additional aspect views disclosed by the earlier design, such as the rear view, are disregarded. The same applies when the new design shows the appearance of only part of a product whereas the prior art discloses the whole product. This means that prior art that discloses the entire design with additional features can prevent finding validity, as the additional features will not be included in the comparison. Even though no such guidelines exist for the Benelux, there is no reason to assume the situation in the Benelux is different.

d) Can a combination of prior art references be used to disclose the features of a design in order to prevent its validity? If YES, is there a limit to the number of prior art references that can be combined?

NO, a combination of prior art references cannot be used to disclose the features of a design in order to prevent its validity, see the answer under 12) a) above.

e) Does the assessment of validity differ where there is numerous prior art or very few prior art available?

As one single prior art has to disclose all features of a design, one single prior art can be enough to prevent the validity of a design. The assessment of validity therefore does not differ.

f) Does the assessment of validity differ with respect to designs for different industry sectors (e.g., textile design vs. GUI design)?

No, as long as legal criteria are met, a design is valid as such regardless of the industry involved.

The influence of prior art on the infringement/scope of protection of a design

13) Does the assessment of infringement/scope of protection of a design differ where there is numerous prior art or very few prior art? Please refer to earlier response(s) where applicable.

The examination of the individual character of a certain design relative to the existing design corpus comes with limits, as the available prior art should also be placed in context. For starters, one must compare a design with prior art that contains all elements of the younger design contained in one single prior design (CJEU; Karen Millen). On that basis, one would only need one prior design for determining the validity of the younger design.

One must also take into account the freedom the designer experienced during the development of the design (Art. 3.3(2) BCIP). In situations where the designer's freedom is limited due to, e.g., the existence of numerous prior art, relatively small changes/features can already result in the existence of an individual character. In situations where the designer has little freedom due to numerous prior art, an individual character can still be obtained, but the individual character and therefore also the scope of protection of such designs will be less strong/broad compared to situations where the designer has all the freedom due to, e.g., fewer prior art. Also insofar specific styles or trends are incorporated in a design, such features do not count towards individual character (Court of Appeal The Hague 3 April 2012, ECLI:NL:GHSGR:2012:BW0094 (THC/Instamat), para. 8).

The aforementioned means that a more densely populated field of prior art is, for example, likely to show styles and trends, whereas that would be less likely to float to the surface in a more open field of prior art. In such matters, more numerous prior art is usually weighed by the Dutch courts. Furthermore, in its decision of 31 May 2013 (Apple/Samsung), the Supreme Court of the Netherlands confirmed that the scope of protection of a design depends on the degree that the design distinguishes itself from the relevant prior art. Therefore, the more distance a younger design is able to take from the existing design corpus, the more strong the individual character and thus the more broad the scope of protection of that younger design would be (see also more recently District Court The Hague 3 June 2020, ECLI:NL:RBDHA:2020:4863 (Casa Vigar/Edco Eindhoven), para. 4.20). It makes sense that one is able to more easily create distance from the existing design corpus if that corpus is less densely populated.

In conclusion, yes, the density of the field of prior art may influence the assessment of infringement/scope of protection.

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

14) Could any of the following aspects of your Group's current law relating to prior art be improved? If YES, please explain.

a) defining criteria of prior art

b) the use of prior art when assessing the requirements for protection of a design

c) the influence of prior art on the infringement/scope of protection of a design

NO.

15) 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.

III. Proposals for harmonization

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

16) Do you believe that there should be harmonisation in relation to the definition of prior art and/or the use of prior art when assessing the requirements for protection?

YES.

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.

- 17) a) Should prior art be used to assess requirements for protection of a design prior to registration/issuance, i.e., during substantive examination by an IP Office? Please answer YES or NO.

The answer to this question appears to be divided. Some believe that, alike in patent proceedings, there should certainly be a role for prior art during the registration process. Such should be in the form of a kind of 'novelty search' during examination. When relevant prior art is found, such should be communicated with the application. This can be in the form of a binding advice or for information purposes only. Main arguments supporting this view are that the applicant has a better view of the value of its design application. And moreover, when prior art can be a ground for refusal, 'clutter' of the register because of the registration of useless designs is combatted.

