

# Federal Law on the Protection of Designs

## (Law on Designs, LDes) of October 5, 2001

[Referendum deadline: January 24, 2002]

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*The Federal Parliament of the Swiss Confederation,*

in accordance with Articles 122 and 123 of the Constitution<sup>1</sup>,

and in consideration of the Order of the Federal Council of February 16, 2002<sup>2</sup>,

*decides:*

## CHAPTER 1 GENERAL PROVISIONS

### Section 1 Subject Matter and Requirements

#### *Subject Matter*

**1.** This Law shall protect, as designs, the creation of products or parts of products characterized in particular by the arrangement of lines, surfaces, contours or colors, or by the materials used.

#### *Requirements*

**2.—(1)** A design may be protected provided that it is novel and original.

(2) A design shall not be novel if an identical design, which may be known to specialists working in the sector concerned in Switzerland, has been disclosed to the public prior to the deposit or priority date.

(3) A design shall not be original if, in relation to the general impression it creates, it differs from a design that may be known to specialists working in the sector concerned in Switzerland, only in terms of minor features.

### *Non-Detrimental Disclosures*

3. The disclosure of a design within the twelve months preceding the deposit or priority date may not be binding on the holder of the right in the design (holder) if:

- (a) a third party has disclosed the design in an abusive manner to the detriment of the entitled person;
- (b) the design has been disclosed by the entitled person.

### *Grounds for Exclusion*

4. Protection of a design shall be excluded if:

- (a) no design within the meaning of Article 1 has been filed;
- (b) the design does not meet the requirements of Article 2 at the time of deposit;
- (c) the features of the design are dictated solely by the technical function of the product;
- (d) the design infringes federal law or international treaties;
- (e) the design is contrary to public policy or to accepted principles of morality.

## **Section 2 Existence of a Design Right**

### *Establishment of a Design Right and Period of Protection*

5.—(1) The right in a design shall be established by the entry of the design in the Register of Designs (the Register).

- (2) Protection shall be for five years beginning with the deposit date.
- (3) It may be extended for four periods of five years each.

### *Deposit-Related Priority*

6. The right in a design shall belong to the person who first filed the design.

### *Persons Authorized to Make a Deposit*

7.—(1) The creator of a design, his or her successor in title or a third party to whom the right belongs in a different capacity shall be authorized to file the design.

(2) Where several people have created the design together, they shall be authorized to file it jointly, unless agreed otherwise.

## **Section 3 Scope of Protection and Effects**

### *Scope of Protection*

8. The protection of the right to a design shall be extended to the designs that exhibit the same essential features and which therefore create the same general impression as a registered design.

### *Effects of a Design Right*

**9.**—(1) The right in a design shall confer on its holder the right to forbid third parties from using the design for industrial purposes. Use means in particular the manufacture, storage, supply, marketing, import, export, transport and possession for such purposes.

(2) The holder may also forbid third parties from participating in unlawful use, or promoting or facilitating such use.

### *Obligation of the Right Holder to Inform*

**10.** Any person who indicates on goods or business documents the existence of a design right, without indicating the number allocated thereto, shall communicate the number free of charge on demand.

### *Several Right Holders*

**11.** Where there are several right holders, the rights provided for in Article 9 shall accrue to them jointly, unless agreed otherwise.

### *Right of Continued Use*

**12.**—(1) The holder may not forbid third parties from continuing to use a design to the same extent as previously, where those parties have, in good faith, used the design in Switzerland during the following periods:

- (a) before the deposit or priority date;
  - (b) during the period of deferral of the publication (Article 26).
- (2) The right of continued use may be transferred only with the business.

### *Right of Parallel Use*

**13.**—(1) The holder may not assert the registered design against third parties who have used it in good faith for professional purposes in Switzerland, between the last day of the period allocated for payment of the fee for a new period of protection and the day when an application for further treatment was submitted (Article 31), or who have taken specific measures for this purpose.

(2) The right of parallel use may be transferred only with the business.

(3) The person who claims the right of parallel use shall pay the holder fair compensation from the time when the design right is reinstated.

### *Transfer*

**14.**—(1) The holder may transfer all or part of his design right.

(2) The transfer must be made in writing but does not need to be entered in the Register. The transfer shall have effect in relation to third parties in good faith only after it has been registered.

(3) Until the registration of the transfer:

(a) licensees in good faith may be exempt from their obligations by rendering performance to the former holder;

(b) the actions provided for by this Law may be brought against the former holder.

#### *License*

**15.**—(1) The holder may authorize third parties to use, exclusively or otherwise, the design right or certain rights stemming therefrom.

