

§ 32:63 Nature—Beneficiaries of rights

In principle, the exclusive right to a design belongs to the applicant, regardless of whether the applicant is the designer. This party also will be presumed to be the owner of any copyright related to the design (article 3.28(2) of the Benelux Convention on Intellectual Property).¹ Nevertheless, the point of departure of the Benelux Convention on Intellectual Property is that the designer is entitled to the exclusive

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¹The presumption will not apply in respect of the true designer or his beneficiary.

right. This appears from article 3.7(1) of the Benelux Convention on Intellectual Property, which stipulates that, if an application for a design is made without the designer's consent, the original designer or the person who is deemed to be the designer pursuant to article 3.8 of the Benelux Convention on Intellectual Property may claim the right to the Benelux application or the rights in the Benelux deriving from an International filing.

The claim can be invoked even if the applicant was not acting in bad faith when filing an application.² The claim should be invoked within five years as from the date of publication of the design registration and must be registered with the Benelux Office of Intellectual Property at the claimant's request. The designer also can claim the aforementioned right(s) if the applicant has requested total or partial surrender of the design registration or has renounced the rights in the Benelux following from an international filing, if the claim has been submitted within one year from the date of publication of the surrender or renunciation and before the expiry of the five-year period (article 3.7(2) of the Benelux Convention on Intellectual Property).

In that case, the claimant cannot enforce its claimed rights against third parties who have exploited, in the period between surrender or renunciation and registration of the claim of the designer, a product identical in appearance or a product that does not produce a different overall impression to the informed user (article 3.7(3) of the Benelux Convention on Intellectual Property). Instead of claiming the filing, the designer can claim, at any time, the Benelux design right or of the rights in the Benelux deriving from an international filing being declared invalid in cancellation proceedings (article 3.7(1) of the Benelux Convention on Intellectual Property).

Article 3.8(1) of the Benelux Convention on Intellectual Property mentions that if a design has been created by an employee in the execution of his duties, the employer will be deemed to be the designer, unless otherwise agreed. A similar rule is applicable for designs created on commission. The commissioning party will be deemed to be the designer, but only if the commission was given with an intention of a commercial or industrial use of the product in which the design is embodied. Parties can agree otherwise (article 3.8(2) of the Benelux Convention on Intellectual Property). The party that is, pursuant to these provisions, deemed to be the designer, also will be the owner of a copyright related to the design (article 3.29 of the Benelux Convention on Intellectual Property).

²Gielen and others, *Kort begrip van het intellectuele eigendomsrecht*, 2020/231 (online: lastly updated on 1 June 2020).