

How to read the Training Material

The Training Material consists of:

- A. A Power Point presentation
- B. A document with additional information (this document)
- C. A banner with the criteria used to create the principles of the Common Practice

This document provides information regarding the PowerPoint presentation as guidance for the speakers.

1. Each page includes an image of the relevant slide.
2. Below the image, relevant information regarding the respective slide is provided, in particular:
 - a) Background information
 - b) Reference to the specific section of the Common Practice
 - c) Specific recommendations provided in Common Practice
 - d) Relevant case-law and its use in the specific sections of the Common Practice

This information can be amended and/or reduced as the speaker sees fit for the particular audience.

Using as a basis the Common Practice document and the additional information provided, speakers can create the speaking notes within the PPT under their discretion.

Example of a standard page in the training instructions:

Slide 20|
Sources of disclosure on the internet: WEBSITES (e-commerce platforms). Relevant case-law



The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The abovementioned case provides insight on e-commerce websites, in particular:

The decision from the Federal Supreme Court of Germany **ZR 187/16 'Ballerina shoes'** claimed that a design embedded in products offered for sale online will, in principle, be considered as an effective act of disclosure.

The Working Group took into account these findings when discussing criteria on e-commerce sites, and established in the Common Practice [2.2.1.1 E-commerce platforms] that:

"Offering a product for sale in an e-shop or displaying it in an online catalogue generally constitutes an event of disclosure of a design incorporated in that product."

Terms of use

The CP10 Training Material has been produced by the European Intellectual Property Office ('EUIPO').

Users may modify or translate the training materials and any of its parts on condition that the EUIPO is credited as the provider of the original and that it is clearly stated that changes have been made to the original material, that the modified version has not been authorised by the EUIPO, and that the EUIPO shall not be responsible for the correctness of any such modified version. Any other reference to the EUIPO, and in particular its official logo, shall be removed from any such version.

The Training material and any of its parts, as well as any modification thereof, may be used for non-commercial teaching and training purposes only.

Table of contents

| Content | Slides |
|---|--------|
| Part I: Introduction | 1 – 8 |
| Part II: CP10 Common Practice: Assessing disclosure of designs on the internet | 9 – 85 |

Part I

Introduction

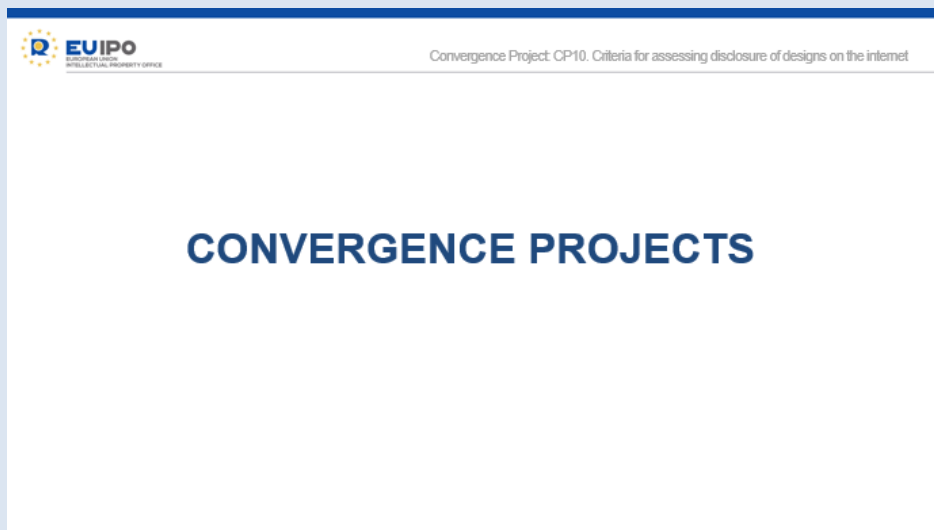
List of slides

| | |
|----------------|---|
| Slide 1 | Title |
| Slide 2 | Convergence Projects (title) |
| Slide 3 | Convergence Projects – Legal basis |
| Slide 4 | Convergence Analysis Project |
| Slide 5 | CP10 – Criteria for assessing disclosure of designs on the internet (title) |
| Slide 6 | CP10: Basis and timeline / CP10 Common Practice (title) |
| Slide 7 | CP10: Basis |
| Slide 8 | CP10: Project timeline |

Slide 1
Title

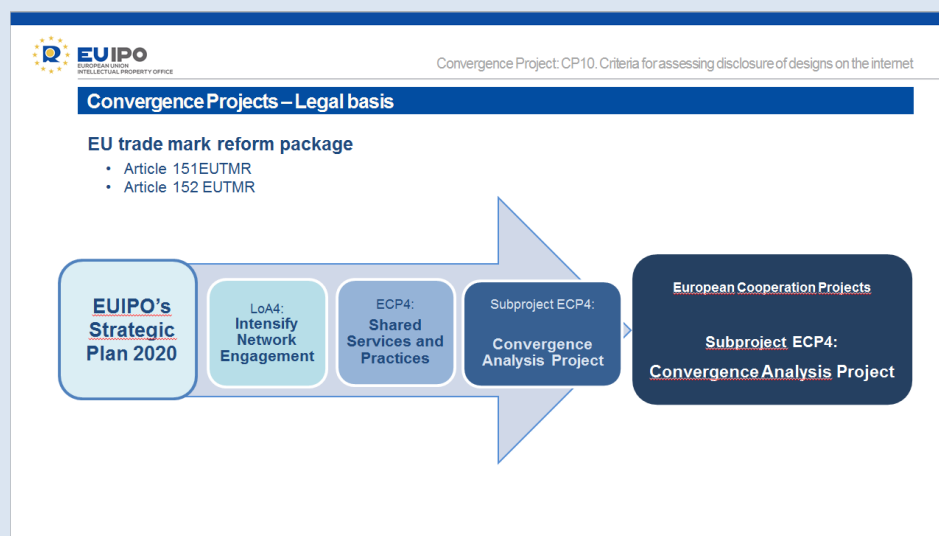


Slide 2
Convergence Projects



Slide 3

Convergence Projects – Legal basis



This slide provides high-level information regarding the Strategic Plan 2020 ('SP2020') and the Convergence Projects.

In December 2015, the European Parliament and Council adopted the EU trade mark reform package. The package contained two legislative proposals which aim to approximate the laws of the Member States relating to trademarks:

- 1) The new Regulation (EU) 2017/2001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark ('EUTMR'), and
- 2) The EU Trade Mark Directive no. 2015/2436 ('EUTMD')

Alongside new provisions on substantive and procedural matters, these texts established a stronger legal basis for the cooperative work:

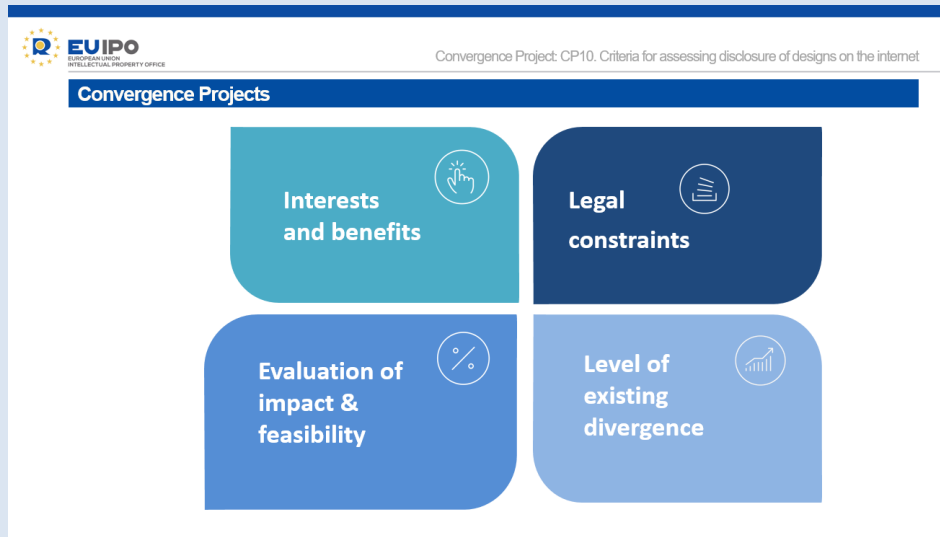
- Article 151 EUTMR: establishes the required cooperation with the MS IPOs to promote convergence of practices and tools in the field of trade marks and design;
- Article 152 EUTMR; explicitly indicates that this cooperation should include the development of common examination standards and the establishment of common practices.

Based on this legislative framework, in 2016, the EUIPO Management Board approved the launch of a suite of European Cooperation Projects ('ECPs'), established within the framework of the EUIPO's Strategic Plan 2020.

In the area of convergence, it included a project dedicated specifically to the identification and analysis of potential new harmonisation initiatives, i.e. the ECP4 Convergence Analysis Project.

Slide 4

Convergence Analysis Project

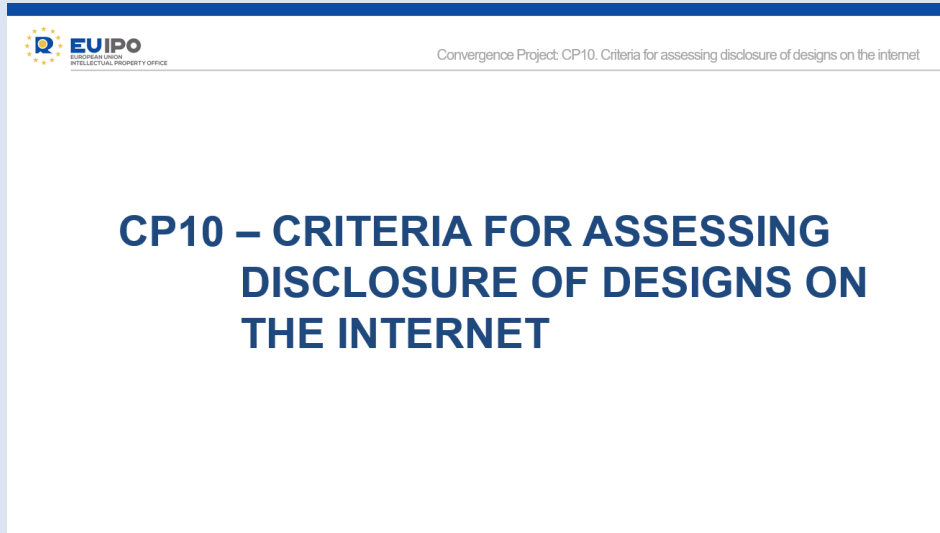


This slide provides high-level information regarding the Convergence Analysis Project.

Under the ECP4 Convergence Analysis Project, every six months a list of areas of practice where a convergence exercise may be beneficial is created. Questionnaires on each topic are sent out to the Intellectual Property Offices of the European Union Member States and the Benelux Office of Intellectual Property with the aim of collecting and mapping the MS IPOs' practices in each area, as well as gauging their interest in a possible convergence Project on the topics identified. The User Associations are also consulted about their interest in a convergence initiative in the same areas.

Slide 5

CP10 – Criteria for assessing disclosure of designs on the internet



This slide provides high-level information regarding CP10 project.

The second cycle of the ECP4 Convergence Analysis Project included an analysis of design practice. The results of these questionnaires were analysed by design experts in a Round Table meeting held on 27 February 2017 in Tallinn. The experts agreed on which options to propose to the Working Group members of the ECP4 Convergence Analysis Project as new design Projects and which design topics to propose for analysis in the following cycles.


In their meeting of March 2017, the Convergence Analysis Working Group members examined the findings of the second analysis cycle and the outcome of the Round Table meeting of design experts and, on that basis, recommended the launch of a new convergence Project:

CP10 Criteria for assessing disclosure of designs on the internet

- *The Working Group members concluded that this Project will be beneficial for MS IPOs and users, as it will bring clarity and consistency regarding the accepted formats for proving the disclosure of prior art on the internet.*

Slides 6 and 7


CP10: Basis and timeline

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

BASIS & TIMELINE

CP10 COMMON PRACTICE

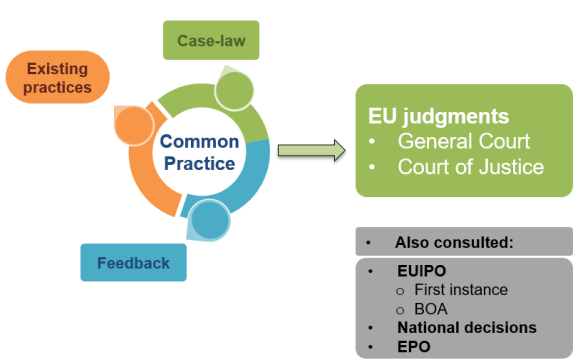
 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Basis

WG Members

- 6 MS IPOs
- 3 UAs
- EUIPO
- EPO



EU judgments

- General Court
- Court of Justice

Also consulted:

- **EUIPO**
 - First instance
 - BOA
- **National decisions**
- **EPO**

These slides provide an overview on the relevant project of the Convergence Project, CP10: Criteria for assessing disclosure of designs on the internet.

The CP10 Working Group is composed of representatives from six EU MS IPOs, the EUIPO and three UAs. A representative of the European Patent Office ('EPO') was also invited to take part in the working group, given their experience in relation to the 'state of the art' and internet disclosures in the field of patents.

The Project Working Group developed the Common Practice principles on the basis of existing practices, the feedback received from the stakeholders, as well as national, EUIPO (first instance and Boards of Appeal level) and EU case-law. The EPO case-law and guidelines were also taken into consideration.

