

INTA Emerging Issues Committee

Design Rights Subcommittee

Report and Recommendations

The Nexus of Design Rights and Trademark Rights

September 2007

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A. Survey of design laws in Brazil, China, the European Union, France, Germany, Japan, Mexico, Taiwan, the United Kingdom and the United States

1. Executive Summary

The Design Rights Subcommittee of 2006-2007 was primarily tasked to examine whether design laws conflict with or enhance/complement laws that protect trademarks. The Subcommittee was also asked to recommend whether INTA should include design rights within its mission.

Based on the Subcommittee's research and deliberations on design and trademark regimes in a number of jurisdictions, it is apparent that design laws and trademark laws protect very different rights. This conclusion is consistent with that reached by the Issues Council in their 2006 briefing for the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographic Indications on the issue of harmonizing trademark and copyright laws. Existing regimes for design protection extend rights to protected designs that are distinct from those rights the design may obtain through trademark laws. In some areas, the design laws may conflict with the trademark laws (Refer to section 4.2). In other areas, they may complement or enhance the protection given to designs under the trademark laws (Refer to section 4.1). Recent US cases discussed in this report appear out of line with the standards applied in other jurisdictions, and INTA may wish to continue to monitor these cases, or, if appropriate take a position on this issue either in the form of a resolution or an amicus brief if the cases continue on appeal.

The Subcommittee therefore believes that INTA should include design rights within its mission and continue to designate a Design Rights Subcommittee of the Emerging Issues Committee to examine and advise on the nexus of design and trademark laws so that INTA members may better determine optimal protection for their properties.

The Design Rights Subcommittee of the Emerging Issues Committee notes that there will be a Designs Rights Subcommittee for the 2008 – 2009 committee term. The Design Rights Subcommittee recommends that the Subcommittee's mandate for the 2008-2009 term includes: a) continuing to monitor the statutory and case law developments in this dynamic, newly developing area; and b) continuing to explore the controversial topics that arise from the nexus of design and trademark rights.

2. Questions Presented

The Nexus of Design Rights and Trademark Rights. This subcommittee was charged with the following objectives for the 2006-2007 term:

- i) Examine whether design laws conflict with or enhance/complement laws that protect trademarks; and
- ii) Recommend whether INTA should include design rights within its mission and recommend appropriate INTA policy and/or action regarding design rights.

3. History of Subcommittee Involvement

3.0 During the 2004-2005 term, the subcommittee conducted a survey on the design laws in the following jurisdictions: Brazil, China, the European Union, France, Germany, Japan, Mexico, Taiwan, the United Kingdom and the United States. We attach the results of this survey as Appendix A.

3.1 Building on the work that had been done during the previous term, the subcommittee identified specific areas in which additional data gathering was necessary in order to address whether design laws conflict with or enhance/complement laws that protect trademarks. These issues included protection of three-dimensional shapes, protection of graphical marks, and enforcement. The subcommittee focused on a narrower group of jurisdictions, including Brazil, China, the European Union, Japan and the United States.

4. Summary of Subcommittee Deliberations

4.0 *Do design laws conflict with or enhance/complement laws that protect trademarks?*

The subcommittee identified areas where there were gaps between the protection available under design laws and the protection available under laws protecting trademarks. The subcommittee also identified areas where design laws complement or enhance trademark protection. This report seeks to address this question through a discussion of these areas of law:

- i) protection of product and packaging shapes as trademarks or designs;
- ii) whether exhaustion of design patent rights precludes protection as a trademark, taking particular note of developments in United States case law;
- iii) the different tests for infringement of trademarks and designs.

4.1 *Protection of Product and Packaging Shapes as Trademarks or Designs*

4.1.1 Within the EU, both under the Community Trade Mark (“CTM”) system and under the national trade mark laws of individual EU Member States, it is now possible to register as trademarks product and packaging shapes. Quite apart from the specific exclusions that apply to shapes (see below), it has in practice been difficult for applicants to demonstrate that their product or packaging shape is sufficiently distinctive to warrant registration as a trademark. This has been so despite the fact that the European Court of Justice (“ECJ”) has made it clear that the criteria for assessing the distinctive character of a three-dimensional trade mark is no different from those to be applied to other types of trade marks.¹

4.1.2 Why, therefore, has it proved to be much more difficult to register three-dimensional shapes than other types of trademarks? The reason for this is that the ECJ has stated (in a number of cases²) that the perception of the relevant section of the public is not necessarily the same in relation to a three-dimensional mark which consists of the shape of the product itself as it is in relation to, for example, a word mark or a figurative mark. The ECJ's view is that whilst the public is used to recognising the latter marks as indications of origin, average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element. Indeed, the ECJ has expressly recognised, therefore, that it is likely to be more difficult to establish distinctiveness in relation to a three-dimensional mark than in relation to a word or figurative mark.

4.1.3 The European Court of First Instance has made it clear that even evidence showing that products in that shape have been marketed and sold in very large quantities will not in itself be sufficient to demonstrate that the product shape has acquired distinctiveness³. Nor is it enough that a large number of relevant consumers associate the shape with a particular manufacturer. There must be a perception amongst the relevant consumers that products of the shape in question originate from a particular undertaking and that perception must result from the use of the shape "as

a trade mark". The applicant must have done something to inform people that the shape is a trade mark. This requirement has proved to be a stumbling block in a number of cases.

4.1.4 As a result of the position adopted by the ECJ it is likely to become increasingly difficult to demonstrate that a three-dimensional product shape is distinctive.

4.1.5 It appears that the standard for registration of three-dimensional product or packaging shapes is also becoming more rigorous in the United States, particularly since the Wal-Mart⁴ and Traffix⁵ decisions. Extensive proof of secondary meaning and non-functionality is required.

4.1.6 In the United States, a distinction is made between product shapes and packaging shapes (and product shapes are held to a higher standard as consumers generally do not perceive the shape of the product to serve a source-identifying function). In other jurisdictions included in our survey, no such distinction was made.

4.1.7 In contrast, in order to be protected as a Community Design, there is no requirement under the Community Designs Regulation⁶ that the shape of the product or of its packaging is distinctive. Although the shape must be new⁷ and have individual character⁸ in order to qualify for Community Design protection, the threshold is relatively low. A design shall be considered to be new if no identical design (nor one whose features differ only in immaterial details) has previously been made available.

4.1.8 Many product and packaging shapes which do not satisfy the distinctiveness requirement for registered trademark protection would qualify as a Community design (assuming the design has not been prior published). Therefore, in the European context, design law may serve as an important supplement to the laws that protect trademarks to the extent that new, distinctive designs may be protected initially under the Community Designs Regulation for a period of time during which the owner may use the distinctively shaped product or packaging and attempt to create the perception in the minds of consumers that the shape is being used "as a trademark."

4.2 *Does Exhaustion of Design Patent Rights Preclude Protection as a Trademark? New developments in U.S. Case Law*

4.2.1 The Subcommittee discussed some recent cases coming out of the United States courts that have raised the issue of whether trademark/trade dress rights can be obtained that cover the same subject matter as an expired patent, inasmuch as patent expiration dedicates the subject matter to the public. In the United States context, this issue has often been framed as a Constitutional issue, i.e., since the Constitution says that exclusive rights to an invention can be granted only for “limited times”, how can trademark/trade dress rights then be used to extend that limited time to a potentially unlimited time after a patent expires?

4.2.2 Two older US Supreme Court cases, *Singer*⁹ and *Kellogg*¹⁰, established that the public has a right to copy the subject matter of expired patents. Over 100 years ago, Singer sued June Mfg. Co. alleging, inter alia, that June had engaged in unfair competition by selling sewing machines “of the exact size, shape, ornamentation, and general external appearance” as machines sold by Singer. June argued that the size, shape and appearance of Singer’s sewing machines were public property because the features incorporated into June’s machines were the subject of nearly 100 patents, all of which had expired long before Singer brought suit. The Supreme Court agreed.

4.2.3 The Court said:

“[I]t is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent.”¹¹

4.2.4 Forty (40) years later, Nabisco sued Kellogg, alleging that Kellogg infringed Nabisco’s state trademark rights by advertising and selling a pillow-shaped wheat biscuit. Nabisco had obtained utility patents on its famous shredded wheat biscuit and machines for making it. Nabisco also had a design patent (U.S. Pat. No. Des. 24,688, issued Sept. 17, 1895) covering the shape of the biscuit. All of Nabisco’s patents had expired. The Supreme Court, affirming *Singer*, held that Kellogg was free to make and sell pillow-shaped wheat biscuits because the pillow-shape form was in

the public domain.

4.2.5 Justice Brandeis stated: “The plaintiff has not the exclusive right to sell shredded wheat in the form of a pillow-shaped biscuit---the form in which the article became known to the public. That is the form in which shredded wheat was made under the basic patent. The patented machines used were designed to produce only the pillow-shaped biscuits. And a design patent was taken out to cover the pillow-shaped form. Hence, upon expiration of the patents the form, as well as the name, was dedicated to the public.”¹²

4.2.6 Later cases both affirmed these holdings, and ignored them, with the bulk of precedent for the past several decades supporting the notion that the rights granted by trademark or trade dress are different than the rights granted in the utility or design patents. This is in line with the decisions from European and Canadian courts that hold that the rights granted by trademark and design law are different and an owner may obtain design and trademark protection in parallel.

4.2.7 There are two cases recently decided in the U.S. that are not only on point, but are among the first modern reported cases that have considered, and in one case actually applied, the Singer “right to copy” doctrine. One of them was in 2006, *Fuji Kogyo Co., Ltd. v. Pacific Bay International, Inc.*, 461 F.3d 675, 2006 U.S. App. LEXIS 21545 (6th Cir. 2006). The other was decided in February 2007, *Keystone Mfg. Co., Inc. v. Jaccard Corp.*, 2007 U.S. Dist. LEXIS 13094 (W.D.N.Y. 02/27/07).

4.2.8 In *Fuji*, the 6th Circuit Court of Appeals affirmed the lower court’s cancellation of *Fuji*’s trademark registration covering one of its designs, and dismissed its section 43(a) Lanham Act claims covering another design, on the grounds, *inter alia*, that the alleged trade dress was the subject matter of two of *Fuji*’s expired utility patents and as such, was in the public domain, relying on the *Singer v. June* case.

4.2.9 In *Keystone*, the court granted the alleged infringer *Keystone*’s motion to conduct a Markman claim construction on the trade dress owner *Jaccard*’s expired utility patent claims¹³. It then determined that the expired utility patent claims did not cover *Jaccard*’s trade dress. Thus, in accordance with the court’s interpretation of the Supreme Court’s *TrafFix* case¹⁴, they concluded that the expired utility patent was not evidence of functionality, rebuking the alleged infringer *Keystone*’s assertion to the contrary.

4.2.10 The court then engaged in a Markman claim construction of Jaccard’s expired design patent, and found that although the design patent did in fact cover the alleged trade dress at issue, it was not presumptive evidence of non-functionality, as asserted by the trade dress owner Jaccard. More pertinent to this discussion, the court went on to consider a request by Keystone for an interlocutory appeal on the issue of whether Jaccard’s expired patents created a “right to copy” the subject matter thereof, independent of any alleged trade dress rights. The court denied the request, using somewhat circuitous reasoning, saying it was contrary to the Supreme Court’s holding in *TrafFix*¹⁵. Thus, it concluded that an immediate appeal on this issue is unlikely to succeed, and therefore facilitating such an interlocutory review will not ultimately advance the termination of the litigation. This case is worth keeping an eye on, because this same “right to copy” issue will likely be raised again.

4.2.11 If Keystone perchance winds up in the Supreme Court, it will squarely present the Court with the “right to copy” issue, which the Court dodged in *TrafFix* where it relied instead on the functionality doctrine to invalidate the alleged trade dress. The reason the “right to copy” issue would be squarely presented is because in *Keystone*, there is an expired design patent, rather than the expired utility patent as in *TrafFix*, and the trade dress functionality doctrine cannot be used to resolve the issue of whether the subject matter of an expired design patent (which protects only ornamental features of a design) can later be claimed as trade dress. The Court will therefore be forced to resolve the “right to copy” issue¹⁶.