(2) At the request of one of the persons concerned, the license shall be entered in the Register. It shall thus become binding on any right acquired subsequently as a result of the design.

#### *Usufruct and Right of Pledge*

**16.**—(1) A design right may be the subject of a usufruct or a right of pledge.

(2) The usufruct and right of pledge shall take effect in relation to those who acquire the design right in good faith only after their registration. The registration shall be made at the request of one of the persons concerned.

(3) Until such time as a usufruct is registered, licensees in good faith may be exempt from their obligations by rendering performance to the former holder.

#### *Compulsory Execution*

**17.** A design right may be the subject of compulsory execution measures.

### **Section 4 Representation**

**18.**—(1) Any person who is party to administrative or judicial proceedings provided for by this Law but who does not have a domicile or registered office in Switzerland must appoint a representative domiciled in Switzerland.

(2) The rules governing professional legal representation shall be reserved.

## **CHAPTER 2 DEPOSIT AND REGISTRATION**

### **Section 1 Deposit**

#### *General Requirements*

**19.**—(1) A design shall be considered to have been filed where a registration application is filed with the Federal Institute of Intellectual Property (Institute). The application must contain:

(a) a request for registration;

(b) a representation of the design suitable for reproduction; if this requirement is not satisfied, the Institute shall impose on the applicant a deadline for remedying the defect.

(2) The fee for the first period of protection must also be paid within the deadline imposed by the Institute.

(3) In cases where a two-dimensional design (a pattern) is filed for which the applicant has requested deferral of the publication in accordance with Article 26, a copy of the design may be filed instead of its representation. If it is planned to maintain the protection of the design after a deferral, a representation of the design suitable for reproduction must be submitted to the Institute in advance.

(4) In return for the payment of a fee, the design may be described in a maximum of 100 words, in order to explain the representation.

#### *Multiple Deposit*

**20.**—(1) Designs which belong to the same class of products under the Locarno Agreement Establishing an International Classification for Industrial Designs of October 8, 1968<sup>3</sup> may be the subject of a multiple deposit.

(2) The Federal Council may limit the size and weight of multiple deposits.

#### *Effects of a Deposit*

**21.** The deposit shall create the presumption that the design is novel and original, and the presumption of the right to file the design.

### **Section 2 Priority**

#### *Requirements and Effects of Priority*

**22.**—(1) Where a design has been lawfully filed for the first time in another State party to the Paris Convention for the Protection of Industrial Property of March 20, 1883<sup>4</sup>, or the deposit takes effect in one of these States, the applicant or his or her successor in title may claim the date of first deposit in order to file the same design in Switzerland, provided that the deposit in Switzerland takes place within the six months following the first deposit.

(2) The first deposit in a State granting reciprocity to Switzerland shall have the same effects as the first deposit in a State party to the Paris Convention.

#### *Formal Requirements*

**23.**—(1) Any person who intends to claim a priority right must submit a declaration of priority to the Institute. The Institute may require a priority document to be submitted.

(2) The right to this claim shall be extinguished if the deadline and formal requirements laid down by the Federal Council are not observed.

(3) Registration of priority shall constitute only a presumption in favor of the holder.

### **Section 3 Registration and Publication**

#### *Registration*

**24.**—(1) Any design filed in accordance with the legal provisions shall be registered.

(2) The Institute shall not accept an application for registration if the formal requirements provided for in Article 19(1) and (2) are not satisfied.

(3) It shall reject a registration application if one of the grounds for exclusion, provided for in Article 4(a), (d) or (e), is obvious.

(4) All the amendments concerning the existence of the design right or the status of holder must also be entered in the Register. The Federal Council may provide for the registration of other information such as the restrictions on the right to transfer the design, as ordered by the courts or the authorities responsible for the compulsory execution.

#### *Publication*

**25.**—(1) On the basis of the registrations included in the Register, the Institute shall publish the information provided for in the order and also a reproduction of the filed design.

(2) The Institute shall determine the publication body.

#### *Deferral of the Publication*

**26.**—(1) The applicant may request in writing that the publication be deferred by a maximum of 30 months, beginning from the deposit or priority date.

(2) During the period of deferral, the holder may request immediate publication at any time.

(3) The Institute shall keep secret the filed design until the deferral expires. Secrecy shall be maintained if the deposit is withdrawn prior to the expiry of the deferral.

#### *Public Nature of the Register and Inspection of Files*

**27.**—(1) Any person may consult the Register, request information on its content and request extracts of it; Article 26 shall be reserved.