The case-law cited within the Common Practice document is all EU judgements (which will be analysed in further detail throughout the presentation), in particular:

CASE LAW REFERENCED

- **Floor covering** [21/06/2018] General Court, T-227/16
(Section 2.5.2 Language and top-level domain)
- **Footwear** [14/04/2018] General Court, T-651/16
(Section 2.1 Key concepts, footnote 4)
(Section 2.5 Exceptions to the availability of the design, footnotes 22, 23)
(Section 2.5.3 Searchability, footnote 25)
- **Cases for mobile phones** [27/02/2018] General Court, T-166/15
(Section 2.2.3 Electronic mails, footnote 8)
(Section 2.4 Means for presenting the evidence obtained from the internet, footnote 16)
(Section 2.4.1 Printouts and screenshots, footnote 19)
- **Cases for portable computers** [18/11/2015] General Court, T-813/14
(Section 2.4.5 Statements in writing, footnote 21)
- **NAMMU (word)** [11/12/2014] General Court, T-498/13
(Section 2.4.5 Statements in writing, footnote 20)
- **Phials** [09/03/2012] General Court, T-450/08
(Section 2.4 Means for presenting the evidence obtained from the internet, footnotes 13 and 14)
(Section 2.4.5 Statements in writing, footnote 20)
- **Umbrellas** [21/05/2015] General Court, T-22/13 and T-23/13
(Section 2.1 Key concepts, paragraph (ii), footnote 6)
(Section 2.5 Exceptions to the availability of the design, footnote 24)
- **Gartenmöbel** [13/02/2014], Court of Justice of the European Union, C-479/12
(Section 2.1 Key concepts, paragraph (i), footnote 5)
- **Ornamentación** [16/12/2010], General Court, T-513/09
(Section 2.2.1.2 Online databases, footnote 7)
- **Doors (parts of)** [15/10/2015], General Court, T-251/14
(Section 2.2.1.2 Online databases, footnote 7)
- **Shower drainage channel** [21/09/2017], Court of Justice of the European Union, C-361/15 P and C-405/15 P
(Section 2.4 Means for presenting the evidence obtained from the internet, footnote 15)
(Section 2.4.1 Printouts and screenshots, footnote 18)
- **Karen Millen Fashions** [19/06/2014], Court of Justice of the European Union, C-345/13
(Section 2.4 Means for presenting the evidence obtained from the internet, footnote 15)

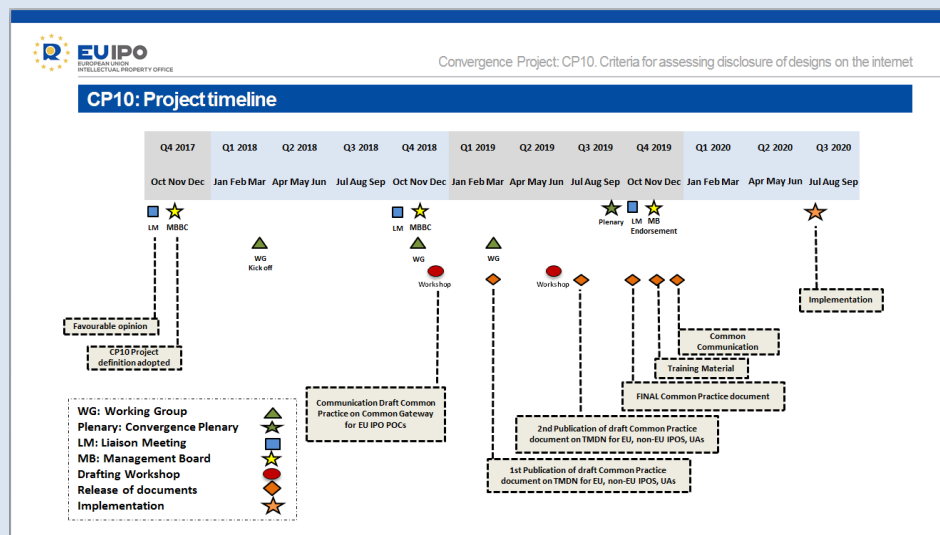
The case-law listed in the Common Practice document is limited to those issued from EU Courts. However, the Working Group members also consulted several national and EUIPO decisions when determining the common practice criteria and recommendations, in particular:

- **Fireplaces (indoor -)** [03/03/2016] EUIPO (ID), ICD No 9862
- **Jars** [23/11/2017] EUIPO (ID), ICD 10 388
- **Bracelets (jewellery), bracelets, bangles** [25/05/2016] EUIPO (BOA), R 62/2015-3
- **Locks** [04/01/2018] EUIPO (BOA), R 1750/2016-3
- **Packaging** [05/03/2013] EUIPO (BOA), R 1341/2013-3
- **Ballerina shoes** [11/01/2018] Federal Supreme Court of Germany I, ZR 187/16
- **Flushing systems for water closets** [08/03/2017] EUIPO (BOA) R 2112/2015-3
- **Soft drink bottle** [02/07/2015] EUIPO (BOA), R 25/2014-3
- **Doors** [20/12/2016] EUIPO (BOA), R 1849/2015-3

- **Plastic bottle, aluminium bottle, chemical bottle, general use bottle, fuel tank applications bottle** [27/10/2017] UKIPO, No. O-544-17
- **Wheel rims** [28/09/2017] EUIPO (BOA), R 1537/2016-3
- **Bathroom accessories** [02/02/2016] EUIPO (BOA), R 3146/2014-3
- **Tables** [12/02/2015] EUIPO (BOA), R 2301/2012-3
- **Service dog label** [12/12/2017] UKIPO, No. O-636-17
- **Boots** [30/11/2018] EUIPO (BOA), R 1629/2017-3
- **Footwear** [06/06/2016] EUIPO (BOA), R 853/2014-3
- **Christmas decorations** [17/01/2017] EUIPO (BOA), ICD 10 141
- **Animal clothing** [05/12/2016] EUIPO (ID), ICD 10 364
- **Sofas** [27/04/2018] EUIPO (ID), ICD 10 729
- **Mythos H.** [31/01/2018] Munich Regional Court I, 37 O 17964/17
- **Air fresheners** [21/02/2017] EUIPO (ID), ICD 10 422
- **Doors** [18/05/2017] EUIPO (ID), ICD No 10 113
- **Hedges, fences** [13/07/2015] EUIPO (ID), ICD 9822

Slide 8

CP10: Project timeline



This slide displays what Project's timeline was with regard to the planning and adoption process. It details the steps taken at relevant points in the Project lifecycle.

| Date | Action / Milestone |
|-------------|---|
| 2018 | |
| March | First Working Group meeting – Kick-off of the Project |
| October | Liaison Meeting - Presentation on the progress of the Project |
| November | Second Working Group meeting |
| December | 1 st Common Practice drafting Workshop |
| December | Communication of the draft CP to all the EU MS, Switzerland and Norway |
| 2019 | |
| March | Third Working Group meeting |
| March | Publication of draft Common Practice on TMDN for all EU IPOs, non-EU IPOs and UAs |
| June | 2 nd Common Practice drafting Workshop |
| September | Convergence Plenary |
| October | Liaison Meeting on Designs - Presentation on the common principles |
| | Development of the training materials |
| November | Adoption of the Common Practice and Common Communication by the MBBC |
| 2020 | |
| April | Implementation phase. |
| | Publication of CP10 Common Communication and Common Practice |

The draft Common Practice was submitted to two public consultations, after which the document including amendments, found general consensus among participants at the Convergence Plenary held on 12 September 2019.

The proposed Common Practice was then presented at the Liaison Meeting in October 2019, where it was acknowledged and recommended that it to be presented to the Management Board for adoption. In the following month, the Management Board adopted the Common Practice. Subsequently, the participating Offices may (on a voluntary basis) proceed to implement it.

Part II

CP10 Common Practice: Assessing disclosure of designs on the internet

CP10: Assessing disclosure of designs on the internet

List of slides

| | | | |
|-----------------|--|-----------------|--|
| Slide 9 | CP10 Common Practice (title) | Slide 49 | Means: Recommendations |
| Slide 10 | Introduction (title) | Slide 50 | Printouts and screenshots |
| Slide 11 | Scope | Slide 51 | Printouts and screenshots: Recommendations |
| Slide 12 | Key concepts | Slide 52 | Case-law |
| Slide 13 | Case-law | Slide 53 | Printouts and screenshots: Recommendations |
| Slide 14 | Key concepts | Slide 54 | Printouts and screenshots: Recommendations |
| Slide 15 | Key concepts | Slide 55 | Printouts and screenshots |
| Slide 16 | Case-law | Slide 56 | Printouts and screenshots: Recommendations |
| Slide 17 | Sources (title) | Slide 57 | Printouts and screenshots |
| Slide 18 | Sources | Slide 58 | Case-law |
| Slide 19 | Websites | Slide 59 | Printouts and screenshots: Recommendations |
| Slide 20 | Case-law | Slide 60 | Printouts and screenshots |
| Slide 21 | Case-law | Slide 61 | Printouts and screenshots: Recommendations |
| Slide 22 | Case-law | Slide 62 | Case-law |
| Slide 23 | Websites: Recommendations | Slide 63 | Printouts and screenshots |
| Slide 24 | Apps | Slide 64 | Printouts and screenshots: Recommendations |
| Slide 25 | Apps: Recommendations | Slide 65 | Case-law |
| Slide 26 | E-mails | Slide 66 | Images and videos |
| Slide 27 | E-mails: Recommendations | Slide 67 | Images and videos: Recommendations |
| Slide 28 | Case-law | Slide 68 | Metadata: Recommendations |
| Slide 29 | File sharing | Slide 69 | URL addresses and hyperlinks: Recommendations |
| Slide 30 | File sharing: Recommendations | Slide 70 | Statements in writing: Recommendations |
| Slide 31 | Establishing the relevant date of disclosure (title) | Slide 71 | Case-law |
| Slide 32 | Establishing relevant date | Slide 72 | Exceptions (title) |
| Slide 33 | Tools | Slide 73 | Exceptions |
| Slide 34 | Search engines and web archiving services | Slide 74 | Case-law |
| Slide 35 | Search engines and web archiving services | Slide 75 | Exceptions |
| Slide 36 | Search engines and web archiving services | Slide 76 | Passwords and payments |
| Slide 37 | Search engines and web archiving services: Recommendations | Slide 77 | Case-law |
| Slide 38 | Case-law | Slide 78 | Languages and top-level domains |
| Slide 39 | Timestamping | Slide 79 | Case-law |
| Slide 40 | Timestamping | Slide 80 | Case-law |
| Slide 41 | Timestamping | Slide 81 | Searchability |
| Slide 42 | Case-law | Slide 82 | Geo-blocking |
| Slide 43 | Timestamping: Recommendations | Slide 83 | Confidentiality |
| Slide 44 | Forensic software tools: Recommendations | Slide 84 | Exceptions: Recommendations |
| Slide 45 | Means (title) | Slide 85 | End of presentation |
| Slide 46 | Means | | |
| Slide 47 | Case-law | | |
| Slide 48 | Case-law | | |

Introduction

Due to the growth of e-commerce and the rise in trade operations conducted over the internet, the disclosure of designs is increasingly made via this channel of communication.

The CP10 Project was launched in 2017 with the objective to bring clarity, consistency and harmonisation regarding the assessment of evidence for proving disclosure of designs on the internet.

The result is the set of criteria on the assessment of disclosure of designs on the internet and the respective recommendations. The Common Practice covers aspects from types of evidence acceptable for presenting the information obtained on the internet to specific recommendations related to the presentation of evidence obtained from social media websites, online media, application ('apps') or other online sources.

It follows the general presumption that a design shall be deemed to have been made available to the public if it has been published following registration, or exhibited, used in trade or otherwise disclosed and also takes into account the existing exceptions to the availability of a design on the internet.

In practical terms, the Common Practice delivers the criteria for assessing disclosure of designs on the internet and provides recommendations on the following aspects:


- Possible sources of design disclosure on the internet
- Types of evidence used for proving disclosure on the Internet
- Different means for establishing the date of disclosure
- The exceptions to the availability of designs on the internet

When drafting the document, emerging and future technologies have been taken into consideration where this was possible.

The Common Practice is intended to be applicable irrespective of the specific proceedings (e.g. ex officio examinations of novelty, invalidity proceedings) or the status of the design (i.e. registered or unregistered).

Therefore, it might also serve as guidance for designers or other right holders when disclosing their designs on the internet or proving such disclosure.

Slide 9 Common Practice


 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


INTRODUCTION

COMMON PRACTICE

Slide 10 Introduction

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet




Objective of this document

Background of the project

Scope of the Common Practice

Slide 11

Project scope


 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Scope of the Common Practice

Provide criteria and recommendations on:

1. Different sources of disclosure on the internet
2. Establishing the relevant date of disclosure
3. Means for presenting the evidence obtained from the internet
4. Exceptions to the availability of designs on the internet

 **OUT of scope**
Assessment of 'circles specialised in the sector concerned'

This slide lays out the key objectives of the Common Practice document.

The CP10 Common Practice document delivers the criteria for assessing disclosure of designs on the internet and provides recommendations on the following aspects:

- possible sources of design disclosure on the internet
 - types of evidence used for proving disclosure on the internet
 - means for establishing the date of disclosure
 - exceptions to the availability of designs on the internet
- ***The Common Practice is intended to be applicable irrespective of the specific proceedings (e.g. ex officio examinations of novelty, invalidity proceedings) or the status of the design (i.e. registered or unregistered).***

The assessment of the concept of 'circles specialised in the sector concerned' provided in Article 6 of the Directive on the Legal Protection of Designs 98/71/EC is out of scope of this project.

Slide 12

CP10: Introduction – Key concepts

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Introduction – Key concepts

Two-step test: design made available to the public:

1 if ...
published following registration or otherwise, or exhibited, used in trade or otherwise disclosed,

2 except ...
where these events could not reasonably have become known

The “key concepts” slides are aimed at explaining the key concepts referred to throughout the Common Practice document.


When assessing disclosure of a design, regardless of whether a disclosure took place on the internet or by any other means, the **two-step test** must be taken into consideration.

Namely, Article 6 of the Designs Directive establishes that a design shall be deemed to have been made available to the public

- (i) **if** it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed
- (ii) **except** where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union

Slide 13

CP10: Introduction – Key concepts. Relevant case-law

 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Introduction – Key concepts. Relevant case-law

Disclosure outside the EU



CP10

[T-651/16](#) of 14/03/2018 ('Footwear'), § 48
General Court

General presumption: design made available if event of disclosure is established, unless established exceptions apply

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The requirement to carry out the two-step test has also been established in EU case-law. By way of example, the General Court upheld this requirement in [Case T-651/16 'Footwear'](#).

It follows in its judgment that the Court should therefore examine whether the evidence produced by the intervener showed that the contested design:


- (i) had been disclosed before the relevant period started, and
- (ii) whether the applicant was able to demonstrate that the disclosure events claimed by the intervener could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union.

This finding can be found reflected in the **Common Practice** document [2.1 Key concepts] as follows:

“Namely, a design shall be deemed to have been made available to the public (i) if it has been published following registration or otherwise, or exhibited, used in trade or otherwise disclosed, (ii) except where these events could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating within the European Union.”

Slide 14

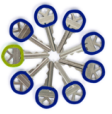
CP10: Introduction – Key concepts

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE


Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Introduction – Key concepts


Exceptions



Confidentiality



Designer/successor in title/third
person during grace period



Abuse

The “key concepts” slides are aimed at explaining the key concepts referred to throughout the Common Practice document.