4.2.12 A sidelight on both of the foregoing cases is that they were pure trade dress cases, having no patent infringement count, and thus are not appealable to the U.S. Court of Appeals for the Federal Circuit. Thus, federal courts are engaging in interpreting the meaning and scope of patent claims under *Markman* with no recourse to the “expert” court that heretofore has been the only appellate court to review the lower court’s *Markman* patent claim constructions.

4.2.13 Based on the Subcommittee’s survey and discussion of the state of the law in other jurisdictions, it appears that there is a consensus in most other jurisdictions that design laws and trademark laws protect different rights, and that an owner can pursue trademark or trade dress protection after the expiration of a patent or design registration (although in the EU, if a product shape has been protected by a patent, it may be difficult then to obtain trade mark registration protection as the Courts are likely to decide that the shape is necessary to obtain a technical result). Thus, the

recent US cases discussed above appear out of line with the standards applied in other jurisdictions and INTA may wish to continue to monitor these cases, or, if appropriate take a position on this issue either in the form of a resolution or an amicus brief if the cases continue on appeal.

4.3 *Different Tests for Infringement of Trademarks or Designs*

4.3.1 In the United States, rights to a unique design can either be protected by trademark registration, or through obtaining a design patent. The test for infringement of rights in a design therefore depends on the type of protection.

4.3.2 With respect to protection of design rights under trademark law, the test as to whether trademark rights have been infringed is well established and requires a comparison of the similarities of the designs as well as the relatedness of the goods or services offered under the design. In order to prevail on an infringement claim, the trademark owner must show that the similarity of the designs and of the goods or services in connection with which they are used causes a likelihood of confusion among the relevant consumers.

4.3.3 As to infringement of a design in a design patent, in cases where the design patent owner is seeking relief against an infringer or possible infringer, the courts have found that the design patent owner must satisfy two tests for a finding of infringement – the “ordinary observer” test and the “point of novelty” test¹⁷. The “ordinary observer” test was first articulated by the Supreme Court in the landmark case of *Gorham Manufacturing Co. v. White*, 81 U.S. 511 (1872). In *Gorham*, the court held that “...if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.” *Id.* at 528. The courts continue to apply the *Gorham* “ordinary observer” test when determining if there is design patent infringement¹⁸. This test focuses on the similarity of the designs as a whole, and not to the independent elements of the design. After finding similarities in the overall design, courts look to see if the accused device incorporated the novelty within the patented design which distinguishes it from the prior art, commonly referred to as the “point of novelty” test¹⁹. This test focuses on the independent elements of the patented design and the differences between the patented design and the prior designs²⁰. If the design patent owner proves that the overall designs are the

same, and that the accused infringer has incorporated the patent owner's novel points of design into the accused design, then the patent owner has satisfied both parts of the test for a finding of infringement.

4.3.4 In the European context, the main difference between the tests for trademark and design infringement in legal proceedings is that the design infringement judge has to examine validity as registered designs are not subject to substantive review prior to registration. There is an assumption for validity. The test for infringement is whether the attacked design produces a different overall impression. This test for determining the "different overall impression" is based on an "informed user", but the standard for an "informed user" is not yet fully established. The idea is that the "informed user" knows the full prior art (that is why he is "informed") but at the same time is not a design expert (that is the "user" element). The effect of the "informed-user"-concept cannot yet be predicted as there are only first or second instance decisions. In particular, there are decisions of the Examination Divisions of the Office for Harmonization in the Internal Market (OHIM in Alicante; decisions are available online under oami.europa.eu). There are not yet decisions of the European Court of Justice (ECJ). The main question in the end will be which degree of similarity needs to be achieved in order to amount to infringement. The lack of case law leads to uncertainty for practitioners in assessing a case of alleged design infringement. This is in stark contrast to the tests for danger of confusion amounting to trademark infringement that have been well-established through judgments of the ECJ and the national Supreme Courts.

4.3.5 The Subcommittee's review and discussion of the different tests for infringement of design rights versus trademark rights highlighted the fact that the laws to protect designs are designed to protect very different rights than the laws protecting trademark rights. Harmonization of these tests may not be practical or desirable, but the Subcommittee sees this as an area where INTA members may benefit from additional information and training.

5. Should INTA include design rights within its mission?

The Subcommittee recognizes that trademarks can be anything that allows consumers to identify the source of goods or services and to distinguish the goods or services from those of other providers. The existing regimes for design protection extend rights to protected designs that are distinct from those rights the designs may obtain through trademark laws. In some areas, the design laws may conflict with the

trademark laws. In other areas, they may complement or enhance the protection given to designs under the trademark laws. While the areas of conflict (like the possible exhaustion discussed above) may represent the most urgent areas of concern for INTA members, the Subcommittee believes that all INTA members can benefit from continued attention to the nexus of design and trademark laws so that they can determine the optimal protection for their properties. Therefore, the Subcommittee recommends that INTA continue to designate a Design Rights Subcommittee of the Emerging Issues Committee so that the Subcommittee can continue to identify areas for INTA attention and possible action.

During the Design Rights Subcommittee's next term, it may wish to focus on issues such as:

- i) the impact of the "right to copy" decisions cases in the United States;
- ii) production of a User Guide, specifically laying out the results of the Subcommittee's prior research in a format that would be helpful to INTA members;
- iii) research into the benefits and shortcomings of design registration systems without substantive examination as opposed to design patent systems that do, and a determination of whether or not this is an issue on which INTA would like to take a position; and
- iv) following the current cases in leading jurisdictions that address issues at the nexus of design and trademark rights as they may form the shape of these rights in the future.

¹ Philips Electronics NV v Remington Consumer Products Limited Case C-299/99 (at paragraph 48)

² Mag Instrument Inc v OHIM C - 136/02 (at paragraph 30), Henkel v OHIM C456/01 and Deutsche Sisi - Werke GmbH v OHIM C - 173/04

³ August Storck KG v OHIM T-396/02

⁴ Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000)

⁵ TrafFix Devices Inc. v. Marketing Displays Inc., 532 U.S. 23 (2001)

⁶ EU Council Regulations 6/2002/EC

⁷ Article 5 of the Community Designs Regulation

⁸ Article 6 of the Community Designs Regulation

⁹ Singer Mfg. Co. V. June Mfg. Co., 163 U.S. 169 (1896)

¹⁰ Kellogg Mfg. Co. v. National Biscuit Co., 305 U.S. 111 (1938)

¹¹ Singer Mfg. Co., 163 U.S. at 185

¹² Kellogg, 305 U.S. at 119-120

¹³ Since *Markman v. Westview Instruments Inc.*, 517 U.S. 370 (1996), courts give primacy to intrinsic evidence (including the description in the patent, the patent claims and the prosecution history) over extrinsic evidence in reaching determinations on claim interpretation.

¹⁴ *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 121 S.Ct. 1255, 149 L.Ed.2d 164 (2001)

¹⁵ *Keystone*, 2007 U.S. Dist. LEXIS 13094 at 30

¹⁶ "The U.S. Constitutional Limits of Product Configuration Trade Dress Rights" by Karl Horlander, 97 TMR 752 (May-June, 2007)

¹⁷ *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1377 (Fed. Cir. 2002); *Oakley, Inc. v. International Tropic-Cal, Inc.*, 923 F.2d 167, 169 (Fed. Cir. 1991)

¹⁸ *Amini Innovation Corp. v. Anthony California, Inc. et al.*, 439 F.3d 1365 (Fed. Cir. 2006); *Bernhardt, L.L.C. v. Collezione Europa USA, Inc.*, 386 F.3d 1271 (Fed. Cir. 2004); *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370 (Fed. Cir. 2002); *Oakley, Inc. v. International Tropic-Cal, Inc.*, 923 F.2d 167, 169 (Fed. Cir. 1991); *Litton Systems, Inc. v. Whirlpool Corporation*, 728 F.2d 1423 (Fed. Cir. 1984)

¹⁹ *Oakley, Id.* at 169; *Contessa, Id.* at 1377; see also *Avia Group Int'l, Inc. v. L.A. Gear Cal.*, 853 F.2d 1557, 1565 (Fed. Cir. 1988); *Shelcore, Inc. v. Durham Indus., Inc.*, 745 F.2d 621, 628 (Fed. Cir. 1984)

²⁰ *Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co.*, 162 F.3d 1113, 1118 (Fed. Cir. 1998)

SUMMARY REPORT - REGISTERED & UNREGISTERED DESIGN RIGHTS

QUESTIONS

(A) REGISTERED DESIGNS

Edited By Jeremy Ben-David

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Edited By Nastassia Synakiewicz

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A. REGISTERED DESIGNS

GENERAL

1. *What types of design can be protected by registration?*

Country	Types of Registrable Designs
1. Argentina	<ul style="list-style-type: none">• 3-D- Forms (Industrial Models)• 2 D Figures (Industrial Drawings)
2. Brazil	<ul style="list-style-type: none">• Shape of object• Ornamental Arrangement of Lines and Colors

3. Canada	<p>Features of shape, configuration, pattern, ornament, combination of these features</p> <p>(Industrial Design)</p> <p>2-D objects, e.g. fabrics, woven or knitted material</p> <p>(Copyright)</p>
4. China	Shape, pattern, color, combination of these features
5. EU	Appearance of product or part of a product (product itself or ornamentation)
6. France	Appearance of a product or part of product (product itself or ornamentation)
7. Germany	2-D or 3-D appearance of a product or part of product
8. Japan	Shape, pattern, color and other design characteristics of products and of parts of products
9. Mexico	<p>3-D Forms</p> <p>(Industrial Models)</p> <p>2-D figures, lines, combination of colors</p> <p>(Industrial Drawings)</p>
10. UK	<ul style="list-style-type: none"> • Product shapes • Ornamentation applied to products (whole or part of the product)
11. USA (copyright)	Works of authorship (any pictorial, graphic or sculptural authorship)
12. USA	<p>Visual ornamental characteristics embodied in or applied to an article of manufacture</p> <p>(Shape of article or surface ornamentation applied to article)</p>
13. Taiwan	Shape, pattern, color or combination of these features

2. *What is the nature of the intellectual property right? (i.e. registered design, design patent etc.)*

Country	Precise Nature Of The Registered Design Right
1. Argentina	Industrial Design
2. Brazil	Registered Design
3. Canada	Registered Design Copyright
4. China	Design Patent
5. EU	Registered Design
6. France	Registered Design
7. Germany	Registered Design
8. Japan	Registered Design
9. Mexico	Industrial Design
10. UK	Registered Design
11. USA (copyright)	Registered Design under US Copyright Law
12. USA	Design Patent
13. Taiwan	Design Patent

3. *What is the relevant legislation and when did it come into force?*

Country	Relevant Legislation
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1.	Argentina	Decree-Law No. 6673/63 (9.8.1963)
2.	Brazil	<ul style="list-style-type: none"> • Ind. Property Law (1996) • Normative Act No. 161 of 2002
3.	Canada	<ul style="list-style-type: none"> • Ind. Design Act (1985) • Copyright Act (1985)
4.	China	<ul style="list-style-type: none"> • Patent Law • Implementing Regulations of the Patent Law
5.	EU	Council Regulation 6/2002 of December 6, 2001
6.	France	<ul style="list-style-type: none"> • Ordinance of 25.07.2001, implementing the EU Directive • Industrial Design Act • Various other Regulations
7.	Germany	Geschmacksmustergesetz (Design Act), implementing the EU Directive (01.06.2004)
8.	Japan	Japanese Design Law (enacted in 1959, amended in 1999)
9.	Mexico	National Industrial Property Law (27.06.1991) and many others
10.	UK	Registered Design Act 1949 (the EU Directive was implemented on 13.10.1998)
11.	USA (copyright)	U.S. Code Title 17 (enacted July 30, 1947, revised Oct. 19, 1976)
12.	USA	U.S. Patent Statute
13.	Taiwan	<ul style="list-style-type: none"> • Patent Act (latest amendment 2004) • Implementing Regulations of the Patent Act (latest amendment 2002)