(2) The files of registered designs may also be consulted. The Federal Council may restrict the right to consultation of the files only where manufacturing or business secrecy, or other overriding interests, dictate otherwise.

(3) In exceptional cases, the file may be consulted prior to registration, insofar as this does not affect the requirements and scope of protection (Articles 2 to 17). The Federal Council shall be responsible for the relevant procedures.

#### *Cancellation of Registration*

**28.** The Institute shall cancel the registration either in part or in full where:

(a) the holder so requests;

(b) the registration is not extended;

(c) the fees provided for have not been paid;

(d) the registration is declared invalid by a judgment which has come into force;

(e) the period of protection provided for in Article 5 has elapsed.

#### *International Deposit*

**29.** Any person who designates Switzerland in an international deposit of an industrial design shall benefit from the protection which this Law confers on the holder of a design

deposited in Switzerland. The provisions of the Hague Agreement Concerning the International Deposit of Industrial Designs of November 6, 1925<sup>5</sup> shall take precedence over those of this Law, if they are more favorable to the holder of the international deposit.

#### **Section 4 Fees**

**30.** The amount of the fees to be paid under this Law and the related Order, together with the payment arrangements, shall be governed by the Rules on Fees of the Federal Institute of Intellectual Property (IPI-RT) of April 28, 1997<sup>6</sup>.

### **CHAPTER 3 LEGAL REMEDIES**

#### **Section 1 Further Proceedings in the Event of a Missed Deadline**

**31.**—(1) An applicant or right holder who has missed a deadline that must be respected in relation to the Institute may make a written request to the Institute to continue the relevant proceedings.

(2) Such a request must be made within two months of the time when the applicant or right holder becomes aware of the failure to respect the deadline, but at the latest within six months of the expiry of the missed deadline. In addition, during these periods the applicant or right holder must perform in full the omitted act and pay the fee prescribed for further treatment of the case.

(3) If the application is accepted, the situation that would have resulted had the act been performed in timely fashion shall be re-established.

(4) Further treatment of a case shall be excluded where the missed deadlines are:

(a) set for submitting a request for further treatment;

(b) set for claiming priority.

#### **Section 2 Appeals**

**32.** Decisions taken by the Institute may be appealed to the Intellectual Property Appeals Commission.

#### **Section 3 Civil Law**

##### *Action for a Declaratory Judgment*

**33.** Any person who establishes that he or she has a relevant legal interest may bring an action for a declaratory judgment that a right or legal relation provided for by this Law does or does not exist.



### *Action for Assignment*

**34.**—(1) Any person who claims a preferable right may bring an action for assignment of a design right against the right holder.

(2) If the holder is in good faith, the action must be brought against him within the two years following publication of the design.

(3) If the assignment is declared, the licenses or other rights granted to third parties in the interim shall be void; these third parties are, however, entitled to the grant of a non-exclusive license if they have used the design in good faith, for professional purposes, in Switzerland, or if they have taken particular measures to that end.

(4) Claims for damages shall be reserved.

### *Action for Performance*

**35.**—(1) A holder whose rights are infringed or are likely to be infringed may request the court to:

(a) prohibit the infringement, if it is imminent;

(b) put a stop to the infringement, if it persists;

(c) order the defendant to indicate the source and number of items in his or her possession that have been manufactured unlawfully, and to indicate the recipients and number of items that have been passed on to industrial customers.

(2) Actions brought under the Code of Obligations<sup>7</sup> that relate to the payment of damages, reparation for moral wrongs and accounting for profits resulting from the provisions on business management shall be reserved.

(3) An action for performance may be brought only after the design has been registered. The applicant may claim the damage retrospectively from the time when the defendant became aware of the content of the application for registration.

(4) Exclusive licensees may bring an action independently of the registration of the license, insofar as the license contract does not exclude it explicitly. Any licensee may be party to infringement proceedings in order to claim the damage he or she has suffered.

### *Confiscation in Civil Proceedings*

**36.** The court may order the confiscation and sale or the destruction of items manufactured unlawfully, or of the facilities, equipment and other means intended primarily to manufacture those items.

### *Single Cantonal Court*

**37.** Each canton shall designate for the whole of its territory a single court that has jurisdiction in civil cases.

### *Interim Relief*

**38.**—(1) Any person who can prove that his or her design right is being infringed or is likely to be infringed and that such an infringement is likely to cause him or her harm that is difficult to repair may request interim relief.

(2) That person may in particular request the court to order relief designed to ensure that evidence is preserved, the source of items unlawfully manufactured is determined, the state of affairs is preserved, or the actions to prevent or put a stop to the problem are provisionally enforced.