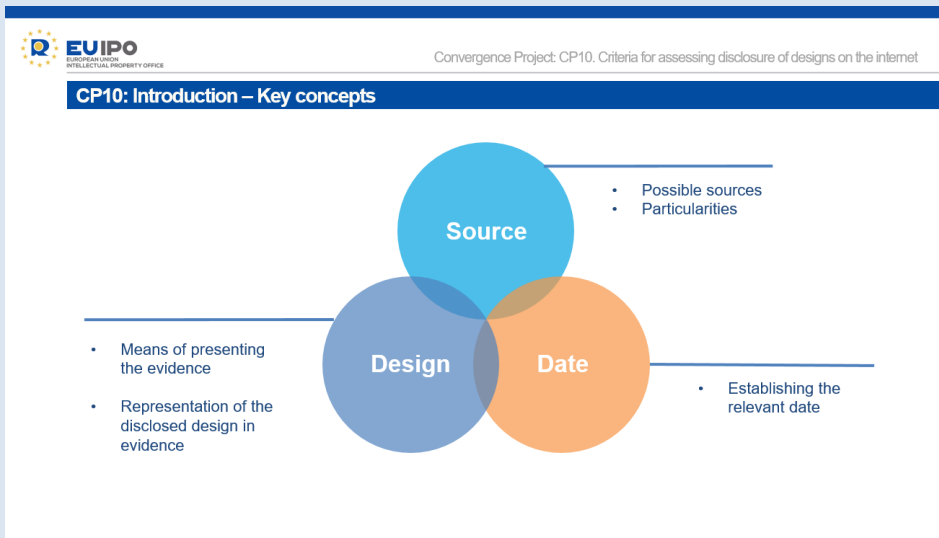
Once disclosure is proven, there is a presumption that such a design has been available to the public, and only under certain circumstances would these events of disclosure not be considered to reasonably become known to the circles specialised in the sector concerned, operating within the European Union (otherwise known as exceptions).

These exceptions can indicate that a design has not been made available to the public, in particular when the design is disclosed:

- (i) under the condition of confidentiality
- (ii) by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer or his successor in title, during the 12-month grace period preceding its date of filing or priority
- (iii) as a consequence of an abuse against the designer

Slide 15

CP10: Introduction – Key concepts



The “key concepts” slides are aimed at explaining the key concepts referred to throughout the Common Practice document.

When assessing the event of disclosure of a design on the internet, the following three key aspects should be taken into consideration:

- (i) The source where a design has been disclosed on the internet
- (ii) The design disclosed
- (iii) The date when the design was disclosed on the internet

(i) *The source where a design has been disclosed on the internet*

In general, a design can be disclosed anywhere in the world, including the internet. When assessing disclosure of a design from an internet source, the following aspects should be taken into account:

- possible sources where the design was disclosed
- particulars of said source

(ii) *The design disclosed*

The internet provides numerous possibilities to prove disclosure of a design. In this regard, the following aspects should be taken into consideration:

- means of presenting evidence obtained from the internet (e.g. printouts, hyperlinks, affidavits, etc.);
- representation and identification of the disclosed design in online evidence

(iii) *The date when the design was disclosed on the internet*


When assessing disclosure of the design on the internet, it is crucial to establish the date when it was made available to the public (the ‘relevant date’).

Proving the relevant date might raise a number of issues, including:

- how to establish it when no date is indicated in the internet source;
- which is the relevant date of disclosure when evidence shows several dates;

Slide 16

CP10: Introduction – Key concepts. Relevant case-law

 EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Introduction – Key concepts. Relevant case-law

Disclosure outside the EU

CP10

C-479/12 of 13/02/2014
(‘Gartenmöbel’), § 33
Court of Justice of the European Union

A design can be disclosed anywhere in the world, including the internet.



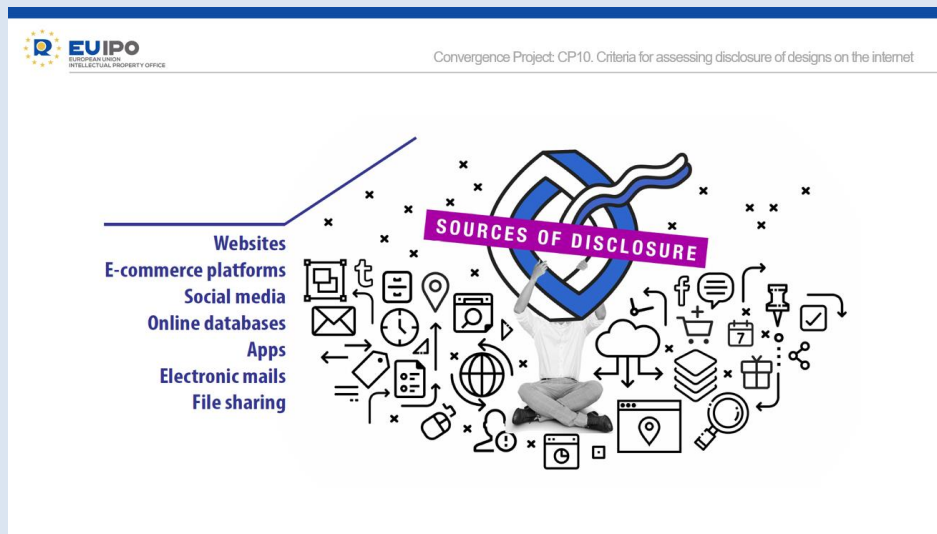
The ‘relevant case-law’ slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

Going back to the first abovementioned key aspect ‘sources’, the CP10 Working Group took into account [Case C-479/12 – Gartenmöbel](#), as this judgment highlighted that, in general, a design can be disclosed anywhere in the world.

The Working Group applied this finding analogously to the internet in the Common Practice document [2.1 Key concepts (i) The source where a design has been disclosed on the internet] as follows:

“In general, a design can be disclosed anywhere in the world, including the internet.”

Slide 17 Sources



Slide 18 CP10: Common Practice Principles – Sources

The slide content is presented on a smartphone screen. At the top, it reads 'CP10: Common Practice Principles' and 'Sources of disclosure on the internet'. The main text on the screen is:

Most common internet sources:

- Websites
- Apps
- Electronic mails
- File-sharing

The top left corner of the slide contains the EUIPO logo and the text 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet'.

This slide aims to present the most common sources of disclosure on the internet.

In terms of disclosure of a design on the internet, the most common sources are:

- websites
- apps
- electronic mails ('e-mails')
- file-sharing

The way of presenting the information obtained from the aforementioned sources might vary and thus they must be addressed separately.

Slide 19

Sources of disclosure on the internet: WEBSITES

The slide features the EUIPO logo (European Union Intellectual Property Office) in the top left corner. The main title is 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet'. Below this, a blue header reads 'CP10: Common Practice Principles', followed by a white box with a blue border containing the text 'Sources of disclosure on the internet'. A vertical teal bar on the left side of the content area is labeled 'Websites'. The main content area lists the following types of websites:

- E-commerce platforms
- Online databases
- Social media

This slide refers to the specific source of disclosure: Websites. It lists the types of websites referred to in the Common Practice (although the principles and criteria are not applicable only to these).

The following types of websites are highlighted in the CP10 Common Practice:

- E-commerce platforms
- Online databases
- Social media

The recommendations in this section could also be analogously applicable to other websites not specifically addressed in the Common Practice.

E-commerce platforms

In practice, designs are made available to the public by displaying them on websites dedicated to e-commerce. Offering a product for sale in an e-shop or displaying it in an online catalogue generally constitutes an event of disclosure of a design incorporated in that product.

Online databases

For the purpose of this document, online databases are understood as those containing information on the intellectual property rights relevant for assessing disclosure of designs. These databases can be administered by public authorities or private entities.

Disclosure from a publication of a design in a database administered by public authorities cannot, in principle, be refuted by relying on the exceptions to availability. On the other hand, the assessment of disclosure that took place in a database administered by a private entity is no different from that applicable to websites in general.

Social media

Social media is widely used by designers and businesses to share their work and present new products. When assessing disclosure of designs on social media sites, aspects such as their purpose of nature might be relevant.

Slide 20

Sources of disclosure on the internet: WEBSITES (e-commerce platforms). Relevant case-law

EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Sources of disclosure on the internet. Relevant case-law


E-commerce platforms

CP10

Websites

ZR 187/16 of 11/01/2018 ('Ballerina shoes'), § 26 - 27
Federal Supreme Court of Germany I

Offering a product for sale in an e-shop = disclosure



The 'relevant case-law' slides list case-law taken into account when drafting the Common Practice Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The abovementioned case provides insight on e-commerce websites, in particular:


The decision from the Federal Supreme Court of Germany **ZR 187/16 'Ballerina shoes'** claimed that a design embedded in products offered for sale online will, in principle, be considered as an effective act of disclosure.

The Working Group took into account these findings when discussing criteria on e-commerce sites, and established in the Common Practice [2.2.1.1 E-commerce platforms] that:

“Offering a product for sale in an e-shop or displaying it in an online catalogue generally constitutes an event of disclosure of a design incorporated in that product.”

Slide 21

Sources of disclosure on the internet: WEBSITES (online databases). Relevant case-law

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles


Sources of disclosure on the internet. Relevant case-law

Online databases

Websites


CP10

[T-251/14](#) of 15/10/2015 ('Doors (part of)'), § 22
General Court



Publication of a design in an online database administered by public authorities constitutes disclosure

[T-513/09](#) of 16/12/2010 ('Ornamentación'), § 20
General Court




The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

Both General Court '**Doors**' and '**Ornamentación**' ([T-251/14](#) and [T-513/09](#), respectively) findings referred to in this slide as well the EUIPO guidelines establish that information disclosed in online databases is considered publicly available as of the date the information was published. The section regarding disclosure of designs in online databases in the Common Practice document [2.2.1.2 Online databases] follows this principle, in particular, by establishing that:

“Publication of a design in a database administered by public authorities constitutes disclosure which, in principle, cannot be refuted by relying on the exceptions to the availability, addressed in Section 2.5 of this document. This includes, for example, online publications of design, trade mark or patent registrations by IPOs.”

Slide 22

Sources of disclosure on the internet: WEBSITES (social media). Relevant case-law

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Sources of disclosure on the internet. Relevant case-law

Social media

CP10

Websites


[ICD 10 141](#) of 17/01/2017 ('Christmas decorations'),
pg. 3
EUIPO

[ICD 10 364](#) of 05/12/2016 ('Animal clothing'),
pg. 3
EUIPO

[ICD 10 729](#) of 27/04/2018 ('Sofas'), pg. 6
EUIPO

37 O 17964/17 of 31/01/2018 ('Mythos H.'),
§ 27 - 28
Munich Regional Court I

- Social media is widely used by designers to share their work and products
- When printout/screenshot does not include all relevant information - recommended to submit additional evidence
- Provide information regarding the purpose or the nature of the relevant social media services



The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The Working Group consulted the following case-law available regarding social media:

In case [ICD 10 141](#) '**Christmas decorations**', screenshots demonstrating a YouTube video displaying the relevant design were submitted. The Invalidity Division upheld that YouTube is a freely accessible website for video sharing, and companies often use this website to promote their products to consumers.

In both cases [ICD 10 364](#) '**Animal clothing**' and [ICD 10 729](#) '**Sofas**', the Invalidity Division upheld that it does not consider the disclosure on social media portals such as Facebook as sufficient evidence if not further supported by other pieces of evidence.

In decision **37 O 17964/17** of 31/01/2018 '**Mythos H.**' from the Munich Regional Court upheld that a closed Facebook group may be qualified as public, given certain circumstances take place, such as if the circle of persons is not clearly defined and if they are not personally connected to each other.

In line with the above findings, CP10 establishes that when assessing disclosure of designs on various social media services, aspects such as its purpose or nature might be relevant, and the Common Practice document [2.2.1.3 Social media] states that:

“social media is widely used by designers to share their work and also by businesses to present new products, etc.”

However, “when assessing evidence of disclosure of a design from certain websites (e.g. online shops, social media sites), the information regarding the purpose and the main characteristics of the website in question could be relevant for assessing the availability of the design.”

Slide 23

Sources of disclosure on the internet: WEBSITES: Recommendations

The slide features the EUIPO logo (European Union Intellectual Property Office) and the text 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet'. Below this is a blue header 'CP10: Common Practice Principles' and a sub-header 'Sources of disclosure on the internet'. A vertical teal bar on the left is labeled 'Websites'. The main content is a list of four recommendations under the heading 'Recommendations'.

Recommendations

- 01** Present website evidence through a printout or a screenshot
- 02** Evidence should display clear image of the design, date of disclosure and URL address
- 03** Printouts: printing date assumed the date of disclosure, unless earlier relevant date established
- 04** Submit information regarding the purpose and the main characteristics of the website in question


This slide lists the recommendations established in the Common Practice document regarding websites.

In view of the above, the Common Practice document provides the following **recommendations** regarding websites as a source of disclosure:

- ***The evidence taken from a website should be presented by creating a printout or a screenshot of the relevant information presented therein.***
- ***The evidence submitted should display a clear image of the relevant design revealing its features, the date of disclosure and the URL address.***
- ***If the information is obtained through a printout, its printing date will be assumed to be the date of disclosure, unless another earlier date can be established from the contents of the document or from any other evidence.***
- ***When assessing evidence of disclosure of a design from certain websites (e.g. online shops, social media sites), the information regarding the purpose and the main characteristics of the website in question could be relevant for assessing the availability of the design.***

Slide 24

Sources of disclosure on the internet: APPS

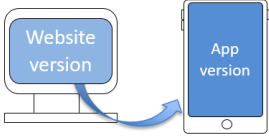
 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Sources of disclosure on the internet

Apps



Setbacks

- Same relevant content
- Difference in means to present the evidence

- Difficulty obtaining proof of disclosure through app when information displayed is temporary
- Limited capability of web archiving services to capture historical data from apps
- Limited possibility to create a printout version

This slide refers to the specific source of disclosure: Applications, or 'apps' and lists the possible setbacks of proving disclosure through this source.

In terms of disclosure of designs, apps and websites can provide the same relevant content (i.e. date, design) in a relatively similar manner. Therefore, the main difference between apps and websites lies not in the content itself, but in the means of presenting the relevant information.

Proving disclosure of designs in apps can be burdensome, in particular because of:

- the difficulty in obtaining proof that a design has been disclosed through an app when the information displayed is temporary and might not be retrievable after a certain period of time
- the limited capability of web archiving services to capture historical data from apps
- the limited possibility to create a printout version of the information displayed in apps

Slide 25

Sources of disclosure on the Internet: APPS: Recommendations

The slide features the EUIPO logo (European Union Intellectual Property Office) and the title 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet'. Below this, a blue header reads 'CP10: Common Practice Principles', followed by a sub-header 'Sources of disclosure on the internet'. A vertical teal bar on the left is labeled 'Apps'. The main content is titled 'Recommendations' and lists four numbered points:

- 01 Extract the relevant information from website version (when available)
- 02 If website version not available → screenshot from mobile device
- 03 Screenshot date assumed date of disclosure, unless earlier relevant date established
- 04 Provide information regarding the purpose and the main characteristics of the app

This slide refers to the specific source of disclosure: Applications, or 'apps'. In particular, it lists the recommendations provided regarding this source.