4. Are there any specific exclusions (e.g. functionality)?

Country	Exclusions To Registration
1. Argentina	<ul style="list-style-type: none"> • Functionality • Contrary to moral rights and good manners
2. Brazil	<ul style="list-style-type: none"> • Solely technical or functional • Contrary to moral • Works of purely artistic nature
3. Canada	Ind. Design: <ul style="list-style-type: none"> • Solely utilitarian function • Any method or principle of manufacture or construction Copyright: No specific exclusions
4. China	<ul style="list-style-type: none"> • Functionality • Contrary to moral, country, public policy
5. EU	<ul style="list-style-type: none"> • Functionality • Contrary to public order/morality • Designs of interconnection (“Lego clause”)
6. France	<ul style="list-style-type: none"> • Functionality • Contrary to public order/morality • Designs of interconnection (except where design serves the purpose of allowing the multiple assembly or connection of mutually interchangeable products within modular system -- “Lego clause) • ”computer programs
7. Germany	<ul style="list-style-type: none"> • Functionality • Contrary to public policy • Computer programs
8. Japan	<ul style="list-style-type: none"> • Functionality • Contrary to public order or morality • Designs that can be confused with articles connected with any other person’s business
9. Mexico	Functionality

10. UK	<ul style="list-style-type: none"> • Functionality • Designs of interconnection • Computer programs
11. USA (copyright)	Useful articles (articles having solely utilitarian function)
12. USA	<ul style="list-style-type: none"> • Functionality • Offensive to race, religion, sex etc.
13. Taiwan	<ul style="list-style-type: none"> • Functionality • Works of fine art • Layout of circuits • Contrary to public order

5. *What attributes must the design have to qualify for registration protection (e.g. eye appeal, novelty, etc.)?*

Country	Attributes Required For Registrability
1. Argentina	<ul style="list-style-type: none"> • Novelty • Visuality • Eye appealing • Originality • Industrial Applicability
2. Brazil	<ul style="list-style-type: none"> • Novelty • Originality
3. Canada	Ind. Design: <ul style="list-style-type: none"> • Visuality • Originality • Fixed Appearance Copyright: Originality
4. China	<ul style="list-style-type: none"> • Novelty • Aesthetic Nature (eye appealing) • Industrial Applicability

5.	EU	<ul style="list-style-type: none"> • Novelty • Individual Character
6.	France	<ul style="list-style-type: none"> • Novelty • “Proper character”
7.	Germany	<ul style="list-style-type: none"> • Novelty • Individual Character
8.	Japan	<ul style="list-style-type: none"> • Novelty • Functional beauty • Industrial applicability
9.	Mexico	<ul style="list-style-type: none"> • Novelty • Industrial Applicability
10.	UK	<ul style="list-style-type: none"> • Novelty • Individual Character
11.	USA (copyright)	Artistic expression
12.	USA	Originality
13.	Taiwan	<ul style="list-style-type: none"> • Novelty • Aesthetic nature (eye appealing) • Non-obviousness

6. *Is global novelty (or merely national novelty) required?*

Country	Extent Of Novelty Required
1. Argentina	Global novelty
2. Brazil	Global novelty
3. Canada	Global novelty
4. China	Global novelty
5. EU	Relative global novelty
6. France	Relative global novelty(“could have reasonably been known”)
7. Germany	Relative global novelty

8.	Japan	Global novelty
9.	Mexico	Global novelty
10.	UK	Relative global novelty
11.	USA (copyright)	Global novelty
12.	USA	Global novelty
13.	Taiwan	Global novelty

7. *Is there a grace period during which the design can be published prior to filing the application for registration?*

Country	Grace Period For Registration After Publication
1. Argentina	6 months
2. Brazil	180 days
3. Canada	<i>Ind. Design:</i> 12 months
4. China	6 months
5. EU	12 months
6. France	12 months
7. Germany	12 months
8. Japan	6 months
9. Mexico	12 months
10. UK	12 months
11. USA (copyright)	Design can be published and registered any time
12. USA	12 months

13.	Taiwan	6 months
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8. *What is the term of protection? What are the renewal periods?*

Country	Term Of Protection	Renewal Periods
1. Argentina	15 years	After initial 5 years, two further periods of 5 years
2. Brazil	25 years	After initial 10 years, three further periods of 5 years
3. Canada	10 years	After initial 5 years, one further period of 5 years
4. China	10 years from publication	None
5. EU	25 years	After initial 5 years, four further periods of 5 years
6. France	25 years	After initial 5 years, four further periods of 5 years
7. Germany	25 years	After initial 5 years, four further periods of 5 years
8. Japan	15 years	None
9. Mexico	15 years	None
10. UK	25 years	After initial 5 years, four further periods of 5 years

11. USA (copyright)	Copyright in a work created on or after January 1, 1978, subsists from its creation and, absent and exception, endures for a term consisting of the life of the author plus 70 years after the author's death. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.	None
12. USA	14 years	None
13. Taiwan	12 years	None

9. *Are there any provisions relating to compulsory licenses or licenses of right?*

Country	Compulsory Or Similar Licenses
1. Argentina	None
2. Brazil	None
3. Canada	None
4. China	Licenses of Right
5. EU	None

6.	France	None
7.	Germany	None
8.	Japan	None
9.	Mexico	Licenses of Right and Compulsory Licenses
10.	UK	None
11.	USA (copyright)	n/a
12.	USA	None
13.	Taiwan	Compulsory Licenses

10. Are foreign designs entitled to protection?

Country	Entitlement Of Registration For Foreign Designs
1. Argentina	Yes
2. Brazil	Yes
3. Canada	Yes
4. China	Yes
5. EU	Yes
6. France	Yes
7. Germany	Yes
8. Japan	Yes
9. Mexico	Yes
10. UK	Yes

11. USA (copyright)	Yes
12. USA	Yes
13. Taiwan	Yes

INFRINGEMENT

11. What rights are given by registration?

Extract from Peter Taylor's Clarification e-mail with respect to Question 11: One of the issues that the question was intended to address was how close an unauthorised design has to be in order to infringe. With the exceptions of Japan, the EU, France, the UK and the US (for design patents), this question has not been answered.

Editor's note: In view of the fact that the question as to the rights given by registration is such a large issue, it may be desirable to address not simply the question of 'closeness' but additional issues covered by the often lengthy answers to this question. For this reason, I have included both the original question 11 (now marked as 11B), and attached thereunder the answers received in full, and inserted an additional question, 11A, namely, "*How close must an unauthorised design be in order to infringe a registered design?*"

11A. How close must an unauthorised design be in order to infringe a registered design?

Country	How Close to Infringe?
1. Argentina	
2. Brazil	
3. Canada	

4.	China	
5.	EU	Any design which does not produce on the informed user a different overall visual impression (parallel with the similarity principle in trademarks).
6.	France	Any design which does not produce on the knowledgeable observer a different overall visual impression (parallel with the similarity principle in trademarks).
7.	Germany	
8.	Japan	A product that includes the partial design would infringe the partial design right regardless as to the appearance of the remainder of the object.
9.	Mexico	
10.	UK	Any design which does not produce on the informed user a different overall impression.
11.	USA (copyright)	
12.	USA	The right to exclude others from making identical items having the same look.
13.	Taiwan	

11B. What rights are given by registration?

Country	Rights Given By Registration
1. Argentina	The right to the exclusive use of the design, which includes the right to prevent that any third party uses, sells, imports, manufactures, distribute, etc. any products in the form of or incorporating the registered design.

<p>2. Brazil</p>	<p>An industrial design registration confers on its proprietor the right to prevent third parties from manufacturing, using, offering for sale, selling or importing for such purposes without his consent a product that is the subject of an industrial design. The industrial design owner is further guaranteed the right to prevent third parties from contributing to the practice by other parties of the cited actions.</p> <p>However, the following are not included: acts practiced by unauthorized third parties privately and without commercial ends, provided they do not result in prejudice to the economic interests of the design owner; acts practiced by unauthorized third parties for experimental purposes, related to studies or to scientific or technological research; a product manufactured that has been placed on the internal market directly by an authorized third party.</p>
<p>3. Canada</p>	<p>Under the Industrial Design Act, “an action for infringement of an exclusive right may be brought in any court of competent jurisdiction by the proprietor of the design or by an exclusive licensee of any right therein.” Sect. 15.</p>
<p>4. China</p>	<p>The right to exclude others to produce, trade, import with the purpose of making profits without the owner’s consent are granted with registration as a design patent.</p>

11B. What rights are given by registration? contd

5. EU

* First of all, although the protection is given by registration, it starts as of, i.e. is retroactively effective as of the filing/priority date. It is important to note that, until the Design application is published, the owner cannot seek to enforce his/her rights. In case of deferred publication, the owner who wants to enforce his rights has to request the early publication of the Design before taking any action.

* A registered CD shall confer on its holder the exclusive right to use it and to prevent any third party not having his/her consent from using it. This 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.

When a registered Community Design is subject to deferred publication, it shall confer the same rights as an unregistered Community Design (see below).

The protection extends to the Design as such as well as any design which does not produce on the informed user a different overall visual impression (parallel with the similarity principle in trademarks).

* There are, however, limitations to the monopoly detained by the owner:

- A) Acts done privately and for non-commercial purposes.
- B) Any acts done for experimental purposes.
- C) Acts of reproduction for the purpose of making citations or of teaching, provided that such acts are compatible with free trade practice and do not unduly prejudice the normal exploitation of the design, and that mention is made of the source.

In addition, the rights conferred by a CD shall not be exercised in respect of

- A) the equipment on ships and aircraft registered in a third country when these temporarily enter the EU territory;
- B) The importation in the EU of spare parts and accessories for the purpose of repairing such craft;
- C) The execution of repairs on such craft.

Furthermore, the EU exhaustion principle applies, i.e. the rights do not extend to acts relating to a product in which a design included within the scope of protection of the CD is incorporated or to which it is applied when the product has been put on the EU market by the holder of the CD or with his consent.

11B. What rights are given by registration? contd

6. France

First of all, although the protection is given by registration, it starts as of, i.e. is retroactively effective as of the filing/priority date. It is important to note that, until the Design application is published, the owner cannot seek to enforce his/her rights. In case of deferred publication, the owner who wants to enforce his rights has to request the early publication of the Design before taking any action. The rights given by registration are as follows:

- A) Ownership: the right may be sold or licensed.
- B) Exclusive right to manufacture, offer for sale, commercialize, import, export, use, and hold to this end any products incorporating the design. Any of the above mentioned acts, if done without the consent of the owner, is forbidden and considered infringement.
- C) The protection extends to the Design as such as well as any design which does not produce on the knowledgeable observer a different overall visual impression (parallel with the similarity principle in trademarks).

There are, however, exceptions to the monopoly detained by the owner:

- D) Any acts done in private and without any commercial purposes.
- E) Any acts done for experimental purposes.
- F) Any reproductions for illustrating or teaching purposes, provided (1) the registration and owner's name are mentioned, (2) the reproductions are made in accordance with loyal commercial practices and (3) they do not damage the normal exploitation of the design.
- G) The rights apply nationally and cannot be implemented outside of the national territory. In this respect, boats registered in a foreign country when they enter only temporarily the French territory are not considered part of the national territory, as the law clearly provides that the rights cannot be validly opposed against (1) equipments located on such; (2) importation of spare parts or accessories for repairing such boats.