(3) For the rest, Articles 28(c) to (f) of the Civil Code<sup>8</sup> shall apply by analogy.

(4) Article 35(4) shall apply by analogy.

#### *Publication of Judgment*

**39.** At the request of the party who wins a case, the court may order the publication of the judgment, at the expense of the other party. The court shall determine the method and scope of the publication.

#### *Communication of Judgment*

**40.** The court shall communicate to the Institute any enforceable judgment that leads to the amendment of a registration entry.

### **Section 4 Criminal Law**

#### *Infringement of a Design Right*

**41.—(1)** On a complaint by the holder, any person who intentionally infringes the holder's right shall be punished with a maximum prison sentence of one year or a maximum fine of 100,000 francs, if he or she:

(a) uses the design unlawfully;

(b) participates in its use by promoting it or facilitating it;

(c) refuses to indicate to the competent authority the source and number of items in his or her possession manufactured unlawfully, as well as the recipients and number of the items that have been passed on to industrial customers.

(2) If the person responsible for the infringement acts for commercial purposes, he or she shall be prosecuted *ex officio*. The punishment shall be imprisonment and a maximum fine of 100,000 francs.

#### *Infringements Committed in the Course of Running a Business*

**42.** Articles 6 and 7 of the Federal Law on Administrative Penal Law of March 22, 1974<sup>9</sup> shall apply to the infringements committed as part of the management of a business by an employee, agent or representative.

#### *Suspension of Proceedings*

**43.—(1)** If the accused claims in civil proceedings that the infringement of the design right is invalid or does not exist, the court may suspend the criminal proceedings.

(2) If the accused claims in criminal proceedings that the infringement of the design right is invalid or does not exist, the court may grant him or her a suitable period to bring an action as part of civil proceedings.

- (3) The period of prescription shall be suspended during suspension of the proceedings.

#### *Confiscation in Criminal Proceedings*

**44.** Even if a case is dismissed, the court may order the items manufactured unlawfully to be confiscated or destroyed, together with the facilities, equipment and other means intended primarily for the manufacture of those items.

#### *Criminal Prosecution*

- 45.** Criminal prosecution shall be within the competence of the cantons.

### **Section 5** **Assistance Provided by the Customs Authority**

#### *Denunciation of Obviously Unlawful Consignments*

**46.**—(1) The Customs Authority shall be authorized to notify the holder of a deposited design of particular consignments, if that person is known and if it is clear that the import, export or transportation of unlawfully manufactured items is imminent.

(2) In such a case, the Customs Authority shall be authorized to retain the goods for three working days in order to allow the holder to file an application under Article 47.

#### *Request for Assistance*

**47.**—(1) If the holder or licensee has specific grounds to believe that the import, export or transportation of goods manufactured unlawfully is imminent, he or she may make a written request to the Customs Authority to refuse to release such goods.

(2) The person making the request shall provide the Customs Authority with all the information available to him or her and which the Authority needs in order to reach a decision; this shall include in particular a precise description of the goods.

(3) The Customs Authority's decision shall be final. It may charge a fee to cover its administrative costs.

#### *Retention of Goods*

**48.**—(1) If, following a request made under Article 47, the Customs Authority has reasonable grounds for suspecting the import, export or transportation of goods manufactured unlawfully, it shall inform the person making the request accordingly.

(2) In order to allow the person making the request to obtain interim relief, the Customs Authority shall retain the goods in question for a maximum period of ten working days, beginning from the communication provided for in (1).

(3) If the circumstances so justify, the Customs Authority may retain the goods in question for an additional maximum period of ten working days.

#### *Securities and Damages*

**49.**—(1) If the retention of goods is likely to cause damage, the Customs Authority may ask the person making the request to provide adequate securities.

(2) The person making the request shall compensate the damage caused by the retention of goods, if interim relief has not been ordered or if that which has been ordered has proved to be unjustified.

## CHAPTER 4 FINAL PROVISIONS

### *Execution*

**50.** The Federal Council shall enact the rules of execution.

### *Repeal and Amendment of Existing Law*

**51.** The rules governing the repeal and amendment of the existing law are contained in the Annex.

### *Transitional Provisions*

**52.—**(1) Registered designs shall be subject to the new law as soon as this Law comes into force. A request for extension for a fourth period of protection must be submitted to the Institute, accompanied by a representation of the design suitable for reproduction.

(2) When this Law enters into force, the designs already deposited but not yet registered shall be subject to the old law until such time as they are registered.