Taking into account the abovementioned criteria provided by the Common Practice document, the **recommendations** on apps as a source of disclosure are:

- *When apps also have a website version, it is advisable to extract the relevant information from the website.*
- *If a website version is not available, a screenshot from a mobile device can be used as evidence.*
- *When the relevant information is presented in a screenshot obtained from an app, the date when the screenshot was taken will be assumed to be the date of disclosure, unless an earlier date can be established from the content of the screenshot itself or any other supporting evidence.*
- *When assessing evidence of disclosure of designs deriving from certain apps (e.g. those used for shopping, social media, etc.), the information regarding the purpose and the main characteristics of the app in question may be relevant for assessing the availability of the design.*

Slide 26

Sources of disclosure on the internet: ELECTRONIC MAILS

The slide features a blue header with the EUIPO logo on the left and the text 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet' on the right. Below the header is a dark blue bar with 'CP10: Common Practice Principles' in white. Underneath is a light blue bar with 'Sources of disclosure on the internet' in white. A vertical teal bar on the left side of the main content area is labeled 'E-mails'. The main content area contains two paragraphs of text.

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Sources of disclosure on the internet

E-mails

Traditionally, e-mails considered private correspondence. However, if aimed to **promote products**, it cannot be considered private correspondence

What should be taken into consideration is the **content** of the e-mail, and **not its form**

This slide refers to the specific source of disclosure: Electronic mails, or 'e-mails'. It introduces this section, listing key characteristics of this source.

Traditionally, an e-mail is perceived as private correspondence. However, if it is aimed to promote a product, including to a limited circle of persons, it should not be considered as such.

Therefore, when assessing disclosure of designs through e-mail communication, it is the content of an e-mail that should be considered and not its form.

The standard data contained in e-mails could provide valuable indications for the assessment of disclosure of designs. For example, the 'sent' or 'received' date could establish when the event of disclosure took place and the recipient addresses could help to identify whether the communication was targeted to the members of the specialised circles concerned.

Slide 27

Sources of disclosure on the internet: ELECTRONIC MAILS: Recommendations

The slide content is as follows:

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Sources of disclosure on the internet

E-mails

Recommendations

- 01** E-mail evidence should include:
 - representation of design
 - clear indication of relevant date
- 02** Indicators of circle specialised in the sector concerned: recipients of the e-mail and its purpose
- 03** Veracity of the confidentiality claim: keep in mind the contents, recipients and purpose of an e-mail


This slide refers to the specific source of disclosure: e-mails, in particular, it lists the recommendations provided regarding this source.

In view of the above criteria regarding e-mails, the Common Practice document established the following **recommendations** regarding e-mails as a source of disclosure:

- *The evidence of the e-mail communication should show a representation of a design.*
- *The date relevant for assessing disclosure should be clearly indicated, especially when the e-mail contains several dates.*
- *The recipients of the e-mail communication and its purpose should be taken into account as this might serve as an indication as to whether it was addressed to the circles specialised in the sector concerned.*
- *If the e-mail contains a confidentiality claim, its veracity should be assessed considering the contents, recipients and purpose of the e-mail.*

Slide 28

Sources of disclosure on the internet: ELECTRONIC MAILS- Relevant case-law

 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Sources of disclosure on the internet. Relevant case law

E-mails

CP10

[T-166/15](#) of 27/02/2016 ('Cases for mobile phones'), § 93
General Court



- When assessing disclosure through e-mails, take into account the content (not form)
- E-mail promoting products not private correspondence

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

In [Case T-166/15](#) ('Cases for mobile phones'), the General Court upheld that e-mails which include information or documents aimed to commercially promote products cannot be considered as 'private correspondence'. The content can determine the intention of the sender of the e-mail (if they wanted to commercially promote a product or if the e-mail was, in fact, a private correspondence).

Following these findings, the CP10 Common Practice document [2.2.3 Electronic mails] states that:

“An e-mail which aims to promote a product, included to a limited circle of persons, should not be considered as private correspondence.” and

“[Therefore,] when assessing disclosure of designs through an e-mail communication, it is the content of the e-mail that should be considered and not its form.”

Slide 29

Sources of disclosure on the internet: FILE SHARING

The slide features the EUIPO logo (European Union Intellectual Property Office) in the top left corner. The main title is 'CP10: Common Practice Principles' and the subtitle is 'Sources of disclosure on the internet'. A vertical teal bar on the left side is labeled 'File Sharing'. The main text states: 'File incorporating design uploaded to a file sharing system = disclosure (in principle)'. Below this, it lists '2 key aspects:':

- link between the contents of the file containing a design and the file's reference in the file sharing system
- relevant date

This slide refers to the specific source of disclosure: File sharing. It introduces this section, listing key characteristics of this source.

Making a file that incorporates a design available through a file sharing system, in principle, constitutes an event of disclosure.

Two of the most common services for file sharing have been considered, namely peer to peer (P2P) and file hosting.

When assessing disclosure of designs through file sharing systems, two key aspects should be taken into consideration:

- establishing the link between the contents of the file containing a design and the file's reference in the file sharing system
- establishing the relevant date

When proving disclosure of a design through file sharing, merely submitting a printout from the platform displaying the indexed file would not be sufficient. The link between the index of the file and its content will need to be established.

In general, the date when the file has been made available for sharing would be considered as the date of disclosure. In the case that the date when the file has been made available is not indicated, the date when it has actually been downloaded would serve as the relevant date.

Slide 30

Sources of disclosure on the internet: FILE SHARING: Recommendations

EUIPO
EUROPEAN UNION
INTELLIGENT PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Sources of disclosure on the internet

File Sharing

Recommendations

- 01** If evidence includes disclosure via file sharing, submit additional evidence
- 02** Relevant date could be date of the upload of a file or when file was actually downloaded
- 03** Use computer-generated timestamping or public notary services to prove link between contents of a file and its indexing reference


This slide refers to the specific source of disclosure: file sharing, in particular, it lists the recommendations provided regarding this source.

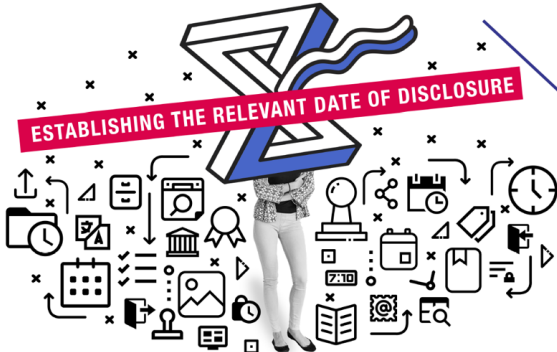
Recommendations:

- *When proving disclosure through file sharing, it is advisable to submit any additional evidence when available, such as e-mails informing users of a new upload, etc.*
- *When the date of the upload of a file to the platform is not available, the relevant date could be proven by showing the date when the file was actually downloaded by a user.*
- *In order to prove the link between the contents of a file and its indexing reference in the platform, computer-generated timestamping or public notary services could be used.*

Slide 31

Establishing the relevant date of disclosure


 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet



Dates provided by search engines and website archiving services
Forensic software tools
Computer-generated timestamp information

Slide 32

Establishing the relevant date of disclosure

 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Establishing relevant date of disclosure

Necessary criterion for assessing disclosure

Establishment of the date of disclosure:
i.e. *the date when the design was made available to the public*

This section provides

Non-exhaustive list of tools to help determine relevant date when design made available on the internet


This slide provides an introduction on the criteria on how to establish the relevant date of disclosure from the abovementioned sources.

Another necessary criterion for assessing disclosure of a design is the establishment of the date of disclosure; that is, the date on which the design has been made available to the public.

The previous section on the sources of disclosure on the internet addresses aspects to be taken into consideration when establishing the relevant date from each specific source where the disclosure event can occur. In turn, this section provides a non-exhaustive list of tools which can help to determine the date when a design has been made available on the internet.

Slide 33

Establishing the relevant date of disclosure – Tools

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE


Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

Establishing the relevant date of disclosure

Establishing relevant date of disclosure

Tools:

- 1 Search engines and web archiving services
- 2 Computer-generated timestamps
- 3 Software forensic tools



This slide provides an introduction on the criteria on how to establish the relevant date of disclosure from the abovementioned sources. In particular, it lists the tools covered by the Common Practice document.

The tools reviewed in the Common Practice document are:

- Search engines and web archiving services
- Computer-generated timestamps
- Forensic software tools

Slide 34

Criteria on how to establish the relevant date of disclosure from these sources: SEARCH ENGINES AND WEBSITE ARCHIVING SERVICES

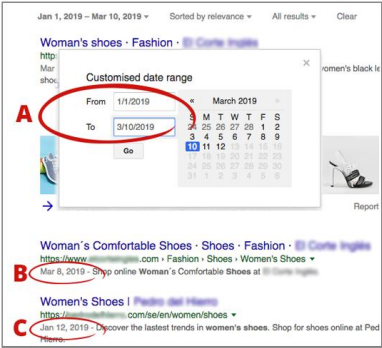
EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Establishing relevant date of disclosure

Search engines allow users to search for the information within a specific time frame



The screenshot shows a search engine interface for 'Woman's shoes · Fashion'. A 'Customised date range' dialog box is open, with a red circle labeled 'A' around the date range selection area. The dialog shows 'From 1/1/2019' and 'To 3/10/2019'. Below the dialog, search results are listed, with a red circle labeled 'B' around the date 'Mar 8, 2019' and another red circle labeled 'C' around the date 'Jan 12, 2019'.

This slide provides an introduction on establishing the relevant date via search engines and website archiving services.


The date of disclosure can be established using the relevant data provided by search engines and website archiving services.

Search engines allow users to search for the information within a specific time frame (see indication 'A' in the example). The obtained results may constitute a preliminary indication as to when the respective content was available online.

However, in order to prove disclosure, the relevant date should be corroborated by further information; ideally the dates contained in the contents of the particular websites listed in the search results.

Slide 35

Criteria on how to establish the relevant date of disclosure from these sources: SEARCH ENGINES AND WEBSITE ARCHIVING SERVICES

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

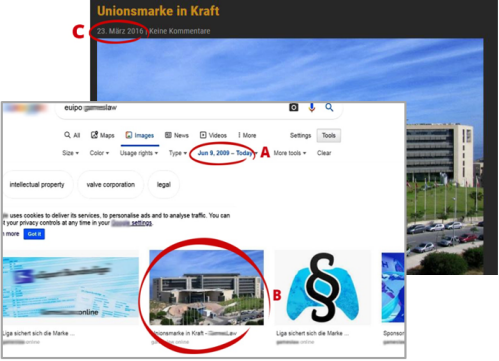
Establishing relevant date of disclosure

Search engines and website archiving services

Setbacks

Established time frame search ('A') might give a result of when the site was cached ('B') and not the date when the content was published ('C')

Use with caution!



This slide is a continuation from the previous slide, and lists the setback of using search engines to prove the relevant date of disclosure.

When searching within a period of time (see indication 'A' in example), the obtained date might not necessarily be the date when the relevant content was published (see indication 'C' in example), but the date the tool cached or captured the particular website (see indication 'B' in example).

Therefore, search engines should be relied on with caution.

Slide 36

Criteria on how to establish the relevant date of disclosure from these sources: SEARCH ENGINES AND WEBSITE ARCHIVING SERVICES

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

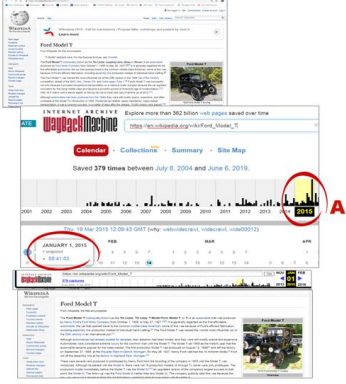
CP10: Common Practice Principles

Establishing relevant date of disclosure

Search engines and website archiving services

Website archiving services (e.g. "WayBack Machine") can help prove date of disclosure.

- Access to archived websites or parts thereof as they appeared at a certain point in time ('captures') ('A')
- Possibility to view and navigate them




This slide explains the benefits of using website archiving services (instead of search engines).

On the contrary, website archiving services (such as the "WayBack Machine") can serve as a valuable tool for proving the date of disclosure.

They provide access to archived websites or parts thereof as they appeared at a certain point in time ('captures') (see indication 'A' in example). Moreover, website archives also provide the possibility to view and navigate them.

Slide 37

Criteria on how to establish the relevant date of disclosure from these sources: SEARCH ENGINES AND WEBSITE ARCHIVING SERVICES: Recommendations


 EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Establishing relevant date of disclosure

Search engines and website archiving services

 **Setbacks**

- limited access to website content
- content removal
- sporadic updates

Recommendations

- 01** Use website archiving services instead of search engine services
- 02** Separate parts of the archived website might relate to different dates

This slide lists setbacks of using website archiving services to prove the relevant date of disclosure as well as the recommendations.

Nevertheless, when assessing the evidence obtained from website archiving services the following aspects should be taken into account:

- limited access to website content. For example, it might not be possible to archive the password-protected content or website owners might block archiving systems from accessing its contents (i.e. Robot Exclusion)
- content removal. Website owners have a right to request removal of the archived contents
- sporadic updates. Websites are not archived every time they are updated or changed, but only when web crawlers visit them. This, in turn, depends on the website's popularity.

Recommendations:

- ***For the purposes of proving disclosure of designs, it is advisable to use website archiving services instead of search engine services.***
- ***It is important to take into account that, when navigating the archived website, separate parts of such website might relate to different dates.***

Slide 38

Criteria on how to establish the relevant date of disclosure from these sources: SEARCH ENGINES AND WEBSITE ARCHIVING SERVICES. Relevant case-law

The slide content is as follows:

CP10: Common Practice Principles
Establishing relevant date of disclosure. Relevant case-law

CP10

- [No. O-544-17](#) of 27/10/2017 ('plastic bottle, aluminum bottle, chemical bottle, general use bottle, fuel tank applications bottle'), § 38
UKIPO
- [R 25/2014-3](#) of 02/07/2015 ('Soft drink bottle'), § 29
- [R 1537/2016-3](#) of 28/09/2017 ('Wheel rims'), § 22
- [R 2112/2015-3](#) of 08/03/2017 ('Flushing systems for water closets'), § 42
- [R 1849/2015-3](#) of 20/12/2016 ('Doors'), § 24
- [R 1341/2013-3](#) of 05/03/2015 ('Packaging'), § 18
EUIPO

Web archiving services is a valuable tool for proving the date of disclosure.

However, in order to prove disclosure using this tool, the relevant date should be corroborated by further information.