Furthermore, the EU exhaustion principle applies to French design registrations, i.e. the rights do not extend to products incorporating the Design when the design has been commercialized in the European Community or

11B. What rights are given by registration? contd

7.	Germany	A registered design confers upon its proprietor the exclusive right to use it and to prohibit third parties from using it. If the use of a registered design by third parties is willful or negligent, the proprietor can also claim compensation for damages. Further, the proprietor is entitled to demand immediate information as to the source and distribution sold of the infringing products, as well as quantities sold. In addition, the proprietor can request that the infringing products be destroyed.
8.	Japan	The owner of a registered design has an exclusive right to commercially work the registered design and designs similar thereto. The owner of a registered design can prevent a third party from exploiting the protected item by manufacture or sale thereof. Furthermore, under the Law as amended, if a design has been registered as a partial design, a product that includes the partial design would infringe the partial design right regardless as to the appearance of the remainder of the object.
9.	Mexico	<p>The right to the exclusive use of the design, which includes the right to prevent that any third party uses, sells, imports, manufactures, distribute, etc. any products in the form of or incorporating the registered design.</p> <p>Please note that the protection commences once the registration has been granted and is retroactive to the filing date.</p>
10.	UK	The proprietor of a registered design can prevent a third party from using the design and any design which does not produce on the informed user a different overall impression. The use of a design by a third party includes making, offering, putting on the market, importing, exporting or using a product in which the design is incorporated or to which it has been applied (or stocking a product for any of those purposes).

11. USA (copyright)	The right to sue in federal court, etc., see above under #8. In addition, the owner of a U.S. copyright in a design has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and (4) to display the copyrighted work publicly;
12. USA	The right to exclude others from making identical items that have the same look.
13. Taiwan	(1) The right to exclude others from producing, selling, offering for sale, using, or importing the design for such purposes without the owner's consent within the term of protection (2) The right to exclude others from importing the methods of reproducing the design for production, sale or use.

12. Is it necessary to prove copying in order to establish infringement?

Country	Necessity of Proof of Copying
1. Argentina	Yes
2. Brazil	Yes
3. Canada	No
4. China	No
5. EU	No
6. France	No
7. Germany	No
8. Japan	No

9.	Mexico	Not necessarily
10.	UK	No
11.	USA (copyright)	No
12.	USA	No
13.	Taiwan	No

13. Is it necessary for the proprietor to mark its products with the registration number?

Editor's Note: Please check carefully whether non-marking can be prejudicial in recovery of damages, in additional countries (apart from Canada, UK and Taiwan).

Country	Marking Of Products With Registration Number
1. Argentina	Not required
2. Brazil	Not required
3. Canada	Not required but non-marking may lead to limited rights to recover damages
4. China	Not required
5. EU	Not required
6. France	Not required
7. Germany	Not required
8. Japan	Not required
9. Mexico	Not required
10. UK	Not required but non-marking may lead to limited rights to recover damages
11. USA (copyright)	Not required
12. USA	Not required
13. Taiwan	Not required but non-marking may lead to limited rights to recover damages

14. *What remedies are available in an infringement action?*

Editor's Note: As may be seen from the table, this question was understood and different ways, to mean the types of action, costs, and various civil and criminal punitive measures. This is clearly a broad subject in its own right, and a comparative study of remedies would require a more detailed study.

Country	Infringement Remedies
1. Argentina	It is possible to include legal costs in the damages action before the civil courts.
2. Brazil	The pertinent Judicial Actions, which can be criminal or civil actions, depending on the case.
3. Canada	Under the Industrial Act, the court may grant injunctive relief and allow for the recovery of damages or profits, grant punitive damages and require the disposal of any infringing article.

<p>4. China</p>	<p>(1) Injunctions</p> <p>A. Removal of the infringement</p> <p>B. Provisional Injunctions</p> <p>(2) Compensatory damages</p> <p>A. The proprietor's profit loss resulting from the patent infringement;</p> <p>B. The infringer's profit gain resulting from the patent infringement; or</p> <p>C. Reasonable damages evaluated by times of the registration permission fee</p> <p>(3) Punitive damages</p> <p>⇒ The amount of punitive damages could be up to triple the amount of profit gained illegally.</p> <p>(3) Criminal charges</p>
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14. What remedies are available in an infringement action? contd

<p>5. EU</p>	<p>prohibition for the defendant from proceeding with the acts which have infringed or would infringe the CD;</p> <p>seizure of the infringing products;</p> <p>seizure of materials and implements predominantly used in order to manufacture the infringing goods, if their owner knew the effect for which such use was intended or if such effect would have been obvious in the circumstances;</p> <p>other sanctions appropriate under the circumstances which are provided by the law of the member state in which the acts of infringement or threatened infringement are committed, including its private international law.</p>
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<p>6. France</p>	<p><u>I. Administrative proceedings: counterfeit seizure</u></p> <p>By Customs administration: upon the Design right owner's request, the Customs may seize any products regarded as infringing the Design right (except where the right is "exhausted"). The owner must obtain a preliminary injunction and/or file a civil or criminal action within ten days from notification from the seizure, otherwise the seizure will lapse.</p> <p>By the police: the products are seized for 30 days.</p> <p><u>II. Civil proceedings</u></p> <p>Preliminary injunction</p> <p>Damages</p> <p><u>III. Criminal proceedings</u></p> <p>Fine: € 300,000 for natural persons (€ 500,000 when infringement results from an organized criminal group) - € 1,500,000 for legal persons.</p> <p>Imprisonment: 3 years (5 years when infringement results from an organized criminal group) – for legal persons, this is replaced by various commercial penalties, such as exclusion from specific markets, closing of the company for a maximum of five years, etc.</p> <p>A & B are doubled in case of repetition or when the infringer has contractual links with the design owner.</p> <p>Order to stop manufacturing and/or selling infringing products and confiscation of receipts and infringing products. The latter may either be destroyed or taken over by owner.</p> <p>Order to close whole or part of the facilities where the infringing goods were manufactured for a maximum duration of five years.</p> <p>Placarding, publication (in newspapers) and/or broadcasting of the decision.</p>
<p>7. Germany</p>	<p>In an infringement action, the proprietor of a design right is entitled to demand that the Defendant cease and desist from manufacturing and/or distributing and/or offering infringing products and provide the Plaintiff with information concerning to what extent the Defendant has manufactured or distributed infringing products. Further, he can request compensation for damages (if the use of the design was willful or negligent) or restitution of unjustified enrichment (in case of slight degree of negligence). In addition, the Plaintiff can request destruction or surrender of the infringing products.</p>

14. *What remedies are available in an infringement action? contd*

8. Japan	<p>(1) The owner of a design right or exclusive licensee may require a person who is infringing or is likely to infringe the design right or exclusive license to discontinue or refrain from such infringement.</p> <p>(2) The owner of a design right or exclusive licensee who is acting under the preceding subsection may demand the destruction of the articles by which the act of infringement was committed, the removal of the facilities used for the act of infringement, or other measures necessary to prevent the infringement.</p> <p>(3) In the case of a design for which secrecy has been demanded under Section 14(1), the owner of the design right or exclusive licensee may not take the action provided for in Subsection (1) until he has given a warning in the form of a document which states the matters referred to in each paragraph of Section 20(3) and which has been certified by the Commissioner of the Patent Office.</p> <p>Damages can also be claimed, as detailed in Section 39 of the Law.</p>
9. Mexico	<p>In Mexico, an infringement action is an administrative procedure that imposes a fine to the infringing party. Once that procedure is finished, the affected party may initiate a civil action for the recovery of damages (40% of the sales price of the infringing goods).</p>
10. UK	<p>A successful claimant in a registered design infringement action will normally be entitled to the following remedies: an injunction restraining the defendant from continuing to infringe the registered design; an order requiring the defendant to deliver up all infringing copies of the design in its possession or control; and, at the claimant's option, an inquiry as to damages or an account of profits. Under an inquiry as to damages, the court will compensate the claimant for the damage which it has suffered as a result of the defendant's infringing activities. Under an account of profits, the court will assess how much profit the defendant has made due to its infringing activity and order that sum to be paid to the claimant. A defendant can also be ordered to disclose the name of its supplier and, in some cases, the names of its customers.</p>

<p>11. USA (copyright)</p>	<p>In general, an infringer is liable for either the copyright owner's actual damages and any additional profits of the infringer, or statutory damages. An award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, may be in a sum of not less than \$750 or more than \$30,000 as the court considers just. However, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000 (for willfulness). If the infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. In addition to damages, an infringer could be subject to an injunction, seizure of the goods, and criminal penalties.</p>
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14. What remedies are available in an infringement action? contd

<p>12. USA</p>	<p>Injunctive relief, damages in the form of lost profits or a reasonable royalty, with the possibility of attorneys' fees and costs.</p>
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13. Taiwan

(4) Compensatory damages

- A. The actual economic loss of the patentee plus the expected economic gain
- B. The difference between the expected profit and the actual profit as a result of the infringement action
- C. The total profit earned by the infringer from the infringing action
- D. The difference between the total profit earned by the infringing action and the infringement expenses
- E. A reasonable amount in case the business reputation of the patentee has been detracted or harmed as a result of the infringement

(5) Injunctions

A. Removal of the infringement

- i. The proprietor may request the destruction of the infringing products or raw materials or items used in infringing the patent, or request other necessary disposal.
- ii. When the inventor's right to indicate his name is infringed, he may request a ruling to indicate the inventor's name or other necessary measures to recover his reputation.
- iii. The injured party may, after an irrevocable favorable judgment is rendered, request the court to issue a ruling for publishing in a newspaper the judgment in full or in part, at the expense of the losing party.
- iv. Any article(s) used in an act of patent infringement or produced by such an act may, upon the application of the injured party to the court, be provisionally seized to serve as the whole or a part of compensation for the damages as may be awarded by judgment

B. Prevention of any threat of infringement

15. *Is it possible to recover legal costs from the unsuccessful party?*

Country	Recovery Of Legal Costs
1. Argentina	Yes, in an action for damages before the civil courts
2. Brazil	Yes, but only in judicial actions
3. Canada	Yes, but not statutorily provided
4. China	Yes
5. EU	Yes
6. France	Yes
7. Germany	Yes. Up to the amount set forth in the German Attorneys' Schedule of fees
8. Japan	Yes. Limited
9. Mexico	Yes. Limited
10. UK	Yes. In part
11. USA (copyright)	Yes
12. USA	Yes
13. Taiwan	-

16. *How easy is it to enforce rights?*

Editor's Note: It seems that part of the answer to this question resides in the issue of substantive examination (see, for example, EU, France and Japan, and Question 26, below)

Country	Ease Of Enforcement
1. Argentina	A slow and long judicial procedure must be initiated.
2. Brazil	It is not very easy
3. Canada	Court actions can be time consuming and expensive.
4. China	It is difficult to say how easy it is to enforce rights, but the enforcement situation has greatly improved over the past few years.
5. EU	No history on this so far. Since there is no substantial examination, I fear that a possibly frequent counterclaim action may be invalidity of the design on the grounds of lack of novelty/individual character, but the jurisprudence still has to be built.
6. France	Quite easy, but punishment is not very severe (both in terms of damages and in terms of criminal sentence), hence not very deterrent, especially for “professional” counterfeiters.
7. Germany	<p>Rights can be enforced by means of a preliminary injunction (which usually takes only one or two days until an injunction is granted) or a final injunction (which takes about 6-12 months before a decision is issued).</p> <p>As the prerequisites for a registered design (novelty and individual character) are not examined in the registration proceedings by the German Patent and Trademark Office, the civil courts before which an action is brought, have to examine whether the design fulfills the requirements of novelty and individual character. If a preliminary injunction is issued and is lifted at the request of the Defendant, as it was based on an invalid design, the Plaintiff is required to pay damages. For this reason, it is always advisable to contact the potential infringer before hand, asking him why he felt entitled to manufacture or distribute a product which is identical with a previous design.</p>

8. Japan	As design rights are conferred after substantive examination, design rights in Japan are relatively stable and their scope is easier to determine as compared to other non-examination countries. Based on design rights, it is easy to warn infringers, but a lawsuit may need substantive preparation and take a long time to resolve.
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16. How easy is it to enforce rights? contd