On the other hand, supporters of the view of maintaining the current situation in which prior art plays no role during the registration process, promote the swift and cost-efficient registration system. When adopting a substantial review of the design application, the registration process will take longer and will become more expensive. Especially as design applications are not widely known and used among SME's, building in additional thresholds such as higher fees and a more lengthy registration process, the less interest these applicants will likely have to consider design protection. Moreover, it is doubtful whether such a novelty search is conclusive in the end.

However, in the Dutch and Benelux jurisdiction, the above discussion is a more theoretical one as only a handful of Benelux design applications are filed yearly. Thus it seems not efficient to consider such change of practice.

If you have answered YES to Q17.a), please proceed to answer Q17.b).

Otherwise, please proceed to Q18).

- b) Referring to Q17.a), for which requirements for protection of a design should prior art be used? Please tick all boxes that apply.

Novelty

Originality

Individual character

Non-obviousness

Inventive step

Aesthetic

Ornamental

Other, namely

- 18) a) Should prior art be used to assess requirements for protection of a design during determination of validity when validity of the design is contested in court or other post-registration/issuance venue? Please answer YES or NO.

YES.

If you have answered YES to Q18.a), please proceed to answer Q18.b).

Otherwise, please proceed to Q19).

- b) Referring to Q18.a), for which requirements for protection of a design should prior art be used? Please tick all boxes that apply.

Novelty

Originality

Individual character

Non-obviousness

Inventive step

Aesthetic

Ornamental

Other, namely

- 19) a) Should prior art be used to assess requirements for protection of a design with respect to infringement proceedings or other legal situations not addressed by Q17 and Q18)? Please answer YES or NO.

YES.

If you have answered YES to Q19.a), please proceed to answer Q19.b).

Otherwise, please proceed to Q20).

- b) Referring to Q19.a), for which requirements for protection of a design should prior art be used? Please tick all boxes that apply.

Novelty

Originality

Individual character

Non-obviousness

Inventive step

Aesthetic

Ornamental

Other, namely

c) Referring to Q19.b), please indicate in which context these requirements for protection should be taken into consideration, e.g., before a judge in infringement proceedings or other legal situations not addressed by Q17) and Q18).

In the Netherlands, the validity of a Benelux design registration can only be disputed or nullified before a Court. In the Netherlands/Benelux, no administrative nullity proceedings with the BOIP exist.

Referring to our answer to question 17a, given the very low numbers of Benelux design registrations, it does not seem to be efficient to set up an administrative cancellation system.

Criteria of prior art

20) a) What should recognized means of disclosure be, i.e., which materials/documents, etc., can constitute prior art?

In principle under the national situation in the Netherlands all (possible) means of disclosure can constitute prior art (ex Article 3.3 sub 3 BCIP). We believe that any restrictions in this regard would be undesirable. The criteria that the disclosure should reasonably have become known to the circles specialized in the sector concerned, operating within the Community / EEA, and as further explained in CJEU 13 February 2013, Case C-479/12 (Gautzsch/Duna), ought to be leading. Consequently, we do not deem there is need for improvement.

b) Should the prior art have to be “printed” and if so, what should that mean?

We believe there is no need to restrict the relevant ‘prior art’ criteria in such a way that only “printed” materials can be regarded as ‘prior art’. We believe that the embodiment of the disclosure of ‘prior art’ (printed or digital) as such should not be relevant. Consequently, we do not deem there is need for improvements.

c) Should the prior art have to be “published” and if so, what should that mean?

We believe it is undesirable to deviate from the current practices and require that the prior art has to be “published” in the sense that it must have been made publicly available before the effective date of the design in question.

Time of disclosure

21) What should the relevant date of a prior art reference be?

As long as it pre-dates the application date or priority date, or the first publication date in case of unregistered designs, the prior art should be taken into account. When thinking of possible improvements one could think of exclusion of prior art that was disclosed a long time ago (for example 100 years ago). However, such cases will normally be ‘caught’ by the requirement that the disclosure should reasonably have become known to the circles specialized in the sector concerned. This allows for flexibility and a case by case approach, without the danger to exclude certain disclosures in advance that despite their timing could have become known to the circles specialized in the sector concerned.

Circumstances of disclosure

22) What, if any, circumstances of disclosure should be relevant? Please tick all boxes that apply.