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The cited EUIPO (BOA) decisions (i.e. [R 25/2014-3](#) ('Soft drink bottle'), [R 1537/2016-3](#) ('Wheel rims'), [R 2112/2015-3](#) ('Flushing systems for water closets'), [R 1849/2015-3](#) ('Doors'), [R 1341/2013-3](#) ('Packaging')) found that, in spite of being overall accepted evidence, printouts or screenshots from the WayBack Machine are usually not considered to be sufficient in itself. This can be due to several factors, including those listed in the Common Practice document [2.3.1 Dates provided by search engines and website archiving services], i.e.:

- *limited access to website content*
- *content removal*
- *sporadic updates*


In the case before the UKIPO (i.e. [No. O-544-17](#) of 27/10/2017 ('plastic bottle, aluminum bottle, chemical bottle, general use bottle, fuel tank applications bottle')), the applicant tried to rebut evidence which consisted in a printout from WayBack machine claiming that its probative value should not be admitted. However, the UKIPO denied this statement, and even came to recognize that evidence from this archiving service is routinely accepted in IP proceedings in the UK. Such recognition can also be found in the abovementioned EUIPO BOA 'Soft drink bottle' decision of 2 July 2017.

With this in mind, the Common Practice [2.3.1 Dates provided by search engines and website archiving services] establishes that:

"(...) web archiving services (such as the "WayBack Machine") can serve as a valuable tool for proving the date of disclosure. (...) However, in order to prove disclosure, the relevant date should be corroborated by further information, ideally the dates contained in the contents of the particular website listed in the search results".

Slide 39

Criteria on how to establish the relevant date of disclosure from these sources: COMPUTER-GENERATED TIMESTAMP INFORMATION


 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles


Establishing relevant date of disclosure

Computer-generated timestamp information

 EU trademark
for qualified
trust services

Electronic timestamps **assign an exact time** to a file, message, transaction, image etc.

Timestamping can **secure the content** in screenshot/printout **from later being amended/removed**



This slide provides an introduction on electronic timestamping.

An electronic timestamp assigns an exact time to a file, a message, a transaction, an image etc., giving evidence that the specific content existed at a point in time. Timestamping can secure the content contained in a printout or screenshot from the possibility of it being later amended or removed from its original source.

Timestamps are provided by reliable third party agents that are authorised by Governments. They may be public or private entities. Some of these agents can have approval from the European Union, because they comply with the recommended European security standards (Qualified Timestamp providers).


Various services providing timestamps are available. The European Commission provides a European list of Qualified Timestamp providers, which are in line with the eIDAS Regulation (EU) N°910/2014 on electronic identification and trust services for electronic transactions in the internal market.

In accordance with the eIDAS Regulation, EU Member States and the European Economic Area publish a list of qualified trust service providers. This list (European Union Trusted Lists (EUTL)) is published by the European Commission, containing a number of active and legacy Trust Service Providers (TSPs) that are specifically accredited to provide the highest level of compliance with the EU eIDAS regulation. These providers offer certificate-based digital IDs for individuals, digital seals for businesses, timestamping, and other relevant services.

Article 41 of eIDAS Regulation establishes that:

- An electronic timestamp shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements of the qualified electronic timestamp.
- A qualified electronic timestamp shall enjoy the presumption of the accuracy of the date and the time it indicates and the integrity of the data to which the date and time are bound.
- A qualified electronic timestamp issued in one Member State shall be recognised as a qualified electronic timestamp in all Member States.

The list of Trusted Services at all European countries is dynamic and published by the European Commission:



CEF Digital
Connecting Europe


Trusted List Browser

Tool to browse the national Trusted Lists and the European List of Trusted Lists (LOTL).

Menu ▾


European Commission > CEF Digital > eSignature > Trusted List Browser

Search a trust service by




Type of service

Search by type of trust service (e.g. time-stamping, certificate for e-signature) and country



































Name of trust service

Search based on the name of a trust service



Signed file

Find the trust service that issued the signing certificate(s) contained in a file

| | | |
|--|---|--|
|  Austria <small>Issue date 2019-10-11</small> ... |  Belgium <small>Issue date 2019-09-05</small> ... |  Bulgaria <small>Issue date 2019-11-15</small> ... |
|  Croatia <small>Issue date 2019-10-02</small> ... |  Cyprus <small>Issue date 2019-07-17</small> ... |  Czech Republic <small>Issue date 2019-12-04</small> ... |
|  Denmark  <small>Issue date 2019-08-05</small> ... |  Estonia <small>Issue date 2019-12-02</small> ... |  Finland <small>Issue date 2019-11-21</small> ... |
|  France <small>Issue date 2019-11-14</small> ... |  Germany <small>Issue date 2019-11-21</small> ... |  Greece <small>Issue date 2019-10-10</small> ... |
|  Hungary <small>Issue date 2019-10-03</small> ... |  Iceland <small>Issue date 2019-10-09</small> ... |  Ireland <small>Issue date 2019-09-24</small> ... |
|  Italy <small>Issue date 2019-10-28</small> ... |  Latvia <small>Issue date 2019-09-02</small> ... |  Liechtenstein <small>Issue date 2019-08-26</small> ... |
|  Lithuania <small>Issue date 2019-10-30</small> ... |  Luxembourg <small>Issue date 2019-08-07</small> ... |  Malta <small>Issue date 2019-10-28</small> ... |
|  Netherlands <small>Issue date 2019-10-21</small> ... |  Norway <small>Issue date 2019-10-31</small> ... |  Poland <small>Issue date 2019-10-14</small> ... |
|  Portugal <small>Issue date 2019-09-24</small> ... |  Romania <small>Issue date 2019-09-05</small> ... |  Slovakia <small>Issue date 2019-08-23</small> ... |
|  Slovenia <small>Issue date 2019-09-26</small> ... |  Spain <small>Issue date 2019-11-25</small> ... |  Sweden <small>Issue date 2019-10-28</small> ... |
|  United Kingdom <small>Issue date 2019-08-31</small> ... | | |

Slide 41

Criteria on how to establish the relevant date of disclosure from these sources: COMPUTER-GENERATED TIMESTAMP INFORMATION

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Establishing relevant date of disclosure

Computer-generated timestamp information

Timestamping browsing sessions: timestamp several screenshots or record a video of a web browsing session

↓

Timestamped certificate including video information/screenshots taken during the browsing session

The image shows a screenshot of a web browser displaying a timestamped certificate. The certificate is a document with a QR code and text, including the URL 'http://www.led.com/A009210-Designs-Richard-DD-DABLE'. A red circle labeled 'A' highlights a section of the certificate, and another red circle labeled 'B' highlights the URL. The background shows a website with a search bar and a list of products.

This slide is a continuation on timestamping – laying out some specificities of this tool, in particular, regarding timestamping browsing sessions.

Timestamping browsing sessions allow users to timestamp several screenshots or record a video of a web browsing session, which is certified through a signed and timestamped certificate that contains the video information and screenshots taken during the browsing session (see indications 'A' and 'B' in the example).

Slide 42

Criteria on how to establish the relevant date of disclosure from these sources: **COMPUTER-GENERATED TIMESTAMP INFORMATION.**

Relevant case-law

EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Establishing relevant date of disclosure. Relevant case-law

Computer-generated timestamp information

CP10

[ICD 10 388](#) of 23/11/2017 ('Jars'), pg. 7
EUIPO



- *Timestamping secures content in screenshots/printouts from being later amended/removed from its original source*
- *Use timestamping as a precautionary measure in order to secure evidence*

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The **Decision [ICD 10 388](#)** ('Jars') established that the date of disclosure on the internet will be considered reliable, in particular, where:

- the website provides timestamp information relating to the history of modifications applied to a file or web page (e.g. as available for Wikipedia or as automatically appended to content such as forum messages and blogs)
- indexing dates are given for the web page by search engines (e.g. from the Google cache)
- a screenshot of the web page bears a date
- information relating to updates to the web page is available from an internet archiving service

In line with the above finding, the Common Practice document [2.3.2 Computer-generated timestamp information] establishes that:

“Timestamping can secure the content contained in a screenshot or printout (...) from the possibility of it being later amended or removed from its original source and

“It is advisable to use timestamping as a precautionary measure so as to secure the evidence of disclosure of designs.”

Slide 43

Criteria on how to establish the relevant date of disclosure from these sources: **COMPUTER-GENERATED TIMESTAMP INFORMATION: Recommendations**

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Establishing relevant date of disclosure

Computer-generated timestamp information

Recommendations

- 01** Use timestamping to secure the evidence of disclosure (precautionary measure)
- 02** If several steps required to obtain the relevant evidence, timestamp the entire browsing session

This slide is a continuation on timestamping – laying out the recommendations provided by the Common Practice document.

Recommendations:

- *It is advisable to use timestamping as a precautionary measure in order to secure the evidence of disclosure of designs.*
- *When several steps are required in order to obtain the relevant evidence, it is advisable to timestamp the entire browsing session.*

Slide 44

Criteria on how to establish the relevant date of disclosure from these sources: FORENSIC SOFTWARE TOOLS

The slide content is as follows:

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Establishing relevant date of disclosure

- Can extract information concerning the relevant date which might be embedded in images, videos or programming (i.e. metadata)

Recommendations

01 Provide information explaining the tool, how the information was obtained, what kind of information was extracted and from which content it was taken

Forensic software tools

This slide presents forensic software tools – laying out some specificities as well as the Common Practice criteria and recommendations regarding this tool.

Forensic software tools are used to acquire digital and computer generated evidence. In particular, these tools can be used, to extract information concerning the relevant date, which might be embedded in images, videos, or the programming used to create a website (i.e. metadata). This data can be used for proving disclosure of designs on the internet.

Forensic software tools can also be used to monitor social media capturing posts together with images.

Recommendations:

- ***When evidence is extracted using forensic software tools, it is recommended to provide information explaining the tool, how the information was obtained, what kind of information was extracted and from which content it was taken.***

Slide 45

Means for establishing the date of disclosure


 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet



Images and videos
Printouts
and screenshots
Metadata
URL addresses
and hyperlinks
Statements
in writing

Slide 46

Means for establishing the date of disclosure

 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

- Any means able to prove disclosure (or rebut the availability) of a design can be submitted
- Disclosure can be established by submitting various types of evidence
- Evidence proving disclosure extracted from the internet can be submitted with other pieces of evidence
- Integrity of the documents submitted is assumed

This slide provides an overview on the section “Means for establishing the date of disclosure”.


The Designs Directive does not provide any specific form in which the evidence on disclosure of designs must be submitted. Accordingly, in general, any means able to prove an event of disclosure or, on the contrary, to rebut the availability of a design can be submitted.

An event of disclosure can be established by submitting various types of evidence. However, it should be recalled that all the evidence should relate to the same design invoked as prior design as several features disclosed in various pieces of evidence relating to different designs cannot be combined for the purposes of disclosure of a single design.

Lastly, integrity of the documents submitted is assumed. The mere possibility of manipulating the relevant information is not enough to raise doubts as to their probative value. Therefore, the evidence presented would only be rejected in the case of reasonable doubt.

Slide 47

Means for establishing the date of disclosure. Relevant case-law


Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure. Relevant case-law

CP10


[T-450/08](#) of 09/03/2012
(‘Phials’), §24 – 25, 30 – 45
General Court



- *Even if some pieces of evidence are not conclusive in themselves, they may contribute to proving an event of disclosure*
- *Disclosure must be demonstrated through solid and objective evidence (and not probabilities or suppositions)*

[C-361/15 P and C-405/15 P](#) of 21/09/2017
(‘Shower drainage channel’), § 69

[C-345/13](#) of 19/06/2014
(‘Karen Millen Fashions’), § 35
Court of Justice of the EU



- *Several features disclosed in various pieces of evidence relating to different designs cannot be combined for the purposes of disclosure of a single design*

The ‘relevant case-law’ slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

The judgment [T-450/08](#) (‘Phials’) has several findings of relevance to the Common Practice document. It must be borne in mind that these findings are principles applicable to any type of disclosure of designs, and not limited to those that took place on the internet.

First, it upholds that the disclosure of an earlier design cannot be demonstrated by probabilities or presumptions, but must be based on concrete and objective evidence that actually reveals the earlier design on the market. Second, it states that the evidence provided must be assessed in relation to one another. While some of the elements may be insufficient on their own to demonstrate disclosure of a design, the fact remains that when they are associated or read together with other documents or information, they can help to form proof of disclosure.


Both judgments [C-361/15 P and C-405/15 P](#) (‘Shower drainage channel’) and [C-345/13](#) (‘Karen Millen Fashions’), uphold similar findings which, in sum, establish that in order for a design to be considered to have individual character, the overall impression which that design produces on the informed user must be different from that produced on such a user not by a combination of features taken in isolation and drawn from a number of earlier designs, but by one or more earlier designs, taken individually.

These findings are reflected in the CP10 Common Practice [Section 2.4 Means for presenting evidence obtained from the internet] as follows:

- ***“An event of disclosure can be established by submitting various types of evidence. Even if some items of evidence are not conclusive of an event of disclosure in themselves, they may contribute to establishing the event of disclosure of a design when examined in combination with other items.”***
- ***“[However,] it should be recalled that an event of disclosure cannot be proven by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient disclosure of the design.”***
- ***“Several features disclosed in various pieces of evidence relating to different designs cannot be combined for the purposes of disclosure of a single design.”***

Slide 48

Means for establishing the date of disclosure. Relevant case-law

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE


Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles


Means for establishing the date of disclosure. Relevant case-law

CP10

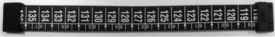
[No. O-636-17](#) of 12/12/2017 ('Service dog label'), § 16
UKIPO



[T-166/15](#) of 27/02/2018 ('Cases for mobile phones'),
§ 64, 90
General Court



[R 62/2015-3](#) of 25/05/2016 ('Bracelets (jewelry), bracelets,
bangles'), § 20, 23
EUIPO



- Integrity of the documents submitted is assumed
- Evidence should only be rejected in case of reasonable doubt

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

Both the UKIPO ([No. O-636-17](#) ('Service dog label')) and the General Court ([T-166/15](#) ('Cases for mobile phones')) upheld in these cases similar findings in terms of the veracity of evidence extracted from the internet. In particular, both found that, unless there is evidence that proves otherwise, there is no reason to assume that website content can be altered and on that account put into question its veracity.