9. Mexico	<p>It really depends on who the infringing party is. If it is a fairly established and located person, then it is easy to enforce the rights. However, if the infringing party may not be located or, if located, may easily disappear because he/she is not well established, then the enforcement of the rights is very difficult.</p> <p>Please note that the law allows multiple resources and, thus, litigation may last many years.</p>
10. UK	<p>A registered proprietor of a design must be careful not to threaten proceedings against anyone other than a manufacturer or importer of the allegedly infringing product. If a threat of proceedings is made against someone other than a manufacturer or importer (for example, a retailer merely selling the allegedly infringing product), anyone who suffers damage as a result of that threat (for example, the manufacturer if the retailer decides to cancel any further orders for the product) could claim damages against the proprietor if the threat cannot be substantiated (i.e. the court subsequently holds that the design is not infringed and/or that it is invalid).</p> <p>Proceedings for infringement can be brought in the Patents Court. It is possible to get an action to trial within 6-18 months.</p>

11. USA (copyright)	Depends on the similarity of the designs. Also, defendant may claim a defense of fair use, which is evaluated on at least four factors: 1) the purpose and character of the use, including whether the use is commercial or nonprofit; 2) the nature of the underlying copyrighted work; 3) the amount and substantiality of the portion used in relation to the work as a whole; and 4) the effect of the use on the potential market for the work. The Act clearly indicates that other factors may also be considered in the fair use defense. In general, all IP civil litigation in the U.S. is very expensive and time consuming.
12. USA	Conceptually, it is easy, but all litigation in the U.S. is expensive and time consuming.
13. Taiwan	-

CANCELLATION

17. Can a third party apply to cancel a registration and, if so, on what grounds?

Country	Cancellation Of Registration By A Third Party
1. Argentina	Yes, but only the legitimate author of the design may apply for cancellation, if it was registered by a third party. The grounds for the cancellation are the illegitimate registration.
2. Brazil	Yes, a third party can apply to cancel a registration if it is not in accordance with the Brazilian law and the term to apply to cancel administratively is five years from the design granting date. Judicially, a third party can apply to cancel a registration in any time.
3. Canada	Yes, but as there are no third party opposition provisions, before or after the design registration, a civil action would have to be instituted in the Federal Court of Canada to challenge ownership or novelty of a design.

4. China	<p>Yes. Any person can apply to cancel a registration if the granted design patent does not comply with the Patent Act in the following ways:</p> <p>(1) The new design right's requirements/elements are not met; or</p> <p>(2) Amendments to the specification and drawings exceed the scope of the new design patent. [EDITOR'S NOTE: <i>It is not clear what was meant here</i>]</p>
5. EU	<p>Yes. 6 main grounds of invalidity (partial invalidity is possible):</p> <p>1) The CD does not comply with the legal conditions (definition; novelty; proper character; exclusions)</p> <p>2) The right holder is not an entitled person – this ground may be invoked solely by the person who is entitled to the CD.</p> <p>3) The CD is in conflict with a prior design which has been made available to the public after the application/priority date, and which protected from a date prior to the said date by a CD application or registration for such a design, or by a design right application or registration of a member state for such a right – this ground may be invoked solely by the applicant for or holder of the earlier right.</p> <p>4) The CD incorporates a prior distinctive sign and Community law or the law of the member state governing the sign confers on the right holder of the sign the right to prohibit such use – this ground may be invoked solely by the applicant for or holder of the earlier right.</p> <p>5) The CD constitutes an unauthorised use of a work protected under the copyright law of a member state – this ground may be invoked solely by the applicant for or holder of the earlier right.</p> <p>6) The CD constitutes an improper use of any of the items listed in Article 6 ter of the Paris Convention, or of badges, emblems and escutcheons other than those covered by said article and which are of particular public interest in a member state – this ground may be invoked solely by the person or entity concerned by the use.</p>

17. Can a third party apply to cancel a registration and, if so, on what grounds?

contd

<p>6. France</p>	<p>Yes: 5 grounds of invalidity:</p> <ol style="list-style-type: none"> 1) The Design does not comply with the legal conditions (definition; novelty; proper character; exclusions) 2) The owner is neither the designer nor his/her assign. 3) The Design infringes the rights deriving from a prior Design, even if the latter was published after the filing or priority date of the former [due to deferred publication] and was hence not taken into account for the appreciation of novelty, provided it has been protected at a prior date through a national, international or Community design application or registration. 4) The Design infringes a prior copyright. 5) The Design incorporates a prior distinctive sign (trademark, company name, trade name, emblem, etc) without owner's consent.
<p>7. Germany</p>	<p>Yes. The proprietor of a design or another intellectual property right (e.g. copyright) can apply for cancellation of the design if it collides with the prior intellectual property right.</p> <p>Any third party can apply to cancel a design if it does not fulfill the requirements of a design (i.e. if it is not new, does not have individual character, or is otherwise excluded from protection as a registered design).</p>

8. Japan	<p>Yes. It is possible to apply to invalidate a registration on the following grounds according to Design Law Section 48:</p> <p>1) where the registration has been effected contrary to the provisions of registrability of designs, unregistrable designs, design of a set of articles, first-to-file rule, related designs, joint applications, and enjoyment of rights of aliens;</p> <p>2) where the registration has been effected contrary to the provisions of a treaty;</p> <p>3) where the registration has been effected in respect of a design application filed by a person who is not the creator of the design and has not succeeded to the right to obtain a design registration for the design concerned;</p> <p>and</p> <p>4) where, after the registration, the owner of the design right has become a person who can no longer enjoy design right or the design right has become contrary to the provisions of a treaty.</p>
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17. Can a third party apply to cancel a registration and, if so, on what grounds?

contd

9. Mexico	<p>Yes, any third party, with a legal standing or interest, may initiate an action to terminate the effects of a registration. Here, we have to differentiate between an Annulment and a Cancellation;</p> <p>a) The grounds for the Cancellation is the failure to use; and</p> <p>b) The grounds for an Annulment are basically the following:</p> <ul style="list-style-type: none"> - Granting of the registration contrary to the law; - Granting when the application should have been declared abandoned; - Granting do to error or oversight or to a person who did not have the right to the design.
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<p>10. UK</p>	<p>A third party may apply for a declaration that a registered design is invalid. The grounds of invalidity include:-</p> <ul style="list-style-type: none"> (i) the design does not satisfy the definition of a "design" (see paragraph 1 above); (ii) the design is not novel or lacks individual character; (iii) the design is dictated solely by function; (iv) the registered design relates to features of appearance of a product which must be reproduced in their exact form and dimensions to enable the product embodying the design to be connected to another product; (v) the design is contrary to public policy or accepted principles of morality.
<p>11. USA (copyright)</p>	<p>Yes. A third party can bring a successful infringement action and thereby cancel a registration. The copyright office may cancel a registration if, e.g., it later determines that the design isn't in fact copyrightable subject matter.</p>
<p>12. USA</p>	<p>A third party may bring a lawsuit to invalidate a patent or raise invalidity as a defense in a patent lawsuit</p>

13. Taiwan	<p>(1) Any person can apply to cancel a registration if</p> <ul style="list-style-type: none"> A) The new design right requirements/elements are not met B) Persons skilled in the art cannot understand the content of the new design and put it into practice due to insufficient specifications and drawings that are required for registration. C) Amendments to the specification and drawings exceeds the scope of the new design D) There are two (or more) identical or similar applications for registration on file E) The country of which the foreign applicant is a citizen does not accept patent applications filed by citizens of Taiwan <p>(2) Only a concerned party can apply to cancel a registration if:</p> <ul style="list-style-type: none"> A) The registration of a jointly-owned new design was not filed jointly by all owners <p>The new design patentee is not the person entitled to file the new design patent application.</p>
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OWNERSHIP

18. Subject to any agreement, who is entitled to apply to register a design? Is the position different, if the design is created by an employee or by a person pursuant to a commission?

Country	Entitlement To Registration - Status Of Employee Or Contractor
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<p>1. Argentina</p>	<p>The person entitle to apply for the registration of the design is, in principle, who ever created the design (author) or hired or entrusted the author to create the design or employed the author to create the design or acquired (buy) the design from the author.</p> <p>If created by many people, each may register the design in the name of all of the authors.</p> <p>Note: The author’s name will always appear on the application/registration.</p> <p>In connection with the creation/invention of designs at work, the rules to follow are the following:</p> <ul style="list-style-type: none"> - If hired for said purpose, the design belongs to the employer; - If developed jointly, then it belongs 50% - 50% to both employer and employee.
<p>2. Brazil</p>	<p>A design may be registered in the name of the author, his heirs or successors, by the assignee or by whoever the law or a work or service contract determines to be the owner. When a design is created jointly by two or more persons, the registration may be applied for by all or any one of them, by naming and qualifying the others to guarantee their respective rights.</p> <p>The design will belong exclusively to the employer when it results from a work contract being executed in Brazil and the object of which is research or the exercise of inventive activity or when such results from the nature of the service for which the employee was contracted. A design developed by an employee will belong exclusively to the employee provided that it is unconnected to his work contract and when it does not result from the use of resources, means, data, materials, installations or equipment of the employer.</p> <p>The ownership of design will be common, in equal parts, when it results from the personal contributions of the employee and from resources, data, means, materials, installations or equipment of the employer, without prejudice to express contractual provisions to the contrary.</p>

3. Canada	The design owner is the designer unless the designer was employed by the applicant when the design was created. Then, the employer is the owner.
4. China	The designer is entitled to apply to register a design patent. If the design is created by an employee or by a person pursuant to a commission, the employer or commissioning party is entitled to apply to register a design. However, if there is any provision otherwise provided in an agreement, such agreement shall prevail.

18. *Subject to any agreement, who is entitled to apply to register a design?*

contd

5. EU	<p>* The right to the Community Design vests in the designer or his successor in title. If two or more persons have jointly developed the design, the right to the Community Design vests in them jointly.</p> <p>The person in whose name the Community Design is filed/registered, shall be deemed to be the person entitled in any proceedings before the OHIM as well as in any other proceedings (i.e. OHIM does not check entitlement to file/register Community Design).</p> <p>If the Community Design is applied for or registered in the name of a person who is not entitled to it, the person who is entitled to it may claim to become recognized as the legitimate holder within three years following the date of publication (same for the joint holder if he was not mentioned as the registered owner).</p> <p>* However, where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, the right to the Community Design shall vest in the employer, unless otherwise agreed or specified under national law.</p> <p>Nevertheless, the designer shall have the right to be cited as such in the register, even if he is not the true holder of the Community Design</p>
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<p>6. France</p>	<p>The designer or his/her assign is entitled to apply to register the design. However, no formal check on this point is made by the Office, i.e. the applicant is deemed to be the designer or his/her assign, until proven wrong by means of court action.</p> <p>Unlike for patents, no specific provisions exist for designs created by employees, so if an employee creates a design under the instructions and supervision of the employer, only the employee can apply for design protection, unless otherwise stipulated in an agreement, i.e. unless the employer is employee's assign.</p> <p>However, under copyright law, the employee still retains some rights, called "moral rights", so even if the Design registration and economic rights of the copyrights are owned by the employer, the employee may still have some substantial rights to his/her creation. Furthermore, no specific provisions are made as regards contracts on Designs so, given the cumulative protection of designs in France, they will most likely be subject to the very restrictive copyright law (see below). Therefore, the agreements between employer and employee must be written very carefully or they could prove invalid/unenforceable.</p>
<p>7. Germany</p>	<p>The designer or his successor in title is entitled to the right in the design. If several persons have jointly developed a design, the right to the design vests in them jointly. Where a design is developed by an employee in the execution of his duties or following the instructions given by his employer, the right to the design vests in the employer, unless otherwise agreed.</p>

*18. Subject to any agreement, who is entitled to apply to register a design?
contd*