(3) When this Law enters into force, registered designs under sealed cover shall remain sealed until the end of the first period of protection.

(4) Article 35(4) shall apply only to the license contracts concluded or confirmed following the entry into force of this Law.

### *Referendum and Entry into Force*

**53.—**(1) This Law shall be subject to referendum.

(2) The Federal Council shall set the date of entry into force.

National Council, October 5, 2001

State Council, October 5, 2001

President: Peter Hess

President: Françoise Saudan

Secretary: Ueli Anliker

Secretary: Christoph Lanz

Date of publication: October 16, 2001<sup>10</sup>

Referendum deadline: January 24, 2002

## ANNEX (ARTICLE 51)

### **Repeal and Amendment of Existing Law**

I. The Federal Law on Industrial Designs of March 30, 1900<sup>11</sup> is hereby repealed.

II. The existing law is amended as follows:

## 1. Code of Obligations<sup>12</sup>

### *Article 332*

[E. Rights in Inventions and Designs]

(1) The inventions that an employee has produced and the designs that he has created, or in whose production he has participated, as part of his professional activities for an employer in accordance with his contractual obligations, shall belong to the employer, irrespective of whether they can be protected.

(2) An employer may, by written agreement, reserve a right in the inventions that an employee has produced and in the designs he has created as part of his professional activities for the employer, but outside the performance of his contractual obligations.

(3) An employee who has produced an invention or created a design, as referred to in (2) shall inform the employer in writing accordingly; the employer shall inform the employee in writing within six months as to whether he intends to acquire the invention or design, or to leave it to the employee.

(4) If the invention or design is not left to the employee, the employer shall pay him special equitable remuneration, taking into account all the circumstances, in particular the economic value of the invention or design, the work done by the employer and his assistants, the use which has been made of his premises, and the expenses incurred by the employee and his position in the enterprise.

### *Article 332a*

*Repealed*

## 2. Federal Law on the Status and Duties of the Federal Institute of Intellectual Property of March 24, 1995<sup>13</sup>

### *Preamble*

Considering Articles 64 and 85, Ch. 1, of the Constitution<sup>14</sup>,

...

### *Article 2(1)(a)*

(1) The Institute shall carry out the following tasks:

(a) it shall prepare legislative texts relating to patents, designs, copyright and related rights, topographies of integrated circuits, trademarks and indications of source, public armories and other public signs, and also other legislative acts relating to intellectual property, insofar as they do not come within the competence of other administrative units of the Confederation;

## 3. Federal Law on the Protection of Trademarks of August 28, 1992<sup>15</sup>

### *Preamble*

Considering Articles 64 and 64<sup>bis</sup> of the Constitution<sup>16</sup>,

...

### *Article 38(3)*

(3) The Institute shall determine the publication body.

#### 4. Federal Law on Patents of June 25, 1954<sup>17</sup>

##### *Preamble*

Considering Articles 64 and 64<sup>bis</sup> of the Constitution<sup>18</sup>,

...

##### *Article 29(3)*

(3) If the judge orders a transfer, the licenses or other rights granted in the interim to third parties shall lapse; such parties will, however, have the right to grant a non-exclusive license when they have already, in good faith, used the invention for professional purposes in Switzerland, or they have made specific preparations to that end.

##### *Article 61(3)*

(3) The Institute shall determine the publication body.

*Note:* Translation by the International Bureau of WIPO.

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<sup>1</sup> RS 101.

<sup>2</sup> FF 2000 2587.

<sup>3</sup> RS 0.232.121.3.

<sup>4</sup> RS 0.232.01/04.

<sup>5</sup> RS 0.232.121.1, revised in the Hague on November 28, 1960 (RS 0.232.121.2).

<sup>6</sup> RS 232.148.

<sup>7</sup> RS 220.

<sup>8</sup> RS 210.

<sup>9</sup> RS 313.0.

<sup>10</sup> FF 2001 5487.

<sup>11</sup> RS 2 866; RO 1956 861, 1962 465, 1988 1776, 1992 288, 1995 1784 5050.

<sup>12</sup> RS 220.

<sup>13</sup> RS 172.010.31.

<sup>14</sup> These provisions correspond to Articles 122 and 164(1)(g) of the Constitution of April 18, 1999 (RS 101).

<sup>15</sup> RS 232.11.

<sup>16</sup> These provisions correspond to Articles 122 and 123 of the Constitution of April 18, 1999 RS (101).

<sup>17</sup> RS 232.14.

<sup>18</sup> These provisions correspond to Articles 122 and 123 of the Constitution of April 18, 1999 RS(101).