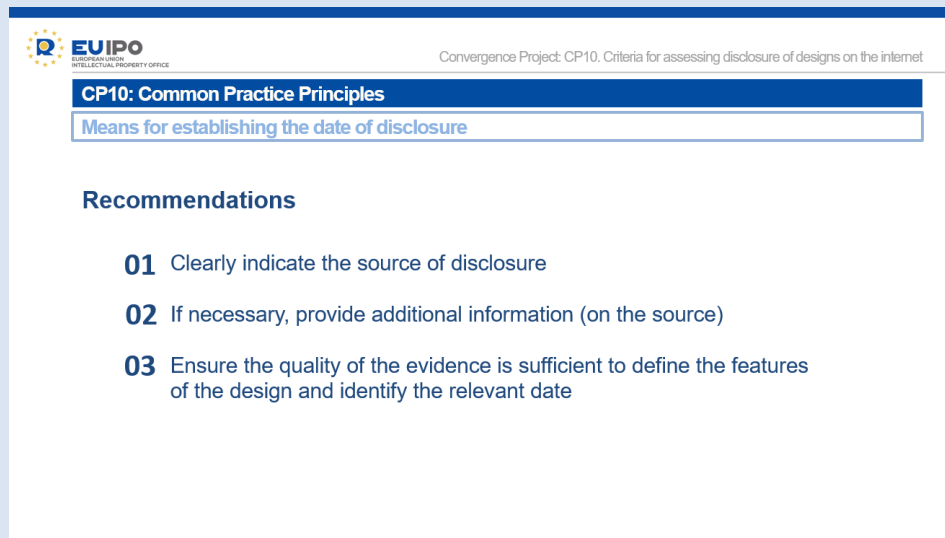
In line with the above findings, the EUIPO in its BOA **Decision of [R 62/2015-3](#)** ('Bracelets (jewelry), bracelets, bangles') upheld that the internet has become a valuable source of information and the simple fact that the information has been obtained from the internet is not in itself sufficient to make it inadmissible. It adds in this respect that, although it would be incorrect to dismiss this evidence put of hand, it should nevertheless be examined with a critical approach, given its non-material nature.


With this in mind, the CP10 Common Practice document [2.4 Means for presenting the evidence obtained from the internet] establishes that:

"Integrity of the documents submitted is assumed. The mere possibility of manipulating the relevant information is not enough to raise doubts as to their probative value. Therefore, the evidence presented would only be rejected in the case of reasonable doubt."

Slide 49

Means for establishing the date of disclosure: Recommendations



 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Recommendations

- 01** Clearly indicate the source of disclosure
- 02** If necessary, provide additional information (on the source)
- 03** Ensure the quality of the evidence is sufficient to define the features of the design and identify the relevant date

This slide is a continuation on means – laying out the general recommendations of this chapter.

Recommendations:

- *The evidence extracted from the internet should clearly indicate the source of disclosure of the design.*
- *If necessary, provide additional information in that respect.*
- *Moreover, it should be of such quality that defines the features of the disclosed design and identifies the dates of disclosure.*

Slide 50

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS

The slide features a blue header with the EUIPO logo (European Union Intellectual Property Office) on the left and the text 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet' on the right. Below the header is a blue bar with the text 'CP10: Common Practice Principles'. Underneath this is a white box with a blue border containing the text 'Means for establishing the date of disclosure'. On the left side of the main content area, there is a vertical blue bar with the text 'Printouts and Screenshots' written vertically. The main content area contains the following text:

Printouts and screenshots should

- ↳ **contain:**
 - a) the source (e.g. URL address)
 - b) the relevant date
 - c) the disclosed design
- ↳ **not** be manually modified

This slide is a continuation on means – laying out Common Practice criteria on printouts and screenshots.

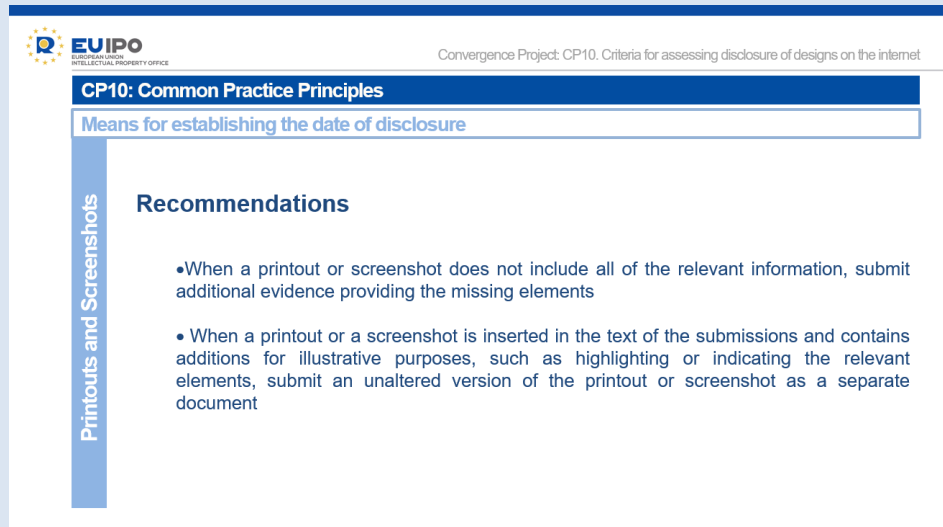
Printouts and screenshots are the most common means of proving disclosure of a design on the internet. They should contain information, in particular, on:

- the source where the content was taken (e.g. URL address)
- the relevant date
- the disclosed design

Printouts or screenshots should not be manually modified, for instance, by adding the date of disclosure or the source.

Slide 51

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations



The slide is a presentation slide with a blue header and a white main content area. The header contains the EUIPO logo and the text 'EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE' on the left, and 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet' on the right. Below the header is a blue bar with the text 'CP10: Common Practice Principles'. Underneath that is a white bar with the text 'Means for establishing the date of disclosure'. On the left side of the main content area, there is a vertical blue bar with the text 'Printouts and Screenshots'. The main content area has the title 'Recommendations' and two bullet points.

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Printouts and Screenshots

Recommendations

- When a printout or screenshot does not include all of the relevant information, submit additional evidence providing the missing elements
- When a printout or a screenshot is inserted in the text of the submissions and contains additions for illustrative purposes, such as highlighting or indicating the relevant elements, submit an unaltered version of the printout or screenshot as a separate document

This slide is a continuation on means – laying out the general recommendations of this chapter.

Recommendations:

- *When a printout or screenshot does not include all of the relevant information, it is recommended to submit additional evidence providing the missing elements (e.g. if the date in the relevant post including the image of the design is missing, comments, remarks or shares made on social media or catalogues published on commercial or retail sites may provide such information).*
- *When a printout or a screenshot is inserted in the text of the submissions and contains additions for illustrative purposes, such as highlighting or indicating the relevant elements (see Example 7 below), it is advisable to submit an unaltered version of the printout or screenshot as a separate document.*

Slide 52

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS. Relevant case-law

EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10: Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Means for establishing the date of disclosure. Relevant case-law

Printouts and Screenshots

CP10

[R 1629/2017-3](#) of 30/11/2018 ("Boots"), § 23 - 24
EUIPO



- If information extracted from printouts is inserted in the submission, an unaltered, separate version should also be submitted
- Printouts and screenshots should contain the:
 - source (URL address)
 - relevant date
 - disclosed design

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

In this case ([R 1629/2017-3](#)), the evidence taken into account was several pages of website printouts, in particular, blogs which displayed the relevant design, the relevant date and the source of the information (i.e. URL address). The Boards considered this evidence sufficient to prove disclosure.

In line with the above, the Common Practice document [2.4.1 Printouts and screenshots] recommends that printouts or screenshots:

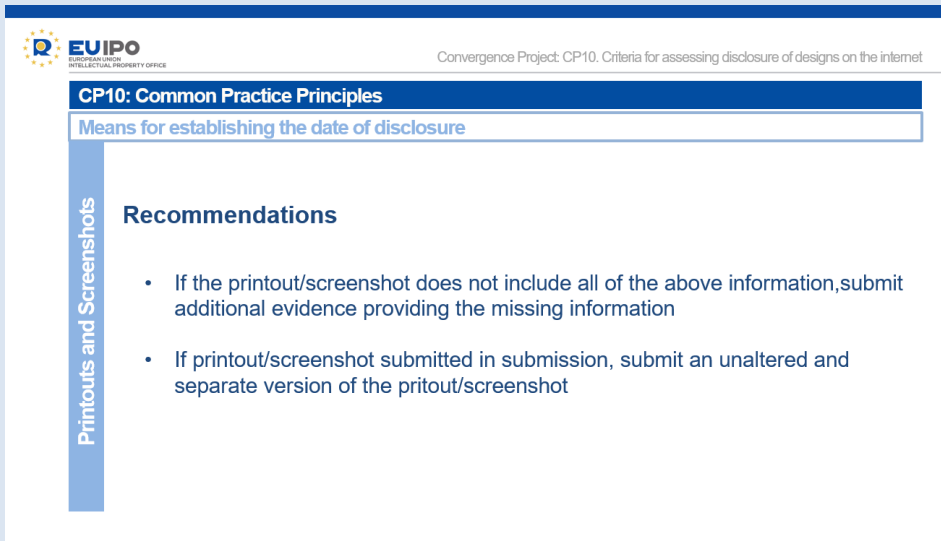
“should contain information, in particular, on:

- ***the source where the content was taken (URL address)***
- ***the relevant date***
- ***the disclosed design”***

This case also assessed images included in the text of the submission itself, but not submitted as a separate piece of evidence. As the Boards members could not find the image anywhere in the evidence, nor in a search online, this image was disregarded.

Slide 53

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations



EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Printouts and Screenshots

Recommendations

- If the printout/screenshot does not include all of the above information, submit additional evidence providing the missing information
- If printout/screenshot submitted in submission, submit an unaltered and separate version of the printout/screenshot

This slide lays out the general recommendations regarding printouts and screenshots.

In view of the abovementioned criteria, the Common Practice document **recommends**:

- ***When a printout or screenshot does not include all of the relevant information, it is recommended to submit additional evidence providing the missing elements (e.g. if the date the relevant post including the image of the design is missing, comments, remarks or shares made on social media or catalogues published on commercial or retail sites may provide such information).***
- ***When a printout or screenshot is inserted in the text of the submission and contains additions for illustrative purposes, such as highlights or indicating the relevant elements, it is advisable to submit an unaltered version of the printout or screenshot as a separate document.***

Slide 54

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Printouts and Screenshots

A) Source

Specific source of disclosure (e.g. a URL address) might not always be (fully) apparent from printouts/screenshots

Recommendations

If not completely displayed in a printout/screenshot, provide additional evidence in this respect

This slide is a continuation on means – laying out CP10 criteria and recommendations of printouts and screenshots – in particular, regarding the source.

Source:


The specific source of disclosure (e.g. a URL address) might not always be (fully) apparent from printouts or screenshots of certain websites or apps.

Recommendations:

- *In the case the source is not completely displayed in a printout or a screenshot, it is recommended to provide additional evidence in this respect.*

Slide 55

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

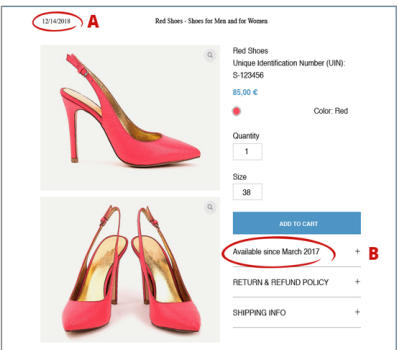
Printouts and Screenshots

B) Relevant date

- Distinguish between printing date (printout) and date of disclosure
- Printing date ('A') assumed date of disclosure, unless an earlier relevant date can be established from:
 - URL address
 - contents of the document itself or
 - any other evidence ('B')

12/14/2011 **A**

Red Shoes - Shoes for Men and for Women



This slide is a continuation on means – laying out CP10 criteria on printouts and screenshots – in particular, regarding the relevant date.

Relevant date:

In relation to printouts, it is important to make a distinction between the printing date of the document (printout) and the date of disclosure of a design. The printing date (see indication 'A' in example) will be assumed as the date of disclosure, unless an earlier date can be established from the URL address, the contents of the document itself or any other evidence (see indication 'B' in example).

Slide 56

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations

The screenshot shows a slide with the following content:

- EUIPO** EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE
- Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet
- CP10: Common Practice Principles**
- Means for establishing the date of disclosure**
- Printouts and Screenshots** (vertical label on the left)
- B) Relevant date**
- Recommendations**
- When several dates are indicated in a printout/screenshot, clearly indicate which is the relevant date

This slide is a continuation on means – laying out the recommendations of printouts and screenshots – in particular, regarding the relevant date.

Recommendations:

- *When several dates are indicated in a printout or a screenshot, it is advisable to clearly indicate which the relevant date is.*

Slide 57

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

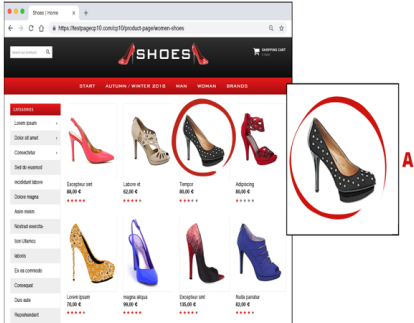
Means for establishing the date of disclosure

Printouts and Screenshots

C) The disclosed design

Printouts/screenshots may show several designs (e.g. screenshot of retailer website)

When several products are displayed in a single printout/screenshot, clearly indicate which is the relevant design ('A')



The screenshot shows a website titled 'SHOES' with a navigation menu including 'START', 'AUTUMN WINTER 2018', 'MAN', 'WOMAN', and 'BRANDS'. The main content area displays a grid of various high-heeled shoes. A red circle highlights a specific black high-heeled shoe with white polka dots. A red letter 'A' is placed to the right of this circle, indicating that this is the relevant design for disclosure.

This slide is a continuation on means – laying out CP10 criteria on printouts and screenshots – in particular, regarding the disclosed design.

A printout or screenshot may show several designs, especially when it is extracted from an e-commerce or retailer website. When this occurs, the relevant design should be clearly indicated in the submitted evidence (see indication 'A' in example).

Slide 58

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS. Relevant case-law

EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles


Means for establishing the date of disclosure

Printouts and Screenshots

CP10

[C-361/15 P and C-405/15 P](#) of 21/09/2017
(‘Shower drainage channel’), § 65
General Court

- Images of a disclosed design should be precise and of sufficient quality to allow the definition of its features



The ‘relevant case-law’ slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

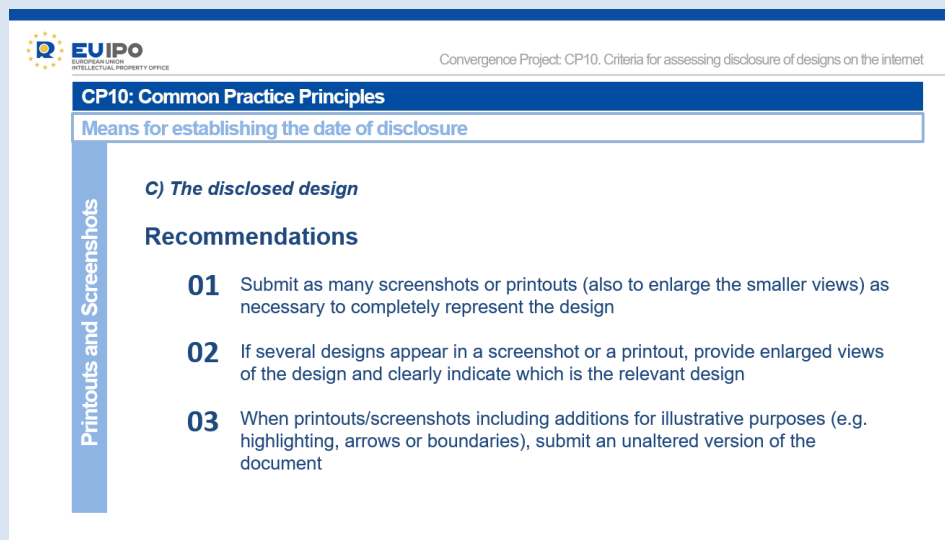
In [judgement C-361/15 P and C-405/15 P](#) (‘Shower drainage channel’), the General Court established that it is for the party who lodged the application for a declaration of invalidity to provide the necessary information and, in particular, to identify and reproduce precisely and entirely the design that is allegedly earlier in order to demonstrate that the contested design cannot be validly registered.