8. Japan	<p>Upon creation of a design, the creator (designer) has the right to obtain a registration for the design. This right can be transferred.</p> <p>Where a design is created by two or more designers, all the creators have the right to obtain a design registration. Unless the right is transferred, the design application must be filed in the names of all the creators.</p> <p>Where a design is created by an employee, the employee has the right to obtain a design registration. If the employee is obliged to assign the right to obtain design registration to the employer under an employment agreement, the resulting design right will be owned by the employer. In this case, the employee has the right to receive a reasonable amount of consideration from the employer.</p> <p>Where a design is created by an outside commissioned designer, the designer has the right to obtain a design registration. It is possible to change this right by contract.</p>
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<p>9. Mexico</p>	<p>The person entitled to apply for the registration of the design is, in principle, who ever created the design (author) or hired or entrusted the author to create the design or employed the author to create the design or acquired (buy) the design from the author.</p> <p>Note: The author's name will always appear on the application/registration.</p> <p>In connection with the creation/invention of designs at work, the rules to follow are the following:</p> <ul style="list-style-type: none"> - If hired for said purpose, the design belongs to the employer; <p>If hired for a different purpose, but the idea came as a result of the work and was developed during working hours and with tools and materials from the employer, the invention belongs to the employer;</p> <ul style="list-style-type: none"> - If developed independent from the work hired to do and outside working hours but in the work place and with materials and tools belonging to the employer, the design will belong 50% to the author and 50% to the employer. <p>If hired for a different purpose, but the idea came as a result from the work and developed within the work place, but on free time and with own tools, the design will belong to the author, but the employer will have a preference right to acquire or obtain a license to the design on equal conditions to a third party.</p>
<p>10. UK</p>	<p>The original proprietor of a design is its author, i.e. the person who creates it. Where a design is created by an employee in the course of his or her employment, that person's employer shall be treated as the original proprietor of the design. Where a design is created pursuant to a commission for money or money's worth, the person commissioning the design shall be treated as the original proprietor of the design. The proprietor of the design is the person entitled to apply to register it.</p>

18. *Subject to any agreement, who is entitled to apply to register a design?*
contd

<p>11. USA (copyright)</p>	<p>Only the author or those deriving their rights through the author can rightfully claim copyright. The author is either the person who actually created the work or, if the work was made for hire, the employer or other person for whom the work was prepared (their agents can also file the application). Works made for hire are subject to specific rules:</p> <ol style="list-style-type: none"> 1) a work prepared by an employee within the scope of his or her employment; or 2) a work specially ordered or commissioned for use as: <ul style="list-style-type: none"> ○ a contribution to a collective work ○ a part of a motion picture or other audiovisual work ○ a translation ○ a supplementary work ○ a compilation ○ an instructional text ○ a test ○ answer material for a test ○ an atlas <p><u>if</u> the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.</p> <p>The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.</p>
<p>12. USA</p>	<p>Only individuals may be listed as inventors, although ownership is generally assigned to a company which is the owner.</p>

13. Taiwan	<p>The inventor, creator or his assignee or heir is entitled to apply to register a design.</p> <p>When a new design is made by an employee in the performance of his job duties, the right to apply for patent and the patent right thereof shall be vested in his employer, and the employer shall pay the employee a reasonable remuneration, provided that if there is any provision otherwise provided in an agreement, such provision shall prevail.</p>
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APPLICATION PROCESS

19. Is it possible to claim priority from an earlier application for the same designs filed in another country?

Editors Note: The basis for a priority claim also seemed relevant to this question. So where it was provided, it has been included in the summary answers to the original question concerning priority. The "basis" information should be checked for completeness.

Country	Claiming Foreign Priority	Basis
1. Argentina	Yes	[PLEASE COMPLETE]
2. Brazil	Yes	Paris Convention, WTO, Bilateral agreement
3. Canada	Yes	Paris Convention
4. China	Yes	Paris Convention, Bilateral agreement
5. EU	Yes	Paris Convention, WTO
6. France	Yes	Paris Convention, WTO

7.	Germany	Yes	Paris Convention, WTO. Public exhibition can also serve to claim priority in Germany within six months of exhibition
8.	Japan	Yes	Paris Convention
9.	Mexico	Yes	Paris Convention
10.	UK	Yes	Paris Convention
11.	USA (copyright)	-	-
12.	USA	Yes	Paris Convention
13.	Taiwan	Yes*	WTO, Bilateral agreement*

*Editor's note: Please check this, as it was not present in the Report for Taiwan.

20. *Is there a classification system?*

Editor's Note: The type of classification system seemed appropriate to mention here. Accordingly, where provided in the country reports, this information has been added.

Country	Classification System	Type
1. Argentina	No	
2. Brazil	No	
3. Canada	Yes	-
4. China	Yes	Locarno
5. EU	Yes	Locarno
6. France	Yes	Locarno and Vienna
7. Germany	Yes	Locarno

8.	Japan	Yes	Internal Since 1998, however, Locarno classification is cited in Official Gazette
9.	Mexico	No	-
10.	UK	Yes	Locarno
11.	USA (copyright)	-	-
12.	USA	No	-
13.	Taiwan	Information missing	

21. What representations of the design are acceptable?

Editor's Notes:

1. The precise technical requirement of each country was not included in this summary, even though it was normally described at length in the Country Reports. An interesting question which arose from these reports, is whether a portion of an object can be protected. This was mentioned in some reports, but clearly may be a further matter for a comparative practice question.
2. In the country reports, China was mentioned as including provisions for the protection of color within a design registration. This may be a further matter for a comparative practice question.

Country	Representations Required
1. Argentina	Graphic and photographic representations, indicating the precise perspective (angle of view)
2. Brazil	Drawings or photos. Perspective view, when dealing with a three-dimensional object and front, side, top and bottom views

3.	Canada	Informal drawings are accepted, but formal drawings must be in black and white only. The drawings must show an object incorporating the design and, if necessary, one or two other views that show all of the design. Photographs are also acceptable.
4.	China	Drawing or photograph. In respect of the subject matter of a product that incorporates the design for which protection is sought, the relevant views and stereoscopic drawings or photographs shall be submitted, so as to clearly show the subject matter for which protection is sought.
5.	EU	The representation shall consist in a graphic or photographic reproduction of the design, either in black and white or in color. However, if the object of the application is a two-dimensional design and the application contains a request for deferment of publication the representation of the design may be replaced by a specimen.
6.	France	Graphical representation (drawing, picture) to be inserted in a specific frame on the application form (limited size). Colors are accepted.
7.	Germany	Graphic or photographic representations. Only if deferred publication is requested, may a specimen of the design be submitted instead of a drawing or photograph.
8.	Japan	drawings or photographs
9.	Mexico	Graphic and photographic representations, indicating the precise angle of view

21. *What representations of the design are acceptable? contd*

10.	UK	drawings or photographs
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<p>11. USA (copyright)</p>	<p>Generally you need to submit a copy of the design. Some special rules may apply, e.g., in the case of works reproduced in three-dimensional copies (sculpture, toys, jewelry, etc.), identifying material such as photographs or drawings is ordinarily required. Other examples of special deposit requirements (but by no means an exhaustive list) include many works of the visual arts such as greeting cards, fabrics, oversized materials, etc. If the work is a pictorial or graphic work, the material should reproduce the actual colors employed in the work. In all other cases, the material may be in black and white or may consist of a reproduction of the actual colors. The copyright office publishes circulars on appropriate specimens.</p> <p>Note that although a copyright registration is not required, the 1976 Copyright Act establishes a mandatory deposit requirement for works published in the United States. In general, the owner has a legal obligation to deposit in the Copyright Office within 3 months of publication in the United States two complete copies of the best edition of the work. It is the responsibility of the owner of copyright or the owner of the right of first publication in the work to fulfill this mandatory deposit requirement. Failure to make the deposit can result in fines and other penalties but does not affect copyright protection. (Note there are some exceptions.)</p> <p>Some categories of pictorial, graphic, and sculptural works are exempt from this requirement, and the obligation is reduced for other categories. The following works are exempt from the mandatory deposit requirement:</p> <ul style="list-style-type: none"> • Scientific and technical drawings and models • Greeting cards, picture postcards, and stationery • Three dimensional sculptural works, except for globes, relief models, and similar cartographic works • Works published only as reproduced in or on jewelry, toys, games, textiles, packaging material, and any useful article • Advertising material published in connection with articles of merchandise, works of authorship, or services • Works first published as individual contributions to collective works (but not the collective work as a whole) • Works first published outside the United States and later published without change in the United States, under certain conditions
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12.	USA	drawings or photographs
13.	Taiwan	No information provided

22. *Are there any rules relating to the registration of sets or series of designs?*

Country	Registration Of Sets Or Series
1. Argentina	up to 50 designs may be submitted as a series, as long as there is uniformity in all of them
2. Brazil	<p>An application for registration of an industrial design shall necessarily relate to one single design, a plurality of variations being permitted, provided that they are destined for the same purpose and retain the same predominant distinctive characteristic, each application being limited to a maximum of 20 (twenty) variations.</p> <p>Sole Paragraph – The drawings must represent the design and its variations, if any, in a manner sufficiently clear and complete for it to be reproduced by a person skilled in the art.</p>
3. Canada	An application must relate to one design applied to a single article or set. Variants (designs which do not differ substantially from one another) are permitted in a single application. Any other design must be the subject of a separate application.
4. China	It is permissible to include a set of designs if the articles are always sold together as a set, but slight variations of designs will be viewed as different designs.
5. EU	The multiple application must be filed within the same Locarno class.
6. France	The series of designs must be filed within the same Locarno class.

7. Germany	There is an upper limit of 100 designs if they are combined in one multiple application. In addition, they must belong to the same class of the classification system.
8. Japan	There are no provisions relating to the registration of a series of designs. A set of articles that are used together as a set of articles may be registered provided that they satisfy certain requirements.
9. Mexico	No there are not. Set registrations are, thus, not allowed. One registration covers only a single design.
10. UK	An application for a registered design can only be filed in respect of a single article or a set of articles. A set of articles is defined as a number of articles of the same general character ordinarily on sale or intended to be used together, to each of which the same design (or the same design with modifications or variations not sufficient to alter the character or substantially affect the identity of it) is applied. There are no provisions relating to series of designs.

22. *Are there any rules relating to the registration of sets or series of designs? contd*

<p>11. USA (copyright)</p>	<p>Under the following conditions, a work may be registered in <u>unpublished</u> form as a "collection," with one application form and one fee:</p> <ul style="list-style-type: none">• The elements of the collection are assembled in an orderly form;• The combined elements bear a single title identifying the collection as a whole;• The copyright claimant in all the elements and in the collection as a whole is the same; and• All the elements are by the same author, or, if they are by different authors, at least one of the authors has contributed copyrightable authorship to each element. <p>In addition, all copyrightable elements that are included in a single unit of publication and in which the copyright claimant is the same may be considered a single work for registration purposes. An example is a game consisting of playing pieces, a game board, and game instructions.</p>
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12. USA	<p>A design patent application may only include a single claim. The claim defines the design which applicant wishes to patent, in terms of the article in which it is embodied or applied. The claim must be in formal terms to “The ornamental design for (the article which embodies the design or to which it is applied) as shown.” The description of the article in the claim should be consistent in terminology with the title of the invention.</p> <p>When there is a properly included special description of the design in the specification, or a proper showing of modified forms of the design, or other descriptive matter has been included in the specification, the words “and described” should be added to the claim following the term “shown.” The claim should then read “The ornamental design for (the article which embodies the design or to which it is applied) as shown and described.”</p>
13. Taiwan	Information missing

23. Approximately how much does it cost to obtain a registration (both official fees and attorney's fees)?

Editor's note: As various countries permit multiple designs in a single application, as well as different fees for extra pages, drawings, priority claims, etc., the information here relates to a single design with a single priority claim, minimum number of pages, and one office action (if relevant).