X geographic location

X type of location (e.g., during an exhibition)

X sector/type of products

X the person disclosing the prior art (e.g., the applicant of a design, a person bound by a confidential agreement, etc.)

X the recipient of the disclosed prior art

X other, namely

All of the above, we refer to our answer on question 9.

Grace period

23 a) Should there be a grace period after a public disclosure of a design for later filing for protection of such design? Please answer YES or NO.

YES.

b) If the answer to Q23.a) is YES, please identify what the length of time for the grace period should be. Also, please explain what the conditions allowing for the benefit of the grace period should be (e.g., formal request, same applicant).

We believe that the current grace-period (12 months) as provided under Article 3.3 sub 4 BCIP is inadequate, although in-house counsel have noted that a shorter (6 month) term may be preferable. Nonetheless, we would like to address the following.

In our opinion, it is currently unclear how to deal with a design registration that has been slightly modified in relation to the initial publication. We believe that in such cases it should be possible for the owner to register his amended design whilst benefiting of the grace-period. In such cases we consider it justifiable to rely upon the grace period. This taking into account that the rationale of the grace period is to allow a design holder to test a design/product in the market during the grace period. Given the purpose of the grace period it should similarly be possible to file a slightly modified design. We note, however, that the modified design naturally should make the same general impression on the informed user as the design that triggered the grace period. It should therefore not concern a significant change. In addition, the modified design registration should still comply with the novelty and individual character requirements.

Other

24) Should there be any other relevant criteria of prior art?

No, we believe all relevant criteria are covered by the current legislation.

- 25) Should the assessment of prior art differ for the different requirements for protection mentioned in Q17)b), Q18)b) and Q19)b)?

The group sees no reason to deviate from the current Benelux practice (see our answers in Q17)b), Q18)b) and Q19)b)).

The use of prior art when assessing the requirements for protection of a design

- 26) a) Should one single prior art reference have to disclose all features of a design in order to prevent its validity?

Yes, the group is of the opinion that Karen Millen is the right way to look at disclosure of features, as protection of a new design will be fairly difficult when the combination of elements of countless prior art can prevent validity.

- b) Should a prior art reference that differs only in minor details from a design prevent finding validity? If YES, please indicate what should only in minor details mean (is it, e.g., in a non-substantive way)?

When the minor details are immaterial, they have little to no effect on the overall impression of a design. Therefore, yes, the group is of the opinion that a prior art reference that differs only in minor details from a design should prevent finding validity.

- c) Should a prior art reference that discloses the entire design with additional features prevent finding validity?

The group is of the opinion that, when prior art discloses the entire design, it should prevent finding validity, regardless of the additional features. Otherwise it would be possible to register several parts of existing designs, which is in conflict with the core of design laws.

- d) Should it be possible to contest the validity of a design on the ground of a combination of prior art references disclosing the features of a design? If YES, should there be a limit to the number of prior art references that can be combined?

No, see Q26) a).

- e) Should the assessment of validity differ where there is numerous prior art or very few prior art available?

No. As we are of the opinion that one single prior art should disclose all features of a design in order to prevent its validity, the assessment of validity should not differ where there is numerous prior art or very few.

- f) Should the assessment of validity differ with respect to designs for different industry sectors (e.g., textile design vs. GUI design)?

No, we do not see any reason why the assessment should differ for different industry sectors.

The influence of prior art on the infringement/scope of protection of a design

- 27) Should the assessment of infringement/scope of protection of a design differ where there is numerous prior art or very few prior art? Please refer to earlier response(s) where applicable.

As per Q13, current practice in the Netherlands already entails that the assessment of infringement/scope of protection of a design may differ where there is numerous prior art or very few prior art. The consensus view of this work group is that this practice need not be changed.

- 28) Please comment on any additional issues concerning any aspect of industrial designs and the role of prior art you consider relevant to this Study Question.

No additional points were raised.

- 29) Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

A total of 5 in-house counsels from various industry sectors (including toys, transportation, health technology, machine industry and food industry) provided their view on questions in Part III.

MvS 11 mei 2021:

<https://docs.google.com/forms/u/0/d/e/1FAIpQLSfji7dHqWyYJXZhCN86shFqYm7Jk6E6Jh5ROcBGh6MKWd2ceQ/formResponse>