With this in mind, the CP10 Common Practice document establishes that:

“Images of a disclosed design should be precise and of sufficient quality to allow the definition of its features.”

Slide 59

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations



The slide content is a screenshot of a document page. At the top left is the EUIPO logo (European Union Intellectual Property Office). To its right is the text 'Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet'. Below this is a blue header bar with the text 'CP10: Common Practice Principles'. Underneath is a white box with the text 'Means for establishing the date of disclosure'. On the left side of the slide, there is a vertical blue bar with the text 'Printouts and Screenshots' written vertically. The main content area has the heading 'C) The disclosed design' and 'Recommendations'. Below this are three numbered points: 01, 02, and 03, each followed by a short paragraph of text.

This slide is a continuation on means – laying out the recommendations of printouts and screenshots – in particular, regarding the disclosed design.

In view of the above criteria, the Common Practice document provides the following **recommendations** when submitting printouts and screenshots as evidence:

- ***If the design is disclosed in several views, it is recommended to submit as many screenshots or printouts (also to enlarge the smaller views) as necessary to represent the design completely.***
- ***If several designs appear in a screenshot or a printout, enlarged views of the design are preferred. Moreover, it should be clearly indicated which is the relevant design invoked.***
- ***When a printout or screenshot includes additions for illustrative purposes (e.g. highlighting, arrows or boundaries), it is advisable to submit an unaltered version of the document as a separate attachment).***

Slide 60

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS

EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

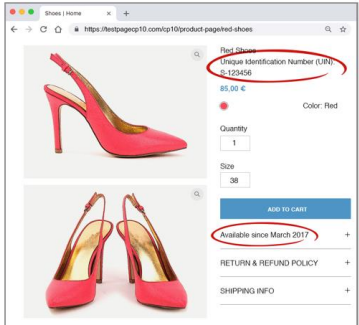
Means for establishing the date of disclosure

Printouts and Screenshots

Printouts and screenshots from e-commerce platforms

E-commerce platforms can indicate the date when the product was first available for sale ('A')

The specific product reference (e.g. name or a code) can link information on the product contained in other evidence ('B')



This slide is a continuation on means – laying out CP10 criteria on printouts and screenshots – in particular, regarding printouts and screenshots from e-commerce platforms.

E-commerce platforms usually indicate the date when the product was first made available for sale (indication 'A' in example), which can be useful when establishing the relevant date of disclosure of a design incorporated in that product.

Another useful piece of information that can usually be found on e-commerce sites is the specific product reference, such as the product code. It can link information on that product contained in different pieces of evidence (e.g. product code found referring to design displayed on website, and the same code is in an invoice where no image of the product can be found).

Slide 61

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations

The slide content is as follows:

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Printouts and Screenshots

Printouts and screenshots from e-commerce platforms

Recommendations

- 01** Include reviews from users, as it might help establish date of disclosure
- 02** A unique code identifying the relevant product can link the information displayed on the e-commerce platform (e.g. design) and that contained in the other evidence (e.g. date of sale)


This slide is a continuation on means – laying out the recommendations of printouts and screenshots – in particular, regarding printouts and screenshots from e-commerce platforms.

In view of the above-mentioned criteria, the Common Practice **recommends**, in terms of submitting printouts and screenshots from e-commerce sites:

- ***It is advisable to include the reviews that users have left after purchasing the product on an e-commerce platform, as this information might be useful for establishing the date of disclosure of a design.***
- ***A unique code identifying the relevant product can serve as a link between the information displayed on the e-commerce platform (e.g. design) and that contained in the other evidence (e.g. date of sale).***

Slide 62

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS. Relevant case-law

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Means for establishing the date of disclosure. Relevant case-law


CP10

Printouts and Screenshots

T-166/15 of 27/02/2018 ('Cases for mobile phones'),
§ 59 - 63
General Court



R 3146/2014-3 of 02/02/2016 ('Bathroom accessories'),
§ 33
EUIPO



Specific product reference and the 'product available since...' reference can link product to information contained in other evidence

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

Case T-166/15 'Cases for mobile phones' refers to the unique number assigned to a single product (for example, the ASIN code used by Amazon) on e-commerce sites. In this case, it was used to link a website printout that included a product which had such an identification to a printout that did not include a representation of the design.

Decision from the Federal Supreme Court of Germany **ZR 187/16 'Ballerina shoes'** which claimed that a design embedded in products offered for sale online will, in principle, be considered as an effective act of disclosure.

EUIPO Decision R 3146/2014-3 'Bathroom accessories'. Some of the evidence submitted displayed content from online retailer websites that sold the product reproducing the contested design. Despite appearing on these websites, the Boards found that since the 'product available since...' information that normally accompanies the image and description of items on many online retailers' websites was missing, it was impossible to know whether the hook was actually for sale — and, therefore, disclosed — before the relevant date.

As a result of consulting these findings, the Common Practice [2.4.1 Printouts and screenshots; 2.4.1.1 Printouts and screenshots from e-commerce platforms] established that:


"The printing date will be assumed to be the date of disclosure, unless and earlier relevant date can be established from the URL address, the content of the document itself (e.g. 'Available since...', 'Last modified on...') or any other evidence."

"The specific product reference, e.g. a name or a code, might be useful when linking the information on that product (e.g. the date of first sale) contained in the evidence."

"A unique code identifying the relevant product can serve as a link between the information displayed on the e-commerce platform (e.g. design) and that contained in the other evidence (e.g. date of sale)."

Slide 63

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS



EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Means for establishing the date of disclosure

Printouts and Screenshots

Printouts and screenshots from online databases

- Publication date from online databases = relevant date ('A')
- Designs published in online databases administered by public authorities = disclosed as from the indicated publication date



This slide is a continuation on means – laying out CP10 criteria on printouts and screenshots – in particular, regarding printouts and screenshots from online databases.

For proving disclosure, the publication date (see indication 'A' in example) specified in the printout or screenshots from the online databases will be considered as the relevant date. The mere filing/ or registration date in online database does not always imply IPR was published.

Designs published in online databases administered by public authorities will be considered disclosed as from the indicated publication date, unless evidence showing an earlier date is provided.

Slide 64

Means for presenting the evidence obtained from the internet: PRINTOUTS AND SCREENSHOTS: Recommendations

EU IPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Printouts and Screenshots

Recommendations

- 01** Indicate the publication date
- 02** Show the INID code 43/45 (when possible)

This slide is a continuation on means – laying out the recommendations of printouts and screenshots – in particular, it provides the recommendations regarding printouts and screenshots from online databases.

When submitting printouts or screenshots from online databases, the Common Practice recommends:

- ***Printouts or screenshots from online databases on the intellectual property rights should indicate the publication date independently of either the date of filing or the date of registration.***
- ***When presenting the document or excerpt from an online database or register referring to patent or design rights, it is recommended to show the publication date and/or the INID code 43 or 45 as this number refers to the date of making a design available to the public.***

Slide 65

Sources of disclosure on the internet: WEBSITES (online databases). Relevant case-law

 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles


Means for establishing the date of disclosure

Printouts and Screenshots

Online databases

CP10

[ICD 9822](#) of 13/07/2015 ('Hedges, fences'), § 12
EUIPO



Show the publication date and/or the INID code 43 or 45

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).


In [case ICD 9822](#), a copy of the registration certificate of the Spanish utility model was submitted. In spite of it being submitted in Spanish, the date of publication was accorded by code (43) of standard ST.9 of WIPO, used for bibliographic data on and relating to patents and designs.

The CP10 Common Practice document [2.4.1.2 Printout and screenshots from online databases] supports this finding by recommending that:

“When presenting the document or excerpt from an online database or register referring to patent or design rights, it is recommended to show the publication date and/or the INID code 43 or 45 ... as this number refers to the date of making a design available to the public.”

Slide 66

Means for establishing the date of disclosure: IMAGES AND VIDEOS

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Means for establishing the date of disclosure

Images and Videos

Relevant date:

- When image/video viewed, or
- When made available for viewing/downloading



This slide is a continuation on means – laying out CP10 criteria on printouts and screenshots – in particular, regarding images and videos.

Regarding the relevant date in images and videos as a means for establishing the date of disclosure, it shall be either:

- When an image/video is actually viewed or,
- When it has been made available for viewing/downloading (e.g. in an online platform)

Slide 67

Means for establishing the date of disclosure: IMAGES AND VIDEOS: Recommendations

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Images and Videos

Recommendations

- 01** If the video itself is submitted:
 - provide information on when and where the video was made available
 - indicate exact moment the design is visible in the video
- 02** Comments by users can provide dates
- 03** Provide information on the source of where the images/video is uploaded

This slide is a continuation on means – laying out the recommendations of printouts and screenshots – in particular, regarding images and videos.

When submitting images and/or videos as evidence, the Common Practice document **recommends**

- *When the video itself is submitted, information on when and where the video was made available to the public (e.g. evidence such as printouts of the video being posted on social media sites or when the video has appeared as an advertisement on a website) should be provided.*
- *When submitting the video, it is recommended to indicate the exact moment (minute(s), second(s)) the design is visible in the video.*
- *When there is no other date indicating disclosure, the comments made by users could serve as evidence, provided that they are dated.*
- *The information on the source where the images or videos are contained should also be provided.*

Slide 68

Means for presenting the evidence obtained from the internet: METADATA: Recommendations

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

Metadata

Means to obtain metadata:

- “information” option on device
- Specialised software (“metadata viewers”)

Recommendations

Provide information on the extraction of the embedded information

This slide is a continuation on means – laying out CP10 criteria and recommendations on printouts and screenshots – in particular, regarding metadata.

Metadata, or EXIF data, is information embedded within images, videos and websites. For example, an image may include information about itself, such as the author, the date it was created or modified or the location where it was taken.

Such information can be useful in terms of providing evidence of disclosure of designs on the internet, in particular, regarding the relevant date or the location the picture was taken.

Metadata can be extracted by tools or may be even accessible from the device that took the image or video itself by selecting the “information” option on the image/video itself.

With this in mind, the Common Practice **recommends** that:

- ***When metadata is submitted as evidence, it is recommended to provide information explaining how it was obtained, what kind of information was extracted and from which source it was taken.***

Slide 69

Means for presenting the evidence obtained from the internet: URL ADDRESSES AND HYPERLINKS: Recommendations

EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Means for establishing the date of disclosure

URL Addresses and Hyperlinks

URL addresses/hyperlinks *per se* insufficient to prove disclosure:

- site of the link may be altered/removed
- Difficulty identifying the information

Recommendations

Submit along with URL/hyperlink printout/screenshot of the relevant information

This slide is a continuation on means – laying out CP10 criteria and recommendations on printouts and screenshots – in particular, regarding URL addresses and hyperlinks.

URL addresses or hyperlinks, *per se*, are insufficient to prove disclosure of a design as the site of the link might be altered or removed and it might be difficult to determine the relevant information for the case when accessed.

With this in mind, the Common Practice **recommends** that:

- ***When the URL or hyperlink is submitted, a printout or screenshot of the relevant information contained therein should also be provided.***

Slide 70

Means for presenting the evidence obtained from the internet: STATEMENTS IN WRITING: Recommendations

The screenshot shows a slide with the following structure:

- Top left: EUIPO logo (EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE)
- Top right: Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet
- Section header: CP10: Common Practice Principles
- Sub-section header: Means for establishing the date of disclosure
- Vertical sidebar on the left: Statements in writing
- Main content area:
 - Section header: Recommendations
 - Text: Statements in writing should be supported by additional evidence

This slide is a continuation on means – laying out CP10 criteria and recommendations on printouts and screenshots – in particular, regarding statements in writing.


As a matter of principle, statements in writing, sworn or affirmed, such as affidavits, would not be sufficient in themselves to prove an event of disclosure.

Therefore, the Common Practice **recommends** that:

- ***The information contained in statements in writing, sworn or affirmed, be supported by additional evidence, such as printouts or screenshots, showing the information relevant for disclosure (e.g. design, date of disclosure, etc.).***

Slide 71

Means for presenting the evidence obtained from the internet: STATEMENTS IN WRITING. Relevant case-law

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Means for establishing the date of disclosure. Relevant case-law

CP10

Statements in Writing


T-813/14 of 18/11/2015 ('Cases for portable computers'), § 29
General Court



Statements in writing would not be sufficient on its own to prove an event of disclosure

T-498/13 of 11/12/2014 ('NAMMU'), § 38
General Court

T-450/08 of 09/07/2012 ('Phials'), § 39-40
General Court



The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

Judgment T-813/14 ('Cases for portable computers') established that affidavits in themselves, as a matter of principle, are not sufficient to prove a fact such as the event of disclosure of an earlier design. They may, however, corroborate and/or clarify the accuracy of additional documents.

Judgment T-450/08 ('Phials') follows the above findings by upholding that such declarations, in principle, constitute admissible evidence, although it must be verified the reasonableness and veracity of the information contained therein, taking into account, in particular its origin, the circumstances of its elaboration, its recipient and whether its content seems sensible and reliable.


The **judgment T-498/13** ('NAMMU') upheld that the particulars in an affidavit made by a person linked, in any manner whatsoever, to the company relying on it must be supported by other evidence.


With this in mind, the recommendation in the Common Practice [2.4.5 Statements in writing] in terms of statements in writing is that:

"The information contained in statements in writing, sworn or affirmed, should be supported by additional evidence, such as printouts or screenshots, showing the information relevant for disclosure (e.g. design, date of disclosure, etc.)."

Slide 72

Exceptions to the availability of designs on the internet

 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet




EXCEPTIONS TO THE AVAILABILITY OF THE DESIGN

- Passwords and payments
- Languages and top level domain names
- Geo-blocking
- Searchability
- Confidentiality

Slide 73

Exceptions to the availability of designs on the internet

 Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Exceptions to the availability of designs on the internet

Exceptions

- Not reasonably known in the normal course of business
- Under explicit/implicit confidentiality conditions
- Made available by designer/successor in title/third person during 12-month grace period
- Consequence of an abuse in relation

This slide introduces the exceptions to the availability of the design on the internet.