Country	Cost Of Registration (Approximate)
1. Argentina	-
2. Brazil	\$ 2,300

3.	Canada	\$ 1,200
4.	China	\$ 500
5.	EU	\$ 1,300
6.	France	?
7.	Germany	\$ 1,000
8.	Japan	\$ 1,800
9.	Mexico	\$ 2,700 – 3,200
10.	UK	\$ 800
11.	USA (copyright)	\$ 230 – 1,000 (including expedited registration)
12.	USA	\$ 2,500 – 5,000 [Editor: \$ 1,500]
13.	Taiwan	-

24. *Approximately how long does it take to obtain registration?*

Country	Length Of Time Taken To Register
1. Argentina	20 days
2. Brazil	3-10 months if no office action issues
3. Canada	8-12 months
4. China	6 months
5. EU	3 months [JMB]
6. France	Short time as no substantive examination
7. Germany	3-4 months
8. Japan	6-12 months if no office action issues
9. Mexico	2-3 years
10. UK	3-4 months

11.	USA (copyright)	4-5 months
12.	USA	1-2 years
13.	Taiwan	18 months approximately

25. *Is there any substantive examination?*

Country	Substantive Examination
1. Argentina	No
2. Brazil	Yes, on Applicant request
3. Canada	Yes
4. China	No
5. EU	No
6. France	No
7. Germany	No
8. Japan	Yes
9. Mexico	Yes
10. UK	No. Since 1 May 1999 the Registrar no longer carries out a novelty search. In practice an examiner will only raise an objection on novelty grounds if he or she is aware of a prior publication of the same design and has documentary evidence to support the objection. In practice this is rare. The same also applies to objections based on individual character.
11. USA (copyright)	Yes
12. USA	Yes
13. Taiwan	Yes

26. *Is there a pre-registration opposition procedure?*

Country	Pre-Registration Opposition
1. Argentina	No
2. Brazil	No
3. Canada	No
4. China	No
5. EU	No
6. France	No
7. Germany	No
8. Japan	No
9. Mexico	No
10. UK	No
11. USA (copyright)	No
12. USA	No
13. Taiwan	No

27. *Is it possible to search for registration and, if so, using what search parameters?*

Country	Searchability Of Registered Designs	Search Parameters
1. Argentina	Yes	Author, subject matter
2. Brazil	Yes	Depends on type of search
3. Canada	No	
4. China	Yes	

5.	EU	Yes, though unreliable	
6.	France	Not really	
7.	Germany	Yes	Registration number, name of the holder, Registration date, Locarno Classification and Indication of products
8.	Japan	Yes	
9.	Mexico	Yes	Owner, subject matter
10.	UK	Yes	proprietor's name or specific types of products
11.	USA (copyright)	Yes	author, title, claimant, miscellaneous
12.	USA	Yes	Inventor, assignee, description
13.	Taiwan	Yes	name and description

B. UNREGISTERED DESIGN PROTECTION

GENERAL

28. What unregistered rights are available to protect designs?

Country	Categories of unregistered rights protecting designs
Summary (Ruby Zefo)	Protection schemes range from specific unregistered design protection laws to copyright protection to limited protection under unfair competition or common law trademark types of laws.
1. Argentina	None
2. Brazil	Minimal: industrial design protection for designs exploited in good faith prior to the filing or priority date of another's application – can continue to exploit in prior manner.
3. Canada	<ul style="list-style-type: none"> - unregistered copyright - very limited trade dress protection

4. China	Copyright
5. EU	Unregistered Community Design (UCD) (+ varying national forms of protection)
6. France	<ul style="list-style-type: none"> - copyright - limited unfair competition protection (not an IP right) - (EU UCD)
7. Germany	<ul style="list-style-type: none"> - limited unfair competition protection (if product imitation is “unfair”) (not an IP right) - (EU UCD) - <i>hardly applicable: copyright – but restricted to extraordinary or trend-setting appearances, thus very difficult to rely on.</i>
8. Japan	<ul style="list-style-type: none"> - unfair competition - copyright
9. Mexico	Minimal: protection for designs exploited in good faith prior to the filing or priority date of another’s application – can continue to exploit in prior manner, and request annulment of third party’s registration.
10. Taiwan	<ul style="list-style-type: none"> - Copyright, and/or - provisions under Fair Trade Act (unfair competition)
11. UK	<ul style="list-style-type: none"> - Copyright, or (depending on the nature of the design), - unregistered design right - (EU UCD)
12. USA (copyright)	Unregistered copyright protection
13. USA (patent)	N/A

29. What types of designs are protected?

Country	Types of Designs Protected
Summary (Ruby Zefo)	Generally designs of some artistic value, and shapes and product configurations under some laws.
1. Argentina	N/A
2. Brazil	Industrial designs providing original/new visual result; only the “ornamental/plastic” aspects of the object (the artistic/aesthetic value) are protectable.

3. Canada	Copyright: 2-dimensional objects only (fabrics, graphic or photographic representations applied to face of an article.
4. China	Created within a literary, scientific, artistic or other intellectual domain. Industrial designs that are artistic works or applied art, e.g. fabric patterns, ornamental lamps.
5. EU	Appearance of the whole or 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.
6. France	a) <u>Copyright</u> : any “work of mind”, whatever the genre, expression mode, merits or destination (including graphic works, sculpture, architecture, applied art, fashion, etc.) b) <u>Unfair competition</u> : 1/ possible as long as there is a risk of confusion – bar is higher than for trademarks (imitation of a name or product presentation; disparagement); 2/ more broadly: “parasitism”, i.e. taking advantage of another’s efforts and the reputation of their name and/or products, whether there is confusion or not and whether the products are competing or not.
7. Germany	<i>(UCD: see EU)</i>
8. Japan	a) <u>Unfair competition</u> – prevention law extends to: <ul style="list-style-type: none"> ○ goods which imitate the configuration of another person’s goods, excluding: <ul style="list-style-type: none"> (i) goods having a configuration which is commonly used for goods of the same kind (or, if it is not the same kind, good which have an identical or similar function and utility) as that of such other person; (ii) goods for which three years have elapsed from the date first selling thereof first commenced. ○ goods or other indication (i.e. name connected with a person’s business, trade name, trademark, mark, container or package of goods, or any other indication of goods or business) which is identical or similar to another person’s goods or other indication as to be well-known among consumers; ○ goods or other indication as one’s own which is identical or similar to another person’s famous goods or other indication. b) <u>Copyright</u> : production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain. Graphic designs, character designs, typeface, architectural designs and computer programs may be protected under Copyright Law if they fall under the above definition.
9. Mexico	N/A

10. Taiwan	a) <u>Copyright</u> : designs created within a literary, scientific, artistic or other intellectual domain. b) <u>Unfair competition</u> : unregistered designs known to consumers as source identifier, e.g. for very famous get-ups.
11. UK	a) <u>Copyright</u> : designs consisting of surface decoration and embodied in a drawing, or designs that are themselves art (e.g. sculpture). b) <u>Unregistered design right</u> : shapes or product configurations.
12. USA copyright	Original works of authorship in a tangible form (pictorial, graphic, sculptural, and some architectural designs).
13. USA (patent)	N/A

30. Are there any specific exclusions (e.g. functionality) ?

Country	Exclusions to unregistered design protection
Summary (Ruby Zefo)	Functionality; common, ordinary, designs; sometimes offensive/amoral designs; some „must fit“ (spare parts) and „must match“ (e.g. auto body panels) exclusions.
1. Argentina	N/A
2. Brazil	- common, ordinary shapes; - functional objects; - objects contrary to morals or which are offensive; - works of pure art (≠ industrial design)
3. Canada	None
4. China	Functionality
5. EU	- designs contrary to morals/public policy; - functionality; - designs of interconnection, with exception of allowing multiple assembly or connection within modular system (“Lego” clause)
6. France	None (<i>UCD: see EU</i>)
7. Germany	None (<i>UCD: see EU</i>)
8. Japan	The scope of copyright is limited so as to allow reproduction of the work for private use, for educational purposes (namely: use in libraries, quotations, preparation of text books in large prints, broadcasting in school educational programs, use in schools and other educational institutions, examination questions), use by the visually impaired in Braille, non-profit performance, articles on current topics, exploitation of political speeches, ephemeral recordings by broadcasting organisations, etc.

9. Mexico	N/A
10. Taiwan	Functionality
11. UK	a) <u>Copyright</u> : design coverage already excludes functionality, so no need for explicit exclusion. b) <u>Unregistered Design</u> : “must fit” (spare parts) and “must match” (e.g. auto body panels) exclusions.
12. USA (copyright)	- functionality; - mechanical or utilitarian aspects of useful articles that have other, protectable artistic elements; - Ideas, procedures, processes, etc. embodied in the work.
13. USA (patent)	N/A

31. What attributes must the design have to qualify for protection?

Country	Qualifying attributes of unregistered designs
Summary (Ruby Zefo)	Some element of novelty/creativity, although the degree varies; originality (no copying); often some artistic value; a tangible form.
1. Argentina	N/A
2. Brazil	- novelty - originality
3. Canada	Originality
4. China	- originality (not resulting from copying and minimum degree of creativity) - tangible form - artistic (created in a literary, scientific, artistic or other intellectual domain)
5. EU	- novelty (no identical prior designs) - individual character (different overall impression vs. prior designs)
6. France	Copyright: Originality (very low standards)
7. Germany	Copyright: the protection of copyright regarding articles of everyday use or the appearance of packaging is restricted to extraordinary and trend-setting appearances. (UCD: see EU)

8. Japan	Copyright: - creativity - must fall within the literary, scientific, artistic or musical domain
9. Mexico	N/A
10. Taiwan	- originality (not resulting from copying and minimum degree of creativity) - tangible form - created within a literary, scientific, artistic or other intellectual domain
11. UK	a) <u>Copyright</u> : originality (low bar – not copied typically enough) b) <u>Design right</u> : originality (slightly higher bar than for copyright – not commonplace in design field – but lower than novelty test for registered designs)
12. USA (copyright)	- originality - artistic - tangible form
13. USA (patent)	N/A

32. *When does the right come into existence?*

Country	Starting point of unregistered design protection
Summary (Catherine Mennenga)	For unregistered copyrights, protection begins at the time the design is created. For unregistered designs, protection generally begins once the design is exploited or made public.
1. Argentina	N/A
2. Brazil	Unregistered design right comes into existence when exploitation starts
3. Canada	Copyright protection begins at the time of the creation
4. China	Copyright protection begins at the time of the creation , i.e. when the design is fixed in a tangible medium.
5. EU	Unregistered design right comes into existence when the design is first made available to the public within the EU (namely published, exhibited, used in trade or otherwise disclosed – except under conditions of confidentiality – in such a way that in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating in the EU).