Once disclosure has been proven, it is presumed that it has been made available to the public within the meaning of Article 6 of the Designs Directive.

Nevertheless, the abovementioned provision also lays down the following exceptions when the design will not be considered to not have been made available to the public:

- When events of disclosure could not reasonably have become known in the normal circle of business to the circles specialised in the sector concerned, operating within the European Union
- When the design has been disclosed to a third person under explicit or implicit conditions of confidentiality
- If the design has been made available to the public by the designer, his successor in title, or a third person as a result of information providing or action taken by the designer or his successor In title during 12-month period preceding the date of filing of the contested application of its date of priority
- If the design has been made available to the public as a consequence of an abuse in relation to the designer

Slide 74

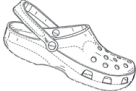
Exceptions to the availability of designs on the internet. Relevant case-law

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Exceptions to the availability of designs on the internet



CP10

Searchability

[R 853/2014-3](#) of 06/06/2016 ('Footwear'), § 83 – 84
EUIPO

[T-651/16](#) of 14/03/2018 ('Footwear'), § 54, 56, 61
General Court

- *Taking into account the global nature of the internet, in general, online content is available worldwide.*
- *To refute the presumption of disclosure, the exception has to be proven by submitting respective evidence.*
- *"When analysing whether events of disclosure of a design could not have reasonably become known to the circles specialised in the sector concerned, examine whether it was not actually possible for those circles to be aware of the events constituting disclosure of a design."*

The 'relevant case-law' slides list relevant case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

In the '**Footwear**' ([R 8953/2014-3](#)) case, the exhibition and sale of the product corresponding to the contested design was made on the Internet and it is a well-known fact that the website could be accessed by anybody from anywhere, including the specialised circles operating in the European Union.


In view of the circumstances in which the design had been displayed on the internet, and in line with the finding that the exhibition or sale of a product outside the European Union is capable of constituting a relevant disclosure (although the final answer will depend on 'the particular circumstances of the case'), it was concluded that the events consisting of exhibition and use in trade in this case could reasonably have become known to the relevant circles in the European Union.

In line with these findings, the Common Practice establishes that:

- ***"Taking into account the global nature of the internet, in general, online content is available worldwide."***
- ***"Only under certain circumstances would this content not be considered to reasonably become known to the circles specialised in the sector concerned, operating within the European Union. This can be due to some restrictions, in particular as to the accessibility or searchability of the information on the internet. However, in order to refute the presumption of disclosure, this exception has to be proven by submitting respective evidence."***
- ***"When analysing whether events of disclosure of a design could not have reasonably become known in the normal circle of business to the circles specialised in the sector concerned operating within the European Union, it must be examined whether (...) it is appropriate to consider that it was not actually possible for those circles to be aware of the events constituting disclosure of a design (...)."***

Slide 75


Exceptions to the availability of designs on the internet

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE


Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

Exceptions to the availability of the design


Exceptions to the availability of designs on the internet




Passwords
&
payments




Languages
&
top-level
domain names



Searchability



Geo-blocking



Confidentiality


This slide introduces the exceptions to the availability of the design on the internet.

In terms of disclosure of designs on the internet and the above-mentioned exceptions, the following aspects should be taken into account:

- Passwords and payments
- Languages and top-level domains
- Searchability
- Geo-blocking
- Confidentiality

Slide 76

Exceptions to the availability of designs on the internet: PASSWORDS AND PAYMENTS

 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Exceptions to the availability of designs on the internet

Passwords and Payments

In general, neither restricting access to a limited circle of people by password protection, nor requiring payment for access would prevent a design that has been made available on a webpage, app or file sharing platform from forming the prior art.

- Exception: internal databases used by employees of a company



This slide continues with the exceptions to the availability of the design on the internet – referring in particular to passwords and payments.

As a general rule, neither restricting access to a limited circle of people by password protection, nor requiring payment for access would prevent a design that has been made available on a webpage, app or file sharing platform from forming part of the prior art.

However, the restricted access to certain internal databases, such as those used only by employees of a company, might prevent an event of disclosure of a design from reasonably becoming known in the normal course of business to the circles specialised in the sector concerned operating within the European Union.

Slide 77

Exceptions to the availability of designs on the internet: PASSWORDS AND PAYMENTS. Relevant case-law

EU IPO
EUROPEAN
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Exceptions to the availability of designs on the internet. Relevant case-law


CP10

Passwords and Payments

ICD No 9862 of 03/03/2016 ('Fireplaces (indoor -)'), pg. 4
EUIPO



ICD 10 388 of 23/11/2017 ('Jars'), pg. 7
EUIPO



Password protection/payment for access does not prevent a design from forming part of the prior art

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

Both decisions ([ICD No 9862](#) and [ICD 10 388](#)) establish that neither restricting access to a limited circle of people (e.g. by password protection) nor requiring payment for access (analogous to purchasing a book or subscribing to a journal) prevent a web page from forming part of the state of the art. It is sufficient if the web page is available without any bar of confidentiality and the accessibility requirements can reasonably be met by the European professionals of the circles concerned.

Despite no higher level decisions or judgments upholding similar findings, the EPO guidelines do assess password and payments in the same manner:

[Section 7.5.1 Establishing the publication date](#)


"Neither restricting access to a limited circle of people (e.g. by password protection) nor requiring payment for access (analogous to purchasing a book or subscribing to a journal) prevent a web page from forming part of the state of the art. It is sufficient if the web page is in principle available without any bar of confidentiality".

The Common Practice [2.5.1 Passwords and payments] follows these findings, as it established that

"In general, neither restricting access to a limited circle of people by password protection, nor requiring payment for access would prevent a design that has been made available on a webpage, app or file sharing platform from forming part of the prior art."

Slide 78

Exceptions to the availability of designs on the internet: LANGUAGE AND TOP-LEVEL DOMAINS

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Exceptions to the availability of designs on the internet

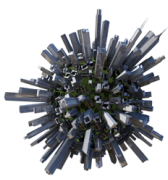
Language and Top-level Domains

Languages:

- Do not (in principle) affect perception of a design – but can impair the possibility to find them on the internet
- Image search technology allows designs published in different languages to be found

Top-level domain:

- In principle, not an obstacle to find designs on the Internet
- But can serve as an indicator of the likelihood of the specialized circle accessing the site



This slide continues with the exceptions to the availability of the design on the internet – referring in particular to languages and top-level domains.


Although, in general, languages would not affect the perception of designs, it might impair the possibility to find them on the internet. Therefore, when assessing disclosure, it has to be taken into account whether in the normal course of business of the specialised circles in question it is expected to search for such information in the respective language.

On the other hand, image search technology has reached a level of technical sophistication that allows a design to be found even if it is published on a website that is not in a language commonly spoken within the EU.

Regarding top-level domain names, they would, in principle, not affect the possibility to find designs on the internet. Nevertheless, they could serve as an indication to determine whether the specialised circles concerned were more likely to access the website or not.

Slide 79

Exceptions to the availability of designs on the internet: LANGUAGE AND TOP-LEVEL DOMAINS. Relevant case-law

 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Exceptions to the availability of designs on the internet. Relevant case-law


Language and Top-level Domains

CP10

T-227/16 of 21/06/2018 ('Floor covering'), § 28
General Court



R 1750/2016-3 of 04/01/2018 ('Locks'), § 13 - 15
EUIPO



- Establish whether the specialized circle is expected to search for information in the respective language
- Depending on the sector concerned, it can be usual or not for the specialised circles to consult information in non-EU languages

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).


Following the findings of the General Court [judgment T-227/16 \('Floor covering'\)](#) and the EUIPO BOA [Decision R 1750/2016-3 \('Locks'\)](#), regarding languages, the Common Practice finds that although, in general, languages would not affect perception of designs, they might impair the possibility to find them on the internet.

With this in mind, and as cited by the Common Practice [2.5.2 Language and top-level domain names]:

“Therefore, when assessing disclosure, it has to be taken into account whether in the normal course of business of the specialised circles in question it is expected to search for such information in the respective language.”

Slide 80

Exceptions to the availability of designs on the internet: LANGUAGE AND TOP-LEVEL DOMAINS. Relevant case-law




 EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Exceptions to the availability of designs on the internet. Relevant case-law

Language and Top-level Domains

CP10

| | | |
|---|---|--|
| <p>ICD 10 422 of 21/02/2017 ('Air Fresheners'), pg. 4 - 5 EUIPO</p>  | <p>ICD No 10 113 of 18/05/2017 ('Doors'), pg. 3 EUIPO</p>  | <ul style="list-style-type: none">• <i>Top-level domains in principle do not affect the possibility to find designs on the internet</i>• <i>They can serve as an indication as to whether the specialised circles were likely to access a website</i> |
| <p>R 2301/2012-3 of 12/02/2015 ('Tables'), § 31 EUIPO</p>  | | |

The 'relevant case-law' slides list case-law taken into account when drafting the Common Principles. They also display **how** the findings were applied in the Common Practice document (in blue box).

In the '**Air fresheners**' ([ICD 10 422](#)) case, the applicant submitted a screenshot of a website with a '.cn' (Chinese) top-level domain. The Invalidity division found that, despite the website being established under a Chinese national domain, it was in English and was freely accessible on the internet, including the specialised circles operating within the EU. It was therefore deemed that the designs shown on the website could have become known to the circles operating in the sector concerned in the EU as required by Article 7(1) CDR and they are therefore considered prior art.

In the '**Doors**' ([ICD No 10 113](#)) decision, the Invalidity division found as a matter of principle, disclosures derived from the internet form part of the prior art and that information disclosed on the internet is considered to be publicly available as of the date the information was posted. Therefore, as the prior design was published by a third party before the RCD filing date, on a web page intended for the Bulgarian public and having the Bulgarian national domain name, the prior design is deemed to have been disclosed.


Similar to the abovementioned findings, the Boards of appeal found in the '**Tables**' ([R 2301/2012-3](#)) decision that although the excerpt of the website was in German and ended with the identifier '.de', there was no reason to assume that the webpage was not accessible to the public.

In line with the above findings, the Common Practice document establishes that:

“As regards top-level domains, in principle, they would not affect the possibility to find designs on the internet. However, they could serve as an indication as to whether the specialised circles concerned were more likely to access a certain website. For instance, if a top-level domain were that of a Member State, it would be more likely that the specialised circles operating in the European Union could have become aware of a disclosure that happened on such a webpage.”

Slide 81

Exceptions to the availability of designs on the internet: SEARCHABILITY

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet


CP10: Common Practice Principles

Exceptions to the availability of designs on the internet

Searchability

Assess the possibility for the specialized circle to find the prior art on the internet

- Consider whether the site was technically accessible
- Customs/behaviours in the normal course of business




This slide continues with the exceptions to the availability of the design on the internet – referring in particular to searchability.

When assessing whether an event of disclosure of a design on the internet has not reasonably become known in the normal course of business to the circles specialized in the sector concerned operating within the European Union, it may be necessary to assess whether the specialised circles were actually able to find the prior art on the internet:

- It should first be considered whether a particular website was technically accessible
- Moreover, specific customs or behaviours in the normal course of business of the specialised circles in the sector concerned should also be taken into account

Slide 82

Exceptions to the availability of designs on the internet: GEO-BLOCKING

 **EUIPO**
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

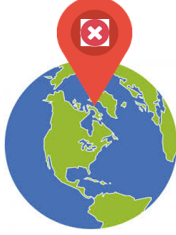
CP10: Common Practice Principles

Exceptions to the availability of designs on the internet

Regulation (EU) 2018/302 (Geo-blocking regulation) aims to give all EU consumers equal rights to access a trader's goods or services, under the same terms, irrespective of their location

- Restricted access to premium multimedia contents
- Block malicious traffic
- Enforcement of price discrimination

Geo-blocking




This slide continues with the exceptions to the availability of the design on the internet – referring in particular to geo-blocking.

Geo-blocking can be another factor that might affect the accessibility to information contained in the internet by the specialised circles operating in the European Union.

When considering the contents of websites, geo-blocking is most commonly associated with its use to restrict access to premium multimedia contents on the internet, such as films and television shows, primarily for copyright and licensing reasons.

Slide 83

Exceptions to the availability of designs on the internet: CONFIDENTIALITY

 **EUIPO**
EUROPEAN UNION
INTELECTUAL PROPERTY OFFICE

Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles


Exceptions to the availability of designs on the internet

Designs disclosed under explicit/implicit confidentiality conditions will not constitute disclosure

Circumstances that might affect the effectiveness of the confidentiality claim in an e-mail:

- contents
- purpose
- recipients

Confidentiality




This slide continues with the exceptions to the availability of the design on the internet – referring in particular to confidentiality.

The last sentence of Article 6(1) of the Designs Directive establishes that those situations where the design has been disclosed under implicit or explicit conditions of confidentiality will not constitute disclosure.

Nevertheless, the effectiveness of the confidentiality claim might depend on the particular circumstances. For instance, in the case of e-mails, the contents, recipients and purpose of the e-mail might affect the veracity of such a claim. Thus, when an e-mail that includes a confidentiality claim is sent to a large number of recipients, including wholesale distributors, regarding new articles on sale, it may not necessarily be considered as confidential.

Slide 84

Exceptions to the availability of designs on the internet: Recommendations

 EUIPO
EUROPEAN UNION
INTELLECTUAL PROPERTY OFFICE


Convergence Project: CP10. Criteria for assessing disclosure of designs on the internet

CP10: Common Practice Principles

Exceptions to the availability of designs on the internet

Recommendations

- 01 Website traffic can help determine whether specialised circles could have accessed the website's contents
- 02 When assessing availability of the design on the internet, take into account:
 - tagging systems, hashtags and links between search terms and images of the design
 - 'popularity' indicators on social media platforms (number of people reached, views, clicks for the post, reactions, comments, shares, followers and likes) ('A')



This slide continues with the exceptions to the availability of the design on the internet – referring in particular to the criteria and recommendations of this section.

Following the above-mentioned criteria regarding the possible exceptions to design disclosure, the Common Practice provides the following **recommendations**:

- **Website traffic could be taken into consideration when assessing whether the specialised circles could have accessed its contents. Various options exist to measure website traffic, such as a page view, a page hit and a session, which may also be quantified by the use of web analytics or similar tools.**
- **When assessing availability of the design on the internet, it is recommended to take into account tagging systems, hashtags and links between search terms and images of the design across different internet platforms.**
- **On social media platforms, the 'popularity' indicators can also be taken into account when assessing availability of the design, such as the number of people reached, views, clicks for the post, reactions, comments, shares, followers and likes (see indication 'A' in example).**

Slide 85

End of presentation

Created by

European Union Intellectual Property Office (EUIPO), Alicante

© **EUIPO 2020**