6. France	a) <u>Copyright</u> protection begins at the time of the creation b) <u>Unfair competition</u> : no action is available until the product/design is put into the market or it can be proven that the other party was aware of their plans.
7. Germany	Copyright protection (if any) begins at the time of the creation (UCD: <i>see EU</i>)
8. Japan	Copyright protection begins at the time of the creation
9. Mexico	N/A
10. Taiwan	Copyright protection begins at the time of the creation , i.e. when the design is fixed in a tangible medium.
11. UK	a) <u>Copyright</u> protection begins at the time of the creation b) <u>Unregistered design</u> right comes into existence when it is recorded in a design document or embodied in an article.
12. USA (copyright)	Copyright protection begins at the time of the creation
13. USA (patent)	N/A

33. *Are foreign designs entitled to protection?*

Country	Entitlement to protection of foreign unregistered designs
Summary (Catherine Mennenga)	In general, yes, provided the owner is a citizen or resident of a country that belongs to a participating treaty or convention.
1. Argentina	N/A
2. Brazil	Yes, if exploited in Brazil
3. Canada	Yes, in accordance with certain treaties/conventions
4. China	Yes, in accordance with certain treaties/conventions
5. EU	Yes, if made available to the public in the EU
6. France	<u>Copyright</u> : Yes, in accordance with certain treaties/conventions <u>Unfair competition</u> : Yes, as long as it is used on the French market
7. Germany	(UCD: <i>see EU</i>)
8. Japan	Yes, in accordance with certain treaties/conventions
9. Mexico	N/A
10. Taiwan	Yes, in accordance with certain treaties/conventions

11. UK	<p><u>Copyright</u>: Yes, in accordance with certain treaties/conventions</p> <p><u>Unregistered Design</u>: Yes, if created by a citizen or subject of a qualifying country (UK, EU member states, certain Commonwealth countries) or first marketed by a qualifying person in the UK/EU.</p> <p>It is therefore likely that designs emanating from outside of the EU will not enjoy design right protection in the UK.</p>
12. USA (copyright)	Yes, in accordance with certain treaties/conventions
13. USA (patent)	N/A

34. What is the term of protection?

Country	Term of protection
Summary (Catherine Mennenga)	<p>For unregistered copyrights: there is some inconsistency between jurisdictions – the term is either life + 50 years or life + 70 years</p> <p>For unregistered designs: there is also inconsistency ranging from three years to potentially perpetual.</p> <p>Moral rights (if any) are generally perpetual.</p>
1. Argentina	N/A
2. Brazil	As long as the design is exploited in Brazil
3. Canada	Life + 50 years
4. China	<p>Copyright:</p> <ul style="list-style-type: none"> - individual author: life + 50 years - corporate author: 50 years after first publication of the work <p>Moral rights: perpetual</p>
5. EU	3 years
6. France	<p>Copyright: life + 70 years</p> <p>Moral rights: perpetual</p>
7. Germany	(UCD: see EU)
8. Japan	Life + 50 years
9. Mexico	N/A

10. Taiwan	Copyright: - individual author: life + 50 years - corporate author: 50 years after first publication of the work Moral rights: perpetual
11. UK	<u>Copyright</u> : life + 70 years – however, where the work has been exploited industrially, the period of enforceable copyright is 25 years from the end of the year in which the articles are first marketed. <u>Unregistered design</u> : 10 years from end of calendar year in which the article is first <i>marketed</i> (subject to an overall maximum of 15 years from the end of the calendar year in which the design was first <i>created</i>).
12. USA copyright	Life + 70 years In case of anonymous/pseudonymous work/work for hire: 95 years from year of first publication OR 120 years from year of creation, whichever expires first.
13. USA (patent)	N/A

35. Are there provisions relating to compulsory licenses or licenses of right?

Country	Compulsory or similar licenses
Summary (C. Mennenga)	With limited exceptions, there are no compulsory licenses or licenses of right for unregistered designs.
1. Argentina	N/A
2. Brazil	No
3. Canada	No
4. China	No
5. EU	No
6. France	No
7. Germany	N/A
8. Japan	No
9. Mexico	N/A
10. Taiwan	No
11. UK	<u>Copyright</u> : No. <u>Unregistered design</u> : license of right for last five years.
12. USA copyright	Only for certain phonorecords (not applicable to designs)
13. USA patent	N/A

INFRINGEMENT

36. *What rights are given to the owner of the relevant unregistered IP right?*

Country	Rights given by the unregistered protection
Summary (Peter Dernbach)	Generally, unregistered designs may be protected by copyright and in some jurisdictions under Fair Trade laws. In Europe, there are unregistered design rights that may complement rights under copyright, but there do not appear to be separate unregistered design rights in the Americas or Asia.
1. Argentina	N/A
2. Brazil	Prior good faith user can continue to exploit the design in the same manner and condition.
3. Canada	Copyright owners can enforce their rights against unauthorized reproduction, distribution of the work or preparation of derivative works.
4. China	<p style="text-align: center;">1- Economic rights (save fair use exceptions):</p> <ul style="list-style-type: none"> - reproduce the work - recite the work publicly - broadcast the work publicly - present the work publicly - transmit the work publicly - display the work publicly - translate the work - adapt their works into derivative works or to compile their works into compilation works - distribute the work through transfer of ownership - rent the work <p style="text-align: center;">2- Moral rights:</p> <ul style="list-style-type: none"> - publicly release the work - indicate the name of the author - prohibit others from distorting the work - make changes to the work or authorize others to do so.
5. EU	The owner may prevent others from making, offering, putting on the market, importing, exporting or using a product in which the unregistered design is incorporated or on which it is applied, or stocking such product for those purposes only if the contested use results from copying the protected design.

10. Taiwan	<p>a) <u>Copyright</u>:</p> <p>1- Economic rights (save fair use exceptions):</p> <ul style="list-style-type: none"> - reproduce the work - recite the work publicly - broadcast the work publicly - present the work publicly - transmit the work publicly - display the work publicly - adapt their works into derivative works or to compile their works into compilation works - distribute the work through transfer of ownership - rent the work <p>2- Moral rights:</p> <ul style="list-style-type: none"> - publicly release the work - indicate the name of the author, a pseudonym or no name (extends to derivative works) - prohibit others from distorting the work <p>b) <u>Unfair competition</u>: right to exclude others from using the design in a manner to pass off its goods or services as those of the owner of the design, or in any other manner that constitutes unfair trade practices.</p>
11. UK	<p>a) <u>Copyright</u>: The owner may enforce its rights (right to copy the work and to issue copies of the work to the public) against defendants who made substantial reproduction of the design.</p> <p>b) <u>Unregistered design</u>: the owner has exclusive right to reproduce the design for commercial purposes and may enforce its rights against primary infringers who copy the design so as to produce articles identical or substantially similar to it, and secondary infringers who import, possess, sell or offer infringing articles.</p>
12. USA (copyright)	Copyright owners can enforce their rights against unauthorized reproduction, distribution, public display of the work or preparation of derivative works.
13. USA (patent)	N/A

37. To establish infringement, is it necessary to prove copying?

Country	Necessity to prove copying
Summary (Peter Dernbach)	It is almost universally required to prove copying for unregistered designs and copyright cases (to the notable exception of the USA). It is not necessary to prove copying for passing off cases.
1. Argentina	N/A
2. Brazil	Yes
3. Canada	Yes (copying of the work or a substantial part thereof)
4. China	Yes
5. EU	Yes
6. France	Copyright: Yes Unfair competition: No, but evidence of copying will increase the amount of damages
7. Germany	<i>(UCD: see EU)</i>
8. Japan	Yes
9. Mexico	N/A
10. Taiwan	Copyright: Yes Passing Off: No
11. UK	Yes (for both copyright and unregistered design claims).
12. USA (copyright)	No, but proving wilfulness may increase damages awarded.
13. USA (patent)	N/A

38. What remedies are available in an infringement action?

Country	Remedies
Summary (Peter Dernbach)	Generally civil remedies and injunctive relief are available in all jurisdictions. In some jurisdictions, criminal remedies are also available.
1. Argentina	N/A
2. Brazil	Civil and criminal remedies are available.
3. Canada	Civil remedies and injunctive relief are available.
4. China	Civil, criminal and injunctive remedies are available (criminal charges only for economic rights).

5. EU	Civil remedies defined by the regulation. Also any appropriate remedies as may be available under the law of the member state where the case is held, incl. civil, criminal (if available) and injunctive remedies (like in registered design cases – see question 14).
6. France	Administrative, civil, criminal and injunctive remedies are available.
7. Germany	<i>(UCD: see EU)</i>
8. Japan	Civil and criminal remedies, injunctive relief (for both copyright and unfair competition).
9. Mexico	N/A
10. Taiwan	Civil and criminal remedies, injunctive relief (criminal charges only for economic rights). Under Fair Trade Act; also administrative remedies.
11. UK	Civil and criminal remedies, injunctive relief.
12. USA (copyright)	Civil and criminal remedies, injunctive relief.
13. USA (patent)	N/A

OWNERSHIP

39. Subject to any agreement, who owns the relevant unregistered IP right in the design? Is the position different, if the design is created by an employee or by a person pursuant to a commission?

Country	Ownership of unregistered right – status of employee or contractor
Summary (Peter Dernbach)	Individual authors are the owners of the unregistered IP rights, though different jurisdictions have different presumptions when it comes to „works for hire“.
1. Argentina	N/A
2. Brazil	The person who, in good faith prior to the filing or priority date of the application for registration, exploited the design in Brazil.
3. Canada	The individual author is the owner, unless the design was work for hire, in which case the employer is the owner.

4. China	<p>The individual author is the owner.</p> <p>If design is created by an employee or a contractor:</p> <ul style="list-style-type: none"> - If there is an agreement, then agreement governs. - If no agreement, then the copyright is owned by the employer, but the employee has the right to indicate their name with the design (moral right)
5. EU	<p>Same as for Registered Community Design (see question 18): The right is owned by the designer or his successor.</p> <p>If two or more persons have jointly developed the design, the right is owned by them jointly.</p> <p>Where the design is developed by an employee, the right is owned by the employer, unless otherwise agreed <u>or specified under national law</u>.</p> <p>Nevertheless, the designer shall have the right to be cited as such in the register.</p> <p>No particular provision regarding commission, i.e. general rule applies.</p>
6. France	<p>The individual author is the first owner of the rights. The economic rights may be assigned (together or separately), but the moral rights remain the property of the author, even if the work was created within the scope of employment.</p> <p>Where the work is created by multiple persons, ownership is defined as follows:</p> <ul style="list-style-type: none"> - Collaboration work (several natural persons participated in the creation thereof): common property of all co-authors; - Composite work (new work into which a pre-existing work was incorporated without the collaboration of the author thereof): author of the new work, subject to the right owned by the author of the pre-existing work. - Collective work (created on the initiative of a natural or legal person in which the individual contributions are amalgamated in the whole): property of the person who divulged the work – to note: only work where a legal person can be the first owner. <p>No specific provisions regarding designs created by employee / contractor, i.e. the general rules above apply.</p>
7. Germany	<i>(UCD: see EU)</i>
8. Japan	<p>The author owns the moral and economic rights.</p> <p>If the work is created by two or more authors, the copyright will be co-owned by all the authors.</p> <p>An employer may be the author under certain conditions.</p>
9. Mexico	N/A

39. Ownership of unregistered right contd

10. Taiwan	The individual author is the owner. If design is created by an employee or a contractor: - If there is an agreement, then agreement governs. - If no agreement, then employer owns economic rights and employee owns moral rights.
11. UK	<u>Copyright</u> : the author is the first owner of any copyright in the work. Where the work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work. <u>Unregistered design</u> : the designer is the first owner of any design – unless it is created in pursuance of a commission or in the course of employment, in which case the commissioning party/employer is the first owner in any design right and copyright in the design.
12. USA (copyright)	The author, or if the work was made for hire, the employer or commissioning party owns the copyright. The authors of a joint work are co-owners of the copyright (unless agreement to the contrary).
13. USA (patent)	N/A

40. Are there moral rights for unregistered designs and if so, what is the term for such rights?

Country	Ownership of unregistered right – status of employee or contractor
Summary (Peter Dernbach)	In the Civil Code systems, separate moral rights are recognized and in principle they are perpetual.
1. Argentina	N/A
2. Brazil	N/A
3. Canada	N/A
4. China	There are moral rights and they are perpetual.
5. EU	The designer has the right to be cited as such and the term is the same as the term for the unregistered design. There may also be moral rights under national laws (either for the copyright or design rights).
6. France	There are moral rights and they are perpetual.
7. Germany	Germany recognizes some moral rights in the unregistered design and they are in principle perpetual.
8. Japan	There are moral rights and they are perpetual.

9. Mexico	N/A
10. Taiwan	There are moral rights and they are perpetual.
11. UK	<p><u>Copyright</u>: yes, namely</p> <ul style="list-style-type: none"> - The right to be identified as its author (subject to written assertion) – this right does not apply to work created by employee. - The right not to have their work subjected to derogatory treatment. <p><u>Unregistered design</u>: No.</p>
12. USA (copyright)	Moral rights for visual art only in one-of-the-kind art or numbered limited editions have some protection under the VARA (Visual Artists Rights Act), namely right of attribution and integrity. These moral rights last for the life of the author. Various state laws still exist that give broader rights or for longer protection.
13. USA (patent)	N/A